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## Arbitration and Americanization: The Paternalism of Progressive Procedural Reform

**ABSTRACT.** This Feature joins recent scholarship suggesting that the Federal Arbitration Act of 1925 (FAA) emerged, at least in part, from a broader Progressive commitment to procedural reform. It departs, however, from the tendency among procedure scholars to conceive of such reform as top-down, federal rulemaking—a tendency that has resulted in a largely celebratory teleology, leading from a Progressive commitment to access to justice to the eventual enactment of the Federal Rules of Civil Procedure in 1938. As recognized in the historical literature, local, bottom-up initiatives (such as the creation of municipal courts and settlement houses) were central to Progressive reform. Moreover, these initiatives were used at least as much for purposes of social control as for social justice. In line with such literature, this Feature examines Progressive lawyers' efforts to develop particular institutional structures responsible for deploying arbitration—an area of inquiry neglected by scholars to date. Situating these efforts within the broader context of a decidedly paternalistic program of Progressive procedural reform, it reflects on the darker implications of the FAA's enactment and implementation.

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**INTRODUCTION**

Even as Alternative Dispute Resolution (ADR) has become increasingly common over the last several decades, the debate over its perceived virtues and vices has intensified. For just about every claim made on behalf of ADR, critics have arisen to assert the contrary. While much of the debate has focused on the extent to which ADR achieves the cost- and time-savings promised by its advocates,<sup>1</sup> the discussion has also addressed fundamental values extending well beyond efficiency. Advocates of ADR insist that it is more effective than adversarial procedure at promoting values of party participation – and thus autonomy – and at ensuring broad, meaningful access to justice.<sup>2</sup> In contrast, detractors claim that ADR’s promises of party autonomy and increased access are often hollow in practice. In their view, ADR advances the interests of a select elite, while denying countless ordinary individuals the remedies afforded by the proverbial day in court.<sup>3</sup>

While the debate over ADR has ranged across a number of specific dispute resolution practices, it is arbitration – and, in particular, binding, pre-dispute arbitration – that has lately assumed center stage. In recent years, the United States Supreme Court issued a series of opinions reinterpreting the Federal Arbitration Act of 1925 (FAA), the net effect of which has been significantly to ex-

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1. For the argument that ADR does not translate into savings in time and money, see, for example, Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 817, 834 (2000); and Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 178–80 (2003). For some examples of the opposing view, see Todd B. Carver, *ADR – A Competitive Imperative for Business*, 59 DISP. RESOL. J. 67, 70–72 (2004); and Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 855–57 (1996).
  2. See, e.g., James W. Meeker & John Dombink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2227 (1993) (suggesting that increased reliance on ADR might be one means of expanding access to justice); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669–70 (1995) (arguing that settlement, including by means of ADR, promotes such values as “consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice”).
  3. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1077–78 (1984) (arguing that settlement—including in the context of ADR—serves to reinforce “distributional inequalities”); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Re-Form Dispute Ideology*, 9 OHIO ST. J. DISP. RESOL. 1, 1 (1993) (noting that ADR is “an often coercive mechanism of pacification”).

pand the enforceability of binding, pre-dispute arbitration clauses.<sup>4</sup> As a result, such arbitration is now used widely, including in consumer and employment disputes—a practice that makes the United States an outlier among democratic, economically developed nations.<sup>5</sup> Advocates of these developments suggest that they increase access to justice (by lowering procedural costs) and reflect a commitment to party autonomy (as embodied in contract).<sup>6</sup> Opponents argue, by contrast, that consumers and employees forced into binding, mandatory arbitration are denied the procedural tools required for meaningful vindication of their rights. Moreover, they assert, such arbitration is the product of contracts of adhesion and therefore reflects (and reinforces) these disputants’ relative lack of power, rather than their autonomy.<sup>7</sup>

In this context, a number of legal scholars—including especially those critical of the Court’s recent arbitration jurisprudence—have turned to the past in an effort to mine history for potential ammunition. Towards this end, many have emphasized that the immediate roots of the FAA lay in a massive lobbying campaign to promote arbitration initiated by the New York Chamber of Commerce. This campaign led first to the enactment of a New York arbitration statute in 1920 and thereafter to the passage of the FAA, conceived as a federal variant of its state predecessor.<sup>8</sup> Pointing to these origins, as well as to the fact

4. See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 112-18 (2011).
5. For a discussion of how and why much of the world (other than the United States) rejects the use of arbitration in consumer and employment disputes, see, for example, JEAN-LOUIS DELVOLVÉ, GERALD H. POINTON & JEAN ROUCHE, *FRENCH ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION* 48 (2d ed. 2009); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357 (2002); Geneviève Saumier, *Consumer Arbitration in the Evolving Canadian Landscape*, 113 PENN ST. L. REV. 1203 (2009); Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT’L L. REV. 81 (2013); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).
6. See generally Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. & PUB. POL’Y 549 (2008); David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999).
7. See generally David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).
8. See generally IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 166-79 (2013). See also Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 979-87 (1999); Claire Lemerrier, *Un modèle français des jugement des pairs: les tribunaux de commerce, 1790-1880* [A

that businessmen in this period were increasingly organizing into trade associations (each with its own rules for resolving intra-communal disputes), these scholars have suggested that the core purpose of the statute was to promote merchant self-regulation. For example, according to Katherine Stone, the FAA can be understood as following from a broader commitment to associationalism—a kind of proto-corporatism, backed by Herbert Hoover in his capacity as Secretary of Commerce, which would soon find full expression in many of the policies of the New Deal.<sup>9</sup> From this perspective, the effort of the U.S. Supreme Court to expand the reach of the FAA well beyond commercial arbitration marks a clear departure from the drafters' goal of promoting a form of communal, intra-merchant dispute resolution.

More recently, Hiro Aragaki has authored an important article that departs from the usual focus on the New York Chamber of Commerce as the driving force behind the FAA's enactment.<sup>10</sup> In his telling, the FAA emerged from the efforts of diverse interest groups, including not only businessmen eager to facilitate a form of private ordering, but also Progressive legal elites, like Roscoe Pound and William Howard Taft, who were committed to promoting procedural reform.<sup>11</sup> More particularly, the FAA's effort to minimize procedural complexity—to facilitate “access to an *alternative forum*” characterized by “simplicity, flexibility, and intolerance of technicalities”—indicates that it “embodied the basic procedural reform values shared by Pound and his colleagues.”<sup>12</sup> Along similar lines, Imre Szalai has argued for the importance of “looking at the arbitration reform movement through the lens of the progressive era.”<sup>13</sup> Doing so, he claims, reveals that the FAA was “a significant, early triumph at the national level in a broader movement for procedural reform.”<sup>14</sup> From this perspective, the fact that the Supreme Court's expansive arbitration jurisprudence gives short shrift to core procedural values suggests that it runs counter to the intended purposes of the FAA.

These scholars' recognition that the FAA's enactment was part and parcel of a broader program of Progressive procedural reform is a vital contribution to the scholarly literature. But the background portrait of such reform on which

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*French Model of Judgment by Peers: The Commercial Courts, 1790-1880*], at 302-49 (2012) (unpublished manuscript) (on file with author).

9. Stone, *supra* note 8, at 987-91.

10. Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014).

11. *Id.* at 1943-53, 1962-90.

12. *Id.* at 1943.

13. SZALAI, *supra* note 8, at 188.

14. *Id.*

both Aragaki and Szalai draw—one common to the literature on civil procedure—glosses over much of the complexity of Progressive procedural commitments. Such scholarship treats the Federal Rules of Civil Procedure—the centerpiece of modern-day civil procedure—as the crowning, though delayed, achievement of Progressive reform efforts,<sup>15</sup> enshrining (in the famous language of Rule 1) the Progressive commitment to “the just, speedy, and inexpensive determination of every action.”<sup>16</sup> The end result is a largely celebratory teleology, leading from a Progressive commitment to access to justice to the eventual enactment of the Federal Rules.

But the Progressive campaign to remake procedure was not limited to the federal courts. If we look at the local level, where, as Michael Willrich notes, “historians of twentieth-century American law and the state too rarely travel,” it is the effort to create new, centralized systems of municipal courts that assumes center stage as the core focus of Progressive procedural reform.<sup>17</sup> Indeed, unlike the campaign to enact the Federal Rules, which bore no fruit until 1938, the Progressive effort to develop centralized municipal courts achieved immediate results, leading, in Willrich’s words, to “a sweeping reorganization of judicial institutions in the early twentieth century.”<sup>18</sup> Moreover, one of the leading such courts—that of Chicago—enabled (in the criminal context) “the rise of eugenics and other coercive forms of social governance.”<sup>19</sup> This should give pause to those who would depict Progressive procedural reform as exclusively other-serving and benign. As Willrich concludes, Progressivism cannot be easily framed as “a project of either ‘social justice’ or ‘social control,’” but was instead at once both one and the other.<sup>20</sup>

If we are to understand how the Progressive lawyers responsible for the enactment of the FAA conceived of arbitration (and its relationship to broader reform goals), we must substantially broaden our conception of what “procedural reform” entailed, looking well beyond the Federal Rules on which civil procedure scholars tend to fixate. Nor is it sufficient to focus on the statutory

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15. See, e.g., PAUL D. MORENO, *THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL: THE TWILIGHT OF CONSTITUTIONALISM AND THE TRIUMPH OF PROGRESSIVISM* 320-21 (2013); Aragaki, *supra* note 10, at 1943, 1963, 1973-2008; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943-73 (1987).

16. FED. R. CIV. P. 1.

17. Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 LAW & HIST. REV. 63, 67 (1998).

18. *Id.*

19. MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* xxvii (2003).

20. *Id.* at xxxix.

language of the FAA and its immediate legislative history. As has long been recognized, the statutory text is too terse and “indeterminate,” and the congressional record “too sparse,” to provide real interpretive guidance.<sup>21</sup> To make meaningful sense of the FAA and of the Progressive conception of arbitration more generally, it is necessary to examine Progressive lawyers’ efforts to develop concrete institutional structures responsible for deploying the procedure—an area of inquiry neglected by scholars to date.

There were two primary institutional contexts in which Progressives sought to use arbitration: the new municipal courts and the American Arbitration Association (AAA), established in 1926. As deployed within the municipal courts, arbitration was imposed at the discretion of the judge, rather than, as contemplated in the FAA, through prior agreement of the disputants themselves. In this sense, it is the AAA—created specifically for the purpose of facilitating the new system of arbitration envisioned by the FAA—that is the most direct institutional reflection of the statute’s intended implementation. Nonetheless, some exploration of the Progressives’ approach to arbitration within the municipal courts is critical to any effort to understand how Progressive lawyers viewed arbitration and its connection to their broader procedural reform commitments. This is in part because the municipal courts were so central to the Progressive project of procedural reform more generally. In addition, it seems likely that experience with arbitration within the municipal courts, though limited, played a role in shaping attitudes towards arbitration in the (later emerging) AAA.

Although there are differences in how arbitration was conceived as between the municipal courts and the AAA—and even in how it was conceived over time within the AAA itself—there are, nonetheless, striking continuities. Most importantly, legal elites consistently embraced arbitration as a means of expanding access to justice (and thereby promoting national unity and values), while also empowering themselves to exercise significant paternalistic discretion.<sup>22</sup> Progressive lawyers’ vision of arbitration thus combined a genuine commitment to broadening access to justice with reflexive and deep-rooted paternalistic assumptions about the inherent wisdom and authority of legal elites like themselves. Present-day debates over whether arbitration makes justice more readily available or instead reinforces elite power can therefore be understood as reflecting the twin sides of an earlier Progressive-era conception of arbitra-

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21. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (describing the “legislative record” concerning key portions of the FAA as “sparse”); Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1238 (2011); *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 515 (2001).

22. See *infra* Part II.B, Parts III.B-C.

tion. This is not to claim that but for the Progressive-era developments traced below, arbitration today would not be subject to these dueling characterizations. To the contrary, arbitration has a very long history, both in the United States and elsewhere; and there is good reason to believe that in many contexts arbitration's appeal has been precisely that it promises a utopian inclusivity denied by formal legal process, even while affording community elites a mechanism for promoting their own interests (and thus the status quo).<sup>23</sup> But modern arbitration under the FAA is most immediately a legacy of the Progressive era and its movement for procedural reform. Accordingly, the deeply paternalistic tendencies of this movement—though too often ignored by procedure scholars—ought to serve as a cautionary reminder to those who might otherwise ignore arbitration's downsides.

Part I explores the vital contribution made by Progressive lawyers to the enactment and subsequent implementation of the FAA. It examines the complex combination of ideological commitments, on the one hand, and professional and status anxieties, on the other, that led many elite (and would-be elite) early twentieth-century lawyers to pursue procedural reform. In so doing, it considers why these lawyers were drawn to both arbitration and conciliation (now mediation) and why—though it seems strange to us today—they tended to view these procedures as roughly parallel forms. In their view, both forms of dispute resolution promised release from the constraints of excessive legality, affording a means to address the complex problems of modern industrial society, but in ways that (unlike newly emerging social science and administrative law) preserved for lawyers the possibility of exercising significant paternalistic discretion.

Part II examines the “small claims and conciliation” branches that Progressives developed within many municipal courts as their leading approach to the problem of urban civil justice. Given the centrality of small claims and conciliation courts to the Progressive vision of procedural reform and the tendency among Progressives to equate conciliation with arbitration, these institutions provide an important window into how Progressives viewed arbitration and its relationship to broader procedural reform goals. This Part describes how the idea for such courts drew on the European model of the “conciliation court”—an institution whose virtues and vices were extensively debated by nineteenth-century Americans. Ironically, while earlier generations had ultimately decided against transplanting conciliation courts on the grounds that they promoted an un-American tendency towards corporatist hierarchy, Progressive lawyers

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23. See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 3-17 (1983); AMALIA D. KESSLER, *A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE* 70-80, 103-40 (2007).

sought to use a later variant of this same institution to “Americanize” the urban, immigrant poor—an endeavor that combined the quintessentially Progressive commitments to assisting the underserved and exerting social control.

Part III turns to the AAA—the institution in which arbitration took most meaningful root. Towards this end, it explores the life and thought of Frances Kellor, a lawyer and sociologist who was a co-founder of the AAA and who served as its primary administrator from its establishment through her death in 1952. Remembered today primarily as a leader of the Progressive Americanization movement, Kellor’s importance in shaping an emerging system of arbitration under the FAA has been largely overlooked. But Kellor played a decisive role in reimagining arbitration as it came to be practiced within the AAA, thereby helping to give concrete, institutional content to the sparse formulations of the federal statute. As she reworked it, arbitration ceased to be a means of assisting the poor, even while it continued to serve other key goals of a paternalistic program of Progressive procedural reform—including, most importantly, the twin aims of Americanization and lawyer-empowerment. Her efforts, moreover, provide important insights into how American lawyers who long prided themselves on their devotion to *public* adversarial procedure came to embrace private arbitral proceedings.

The Conclusion inquires into the legacy of Progressives’ paternalistic conception of arbitration as embodied in the municipal courts and, most importantly, in Kellor’s AAA. An appreciation of this history highlights the extent to which the legitimacy of arbitration (and mediation) today continues to depend, to a significant degree, on the legitimacy of the third-party arbitrator’s (or mediator’s) discretionary exercise of authority. For Progressive lawyers who imagined themselves as a kind of natural elite, justifying the paternalism implicit in such exercises of authority posed little difficulty. But the legal profession, like all of American society, has since been substantially democratized, making such justification much harder today than it was a century ago. Courts may therefore have a greater role to play in supplying the requisite assurances that private arbitration (and mediation) promote public justice.

