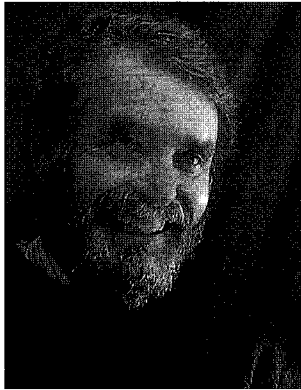


# A VIEW FROM THE TOWER

Justin Sweet



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Preparing for the sixth edition of my *Legal Aspects of Architecture, Engineering and the Construction Process*, I read two recent cases decided by the U.S. Supreme Court dealing with arbitration. They caused me to reflect on academia, the world of law schools, of which I was a part for many years. But first the cases.

Both dealt with the issue of whether the Federal Arbitration Act (FAA) preempted state law. In 1995 the Court decided *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 115 S. Ct. 834 (1995), which I shall call the *Dobson* case. *Dobson* purchased termite protection insurance from Allied-Bruce when *Dobson* bought a house. A dispute arose. *Dobson* wanted to take it to court. Allied-Bruce pointed to a clause in the contract that required that disputes be sent to arbitration. *Dobson* countered with an Alabama statute that barred agreements to arbitrate future disputes unless the contracting parties contemplated substantial interstate activity. The Alabama Supreme Court agreed with *Dobson*, concluding that this transaction was not one that involved substantial interstate commerce.

Most important for the consumer protection aspect of this dispute, *Dobson* was supported by twenty attorneys general who wanted the court to pull back from decisions that gave a broad reading to interstate commerce. It appears that the attorneys general thought that consumer citizens may be better off in court than in arbitration.

The Supreme Court held the Alabama statute was preempted by the FAA. The Court paid great tribute to arbitration and stated that it would be to the advantage of consumers if small claims went to arbitration.

An interesting twist in *Dobson* is the Court having stated that the state cannot enforce all the terms of a contract but provide a special formal threshold requirement for an agreement to arbitrate future disputes. This unitary approach is a far cry from the divisibility fiction the Court employed in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), which blunted any attempt to avoid arbitration by asserting fraud. Anything that helps arbitration, evidently.

The second case was *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996), decided in 1996. The dispute involved a fast food franchise that included an agreement to arbitrate all future disputes. The franchisee wanted to go to court. The franchisor sought arbitration. The franchisee pointed to a Montana statute that requires that arbitration clauses be typed in underlined capital letters and be inserted on the first page of the contract.

The Supreme Court reversed the Montana Supreme Court. Invoking the *Dobson* case, it held the Montana statute had been preempted by the FAA. The state cannot single out the arbitration clause for special formal requirements. This would frustrate the FAA.

Now to my main point, the "party line" that one finds in academia, no different than other institutions. I speak of academia as the *Dobson* opinion was written by Justice Breyer, a former professor at the Harvard Law School and federal circuit judge. The opinion in the *Casarotto* case was authored by Justice Ginsberg. Before she was appointed to the federal bench and ultimately to the Supreme Court, she was a professor at Columbia Law School and a leading law school text writer.

First, let us look at the two policies that intersect in the *Dobson* and *Casarotto* cases, arbitration and consumer protection. How does academia view them? I am, of course, aware that academia is not a monolithic institution. Some will not go along with the "party line," but there is an academic policy or a "party line" on these as well as other issues.

It seems clear to me that protecting consumers and favoring arbitration are academic policies. Although I think both have lost their glitter a bit in recent years, particularly consumer protection, they are still important components of law school policy. The two cases demonstrate a disagreement over how to protect consumers. State officials, and in this I include the Alabama and Montana legislatures, the high courts of each state and many attorneys general, want the states to be able to see to it that either consumers need not arbitrate (Alabama) or must be warned before they sign a contract that they are giving up court and must arbitrate (Montana). The U.S. Supreme Court, as does academia, feels that consumers are better off arbitrating. Some states obviously have their reservations about this.

But there is more. In my view the law schools tend to favor the common law over statute law, particularly state statutes. That is the way law schools teach. All law schools are led by national schools and use national casebooks. Clearly the academy will prefer the federal, well-crafted, more teachable FAA to parochial, inelegant state statutes. The unfortunate thing about this approach is that the FAA was enacted in the 1920s simply to make agreements to arbitrate future disputes enforceable, as did many states. (Concurrent jurisdiction created problems.) The FAA has hardly been touched since. It has been the states that have had to deal with the "nuts and bolts" of arbitration. It is the states that have had to face whether arbitration has been waived, whether arbitrations can be consolidated or a party joined to an existing arbitration, whether the arbitrator has exceeded his jurisdiction or whether the award was proper. Yet the states cannot protect consumers from a system that some feel is rigged against them and with which they or their lawyers may not be familiar. Pity.

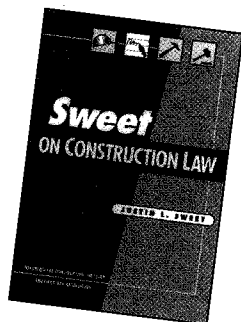
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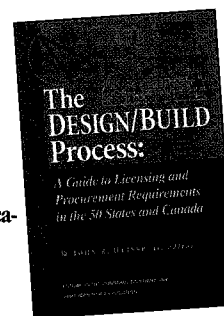
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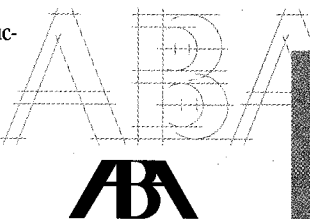
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