### **I. PROGRESSIVE-ERA LAWYERS’ PURSUIT OF PROCEDURAL REFORM**

The key role of Progressive lawyers in the enactment and implementation of the FAA suggests that, as Hiro Aragaki and Imre Szalai argue, the statute ought to be viewed as an extension of a broader Progressive commitment to procedural reform.<sup>24</sup> Making sense of this commitment requires us to examine

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24. See generally SZALAI, *supra* note 8; Aragaki, *supra* note 10.

the broad range of challenges and opportunities faced by early twentieth-century lawyers.

A. *The Enactment of the FAA*

But for the support of Progressive lawyers and bar associations, it is highly unlikely that either the New York arbitration statute of 1920 or the FAA modeled on it would have been enacted. Both statutes were the product of a massive educational and lobbying campaign that was initiated by Charles L. Bernheimer, head of the New York Chamber of Commerce's Committee on Arbitration, established (on his urging) in 1911.<sup>25</sup> While Bernheimer and the Chamber were responsible for launching the campaign, it was conducted largely by Progressive lawyer Julius Henry Cohen and the bar associations whose support he helped garner.<sup>26</sup> Cohen brought together Bernheimer and the Chamber's Committee on Arbitration with the New York Bar Association's Committee on the Prevention of Unnecessary Litigation to develop a set of rules and policies for preventing unnecessary litigation—including promoting arbitration.<sup>27</sup> The two organizations successfully lobbied together for the New York arbitration statute.<sup>28</sup> Thereafter, with the assistance of Cohen, who was active in the American Bar Association (ABA), Bernheimer and the Chamber worked with the ABA to press for the enactment of the FAA.<sup>29</sup> In short, as argued in a 1926 publication for which Bernheimer wrote the foreword, the New York Chamber's success in promoting statutory reform was a product, in no small part, of its efforts to "establish[] the most cordial relations with the local bar, and the state and American bar associations."<sup>30</sup> These efforts were reflected in the fact that "[e]very proposed change in statute or court rule or in treatises has had the previous approval of the proper bar associations or of the American Bar Association," such that "the legislative measures were invariably drafted by the bar with the collaboration of the Chamber's committee."<sup>31</sup>

How did Progressive lawyers understand the purposes of the FAA? Working as counsel for the Chamber, Cohen spoke on its behalf, helping to translate

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25. See SZALAI, *supra* note 8, at 34-39, 42-45.

26. See *id.* at 41-42.

27. See JULIUS HENRY COHEN, *THEY BUILT BETTER THAN THEY KNEW* 155 (1946); SZALAI, *supra* note 8, at 62-63.

28. SZALAI, *supra* note 8, at 66-70, 73-74, 83-85.

29. See JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 10-11 (1918); SZALAI, *supra* note 8, at 103-05, 118-26, 135-44, 158-59.

30. CLARENCE F. BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS* 107-08 (1926).

31. *Id.* at 108.

the businessmen's goals into the language of the law. As we will see, however, there is good reason to conclude that Cohen's decision to assist the Chamber in its campaign for arbitration stemmed at least as much from his own ideological commitment to promoting Progressive procedural reform as it did from any narrowly professional incentive to satisfy the client.<sup>32</sup> Moreover, lawyers' involvement in promoting the FAA extended far beyond formal legal representation and included the independent efforts of prominent bar associations to promote the statute's enactment.<sup>33</sup> Lawyers thus had their own reasons for pursuing the enactment of the FAA, and there is little basis to conclude that these were the same as those of the elite businessmen of the Chamber. Indeed, the development of vying arbitration organizations—one led by such businessmen and the other by lawyers—strongly suggests that the two groups did not, in fact, share the same understanding of the statute's purposes.<sup>34</sup>

In 1922, just two years after the enactment of the New York arbitration statute, the Arbitration Society of America was established by Moses Grossman, a prominent New York City lawyer, in conjunction with other leaders of the New York and national bars.<sup>35</sup> Grossman had approached Bernheimer a few months earlier to suggest that the two work together in developing the Society, but Bernheimer had virulently refused any such involvement.<sup>36</sup> As Imre Szalai explains, "Bernheimer was deeply concerned that Grossman's plan . . . would undermine the Chamber's work and the growth of flexible, less formal, private arbitration tribunals for business interests."<sup>37</sup> Bernheimer's fears were, as it turns out, justified. As developed by Grossman, the Arbitration Society of America brought together not only businessmen, but also judges and lawyers, with an eye towards resolving not only commercial disputes, but "all disputes and differences."<sup>38</sup> Bernheimer and his businessmen colleagues responded to the threat posed by Grossman's Association by creating their own competing organization in 1925: the Arbitration Foundation.<sup>39</sup>

Concerned that the internecine war between them would undermine the cause of arbitration, the two groups eventually agreed to resolve their dispute

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32. See *infra* notes 45-49 and accompanying text.

33. See *supra* notes 26-31 and accompanying text; *infra* notes 35-43 and accompanying text.

34. See *infra* notes 35-43 and accompanying text.

35. AUERBACH, *supra* note 23, at 106; FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 11-15 (1948).

36. SZALAI, *supra* note 8, at 112-14, 117.

37. *Id.* at 114.

38. *Id.* at 117 (quoting *New Tribunal Cuts Red Tape of Courts in Civil Disputes*, N.Y. TIMES, May 13, 1922, at 1).

39. AUERBACH, *supra* note 23, at 108; KELLOR, *supra* note 35, at 15.

by arbitration, leading to their merger and the ensuing birth in 1926 of the American Arbitration Association (AAA).<sup>40</sup> But as detailed by Jerold Auerbach, the resulting Association was “an indisputable victory for bench and bar.”<sup>41</sup> Indeed, the AAA’s first Board of Directors included such Progressive legal luminaries as Roscoe Pound and Charles Evan Hughes.<sup>42</sup> Lawyers, moreover, dominated the new organization both as board members and as arbitrators, and they began regularly to serve as counsel in arbitration proceedings.<sup>43</sup> If we wish to understand the intended purposes of the FAA, it is therefore essential to examine the aspirations of the lawyers whose support was crucial for its enactment and who spearheaded its initial implementation through the founding of what would become the AAA.

*B. New Challenges to Lawyers’ Longstanding Leadership Role*

Progressive-era lawyers fundamentally remade the American legal system, creating the underpinnings of the modern administrative state and refashioning urban justice on the foundations of civil-service bureaucracy and social-scientific expertise.<sup>44</sup> The breadth of these lawyers’ interests and activities means that any effort to provide a summary account of their motivations necessarily risks oversimplification. Some generalization is nonetheless possible. Progressive lawyers recognized that the rise of modern, mass society implied the need for new procedural mechanisms, beyond the traditional adversarial trial, to provide ordinary individuals with compensation for harm. Reform was necessary, they believed, to ensure meaningful access to justice—an important value in its own right, but one that also served as a key underpinning of social and political stability and thus national strength. But while advocating for reform, Progressive lawyers also understood that, for a variety of reasons—including the emergence of growing competition from both within and without the legal profession—the effort to develop new procedures had the potential to undermine their own longstanding status and power within American society. For Progressives, the embrace of arbitration and conciliation (which they tended to equate) provided a way to square the circle—to advocate new modes of access to justice (and thereby strengthen the nation), while at the same time empowering themselves.

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40. AUERBACH, *supra* note 23, at 108; KELLOR, *supra* note 35, at 16-17.

41. AUERBACH, *supra* note 23, at 108.

42. KELLOR, *supra* note 35, at 184.

43. AUERBACH, *supra* note 23, at 108; KELLOR, *supra* note 35, at 18-19.

44. See, e.g., JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 98-113 (1950); WILLRICH, *supra* note 17, at 29-115.

In the early decades of the twentieth century, lawyers feared that they were on the verge of losing their distinctive power and prominence in American society. Along with the rise of the modern, administrative state and university, there emerged government bureaucrats, social workers, and other new professionals, whom lawyers worried might be better positioned to address a broad range of social needs.<sup>45</sup> The extent of this fear, as well as its role in influencing lawyers to support the New York Chamber's campaign for arbitration (culminating in the FAA), is suggested by a book published by Julius Henry Cohen in 1916—at the same time that he was serving as Bernheimer's main ally in pressing for the New York arbitration statute. Entitled *The Law—Business or Profession?*,<sup>2</sup> Cohen's book argued that lawyers were facing new kinds of competition in the practice of law and that this, in turn, necessitated a new focus on professional ethics. In his words, “[a]ll over the country laymen are asking themselves: Why are we not permitted to do things lawyers do . . . ?”<sup>46</sup> Ensuring sound legal ethics, Cohen suggested, was a way to preserve the lawyers' guild monopoly by demonstrating to an increasingly skeptical public that lawyers viewed law as a public service, rather than a mere trade, and were therefore ideally suited to perform legal functions. In line with this call for lawyers to commit themselves to public service, Cohen himself championed a broad range of causes, seeking to promote rent control and public housing, while also working to establish the Legal Aid Society.<sup>47</sup> So too, he sought to prove his public-minded devotion to the law by displaying a commitment to procedural reform and by campaigning, in particular, for the enactment of arbitration statutes.<sup>48</sup> In all these respects, Cohen was in good company.<sup>49</sup>

In urging the utility of arbitration and conciliation—as deployed especially by the municipal courts that served the urban immigrant poor—many Progressive-era lawyers alluded to the risk of losing their professional monopoly. For example, in 1923, Chief Justice Dempsey of the Municipal Court of Cleveland

45. See generally WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930* (1977); MICHAEL J. POWELL, *FROM PATRICIAN ELITE TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988). See also HURST, *supra* note 44, at 313-22; Michael Grossberg, *The Politics of Professionalism: The Creation of Legal Aid and the Strains of Political Liberalism in America, 1900-1930*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO THE TWENTIETH CENTURIES* 305, 307 (Terrence C. Halliday & Lucien Karpik eds., 1997).

46. JULIUS HENRY COHEN, *THE LAW—BUSINESS OR PROFESSION?*, at xiv-xv (1916).

47. SZALAI, *supra* note 8, at 42; Aragaki, *supra* note 10, at 52.

48. SZALAI, *supra* note 8, at 45-48, 51, 58-59, 74-76, 80-85, 109, 118-23, 133-43, 191-92; Aragaki, *supra* note 10, at 1947-49, 1979-88, 2003.

49. See HOBSON, *supra* note 45, at 221-88; SZALAI, *supra* note 8, at 26-27, 34-35, 98-100; Aragaki, *supra* note 10, at 2002-04; Grossberg, *supra* note 45, at 306-07, 312-13.

argued in favor of the conciliation proceedings afforded by newly established municipal courts like his own by noting that “[t]he demand and necessity for simplification of procedure . . . is becoming more insistent and it is up to the legal profession to see the handwriting on the wall and take initiative.”<sup>50</sup> Similarly, as late as 1935, a Detroit-based lawyer named A. C. Lappin warned that as lawyers failed to develop “a proper system of securing justice,” “the public begins to tinker with the judicial machinery, applies common sense, and organizes trade committees, administrative boards and commissions with judicial powers.”<sup>51</sup> The end result was that “[i]f we, as lawyers, do not bestir ourselves immediately and lead the movement, the movement will lead us—lead us out of business.”<sup>52</sup> Pointing in part to the efforts of the AAA, Lappin then argued that arbitration would enable the lawyer to contribute “to improvement and progress in turning the wheels of justice” and thereby both “satisfy his client and make the most of his career.”<sup>53</sup>

In the eyes of Progressive-era lawyers, the threat to their monopoly came not only from outside the legal profession, but also from within it. In the wake of rapid industrialization and extensive immigration, American cities grew enormously from the late nineteenth century onward. In this new urban environment, a new kind of lawyer had emerged. Like the clients they served, these new lawyers were themselves immigrants. Hailing from Southern and Eastern Europe, they seemed alien to the more established, Protestant, and often Republican lawyers, not only in the foreign languages that they spoke, but also in their adherence to Catholicism and Judaism and in their typically Democratic politics.<sup>54</sup> So too, these new lawyers seemed to the older sort to be distastefully aggressive and tradesmen-like in their pursuit of clients.<sup>55</sup> It was in part the fear of losing out to such “ambulance chasers” that led Progressive lawyers to insist on the vital importance of purifying legal ethics.<sup>56</sup>

At the same time, those who belonged to the new breed of lawyers and were therefore anxious about being perceived as “ambulance chasers” had particular reason to highlight their own commitment to professional ethics and

50. Chief Justice Dempsey, *Conciliation in the City of Cleveland*, 9 A.B.A. J. 749, 750 (1923).

51. A.C. Lappin, *Arbitration and the Bar*, 21 J. AM. JUDICATURE SOC'Y 164, 166 (1937).

52. *Id.*

53. *Id.* at 169.

54. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 49-50, 102-29 (1977); POWELL, *supra* note 45, at 141-43.

55. See HOBSON, *supra* note 45, at 298-303 (describing the “battle against the growing ‘commercialization’ within the bar”); POWELL, *supra* note 45, at 11-28 (discussing patrician New York lawyers’ distaste for “ethnic small-firm or solo practitioners”).

56. See HOBSON, *supra* note 45, at 299, 301-03; POWELL, *supra* note 45, at 141-43.

procedural reform as a means of distancing themselves from their unwashed brethren. It is thus surely no coincidence that so many of the Progressive-era lawyers who pressed for reform were themselves outsiders, eager to be absorbed into the mainstream, Protestant elite.<sup>57</sup> Two of the lawyers most involved in promoting the FAA and the resulting system of arbitration, Julius Cohen and Moses Grossman, were Jewish. And as we will see, women also played an important role in Progressive legal reform—including, in the case of arbitration, Frances Kellor.<sup>58</sup>

That Progressive-era lawyers were drawn to procedural reform in part because of their fear of losing (or hope of gaining) power does not mean that their interests were exclusively material. As Robert W. Gordon observes, any account of the late nineteenth- and early twentieth-century legal profession that attends only to its material interests ignores the important fact that lawyers understand themselves as “hav[ing] obligations to a universal scheme of order, ‘the law,’ . . . that [is] supposed to regulate social life in accordance with prevailing political conceptions of the good.”<sup>59</sup> Indeed, American lawyers long viewed themselves as key civic leaders—an inheritance of a nineteenth-century, civic-republican image of the lawyer as the country’s natural elite responsible for undertaking the public-serving acts required to preserve and promote national well-being.<sup>60</sup> But many of the same developments that seemed to undermine lawyers’ monopoly also served to reconfigure their role, such that their claim to a position of social and political leadership came to seem increasingly tenuous.

Conceiving of themselves as modern-day Ciceros, antebellum lawyers regularly sought opportunities to undertake highly visible, public oratory,

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57. See, e.g., Jerold S. Auerbach, *From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience*, 66 AM. JEWISH HIST. Q. 249 (1976) (discussing Jews’ rise to prominence in the legal profession from the early twentieth-century onward); William E. Forbath, *Jews, Law and Identity Politics* (Mar. 31, 2014) (unpublished manuscript), [http://www.utexas.edu/law/faculty/wforbath/papers/forbath\\_jews\\_law\\_and\\_identity\\_politics.pdf](http://www.utexas.edu/law/faculty/wforbath/papers/forbath_jews_law_and_identity_politics.pdf) [<http://perma.cc/8CMB-QPXB>] (describing the highly influential role of Jewish lawyers in shaping Progressive-era law and constitutionalism).

58. See *infra* Part III.

59. Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 53 (Gerald W. Gawalt ed., 1984).

60. See Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE: J. INTERDISC. LEGAL STUD. 381, 384-92 (2001) (discussing early nineteenth-century views of “lawyers as America’s governing class”); Robert W. Gordon, *Oliver Wendell Holmes Lecture at Harvard Law School* (Feb. 1985) (on file with author); see also AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877* (forthcoming) (on file with author).

ranging from courtroom jury argument and cross-examination to stump speeches and legislative orations.<sup>61</sup> Adversarial litigation, which provided numerous opportunities to engage in such public (and, at least seemingly, public-serving) oratory, was therefore key to antebellum lawyers' self-conception.<sup>62</sup> But in the late nineteenth and early twentieth centuries, significant socio-economic and governmental changes altered the nature of legal practice, decreasing the centrality of litigation. The post-bellum period witnessed the emergence of powerful corporate interests, which helped give rise to a new kind of lawyer—one valued more for his specialized expertise and capacity to negotiate than for his ability to undertake courtroom litigation.<sup>63</sup> At the same time, the development of new banking, insurance, and railroad interests led to an expansion of the regulatory state.<sup>64</sup> And much like the corporations they tried to police, administrative agencies sought lawyers who were, in the words of J. Willard Hurst, “[m]aster[s] of [f]act” and “[a]dministrators of [s]ocial [r]elations.”<sup>65</sup>

As the significance of litigation declined and lawyers assumed a less visible and dramatic role, their position of social and political leadership—long linked to adversarialism—seemed to be in jeopardy. Here as well, however, the quest for procedural reform appeared to offer a solution. By virtue of their unique expertise in this arena, lawyers pursuing such reform could display their distinctive commitment to and capacity for public service, thus justifying their claim to leadership. As A. C. Lappin reminded his fellow lawyers, “I am convinced that the ordinary man looks to the legal profession, more than to any other factor, for a proper system of securing justice.”<sup>66</sup>

But while Progressive-era lawyers had much to gain by advocating for procedural reform of any sort, they had good reason to encourage the adoption, in particular, of both arbitration and conciliation. These two modes of procedure, they believed, would promote the Americanization of the urban immigrant poor—a goal whose vital importance was underscored by Charles Evans Hughes in a speech that he gave to the New York Bar Association in 1918:

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61. Gordon, *supra* note 60; Kessler, *supra* note 60.

62. Kessler, *supra* note 60.

63. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 329-49 (3d ed. 2005) (discussing late nineteenth-century developments in the economy and in administrative law and regulation and how these transformed the nature of legal practice); HURST, *supra* note 44, at 339, 342-52.

64. HURST, *supra* note 44, at 339, 342.

65. *Id.*

66. Lappin, *supra* note 51, at 166.

We are fond of speaking of Americanization. If our Bar Association could create a sentiment which would demand that in all our cities the police courts and minor civil courts should fairly represent the Republic as the embodiment of the spirit of justice, our problem of Americanization would be more than half solved. A petty tyrant in a police court, refusals of a fair hearing in minor civil courts, the impatient disregard of an immigrant's ignorance of our ways and language, will daily breed Bolsheviks who are beyond the reach of your appeals. Here is work for lawyers. . . . The security of the Republic will be found in the treatment of the poor and the ignorant; in indifference to their misery and helplessness lies disaster.<sup>67</sup>

Conciliation and arbitration would make it possible to deliver better, more satisfying justice at the local level and thereby help the country to resist the growing threat of Bolshevism.

*C. The Appeal of Arbitration and Conciliation (and Progressive Lawyers' Tendency To Equate the Two)*

In developing procedural tools for providing access to justice to (and thereby Americanizing) the urban, immigrant poor, Progressive lawyers were drawn first and foremost to conciliation, as deployed in municipal court branches devoted to "small claims and conciliation." But they also experimented with arbitration.

Conciliation – or, in modern parlance, mediation – is aimed at empowering the parties themselves to achieve a resolution.<sup>68</sup> While approaches to conciliation vary widely, the process is generally one in which a private, third-party mediator encourages the disputants to agree on a mutually acceptable resolu-

67. KATE HOLLADAY CLAGHORN, *THE IMMIGRANT'S DAY IN COURT* 155 (1923) (quoting N.Y. L.J., Jan. 24, 1919).

68. Present-day scholars and practitioners of alternative dispute resolution sometimes draw fine distinctions between mediation and conciliation, but these are so subtle that there appears to be striking disagreement within the field. Compare JOHN W. COOLEY WITH STEVEN LUBET, *ARBITRATION ADVOCACY* 2-3 (2d ed. 2003) (describing conciliation as a process in which "the neutral's goal is to assist in reducing tensions, clarifying issues, and getting the parties to communicate" – in contrast to mediation, in which the neutral goes further and actually "assists the disputants in reaching a voluntary settlement"), with Michael B. Shane, *The Difference Between Mediation and Conciliation*, *DISP. RESOL. J.* 31 (1995) (defining conciliation as a process in which a neutral "make[s] a non-binding recommendation or finding that often concerns the factual or the legal issues in dispute, as well as . . . [a recommendation concerning] the appropriate resolution of the dispute" – in contrast to mediation, a process in which the neutral is "not mandated by the parties to make a finding or decision nor to recommend, jointly, to the parties").

tion of their dispute. Since the mediator has no formal authority to impose his own judgment on the disputants, conciliation is said to occur only when the disputants themselves freely choose to embrace a given resolution.<sup>69</sup> Advocates of the procedure thus claim that it enhances values of party autonomy, while at the same time enabling the preservation of longstanding and productive relationships.<sup>70</sup>

Arbitration, in contrast, is more akin to a traditional adversarial trial. Although the arbitrator, like the mediator, is a third party appointed by means of private agreement, her role—much like that of a judge—is to reach her own judgment as to the appropriate outcome and to impose it on the parties. While arbitral proceedings are expected to be more streamlined than those of an adversarial trial, they—like litigation, but quite unlike conciliation—are usually structured around the formal presentation of the evidence, often by legal counsel.<sup>71</sup> Proponents of arbitration therefore assert that it offers many of the virtues of trial, including a binding, evidence-based judgment, but with fewer procedural formalities and thus at lower cost.<sup>72</sup>

While conciliation and arbitration are understood today to be clearly distinct procedures, Progressive lawyers tended to equate the two. Reflecting this tendency to associate arbitration with conciliation, the New York County Lawyers Association created a Committee on Arbitration and Conciliation (headed by none other than Moses Grossman himself).<sup>73</sup> And the municipal court established in New York City—commonly described as the “Poor Man’s Court” and highly visible because of the city’s national prominence—was governed by a procedural code authorizing “a system of arbitration and conciliation between litigants.”<sup>74</sup> As observed by Edgar J. Lauer, a judge on the court, he and his colleagues on the bench had “secured a new method of disposing of the great mass of disputes and contentions that ordinarily are brought to court”—namely, “[r]ules providing for conciliation and arbitration.”<sup>75</sup>

In the view of Progressive lawyers, these two modes of procedure share certain key features, such that they should be conceived as kindred forms. This was the position taken, for example, by Reginald Heber Smith, a prominent

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69. COOLEY, *supra* note 68, at 2-3.

70. *Id.* at 5-6.

71. *Id.* at 2-7.

72. *Id.* at 2-6.

73. *N.Y. County Lawyers Committees*, 5 N.Y. ST. B. ASS’N BULL. 369, 370 (1933).

74. Walter E. Warner, *New Municipal Court Code and Rules with Annotations*, in 30 EAGLE LIBR., NO. 192, at 2 (1915).

75. Edgar J. Lauer, *Conciliation and Arbitration in the Municipal Court of the City of New York: A New Sphere of Usefulness for the Progressive Modern Court*, 66 INS. MONITOR 87, 87 (1918).

Boston-based lawyer who is widely credited with helping to galvanize the modern legal aid movement.<sup>76</sup> In his seminal 1919 publication *Justice and the Poor*,<sup>77</sup> Smith recognized that as a technical matter, conciliation and arbitration are distinct.<sup>78</sup> But while acknowledging the formal distinctions, he insisted that as a practical matter, there are important parallels between the two, and, indeed, between these forms of procedure and that of small claims courts as well. Most importantly, all of these procedures aim to eliminate unnecessary technicalities and thereby obviate any need for expensive lawyers. In Smith's words, "small claims courts, conciliation, and arbitration have much in common" in that "[i]n parallel ways they avoid the fundamental difficulty of the expense of counsel by making the employment of attorneys unnecessary."<sup>79</sup> Along similar lines, Lauer argued in 1918 that conciliation and arbitration share a tendency towards procedural simplicity, such that they both permit the "expeditious disposal of litigation" by means of an "inexpensive method."<sup>80</sup> So too, Frances Kellor observed that "[d]uring its evolution through the centuries, arbitration . . . had become identified with bargaining processes of mediation and conciliation."<sup>81</sup>

In addition to the cost- and time-savings that they purportedly afford, arbitration and conciliation were said to share other similarities thought to be of use in the broader project of Americanization. According to contemporary lawyers, arbitration and conciliation, unlike adversarial procedure, are able to restore the relationships threatened by the dispute and thus shore up the communal bonds required for national unity and power. As A. C. Lappin claimed, "[W]here litigation engenders rancor and hostility, the spirit of conciliation bows naturally from the closer contacts of arbitration."<sup>82</sup> Along similar lines, Lauer observed that "the contested court trial almost invariably leaves one of

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76. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 ME. L. REV. 301, 302 (2000); Grossberg, *supra* note 45, at 308-12.

77. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (Patterson Smith Publ'g Co., 3d ed. 1972) (1919).

78. As Smith explained, arbitration "stands midway between conciliation and court litigation" in that "[l]ike the former [and unlike the latter], it is a method that can be used only by consent," but once the arbitral award has been issued, "the enforceability of the decision rests not on consent as in conciliation, but on the compulsion of legal process." *Id.* at 68.

79. *Id.* at 72.

80. Lauer, *supra* note 75, at 88.

81. KELLOR, *supra* note 35, at 26. As we will see, Kellor argued that this tendency to confuse arbitration with conciliation came to an end only with the establishment of the AAA and its development of a newly systematized approach to arbitration. See *infra* notes 254-262 and accompanying text.

82. Lappin, *supra* note 51, at 168.

the parties dissatisfied,” such that “[a]lmost without fail the parties to the controversy become and remain enemies.”<sup>83</sup> In contrast, “[t]he result of a conciliation or arbitration proceeding is far different” in that “[a] spirit of good will and friendliness is encouraged in place of a spirit of hostility and enmity.”<sup>84</sup> As a consequence of such good will, “a discharged employee may be re-employed or an interrupted business relationship may be resumed.”<sup>85</sup> In this way, disruptions harmful to the economy are avoided, along with any risk that disgruntled workers might succumb to leftist radicalization.

But while Progressive lawyers frequently insisted that arbitration and conciliation share a similar propensity for promoting reconciliation, they failed to specify why this was the case. Although conciliation identifies peace-making as its end goal, arbitration – as these lawyers were well aware – culminates in a decision that the disputants are bound to respect and that may therefore displease one, if not both of them.<sup>86</sup>

The assumption that arbitration and conciliation both promote harmony likely lay in some combination of the prevalence (and visibility) of commercial arbitration and, perhaps more importantly, in the institutional structure of the new municipal courts. As Progressive lawyers recognized, commercial arbitration was the most longstanding and well-developed type of arbitration. Smith, for example, observed that “[i]t was frequently employed in an organized way by New York merchants as early as 1768.”<sup>87</sup> Deployed by businessmen seeking an end to business disruptions, arbitration thus came to be widely associated with peacemaking. Accordingly, as Smith rightly noted, the New York Chamber of Commerce’s Committee on Arbitration lauded itself for its efforts to promote conciliation.<sup>88</sup> In addition, as we will see, the Progressive model of the municipal court relied on a powerful judge who was expected to exercise significant paternalistic power and discretion. In the hands of such a judge, the dividing line between reconciling the litigants (conciliation) and imposing his own view of justice (arbitration) might be difficult to discern. Progressive lawyers expected, in other words, that the poor immigrant disputants served by the municipal courts would tend, by virtue of their relative lack of education, wealth, and power, to respect the judge’s authority and thus to reconcile as he

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83. Lauer, *supra* note 75, at 88.

84. *Id.* at 88, 89.

85. *Id.* at 89.

86. *See supra* notes 68-75 and accompanying text.

87. SMITH, *supra* note 77, at 68.

88. *Id.* at 70 (citing N.Y. CHAMBER OF COMMERCE COMM’N ON ARBITRATION, REPORT FOR 1914, at 3 (1914)).

dictated.<sup>89</sup> The same assumption of deference on the part of the poor and uneducated likely informed Smith's observation that "[i]n the legal aid societies the principle of arbitration in conjunction with conciliation is daily employed."<sup>90</sup>

As this suggests, one of the main reasons that Progressive lawyers found both conciliation and arbitration so appealing (and tended to associate them with one another) is that these procedures seemed to promise a release from the constraints of excessive legality. From the perspective of Progressive lawyers, the great challenge of their age—a period of tremendous socioeconomic transition in the wake of rapid post-bellum industrialization—was to preserve the country's commitment to the democratic rule of law even while endowing government with the flexibility and expertise required to address the new problems of mass industrial society.<sup>91</sup> As Roscoe Pound and William Howard Taft famously argued, there were reasons to suspect that the traditions of common-law-based adversarialism were poorly suited to the new socioeconomic conditions.<sup>92</sup> Cumbersome and expensive, adversarial litigation was able to identify violations of legal rights, but it could not in any cost-effective way provide meaningful relief for the numerous social ills, such as work-place injury and consumer fraud, that predictably plagued large populations in the new urban, industrial environment.<sup>93</sup>

One solution that Progressives embraced was to turn to social science by channeling certain recurrent types of claims before bodies of specialized experts. Precisely this approach was adopted in the workers' compensation schemes established throughout the United States in the early part of the twentieth century.<sup>94</sup> Similarly, the Progressive subdivision of the new municipal courts into specialized units focused, *inter alia*, on juvenile justice and crime

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89. See *infra* notes 158-159 and accompanying text; see also Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 431-42 (2009) (discussing Bentham's critique of conciliation proceedings as tending towards the paternalistic assertion of authority).

90. SMITH, *supra* note 77, at 70.

91. Grossberg, *supra* note 45, at 306-07.

92. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. ANN. REP. 395 (1906); William H. Taft, *The Delays of the Law*, 18 YALE L.J. 28 (1908); see also JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 223-28 (2007) (discussing Pound's speech and its influence).

93. See WITT, *supra* note 92, at 167-69.

94. See *id.* at 168-70; see also JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKING MEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 126-51 (2004).

was conceived as an effort to remedy particular social problems through the deployment of social scientific expertise.<sup>95</sup>

But while Progressive lawyers played a decisive role in developing the apparatus of what came to be called “socialized law,” these new administrative schemes of adjudication posed a threat to lawyers’ traditional guild monopoly and, at least as importantly, to their longstanding position of social and political authority. To the extent that dispute resolution came to be viewed as hinging on social scientific expertise—a belief reflected in the growing number of non-legal specialists (including doctors, psychologists, and social workers) hired by the new municipal courts<sup>96</sup>—what role would lawyers themselves continue to play in the administration of justice? As John Witt shows, one solution—developed by Pound himself, in alliance with Melvin Belli and the plaintiffs’ injury bar—was to settle cases in certain areas of tort law (including, notably, automobile injury suits) in accordance with what was essentially a privatized administrative scheme for assigning liability and damages.<sup>97</sup> Although this approach enabled lawyers to continue earning significant profits, it transformed their role into a largely mechanical, discretion-free exercise, involving the application of pre-established valuations and rules of thumb. Both conciliation and arbitration, in contrast, allowed lawyers to focus on actively promoting substantive justice, rather than mechanistically applying administrative guidelines. And while administrative approaches appealed to social scientific expertise as their underlying source of legitimacy, conciliation and arbitration were understood to be grounded—in ways that Progressives themselves failed clearly to theorize—on the discretion (and assumed wisdom) of the legal elites deploying them. Indeed, perhaps nothing more clearly underscores the deep-rooted paternalism of the Progressives’ conception of arbitration than their tendency to associate it with conciliation—a practice that, as we will see, a previous generation of Americans had dismissed as suited only to hierarchical, Old World societies.

## II. COURTS OF “SMALL CLAIMS AND CONCILIATION” AND THE PROGRESSIVE CAMPAIGN TO AMERICANIZE THE URBAN, IMMIGRANT POOR

Although Progressive lawyers emphasized the utility of both arbitration and conciliation in addressing the problems of the poor and experimented to some degree with both procedures, it was conciliation—as deployed in the

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95. See WITT, *supra* note 92, at 198; see also WILLRICH, *supra* note 19, at xxxii-xxxiii.

96. WILLRICH, *supra* note 19, at xxxii-xxxiii.

97. WITT, *supra* note 92, at 270-75.

small claims and conciliation branches of the new municipal courts – that ended up becoming the centerpiece of their program for urban civil justice. Given the centrality of the small claims and conciliation courts to the Progressive vision of civil justice, as well as Progressives' tendency to depict arbitration and conciliation as kindred forms, any attempt to make sense of the Progressive conception of arbitration (and its relation to broader procedural reform goals) ought to take some account of these courts. Put differently, one way to understand what Progressives hoped might be achieved through arbitration is to explore their aspirations for the small claims and conciliation courts.

A. *The European Model of the Conciliation Court and the (Largely) Failed Nineteenth-Century American Efforts To Transplant It*

The Progressive push to develop municipal courts was part of a broader effort, associated first and foremost with Republicans, to weed out the Democratic party machines that had long dominated major urban areas.<sup>98</sup> Although the municipal courts varied in structure and function, they shared a common focus on providing access to justice for urban dwellers, many of whom were poor immigrants. From the perspective of Progressive reformers, winning the hearts and minds of these men and women was a way not only to promote Republican victory at the ballot box, but also to counter dangerous tendencies towards radicalization that were reflected in the prevalence of labor mobilization and strike activity during the late nineteenth and early twentieth centuries.<sup>99</sup> Reformers thus devoted particular attention to establishing “small claims and conciliation” branches within the municipal courts. Expected to specialize in the minor matters thought to typify the complaints of the urban poor,<sup>100</sup> the small claims and conciliation courts would deploy conciliation whenever possible as a means of ensuring rapid, cheap, and possibly lawyer-free dispute resolution.<sup>101</sup>

It is at first glance surprising that Progressive lawyers would encourage the development of a mode of procedure intended to facilitate the ability to proceed *pro se*, in that this would seem to threaten their own professional interests. In reality, however, elite lawyers were only too happy to undermine the client base of the “ambulance chasers,” who tended to monopolize representa-

98. See HURST, *supra* note 44, at 98-100.

99. See WILLRICH, *supra* note 19, at xxx-xxxii.

100. See *infra* notes 158-159 and accompanying text.

101. See generally Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 293, 313-46 (describing the evolution of small claims courts).

tion of the urban poor.<sup>102</sup> As explained in the annual report of the ABA's Committee on Small Claims and Conciliation Procedure in 1924, "[T]he better members of our profession have no ardent desire to try \$25 cases in a small claims court and . . . it is the less desirable fraction of the bar that the small claims courts want to keep out . . ." <sup>103</sup> But while elite Progressive lawyers were perfectly willing to do away with lawyers as counsel to the disputants in such courts, they assumed that lawyers (of their own ilk) would serve as judges.<sup>104</sup>

In devising courts of small claims and conciliation, Progressive lawyers drew on the European model of the conciliation court—an ideal type that, as I have argued elsewhere, was devised by Jeremy Bentham based on the French *bureaux de conciliation*.<sup>105</sup> Created by the French revolutionaries in 1790, these institutions were shortly thereafter adopted by other continental European countries and their colonies, including Spain, Prussia, and Denmark.<sup>106</sup> As depicted by Bentham, the defining feature of these courts was that they relied on lay judges, lacking legal training, who were elected by the local community because of their reputation for wisdom and common sense. Such judges were expected to deploy their high standing within the community, rather than legal knowledge, to mediate intra-communal disputes in private, lawyer-free proceedings.<sup>107</sup>

Bentham ultimately concluded that conciliation courts were fundamentally paternalistic institutions and therefore ill-suited to any society committed to principles of democratic governance.<sup>108</sup> But despite his own concerns, Bentham's ideal type of the "conciliation court" was embraced by others, who began using the term to refer not only to *bureaux de conciliation* (and their counterparts outside of France), but also to other types of courts. These included, most especially, the European labor courts, modeled on the French *conseils de prud'hommes*, in which lay representatives of capital and labor, elected by their respective constituents, sat together to resolve employment disputes.<sup>109</sup> While the various institutions that came within the broader rubric of "conciliation court" differed in significant respects, they shared certain core characteristics.

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102. See POWELL, *supra* note 45, at 141-44; see also *supra* notes 54-58 and accompanying text.

103. *Conference of Delegates Deals with Vital Topics in 1924 Meeting*, 10 A.B.A. J. 815, 830 (1924).

104. See *infra* notes 125-56 and accompanying text.

105. Kessler, *supra* note 89, at 431-42.

106. *Id.* at 426, 451.

107. See *id.* at 462.

108. The one possible exception that he was willing to countenance was for family-related disputes, since the patriarchal model of the family made paternalism appropriate. Kessler, *supra* note 89, at 439-41.

109. Kessler, *supra* note 60.

These included, most importantly, a reliance on lay leaders, who were selected because of their standing within the relevant community, to resolve disputes on the basis of informal, conciliation-promoting procedures. And as I have argued elsewhere, these shared characteristics derived from a centuries-old European tradition of corporatism pursuant to which the group, rather than the individual, was the focal point of the law.<sup>110</sup>

In urging the adoption of “courts of small claims and conciliation,” Progressive lawyers frequently pointed to the European model of the conciliation court. For example, Reginald Heber Smith observed that “[i]n Norway and Denmark courts of conciliation have existed since 1795” and that “in Norway 75 per cent and in Denmark 90 per cent of all litigation is peaceably adjusted through judicial conciliation.”<sup>111</sup> He further remarked that “[i]n the industrial [or labor] courts of France, Switzerland, and Germany which have jurisdiction over disputes between employers and employees, conciliation plays a leading part.”<sup>112</sup> Similarly, in a 1917 article concerning courts of small claims and conciliation, William R. Vance, then dean of the University of Minnesota Law School, commented that “[b]y royal edicts of 1795 and 1797 there were established in Denmark and Norway . . . courts of conciliation which have proved so highly successful in affording inexpensive and speedy justice to the poorer class of suitors, that their fame has spread throughout the world.”<sup>113</sup> Moreover, “[i]n France, at the time of the Revolution, conciliation powers were given to justices of the peace [heading the *bureaux de conciliation*], with the result that their courts have continued for over a hundred years to dispose annually of huge numbers of small cases by bringing the parties to an amicable understanding.”<sup>114</sup>

In seeking to develop courts of small claims and conciliation, inspired by the European model of the conciliation court, Progressives operated within a remarkably long tradition of American efforts to transplant this model to the New World. Indeed, as I have shown elsewhere, Americans engaged in multiple debates throughout the nineteenth century concerning the desirability of such institutions.<sup>115</sup> But despite these pervasive debates (several of which resulted in the enactment of state constitutional provisions authorizing legisla-

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110. *Id.*

111. SMITH, *supra* note 77, at 61-62.

112. *Id.* at 62.

113. William R. Vance, *A Proposed Court of Conciliation*, 1 MINN. L. REV. 107, 108 (1917).

114. *Id.* at 109; *see also* Dempsey, *supra* note 50, at 750 (observing that “Courts of Conciliation are not peculiarly American institutions” and that they have long existed in Denmark, Norway, and France).

115. *See* Kessler, *supra* note 89, at 442-78; Kessler, *supra* note 60.

tures to create conciliation courts), these institutions did not meaningfully take root in American soil.<sup>116</sup> While the reasons for these repeated failures are varied and complex, the most important factor was that Americans concluded that conciliation courts were grounded on a corporatist tradition largely absent from the United States. In a country that prided itself on its commitment to individual equality, it was, in short, far from clear where to ground (and how to justify) the conciliation judge's extralegal, discretionary authority. Accordingly, nineteenth-century (white) Americans ultimately rejected such courts as suited only to hierarchical and despotic European nations (and to African-Americans, imagined to be primitive and deferential).<sup>117</sup>

In arguing for the establishment of courts of small claims and conciliation, Progressives often acknowledged the largely failed nineteenth-century efforts to establish such institutions in the United States. Vance, for example, noted that in 1846, the New York Constitution was revised to include a provision "authorizing the legislature to establish courts of conciliation," but "[t]he New York legislature seems never to have seriously considered exercising the power thus given."<sup>118</sup> And while "[c]onstitutional provisions similar to that of 1846 in New York were adopted" in several other states, these resulted at most in the enactment of statutes "of limited scope and doubtful usefulness."<sup>119</sup> Similarly, Smith remarked that "[i]n the reform wave of 1846 to 1852 . . . provisions respecting conciliation were inserted in six of the new constitutions which were adopted during that period," but in all these jurisdictions, "the plan met with . . . failure."<sup>120</sup> Perhaps because of these failures, most Progressives arguing for the establishment of courts of small claims and conciliation ultimately did not dwell much on history.<sup>121</sup> Instead, they simply underscored the pressing present-day need for such institutions, pointing to the threat to core American values posed by a growing mass of unassimilated urban immigrants. In a move redolent with (unrecognized) irony, they sought to deploy for purposes of promoting Americanization an institution rejected by their nineteenth-century predecessors as fundamentally un-American.

Along these lines, Smith argued in favor of small claims and conciliation courts by noting that one "accruing advantage of having the parties brought

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116. The one partial exception was the Freedmen's Bureau Courts created by the North to facilitate the postbellum Reconstruction of the South. See Kessler, *supra* note 60; Kessler, *supra* note 89, at 470-78.

117. See Kessler, *supra* note 60; Kessler, *supra* note 89, at 464-78.

118. Vance, *supra* note 113, at 109.

119. *Id.*

120. SMITH, *supra* note 77, at 61.

121. See Vance, *supra* note 113, at 110.

into direct contact with the judge” is that this “mak[es] justice seem a more real thing to the average man”—a development that would, in turn, result in “beneficial effects on good citizenship and loyalty.”<sup>122</sup> The ABA’s Committee on Small Claims and Conciliation Procedure made much the same point. The Committee’s 1924 report includes a section entitled “Genuine ‘Americanization.’”<sup>123</sup> As this title suggests, the Committee believed that the utility of courts of small claims and conciliation was not simply that “they do justice in a class of cases where justice could not be done by the machinery formerly in existence.”<sup>124</sup> Of at least equal importance was that these courts demonstrated American principles of equal justice under the law, thus winning the hearts and minds of those urban immigrant dwellers at risk of radicalization. In the words of the report, “[b]ecause they secure justice to the humble citizen with his small case they demonstrate the integrity of our institutions and they afford a practical object lesson in real, as distinguished from talky-talk, Americanization.”<sup>125</sup>

*B. The Progressive Prototype: Manuel Levine’s Cleveland-Based “Conciliation Branch”*

In insisting that municipal courts would play a vital role in a broader program of Americanization, Progressives looked first and foremost to Judge Manuel Levine of the Cleveland Municipal Court.<sup>126</sup> With the support of his judicial colleagues, Levine created a specialized “Conciliation Branch” of the court in March 1913.<sup>127</sup> The contemporary pro-reform press praised Levine, a Republican, for his successful attempts—first as a police prosecutor and then as a judge of the Municipal Court—to clean up the corruption that had once typified Democrat-controlled Cleveland. As depicted in these reports, Levine’s efforts to target such corruption and thereby bring law and justice to the city’s poor, immigrant community were best understood as mechanisms of Americanization.

122. SMITH, *supra* note 77, at 52-53.

123. *Conference of Delegates Deals with Vital Topics in 1924 Meeting*, *supra* note 103, at 830 (providing the *Report of Committee on Small Claims and Conciliation Procedure*).

124. *Id.*

125. *Id.*

126. See, e.g., SMITH, *supra* note 77, at 63-65; Newton A. Fuessle, *The People’s Court: Making Americans by Justice*, COLLIER’S, July 3, 1915, at 27; Raymond C. Moley, *Justice Through Common Sense: The Conciliation Court*, 33 SURV. 99, 101 (1914); Ernest Poole, *The Story of Manuel Levine*, OUTLOOK, Oct. 26, 1907, at 414; Philip R. White, *Conciliation Branch of the Municipal Court of Cleveland*, LEGAL AID REV., Oct. 1915, at 1.

127. SMITH, *supra* note 77, at 63-65; Fuessle, *supra* note 126, at 27.

Consider, for example, a piece published in 1907 by Ernest Poole, a journalist and advocate of social reform who would go on to later fame as a novelist.<sup>128</sup> According to Poole, the party “boss” who ran Cleveland’s sixteenth ward was widely known by the local immigrant Jewish community, recently arrived from Russia and elsewhere in eastern Europe, as “the Czar.”<sup>129</sup> While the Czar held election campaign events on a platform decorated with “the Stars and Stripes,” he conducted himself in all public matters as if he were an Old World despot.<sup>130</sup> He “spoke in Yiddish,” rather than English, and he encouraged the audience of mostly peddlers to engage in theft and to do their “best to escape the vigilance of the police department.”<sup>131</sup> If they were caught, he promised, he would help them, aided by the many judges and prosecutors in his pocket: “For here are *our* judges and *our* prosecutors. They are with us tonight and are with us all the time.”<sup>132</sup> Among the judges in the “boss’s” pocket were the justices of the peace, who earned their fees through numerous corrupt practices and whose “victims were usually ignorant working men and women who could not afford lawyers.”<sup>133</sup> In short, as depicted by Poole, Cleveland municipal governance was not only corrupt but also under the control of foreign elements who conducted all business and politics in an alien language and culture – one that threatened core American values of property and justice under the law.

According to Poole, strong Progressive leadership of the sort that Manuel Levine represented offered the solution to the problems of Cleveland, as well as those of the nation’s other urban areas. Appointed as an assistant police prosecutor, Levine eagerly fulfilled the hopes of his backers, using his power to clean up the city.<sup>134</sup> This meant not only going after the Czar and his cronies, but also persuading the local Jewish immigrants that they could trust the American legal and political system to protect their interests and thus do without the Czar’s patronage. Towards this end, Levine organized the peddlers in town into “a society for political independence and mutual aid,” and speaking with hundreds of its members at a time, “[h]e assured them that they were not outlaws, as the Czar had said. He told them that in America Jews need not fear the

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128. EDD APPLGATE, *MUCKRAKERS: A BIOGRAPHICAL DICTIONARY OF WRITERS AND EDITORS* 142-46 (2008).

129. Poole, *supra* note 126, at 413.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 417; *see also* Fuessle, *supra* note 126, at 27 (“The victims [of the justices of the peace] were usually ignorant foreigners, unable to afford lawyers.”).

134. Poole, *supra* note 126, at 415-19.

police if they complied with the laws.”<sup>135</sup> By persuading these peddlers of the justice of American institutions, he succeeded, moreover, in curbing their illegal activity, such that “since that time it is amazing how the trade in stolen goods has dropped off.”<sup>136</sup>

Written in 1907, Poole’s article preceded Levine’s election to the Cleveland Municipal Court and his subsequent establishment of a Conciliation Branch. But as depicted in articles thereafter published in Progressive newspapers, Levine’s work as a conciliation judge tracked the pedagogical, Americanizing role that he had previously assumed as a prosecutor. This was precisely the point made in 1915 by Newton A. Fuessle, another journalist and novelist, in an article aptly entitled *The People’s Court: Making Americans by Justice*.<sup>137</sup> According to Fuessle, “Judge Manuel Levine gave Cleveland its Court of Conciliation, just as he gave Cleveland last year its first great Fourth of July reception for newly naturalized citizens—a . . . forerunner of the year’s ‘Americanization Day’ celebrations . . . .”<sup>138</sup> As suggested by this reference to Americanization Day—a celebration organized in 1915 by Progressive lawyer Frances Kellor and the National Americanization Committee that she headed<sup>139</sup>—Levine’s conciliation court was an instrument for promoting Americanization. “[A] forum of common sense, unfettered by technicalities” and with “judges [who] are peacemakers,” the conciliation court decided disputes without lawyers “confus[ing] litigants” and with “[e]ach party tell[ing] his story in his own language.”<sup>140</sup> The end result was that “Levine had done for Cleveland’s immigrants what no one else had ever thought of doing. He took away the fear of the law, and stimulated them to right living and fair dealing.”<sup>141</sup>

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135. *Id.* at 419.

136. *Id.*

137. Fuessle, *supra* note 126, at 27.

138. *Id.*

139. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 242-44 (1969).

140. Fuessle, *supra* note 126, at 27.

141. *Id.* That Levine’s role as conciliation judge was to teach American values and thereby instill a love of American law and justice was a point made not only by his Progressive supporters, but also by Levine himself. As he reflected in an article appearing in the January 1916 issue of the *Immigrants in America Review*, a publication edited by Frances Kellor,

When justice is reduced to terms of simplicity, the relation of the litigant to the court will become more intimate. There will be a better understanding of the function of courts on the part of the people, and a better appreciation as to the needs of the people on the part of the judge. The courts will then become an added bulwark of our liberties as they will instil into the hearts of Americans and coming Americans a firmer faith in the justice of democracy.

What enabled Levine to deploy the “Conciliation Branch” of the municipal court as such an effective method of Americanization? The official Progressive line was that by simplifying procedure, courts of small claims and conciliation eliminated the technicalities that prevented the just outcome from emerging as a self-evident truth. In Smith’s words, “after rules of pleadings, procedure, and evidence have been eliminated, there is nothing left for the lawyer to do.”<sup>142</sup> Progressive lawyers were thus careful to insist that, unlike the European model of the conciliation court rejected by their nineteenth-century predecessors, these new American courts did not afford what Max Weber termed “kadi justice” – namely, a form of personalized justice, which hinged on the judge’s high status within the community (and concomitant ability to secure deference to his judgments).<sup>143</sup> Instead, Progressive lawyers argued, courts of small claims and conciliation merely enforced generally applicable rules of law in a procedurally simplified and therefore more cost-effective manner.

In seeking to distance small claims and conciliation courts from kadi justice, Progressives frequently referred to Harun al-Rashid – the Abbasid Caliph of late eighth- and early ninth-century Baghdad who was famously depicted in the *Arabian Nights* as a quintessentially just ruler.<sup>144</sup> Consider, for example, the following passage from the 1924 report of the ABA’s Committee on Small Claims and Conciliation Procedure: “The justice of the case [in courts of small claims and conciliation] is determined . . . not as the arbitrary ruling of an untrammelled despot and not as the merciful dispensation of a Haroun-el-Raschid, but according to law.”<sup>145</sup> In much the same way, Smith rejected the notion that Levine was a “Haroun-al-Rashid, the inference being that he dispense[s] a sort of Oriental justice without regard to rules of law.”<sup>146</sup> Although Levine’s court “exercises wide equity powers,” it was, Smith claimed, “[f]undamentally . . . a court of law.”<sup>147</sup> Underlying this effort to distance small claims and conciliation courts from kadi justice was an inchoate understanding among Progressive legal elites that an institution in which the judge’s legitima-

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Manuel Levine, *Getting the Immigrant’s Trial Balance in the Cleveland Courts*, IMMIGRANTS IN AM. REV., Jan. 1916, at 31, 36.

142. SMITH, *supra* note 77, at 72.

143. See 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 976 (Guenther Roth & Claus Wittich eds., 1978); Kessler, *supra* note 60.

144. See LUDWIG W. ADAMEC, *HISTORICAL DICTIONARY OF ISLAM* 120 (2d ed. 2009); Ulrich Marzolph, *Harun al-Rashid (786-809)*, in 2 *THE GREENWOOD ENCYCLOPEDIA OF FOLKTALES & FAIRY TALES* 443-44 (Donald Haase ed., 2008).

145. *Conference of Delegates Deals with Vital Topics in 1924 Meeting*, *supra* note 103, at 829 (providing the *Report of Committee on Small Claims and Conciliation Procedure*).

146. SMITH, *supra* note 77, at 51.

147. *Id.*

cy hinged on his high communal standing, rather than his legal knowledge, did not necessarily play to their strengths.

But while Progressive lawyers tended to insist that courts of small claims and conciliation based their decisions on generally applicable law, their counterparts in journalism were not so sure. A close examination of Levine's Cleveland-based court, they implied, revealed that it was the judge's position of leadership within the Jewish immigrant community, rather than his legal knowledge, that accounted for his success in promoting conciliation and establishing the court's legitimacy. As Poole was careful to highlight, Levine came from the same Jewish immigrant community as "the Czar" and his corrupt compatriots.<sup>148</sup> He was "a Russian Jew" who had learned "the meaning of despotism" as a young man exposed to "the flogging of women and children by Cossacks and police."<sup>149</sup> Having heard "in secret meetings" about "the American Constitution . . . [and] the Declaration of Independence," Levine had managed to "escape[] across the Russian frontier and had come to America, full of hopes and dreams and ideals of this mighty free Republic."<sup>150</sup> Horrified to discover that, just as a czar controlled Russia, so too a czar controlled much of Cleveland, he became despondent. But then he discovered "Hiram House," one of the first settlement houses in the country, and "[h]ere, from George Bellamy, the head worker [and founder] of the House, he began to get other ideas of American city life."<sup>151</sup> Infused with these Progressive ideas, Levine began teaching himself English, "joined a social reform club," and while "work[ing] sixteen hours a day" somehow managed to earn a law degree through night school.<sup>152</sup>

Having pulled himself up by his own bootstraps—with the assistance of Progressive reformers—Levine was an object lesson in what Progressive urban reform could achieve. He and his Progressive backers were thus determined that he should be the one to persuade his fellow immigrants to turn their loyalty from the (local and foreign) czar to American law and justice. As Poole explained, "through the help of Bellamy and other friends, [Levine] was appointed an assistant police prosecutor."<sup>153</sup> And in selecting Levine for the position, the District Attorney remarked: "I . . . [did so] . . . because I knew I could trust him to show his own people, the immigrants, that, in spite of all they had learned, there was such a thing as justice in America—equality before the

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148. Poole, *supra* note 126, at 413.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 413-15.

153. *Id.* at 415.

law.”<sup>154</sup> In short, Poole concluded, Levine’s success proved that immigrants themselves had a special role to play in solving the “immigrant problem” then facing American cities:

There are many men of this stamp beginning to appear in the foreign quarters of our cities. And the work that they are doing in these days of immigrant problems gives strong hope that perhaps, after all, so long as America is a democracy, the real salvation of the immigrants may be best worked out for them by their own leaders – and by themselves.<sup>155</sup>

Much like Poole, and true to a tradition of thinking about conciliation courts dating back to Jeremy Bentham, Fuessle emphasized that what enabled Levine to succeed in his role as an (Americanizing) conciliation judge was the trust that the local litigants placed in him as a member of their own Jewish, immigrant community. Like an earlier generation of Americans debating the merits of conciliation courts, and quite unlike Reginald Heber Smith and the American Bar Association, Fuessle depicted Levine as exercising a kind of kadi justice. In Fuessle’s words, “Levine is a sort of Harun-al-Raschid in Cleveland” around whom locals from the community flock, seeking wisdom and advice: “Women come with babies in their arms, and men with the dirt and sweat of toil on their faces. He is bringing the court and its functions within the scope and comprehension of the humblest.”<sup>156</sup> In this sense, he was a true “people’s judge.”<sup>157</sup>

For Progressive lawyers, eager to develop some variant of the conciliation court as a mechanism for Americanization, but also to insist that these courts were bound by the rule of law, the conjunction of small claims *and* conciliation was the solution to the logical quandary in which they found themselves. As Smith argued:

In these courts it is difficult, if not impossible, to determine where their function as a conciliation tribunal ends and their work as a small claims court begins . . . [but] [f]ortunately, it is not necessary [to do so]. In the field of small claims the two merge and become indistinguishable because both are based on precisely the same informal procedure.<sup>158</sup>

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154. *Id.*

155. *Id.* at 419.

156. Fuessle, *supra* note 126, at 27.

157. *Id.*

158. SMITH, *supra* note 77, at 63.

Conjoining small claims and conciliation in this way permitted, in short, a conceptual fuzziness—one that was justified in the paternalistic mindset of Progressive legal reformers by the relative disdain in which they held the urban, immigrant poor whose claims they sought to channel into these new courts. In the view of such reformers, the law ultimately did not matter much in these courts, because such inferior people were (1) not likely to have claims raising any truly difficult question of law or (2) to insist on their legal rights. As Vance observed:

[M]ost persons, especially of the more ignorant classes, would be willing to accept the advice of a trusted public officer in regard to the settlement of any disputes which they have with their neighbors, and . . . comparatively few are of such litigious disposition that they will insist upon litigating a claim when they have been informed by such an officer that the claim is without merit.<sup>159</sup>

Like Bentham before him, Vance and his fellow Progressives understood the conciliation court model ultimately to hinge on the judge's (communally grounded) power vis-à-vis the disputants—and on the concomitant willingness of the disputants to defer to his good counsel. This was, moreover, a key part of its appeal.

As reflected in the contemporary excitement over courts of “small claims and conciliation,” it was conciliation, rather than arbitration, that the Progressives ultimately embraced as the procedure of choice for delivering urban civil justice.<sup>160</sup> To the extent that Progressive reformers sought to pursue some combination of Americanizing urban immigrants and empowering themselves, it is easy to see why—despite the pervasive tendency to associate conciliation with arbitration—the former was ultimately deemed better suited to the task. As we have seen, the inherited European model of the conciliation court suggested that a powerful, discretion-laden judge—one who was in some way grounded in the community he served—could lead the disputants to correct (American) living. Moreover, in the process, the lawyer-judge himself would enjoy substantial, unbridled authority. In contrast, despite the ubiquity of statements to the effect that arbitration and conciliation were merely variants on a common theme, the fact was that, as Progressive lawyers were well aware, arbitration seemed to endow the lawyer serving as decision maker with less

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159. Vance, *supra* note 113, at 111; *see also* Grossberg, *supra* note 45, at 307 (arguing that Progressive lawyers favored “a two-tier legal system that sanctioned adversarial solutions for those who could pay, and alternative forms of dispute resolution for those who could not”).

160. *See* Steele, *supra* note 101, at 347-48 (describing the widespread enthusiasm for courts of small claims and conciliation that persisted through about 1940).

discretion. As Smith observed, “An arbitrator is not bound to follow the rules of the substantive law, but the general practice . . . is for arbitrators to adhere rather closely to rules of law.”<sup>161</sup> Indeed, according to Smith, while small claims, arbitration, and conciliation procedure were all roughly akin to one another in their focus on procedural simplification, the three modes could be aligned on a spectrum between formal, law-bound proceedings, on the one hand, and informal, extralegal proceedings, on the other. In this spectrum,

[A]rbitration stands midway between the other two, with the small claims court at one end representing . . . a legally constituted court of compulsory jurisdiction and with the conciliation tribunal at the other end representing . . . an extra-legal agency without any compulsory power to render or enforce a binding decision.<sup>162</sup>

To the extent that arbitration was to fulfill the procedural reform ambitions of Progressive lawyers, it would thus have to be developed in ways that attended to the reality that it was not, in fact, conciliation and that it differed from the latter primarily in that it tended more closely to approximate formal, adversarial procedure.

It was within a very different institutional setting from that of the municipal courts that the Progressive approach to arbitration would develop meaningful roots – namely, within the AAA. In this new context, arbitration lost any immediate connection to improving the lives of the poor. But it remained very closely tied to the broader ambition of Progressive legal elites to develop procedures that would promote national unity and values, while also empowering themselves.

### III. THE “AMERICAN CONCEPT OF ARBITRATION” AND THE NEW IDEAL OF PRIVATE PROCEDURE

The important linkages between the AAA’s budding system of arbitration and the Progressive program of (Americanizing) procedural reform can be seen in the neglected writings of Frances Kellor—a figure central not only to the AAA, but also to Progressive legal and social reform more generally. Kellor is well known to scholars of Progressive-era social reform who study such developments as the creation of settlement houses and the rise of the Americaniza-

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<sup>161</sup> Reginald Heber Smith, *The Elimination of Delay Through Small Claims Courts and Conciliation Tribunals*, 10 PROC. ACAD. POL. SCI. CITY N.Y. 216, 217 (1923).

<sup>162</sup> *Id.*

tion movement.<sup>163</sup> She has been sidelined, however, in the legal literature addressing the enactment of the FAA and, most especially, the broader project of Progressive procedural reform.<sup>164</sup> This neglect is partially a product of the unfortunate tendency to conceive of procedural reform narrowly as top-down (and federal) rulemaking.<sup>165</sup> But it is also a legacy of a gendered narrative of Progressive legal reform—one that has tended to lionize certain heroic, male icons (usually law professors or judges) as the courageous exponents of legal change.<sup>166</sup> Yet as Felice Batlan argues, elite and middle-class women working in settlement houses, serving the needs of the urban, immigrant poor, also played a vital though unacknowledged role in the development of Progressive legal thought and reform.<sup>167</sup>

A fixture of the settlement houses, Frances Kellor was one such woman. Trained as a lawyer and a sociologist, she utilized opportunities afforded by the program of Progressive reform to develop a career that took her from the settlement houses into the upper echelons of the burgeoning administrative state, first locally and then nationally. As she recognized, this was a realm of government unique in its willingness to afford a meaningful (though still limited) role to women.<sup>168</sup> At the same time, Kellor developed close relations with business elites and sought throughout her years in government to foster various forms of public-private partnership.<sup>169</sup> Having long called for the private sector to play an important role in addressing the nation's social ills, she ultimately looked to the arbitration system being developed by the AAA as a means of furthering her abiding commitment to the quintessentially Progressive project of Americanization.<sup>170</sup> The end result is an important but forgotten story of Progressive procedural reform—one that, as we will see, goes a long way towards

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163. See, e.g., GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 71-73 (2001); HIGHAM, *supra* note 139, at 234-63.

164. Ian Macneil, Hiro Aragaki, and Imre Szalai all make brief mention of Kellor in their discussions of the rise of modern arbitration, but they do not focus substantial attention on her. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION* 38-40 (1992); Aragaki, *supra* note 10, at 1983-84, 1993, 2004; Imre S. Szalai, *Modern Arbitration Values and the First World War*, 49 *AM. J. LEGAL HIST.* 355, 358-59, 362 (2007).

165. See Kessler, *supra* note 60 (critiquing this tendency).

166. Felice Batlan, *Law and the Fabric of the Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture*, 15 *S. CAL. INTERDISC. L.J.* 235, 248-51 (2006).

167. *Id.*

168. See generally CAMILLA STIVERS, *BUREAU MEN, SETTLEMENT WOMEN: CONSTRUCTING PUBLIC ADMINISTRATION IN THE PROGRESSIVE ERA* (2000).

169. See *infra* notes 174-179, 184-202, and accompanying text.

170. See *infra* Parts III.B-C.

explaining how lawyers came to view the private nature of arbitral proceedings as a significant value in its own right, consonant with a long tradition of conceiving of American procedure in exceptionalist terms.

*A. Kellor's Early Life and Career: Social Gospel, Settlement Houses, and Americanization*

In the years leading up to and through the First World War, Kellor was the preeminent leader of the Progressive Americanization movement.<sup>171</sup> She thus remains a controversial figure. While some praise her heroic efforts to help the disempowered (including especially immigrants), others point to the ways she sought to impose her own white, middle-class, and Protestant values on the very people whom she claimed to serve.<sup>172</sup> In reality, both accounts are to some degree accurate in that they reflect the two sides of the Progressive approach to reform.

Kellor exemplified the duality of Progressive social and legal reform. Born in Columbus, Ohio in 1873, she grew up in Coldwater, Michigan, raised by a single working mother who struggled to make ends meet.<sup>173</sup> In her late teens, she joined the church of the local Presbyterian Minister, the Reverend Henry P. Collin, who proved to be enormously influential in shaping her worldviews.<sup>174</sup> A devotee of the social gospel movement, Collin urged the application of Christian ethics to the social ills produced by modern industrial capitalism.<sup>175</sup> It was through the social gospel that Kellor, like many other Progressives, was first inspired to advocate for key reforms in such institutions as factories, prisons, and schools. In this respect, the Progressive agenda of Kellor and her peers was a kind of Christianizing mission, pursuant to which the urban immigrant poor would be exposed to (white and middle-class) Protestant values of “self-help”

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171. HIGHAM, *supra* note 139, at 239.

172. Compare, e.g., Lucille O'Connell, *Frances Kellor*, in NOTABLE AMERICAN WOMEN: THE MODERN PERIOD 393, 393-95 (Barbara Sicherman et al. eds., 1980) (praising Kellor), and John Press, *Frances Kellor, Americanization, and the Quest for Participatory Democracy* (2009) (unpublished Ph.D. dissertation, New York University) (on file with author) (same), with TIFFANY M. GILL, *BEAUTY SHOP POLITICS: AFRICAN AMERICAN WOMEN'S ACTIVISM IN THE BEAUTY INDUSTRY* 34-35 (2010) (criticizing Kellor), and HIGHAM, *supra* note 139, at 234-59 (same).

173. William Joseph Maxwell, *Frances Kellor in the Progressive Era: A Case Study in the Professionalization of Reform* 61-65 (Apr. 22, 1968) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

174. *Id.* at 75-82; Press, *supra* note 172, at 23-24.

175. Maxwell, *supra* note 173, at 75-82; Press, *supra* note 172, at 23-24.

and “moral discipline.”<sup>176</sup> As part of the same mission, Progressives sought to remind community leaders, including prominent business elites, of the importance of “social responsibility,” thereby conveying what was in essence a quasi-secularized message of Christian charity.<sup>177</sup>

Profoundly shaped by the teachings of the social gospel, Kellor went on to earn a law degree at Cornell in 1897 and then to pursue graduate training in sociology at the University of Chicago.<sup>178</sup> Thereafter, she went to work in the settlement houses, first in Chicago and then in Manhattan’s Lower East Side.<sup>179</sup> The apotheosis of the quintessentially Progressive combination of social service and paternalism, the settlement houses were designed to provide much needed assistance to the urban, immigrant poor, while also serving as a laboratory for the sociological research believed to be key to solving modern social ills. Within the settlement houses, white, educated, Protestant women like Kellor provided services and conducted research. Living alongside the women whom they served and studied, they modeled the right, American way to behave.<sup>180</sup> The Americanization movement that Kellor would go on to lead had its roots in the settlement houses, which understood their core mission to be that of Americanizing the immigrants. This would be achieved by teaching the linguistic, civic, and job skills necessary for them to become independent citizens and by providing them, in the interim, the material support required to earn their patriotic loyalty.<sup>181</sup>

Familiar with Kellor’s success in the famous Henry Street settlement house, then New York Governor Charles Evan Hughes invited her in 1910 to head the state’s new Bureau of Industries and Immigration (BII).<sup>182</sup> In this capacity, she began what would be a life-long effort—fully in line with the teachings of the social gospel that she had imbibed in her youth—to harness business leadership in service of social and legal reform. That same year, she assumed control of the New York-New Jersey branch of the North American Civic League for

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176. George M. Marsden, *Afterword: Religion, Politics, and the Search for an American Consensus*, in *RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S*, at 380, 384 (Mark A. Noll ed., 1990). “The social gospel was a program for Christianizing America . . . [Progressive] Republicans were building a Christian consensus, but were suppressing the exclusivist evangelical Protestant elements so as to be able to absorb the new immigrants within their domain.” *Id.* at 385.

177. *Id.* at 384.

178. Maxwell, *supra* note 173, at 61-65, 95-100.

179. *Id.* at 127-29; Press, *supra* note 172, at 54-55.

180. See Batlan, *supra* note 167, at 238-47.

181. See Press, *supra* note 172, at 55-57.

182. Maxwell, *supra* note 173, at 183-84; Press, *supra* note 172, at 69-70.

Immigrants (NACL)<sup>183</sup> – a private organization, consisting largely of industrialists and financiers, that was originally established in Boston to pursue Americanization.<sup>184</sup> While the BII and the NACL were distinct organizations, the lines between them became blurred, as Kellor used her position in each group to promote the broader goal of encouraging business elites to support social reform.<sup>185</sup>

As the United States' entry into the First World War appeared increasingly likely, the perceived urgency of assimilating the nation's many new immigrants grew. Haunting many Progressives, including Kellor, was the specter of large-scale strikes that might threaten a continued supply of essential, wartime labor. In her words, it was vital

to put English-speaking workmen in . . . [urban] factories, men able to understand orders and guard against accident; men able to grasp American industrial ideals, open to American influences and not subject only to strike agitators or foreign propagandists; to turn indifferent ignorant residents into understanding voters, participants in the laws under which they reside; to make immigrant homes American homes and to carry the American standards of living to the farthest corners of the community; to unite foreign-born and native alike in enthusiastic loyalty to our national ideals of liberty and justice.<sup>186</sup>

In this context, Kellor's Americanization work in the New York area brought her to national prominence. Assuming direction of the National Americanization Committee (NAC), she took a lead in organizing its 1915 effort to transform the July 4 holiday into "Americanization Day."<sup>187</sup> She also continued to urge an alliance between business and government in promoting Americanization.<sup>188</sup> Towards this end, while heading the NAC, she also took a position as Special Advisor on War Work among Immigrants within the Division of Immigrant Education housed within the Federal Bureau of Education.<sup>189</sup> Wearing these two hats, she coordinated the activities of both organizations, ensuring that key funding for the Division would come directly from the NAC for a full

<sup>183</sup>. JOHN F. MCCLYMER, *WAR AND WELFARE: SOCIAL ENGINEERING IN AMERICA, 1890-1925*, at 110-11 (1980); Press, *supra* note 172, at 69-70, 78.

<sup>184</sup>. MCCLYMER, *supra* note 183, at 110-11; Press, *supra* note 172, at 69-70, 78.

<sup>185</sup>. Press, *supra* note 172, at 70. Thus, for example, when the BII lacked sufficient funding from the legislature to print and distribute its reports, the NACL provided it. *Id.* at 71.

<sup>186</sup>. MCCLYMER, *supra* note 183, at 112-13.

<sup>187</sup>. HIGHAM, *supra* note 139, at 243; Maxwell, *supra* note 173, at 228; Press, *supra* note 172, at 6.

<sup>188</sup>. Press, *supra* note 172, at 185.

<sup>189</sup>. MCCLYMER, *supra* note 183, at 114-15.

five years.<sup>190</sup> It was only in 1919 when a new federal statute prohibited federal agencies from taking private funds that this arrangement ceased and, as a result, the Division collapsed.<sup>191</sup>

Although the end of the war removed one foreign threat, it replaced it with another in the form of the Red Scare. Kellor thus continued to insist on the vital importance of business and government leaders committing themselves to a program of Americanization, this time to resist the danger of Bolshevism. Towards this end, in March 1919, Kellor transformed the NAC into a new Inter-Racial Council, focused on persuading various ethnic leaders within the United States to join in a campaign for Americanization.<sup>192</sup> The Council then purchased the American Association of Foreign Language Newspapers, which supplied news stories and advertising to the foreign-language press.<sup>193</sup> As Kellor explained to the business elites behind the National Association of Manufacturers, the motivation for this purchase was to develop a mechanism for ensuring that the many foreign-language papers in the country would be “pro-American.”<sup>194</sup> With money supplied in part by the National Association of Manufacturers, Kellor’s Council deployed the American Association of Foreign Language Newspapers as “a means of controlling the foreign-language press and shaping its influence along the lines of a better Americanism and in opposition to Bolshevism.”<sup>195</sup>

Despite these achievements, the Inter-Racial Council collapsed by 1921, along with the Americanization movement as a whole.<sup>196</sup> As demilitarization proceeded and men returned home eager to find work, the need to rely on immigrants as a cheap source of labor seemed less pressing.<sup>197</sup> In this economic

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190. Press, *supra* note 172, at 210.

191. HIGHAM, *supra* note 139, at 257; Press, *supra* note 172, at 210. In her capacity as head of the NAC and a leading figure within the Division of Immigrant Education, Kellor spearheaded a range of Americanization initiatives, including such repressive procedures as surveilling all immigrant aliens and requiring real estate owners to register their tenants with the government. MCCLYMER, *supra* note 183, at 114-15. While not all her proposed measures were adopted, a number were, leading, *inter alia*, to the creation of Americanization bureaus throughout the country. *Id.* at 115.

192. MCCLYMER, *supra* note 183, at 121.

193. *Id.*

194. *Id.* (quoting Frances Kellor, *Address of Miss Frances A. Kellor*, in PROCEEDINGS OF THE 24TH ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES 361-68 (1919); PROCEEDINGS OF THE 25TH ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES 297 (1920)).

195. *Id.*

196. *Id.*

197. *Id.* at 121-22.

climate, and as a result of a burgeoning belief in supposed racial difference, business elites and government leaders turned increasingly towards restricting immigration as the better policy for avoiding Bolshevism and promoting a cohesive American polity.<sup>198</sup>

*B. The Great Depression: Kellor's Initial, Corporatist Vision of Arbitration Within the AAA*

It is commonly argued that the end of the Americanization movement marked a crucial turning point in Kellor's career. In the words of Allison D. Murdach, "[b]ecause of these defeats [to the movement], Kellor largely abandoned her Americanizing efforts after the end of World War I" and shifted instead to a new focus on arbitration.<sup>199</sup> Such assertions, however, misconstrue the nature of Kellor's interest in arbitration. Arbitration was, in her eyes, a means of fortifying American values at home and extending them abroad—and all by relying, as she always had, on the help of business elites. Indeed, it is striking to note that some of the very same financial magnates who assisted Kellor in her capacity as leader of the Americanization movement went on to play a central role in the AAA. For example, the banker Felix Warburg helped to supply the private funding that she used to support the Americanization work of the Federal Bureau of Education's Division of Immigrant Education.<sup>200</sup> Thereafter, he served on the AAA's first board of directors,<sup>201</sup> seemingly at Kellor's behest.<sup>202</sup> Kellor's embrace of arbitration was thus, in various respects, very much a continuation of, rather than a departure from, her longstanding commitment to Americanization.

Intimately involved with Progressive legal and social reform, Kellor was well aware of efforts to deploy conciliation (and to a lesser extent arbitration)

198. See HIGHAM, *supra* note 139, at 261-63.

199. Allison D. Murdach, *Frances Kellor and the Americanization Movement*, 53 SOC. WORK 93, 95 (2008); see also John J. Miller, *Miss Americanizer*, 83 POL'Y REV. 64, 64 (1997) (arguing that when "in the 1920s, . . . the country decided to slam shut the door" to immigrants, Kellor "moved on to become an expert in international arbitration"); Sandra K. Partridge, *Frances Kellor and the American Arbitration Association*, 2012 DISP. RESOL. J. 16, 18 (describing Kellor's shift from Americanization to arbitration as a "career change").

200. HIGHAM, *supra* note 139, at 241-42.

201. KELLOR, *supra* note 35, at 184.

202. As Kellor noted in a letter that she wrote to Warburg in May 1925, just shortly after the FAA went into effect—and as the Arbitration Society of America and Arbitration Foundation duled for leadership of the fledgling procedural form—"[i]t will be grand to have you back for with the increase in the popularity of Miss Arbitration, her suitors tend to quarrel." Letter from Frances Kellor to Felix Warburg (May 5, 1925) (American Jewish Archive, copy on file with author).

as a means of addressing the problems of (and thereby Americanizing) the urban, immigrant poor.<sup>203</sup> Indeed, as head of the NACL, she developed a “‘conciliation’ department” focused on “obtain[ing] settlement of all complaints brought by aliens.”<sup>204</sup> This department settled on the order of 2,500 complaints (concerning especially employment and housing) between 1912 and 1913 alone.<sup>205</sup> Long experienced with calling on business elites to promote social reform—and likely tending (like other Progressives) to associate arbitration with conciliation—Kellor saw in New York businessmen’s burgeoning effort to promote commercial arbitration an avenue for continuing her long-term commitment to the cause. She therefore became a founding member of the AAA in 1926, serving as its first Vice President from the moment of its birth that year until her death in 1952.<sup>206</sup> As such, she was widely recognized as “the directing head” and “chief administrator” of the association, “experienced in every phase of arbitral problems.”<sup>207</sup> Although Kellor was not the only person to serve in a leadership position within the AAA, the acknowledged centrality of her role suggests that her understanding of arbitration constituted a defining strand of the organization’s self-conception, even if there were also others.

Kellor’s conception of how to use arbitration within the AAA to promote national unity and power fluctuated during the first decades of the organization’s existence in relation to the nature of the challenges that the country faced. Soon after the AAA was established, the United States sank into the Great Depression, such that the problem of poverty with which Kellor and other Progressives had long struggled was further exacerbated. In the election of Franklin Roosevelt and the development of the New Deal, Kellor saw an opportunity to further her long-term commitment to encouraging partnerships between government and business aimed at assisting the impoverished and thereby strengthening the nation. Through her leadership position at the AAA, she sought to guide leading businessmen, as she always had, to fulfill their patriotic obligations towards those less fortunate, while also working closely with the government administrators responsible for implementing New Deal poli-

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203. In her capacity as editor of the *Immigrants in America Review*—a journal published quarterly by the Committee for Immigrants in America (itself an auxiliary of, and later absorbed into, Kellor’s National Americanization Committee)—Kellor published a piece authored by Judge Manuel Levine of the Cleveland Municipal Court describing his efforts to deploy conciliation for purposes of Americanizing the city’s immigrant poor. See Levine, *supra* note 141.

204. Press, *supra* note 172, at 78.

205. *Id.* at 79.

206. Maxwell, *supra* note 173, at 264.

207. Philip G. Phillips, *Frances Kellor’s Arbitration in Action*, 55 HARV. L. REV. 1417, 1417 (1942) (book review); see also ENCYCLOPEDIA OF WOMEN AND CRIME 141 (Nicole Hahn Rafter ed., 2000) (discussing the centrality of Kellor’s role within the AAA).

cy.<sup>208</sup> Writing in 1934, she presented arbitration—developed by the AAA—as the cornerstone of the “new industrial society” then in the process of being built through the National Industrial Recovery Act of 1933 (NIRA).<sup>209</sup>

Held unconstitutional by the U.S. Supreme Court in 1935, the NIRA was short-lived.<sup>210</sup> But it embodied in many ways the New Deal aspiration (itself an outgrowth of Progressive-era politics) for a quasi-corporatist mode of governance—one that assumed friendly, non-adversarial relations between business and government. The NIRA thus authorized trade or industrial associations to develop codes of fair competition and thereby regulate themselves. The hope was that such codes would help to curb the unrestrained competition believed to have caused the economic crisis, but in a manner less intrusive than excessive top-down regulation.<sup>211</sup> Responding to these developments, Kellor argued in a book entitled *Arbitration in the New Industrial Society* that a way must be found to “secur[e] compliance with codes on the basis of justice and integrity.”<sup>212</sup> The answer, she suggested, was arbitration—as supplied first and foremost through the AAA.

According to Kellor, the new industrial society hinged on the development of a new approach to governance—one in which “industry, labor, the government and the consumer become partners.”<sup>213</sup> This vast project of cooperation, in turn, required “a sufficient amount of economic goodwill to assure the necessary understanding and cooperation which a partnership requires in order to be successful.”<sup>214</sup> While litigation tended to encourage acrimony and thus destroy goodwill, arbitration, Kellor insisted, was the latter’s “greatest friend and protector.”<sup>215</sup> Accordingly, “[w]herever it goes, arbitration dissipates fear, restores confidence, cultivates goodwill and keeps the industrial machine running swiftly and smoothly in the way men have dreamed it could be run.”<sup>216</sup> In so arguing, Kellor drew on the claims of Progressive lawyers from the 1910s and 1920s. As we have seen, these lawyers frequently insisted that arbitration,

208. See *supra* notes 174-179, 184-202 and accompanying text.

209. See National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (formerly codified at 15 U.S.C. §§ 703-710); FRANCES KELLOR, *ARBITRATION IN THE NEW INDUSTRIAL SOCIETY* (1934).

210. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

211. See Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 598-601 (2007).

212. KELLOR, *supra* note 35, at vii.

213. *Id.* at 3.

214. *Id.*

215. *Id.* at 14.

216. *Id.*

like conciliation, tended to promote the restoration of friendly relations.<sup>217</sup> Moreover, just as this earlier generation of lawyers viewed arbitration (and conciliation) as a means of Americanizing the urban, immigrant worker and thereby ensuring industrial preparedness, Kellor's vision of how to deploy arbitration within the "new industrial society" focused on promoting the relations required for industrial efficiency, itself a precondition to the country's geopolitical predominance.

As a practical matter, Kellor's conception of how to use arbitration to promote national recovery under the NIRA relied on expanding the institutional framework already created by the AAA. As she explained, the AAA had developed a "six-point program" that "had for its objective the establishment of arbitration as the quasi-judicial branch of industry for the administration of justice through trade associations."<sup>218</sup> "[U]ndertaken under the direction of the American Arbitration Association" and involving "the collaboration of approximately three hundred trade associations and professional groups,"<sup>219</sup> this program was to culminate in "[t]he establishment of a central planning agency" vital for "industrial self-government."<sup>220</sup> Through the development of this program, Kellor suggested, the AAA had anticipated the needs of the new industrial society. The codes then being developed under the NIRA, she claimed, were "not fully coordinated in a workable system; nor [were] they aimed at the fundamental objective of capturing and controlling the vast amount of economic goodwill that [was] running to waste under present methods."<sup>221</sup> But a close study of the AAA's efforts to encourage both inter- and intra-group collaborations would provide much needed advice on how to develop a "workable system." Among the necessary reforms was the establishment of a "Court of Amity and Arbitration," aimed at resolving commercial, labor, and unfair trade practice disputes by means of arbitration.<sup>222</sup> Guidance for how to conduct the court's proceedings could be supplied by "the forms adopted by the American Arbitration Association."<sup>223</sup> So too, the AAA's institutional apparatus would be of service: "Much of the machinery now in use in New York City under the auspices of the American Arbitration Association, comprising about fifteen

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217. See *supra* notes 82-90 and accompanying text.

218. KELLOR, *supra* note 35, at 65.

219. *Id.* at 65 n.2.

220. *Id.* at 70, 72.

221. *Id.* at 198.

222. *Id.* at 200-02.

223. *Id.* at 204 n.2.

hundred arbitrators who serve without compensation, could be placed immediately at the services of the court.”<sup>224</sup>

The Supreme Court’s holding that major portions of the NIRA were unconstitutional undermined the New Deal vision of industrial codes<sup>225</sup> and, along with it, any opportunity to implement Kellor’s plan for AAA-assisted arbitration. Not long thereafter, the global crisis of the 1930s culminated in the Second World War—itsself, as it turned out, a great boon to the country’s domestic economy. As the United States emerged from war a political and economic superpower, it suddenly seemed that the longstanding problem of poverty was en route to resolution and that the main threat to national security was the increased power of the Soviet Union, eager to expand its global influence.

Buoyed by the pervasive optimism of the post-war economic rally—but also well aware of the deepening Soviet threat—Kellor turned once again to arbitration as a mechanism for promoting American values and national power. In so doing, however, she reimagined its virtues in ways that would have a lasting influence on how arbitration is justified to this very day. The utility of arbitration was no longer primarily that it encouraged goodwill and harmony, thereby facilitating a working partnership between business and government. To the contrary, arbitration was now conceived as an entirely private affair. Its great virtue was precisely that, as a form of privately contracted procedure—remote from government involvement—it taught the quintessentially American virtues of self-reliance and freedom.

*C. The Cold War: Kellor’s Later, Free Market Account of Arbitration Within the AAA*

In 1948, just a few years before her death, Kellor published a comprehensive account of the AAA and its vision of the role of arbitration in American (and global) society.<sup>226</sup> While the Progressive era was by then long past, *American Arbitration: Its History, Functions and Achievements* reads in many ways as a last gasp of the Progressive vision of procedural reform. Its core message thus links a call for procedural simplicity (the need, in Kellor’s words, to substitute a “simple and attractive” procedure for “legal technicalities”)<sup>227</sup> with a paternalistic drive to deploy procedure for purposes of Americanization and lawyer empowerment.

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<sup>224</sup>. *Id.* at 203 n.1.

<sup>225</sup>. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>226</sup>. KELLOR, *supra* note 35.

<sup>227</sup>. *Id.* at 24.

According to Kellor, the birth of the AAA inaugurated a new kind of arbitration practice—one that was distinctively American. While she acknowledged that the early origins of arbitration date back to “the most primitive society”—to “the dim recesses of fable and mythology”—she argued that the establishment of the AAA constituted a defining new moment in this long history because it marked the birth of “American Arbitration.”<sup>228</sup> The AAA was so named, in other words, not simply because it was an arbitration association located in the United States, but more fundamentally because it was committed to promoting “*American* Arbitration.” In Kellor’s view, the “American concept” of arbitration was unique in a number of particulars. As embodied in the FAA, the American approach to arbitration sought to encourage irrevocable, pre-dispute agreements to arbitrate that would result in arbitral awards largely immune to substantive judicial review.<sup>229</sup> So too, as facilitated by the AAA, the American approach afforded pre-constituted arbitral procedures and structures that transcended any particular dispute and any given professional or trade association.<sup>230</sup> But perhaps most importantly, the “American concept of arbitration was unique” in that it was consonant with distinctively American values.<sup>231</sup>

As reflected in the AAA’s commitment to ensuring that arbitration would be “responsive to the social and economic needs of American commercial and industrial life,” the American approach to arbitration was “unusual in that it systematically encouraged individuals in self-regulation and in the control of their disputes within the framework of free enterprise and business institutions.”<sup>232</sup> Indeed, Kellor explained, a core function of arbitration “in a democratic society is to encourage self-regulation and self-discipline within a framework of individual initiative and private enterprise.”<sup>233</sup> Arbitration, in other words, helped to promote the very ideals of freedom and self-discipline that she had once taught in the settlement houses. Its purpose was thus not merely to resolve disputes, but also to serve an educational mission, teaching the (distinctively American) virtues of a free market order. In this sense, arbitration

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228. *Id.* at 3.

229. *See id.* at 22–28. In reality, some of the features of arbitration under the FAA and the AAA that Kellor lauded as uniquely American could be found elsewhere. For example, as Ian Macneil emphasizes, reforms to English law concerning arbitration—including, most importantly, abrogation of the rule permitting parties to revoke their pre-dispute agreement to arbitrate—proved highly influential for American reformers such as Julius Henry Cohen. MACNEIL, *supra* note 164, at 27.

230. *See KELLOR*, *supra* note 35, at 22–28.

231. *Id.* at 27.

232. *Id.*

233. *Id.* at 39.

was “*not* organized solely in the interest of parties in dispute.”<sup>234</sup> Accordingly, it was a mistake to try to finance arbitration exclusively through user fees, since the result would be “to deter parties from arbitrating” and thereby defeat arbitration’s vital pedagogical function.<sup>235</sup> At the same time, it was unthinkable to seek governmental support, since this ran counter to the core philosophy underlying American arbitration—namely, that it was a quintessentially private process:

The [American Arbitration] Association believes that voluntary arbitration . . . is the act of private individuals; that it is their self-regulation and individual effort that should be encouraged, and that, therefore, systems that encourage or apply voluntary arbitration among contracting parties, should be privately financed.<sup>236</sup>

As her longstanding commitment to promoting national unity and strength became tinged by post-war optimism and expansionism, Kellor began to describe arbitration as an important mechanism for exporting American values abroad. As she explained, the goal of the AAA was not only “to construct a national system for economic peace and security in domestic affairs,” but also “to use this system for international peace and security.”<sup>237</sup> Echoing her earlier emphasis on arbitration as a mechanism for promoting goodwill, she suggested that the AAA would teach individuals across the world how “to arbitrate their differences within the range of their own activities and experiences” and would help “governments” to learn how “amicably to solve their differences.”<sup>238</sup> So too, the AAA would seek to implement “a long-range program looking toward the eventual establishment of a universal system” of arbitration.<sup>239</sup> In these ways, the organization would disseminate arbitral mechanisms designed to promote world peace while ensuring that this peace was grounded on core American values of freedom and free enterprise. Because arbitration embodied ideals of self-governance, the spread of arbitration would be a way of ensuring that people throughout the world are encouraged to act “of their own accord, and through their own efforts.”<sup>240</sup>

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<sup>234.</sup> *Id.* at 38 (emphasis added).

<sup>235.</sup> *Id.*

<sup>236.</sup> *Id.* at 40-41. Kellor identified charitable “contributions from persons and organizations interested in the public advantages of arbitration” as one key source of income for the AAA. *Id.* at 40.

<sup>237.</sup> *Id.* at 22.

<sup>238.</sup> *Id.*

<sup>239.</sup> *Id.* at 148.

<sup>240.</sup> *Id.* at 22.

In the interim, however, before the ultimate triumph of the American conception of arbitration, there would be competition from elsewhere – most importantly from the Soviets. As Kellor observed, “other countries, like the Soviet Union,” had established “a complete domestic and foreign system of arbitration,” but one that was profoundly un-American in nature.<sup>241</sup> In the Soviet Union, “the reference of disputes is compulsory through state facilities provided by the government.”<sup>242</sup> This defeated the notion that arbitration is an embodiment of freedom, as exemplified in the American system by the fact that parties choose through free, private contract to submit their dispute to arbitration (and by the fact that the arbitration is privately financed). As a result, Kellor concluded, there was reason to be concerned that the use of arbitration for purposes of “education of the people may not be so feasible” in the Soviet Union.<sup>243</sup> The American approach to arbitration thus had to be exported abroad to help counter Soviet influence in the growing Cold War battle for ideological sway. It was necessary “to make the American concept of arbitration available to many people in many countries and to carry its message of goodwill and [privately ordered] co-operation throughout the world.”<sup>244</sup>

In framing arbitration as a quintessentially American mode of procedure, Kellor drew on – but also radically reworked – a longstanding discourse pursuant to which a commitment to courtroom-based adversarial procedure is a distinguishing feature of American identity.<sup>245</sup> Pointing to the asserted interconnection between arbitration and American identity, Kellor suggested that it was a mystery why a mode of procedure so consonant with American values of free self-governance played such an “obscure and humble role . . . in early American history.”<sup>246</sup> In her words, “why [would] a people, so bent upon freedom, self-discipline, and self-regulation, . . . have ignored arbitration, which so embodies these qualities?”<sup>247</sup> But while both the nineteenth-century discourse of adversarialism and Kellor’s defense of arbitration appealed to freedom as a distinguishing American value – and suggested, moreover, that the free market was a key component of such freedom – the move from adversarialism to arbitration

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241. *Id.* at 146-47.

242. *Id.* at 146.

243. *Id.* at 146.

244. *Id.* at 16.

245. See Kessler, *supra* note 60.

246. KELLOR, *supra* note 35, at 6.

247. *Id.* Kellor offered several possible answers to this question. Most importantly, she suggested, a propensity to tolerate or even applaud disputation was consistent with the country’s initial pioneering mentality: “[D]isputes were regarded as an inevitable and healthful process in the development of a new country.” *Id.*

was accompanied by an important reconceptualization of the procedural implications of liberty.

As I have argued elsewhere, the language of adversarialism developed in the nineteenth century suggested that the individual's competitive assertion of self-interest through adversarial litigation—undertaken in *public*—was key to sustaining American freedom.<sup>248</sup> In contrast, Kellor claimed that it was the *private* nature of the arbitral forum—the fact that it was chosen and designed through free contract—that made it such a bulwark of American liberty. Indeed, as Kellor understood it, the fact that arbitral proceedings were a product of free contract meant that both these proceedings and the awards they generated were a form of private property. As explained in a *Code of Ethics for Arbitrators*, issued in 1946 “as a guide for members of the Panel of the American Arbitration Association” (and included as an annex to Kellor's book), the fact that “[t]he parties appoint the Arbitrator to decide an issue for them and to deliver the award to them” means that the award is “their joint property and the Arbitrator is not in a position to release the award to anyone else or to give it publicity without the approval in writing of all the parties.”<sup>249</sup> For like reasons, “[a]n arbitration proceeding is private and no information or publicity should be given by the Arbitrator concerning any matter that transpired during the proceedings, unless both parties have indicated their willingness to have the matter made public.”<sup>250</sup>

But while the “American concept” of arbitration differed from traditional adversarial procedure in its embrace of privacy, the two shared a significant reliance on lawyers. Lawyers not only played a predominant role in building the AAA, but also regularly “served as arbitrators, or appeared in [arbitral] Tribunals on behalf of clients.”<sup>251</sup> Indeed, the Commercial Arbitration Rules adopted by the AAA and annexed to Kellor's book outline a “Procedure for Oral Hearing” that follows in core respects the basic structure of an adversarial trial.<sup>252</sup> Thus, over the years, American lawyers engaged in arbitration have embraced many of the techniques and attitudes of adversarialism—including cross-examination, a focus on winning at all costs, and a tendency to treat the judge as a passive, powerless decision maker.<sup>253</sup> Moreover, as we have seen, Progress-

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248. See Kessler, *supra* note 60.

249. KELLOR, *supra* note 35, at 235 & n.2, 242.

250. *Id.* at 242.

251. *Id.* at 18.

252. *Id.* at 219, 223-25.

253. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 51-58 (1996);

sive lawyers long searched for a mode of procedure that would be more flexible and cost-effective than traditional, courtroom-based adversarialism, even while eagerly seeking to preserve for themselves a greater role than that permitted by new forms of “socialized” and administrative law.<sup>254</sup> As developed within the AAA, arbitration seemed to fit the bill in that it operated outside the constraints of formal law and procedure but nonetheless enabled lawyers to draw on a great many of their traditional adversarial techniques.

Indeed, according to Kellor, it was precisely because arbitration, as developed by the AAA, adhered to core features of adversarial process that it became possible for the first time clearly to delineate between arbitration and conciliation. As she explained, there was a centuries-old tendency to identify arbitration with “mediation and conciliation” — one that, as we have seen, was widespread among Progressive-era lawyers.<sup>255</sup> But the mistaken assumption that “arbitration was a species of compromise” was, Kellor claimed, “immediately dispelled under the concept of organized arbitration which the Association put into effect.”<sup>256</sup> This was because, under the AAA’s organized system, “[a]ll of its Panel members were instructed to act as arbitrators and not as mediators or conciliators, under Rules that made no provision for any proceeding not of a quasi-judicial character.”<sup>257</sup> It was “through adherence to this standard that lawyers have come so generally to practice arbitration in [AAA] tribunals.”<sup>258</sup> Able to preserve core aspects of their traditional adversarial role — and even to continue appealing to the notion that they deployed a distinctively American, freedom-promoting mode of procedure — lawyers of Kellor’s generation (and those that followed) had good reason to embrace arbitration, even while abandoning publicity.

Kellor’s writings thus help to explain what would otherwise be an historical puzzle — namely, how a legal profession that long prided itself on its commitment to adversarial procedure (and that framed this quintessentially *public* procedure as a defining feature of an exceptionalist American identity)<sup>259</sup> was able to embrace the turn to *private* arbitral proceedings. In her capacity as a founder and “chief administrator” of the AAA during the first three decades of its existence, Kellor acted in the missionary capacity for which Moses Grossman had

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Christopher Baum, *The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes*, 84 ST. JOHN’S L. REV. 907, 930-31 (2010).

254. See *supra* notes 91-97 and accompanying text.

255. KELLOR, *supra* note 35, at 26.

256. *Id.*

257. *Id.*

258. *Id.*

259. See Kessler, *supra* note 60.

called, seeking “to spread the gospel of arbitration.”<sup>260</sup> In this role, she presented arbitration as the natural extension of core American values of freedom and self-reliance, arguing that it served a vital public function that extended well beyond the particular interests of any given set of disputants. The implication was that a great tradition of (lawyer-empowering) American legal exceptionalism continued alive and well into the twentieth century, but its foundations had shifted from public litigation to private arbitration. While this account of arbitration as a triumphant form of distinctively American procedure has been forgotten today, it likely played a role in convincing an earlier generation of lawyers that arbitration was consonant with their inherited conception of procedure as a device for promoting both public-serving freedom and their own self-aggrandizement.

Kellor turns out, moreover, to have been quite prescient in suggesting that there is a uniquely “American concept” of arbitration and that this concept reflects a distinctively American commitment to (marketplace) freedom. As commentators have observed, the United States today is unique in its willingness to extend pre-dispute, binding arbitration to both consumer and employment disputes. In European countries, arbitration clauses in consumer and employment contracts are typically deemed unenforceable as a result of both EU law and national policies.<sup>261</sup> While the ability of corporations in the United States to enforce such clauses is a product of Supreme Court jurisprudence issued well after Kellor’s death in 1952, her conception of arbitration as the embodiment of freedom and free contract anticipated (and, indeed, undergirds) this later body of case law. As Stephen J. Ware recently argued in congressional proceedings on “Mandatory Binding Arbitration,” “What some call ‘mandatory arbitration’ is better called ‘contractual arbitration’ . . . . Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily.”<sup>262</sup>

As early as the 1930s, Kellor advocated the use of pre-dispute binding arbitration to remake consumer disputes, urging trade associations to include an arbitration clause within their standard contracts.<sup>263</sup> In so arguing, Kellor had no illusion that the prototypical consumer would actually read the standard contract in advance of concluding the transaction. She imagined that the con-

260. Moses H. Grossman, *Speeding Up Justice Through Arbitration*, 5 ILL. L. Q. 135, 138 (1923).

261. See *supra* note 5; see also Council Directive 93/13, 1993 O.J. (L 95) (EC) (including pre-dispute, binding arbitration clauses on a list of terms presumed to be unfair in consumer contracts).

262. *Mandatory Binding Arbitration: Is It Fair and Voluntary?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 83 (2009) (statement of Stephen J. Ware, Professor of Law, University of Kansas School of Law).

263. See KELLOR, *supra* note 209, at 53.

sumer would discover the arbitration clause only when, having decided to pursue litigation, he consulted a lawyer, who in turn, “examines the contract . . . [and] finds that he cannot institute a suit.”<sup>264</sup> Such a contract of adhesion was hardly consonant with Kellor’s extravagant praise of arbitration as the embodiment of principles of free choice. But it was fully consonant with the paternalism of the Progressive approach to legal and procedural reform. In Kellor’s view, arbitration would serve the consumer’s own best interests, as he would in time come to recognize. The consumer, she stated, would “find[] that at little cost and in complete privacy the conflicting claims can be immediately considered and the matter adjusted.”<sup>265</sup>

The latent paternalism of Kellor’s approach to arbitration is evident perhaps first and foremost in the AAA’s effort to develop what Kellor called “organized arbitration.”<sup>266</sup> As she repeatedly emphasized, a distinguishing feature of arbitration under the combined forces of the FAA and AAA was that it afforded parties a pre-constituted package that they could easily incorporate by reference into their agreement.<sup>267</sup> In this way, parties were spared the burden of having to design their own unique arbitral procedures—a savings in time and money that was essential for enabling arbitration to serve as a cost-effective mechanism for addressing the numerous disputes of modern industrial society. This meant, however, that the legal elites responsible for running the AAA were themselves entrusted with substantial, discretionary power to craft the pre-constituted package of procedures as they deemed best. While parties were in theory free to contract around such pre-packaged procedures, this was not an option for those subject to contracts of adhesion. Moreover, even when negotiation is possible, default rules are often sticky.<sup>268</sup>

The weight that Kellor placed on the elite nature of the AAA’s leadership can be seen in the concluding chapter of her book on “American Arbitration.” Entitled “Builders of American Arbitration,” the chapter devotes a full thirty-six pages to listing the various individuals and groups responsible for establish-

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<sup>264.</sup> *Id.*

<sup>265.</sup> *Id.*

<sup>266.</sup> KELLOR, *supra* note 35, at 22-28.

<sup>267.</sup> *See id.* at 24-25.

<sup>268.</sup> *See* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655-61 (2006) (summarizing various scholarly accounts of why parties fail to opt out of default provisions, even when doing so would seem to be to their advantage); Russell Korobkin, *Wrestling with the Endowment Effect, or How To Do Law and Economics Without the Coase Theorem*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 300, 323-26 (Eyal Zamir & Doron Teichman eds., 2014) (describing how the pervasive psychological tendency to value entitlements more when one is endowed with them than when one is not translates into a tendency for contractual default provisions to be sticky).

ing and serving the AAA—including such Progressive legal luminaries as Roscoe Pound and Charles Evan Hughes.<sup>269</sup> Most tellingly, as suggested by her tendency to refer interchangeably to the AAA and “American Arbitration,” Kellor envisioned the AAA as the *only* provider of “American Arbitration.”<sup>270</sup> While the availability of multiple providers would seem to follow from her conception of arbitration as the embodiment of a distinctively American commitment to freedom and the (competitive) free market, such a possibility was, in fact, unimaginable to her. In her view, the AAA reflected the assembled wisdom of the Progressive legal elite, such that its monopoly was quite simply beyond question.

### CONCLUSION

For Progressive lawyers, the appeal of arbitration and conciliation was two-fold. These practices seemed to afford much needed reform by expanding access to justice and thereby strengthening the nation. At the same time, they preserved a space in which lawyers might continue to exercise significant, unconstrained discretion of the sort threatened by new, more administrative approaches to dispute resolution.

From this perspective, it is hardly surprising that the debate over arbitration today focuses, in no small part, on whether the procedure expands access to justice or instead serves to empower certain (now largely corporate) elites. Indeed, despite many scholars’ aspirations, efforts to draw on history for evidence that would clearly support one or the other of these positions are bound to disappoint, because there was no founding moment of consensus from which we have since departed. The current debate, in other words, simply re-

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269. KELLOR, *supra* note 35, at 181-217.

270. In Kellor’s concluding chapter, “Builders of American Arbitration,” she insisted that “American arbitration . . . has been built in the true American way—by the participation of many individuals and organizations.” *Id.* at 181. But the five men whom she identified as most responsible for “the development of American arbitration” were themselves all key leaders of the AAA. *Id.* at 181-83. Moreover, the various organizations she listed as participating with these five in the building of “American arbitration” are themselves all identified as such because they contributed in some fashion to the work of the AAA. These include components of the AAA itself (like the Association’s board of directors and trade-specific subdivisions) or affiliated associations (including, *inter alia*, trade groups and foundations that donated funds for research). *Id.* at 184-216. And in insisting on the disinterested, public-serving nature of the efforts undertaken by these “builders” of “American arbitration,” Kellor concluded that “at no time in the history of the Association have the personal interests of these builders swayed any arbitrator in any tribunal.” *Id.* at 183. As this suggests, the history of “American arbitration” was all but synonymous, in her mind, with the history of “the [American Arbitration] Association.”

capitulates the tensions within Progressives' conflicted approach to arbitration. That does not mean, however, that this history is without implications for the present.

Both arbitration and mediation (conciliation) today continue to be grounded on the exercise of extralegal discretion. Although many arbitration agreements require the arbitrator to apply a particular body of law, restrictive limits on judicial review mean that, in practice, arbitrators have significant freedom to depart from the law in rendering an award.<sup>271</sup> And while mediation is said to depend entirely on the disputants' own decision to reconcile, recent scholarship has reaffirmed Bentham's now centuries-old insight that, in many cases, it is quite difficult to distinguish between the disputants' choice and the mediator's influence.<sup>272</sup> Unlike litigation, ADR's legitimacy thus does not hinge on the authority of the law as such, but instead, as Progressives obliquely recognized, on the discretionary judgment of the third-party arbitrator or mediator.

Underlying Progressive lawyers' belief that arbitration would expand access to justice and at the same time reinforce a paternalistic form of social control was their assumption that they themselves were a natural and necessary elite, whose empowerment would inevitably redound to the public good. That we have inherited a Progressive model of arbitration, reflected in the FAA, therefore raises the question of where we might locate such an elite today. While plenty of individuals and groups exercise substantial power, there is no readily available language by means of which to claim such power as an entitlement. In the last half-century or so, the legal profession, along with American society as a whole, has been considerably democratized along any number of dimensions, including, not least, gender and race.<sup>273</sup> As a result, the notion that an elite segment of the bar might call on its own status as a form of collateral—

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271. See MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 413, 424-30 (2010) (discussing the "manifest disregard of the law" standard for vacating an arbitral award and noting that (1) it is more stringent than simply "error or misunderstanding with respect to the law" and (2) there is currently a split between U.S. circuit courts concerning whether the standard survives the Supreme Court's 2008 decision in *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

272. See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

273. See, e.g., JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 130-31 (2011); Carroll Seron, *The Status of Legal Professionalism at the Close of the Twentieth Century: Chicago Lawyers and Urban Lawyers*, 32 LAW & SOC. INQUIRY 581, 596-97 (2007) (reviewing JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1994), and JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005)).

designed to ensure that private proceedings will be conducted in furtherance of the public interest—is much harder to justify or to operationalize, and rightly so. In a world in which we do not imagine that there is a select legal elite endowed with a self-evident capacity to exercise the right kind of (public-serving) discretion, justifying the paternalistic authority that arbitrators and mediators continue to exercise has become much more difficult.

To a great extent, the solution has been to fall back on the market-based justifications advanced by Kellor. Indeed, in ways that Kellor herself never imagined possible, arbitration has become a market product, subject to extensive competition. Since 1979, the AAA has come to share the field with such competitors as JAMS (formerly known as Judicial Arbitration and Mediation Services) and the International Institute for Conflict Prevention and Resolution (CPR), among others.<sup>274</sup> In this context, the discretion with which arbitrators (and mediators) are endowed is legitimated by the disputants' selection of these providers from within a competitive marketplace. But trusting the market in this way entails the not insubstantial risk that the decision of whom to endow with discretionary authority will ultimately be determined in accordance with market power. While current advocates of arbitration follow Kellor's lead in pointing to the virtues of free contract, it is a mistake to take her entirely at her word. Like other Progressives, Kellor was all for the free market, but only when properly managed by the appropriate legal (and public-minded business) elites. In the absence of a legal and political culture that fosters such leadership (and deference to it), it may well be necessary for the courts to supply the additional oversight required to ensure that private arbitration is developed and deployed in the interests of public justice.

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274. See Seth H. Lieberman, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye That is "Nonneutral Neutrals,"* 5 CARDOZO J. CONFLICT RESOL. 215, 228-30 (2004).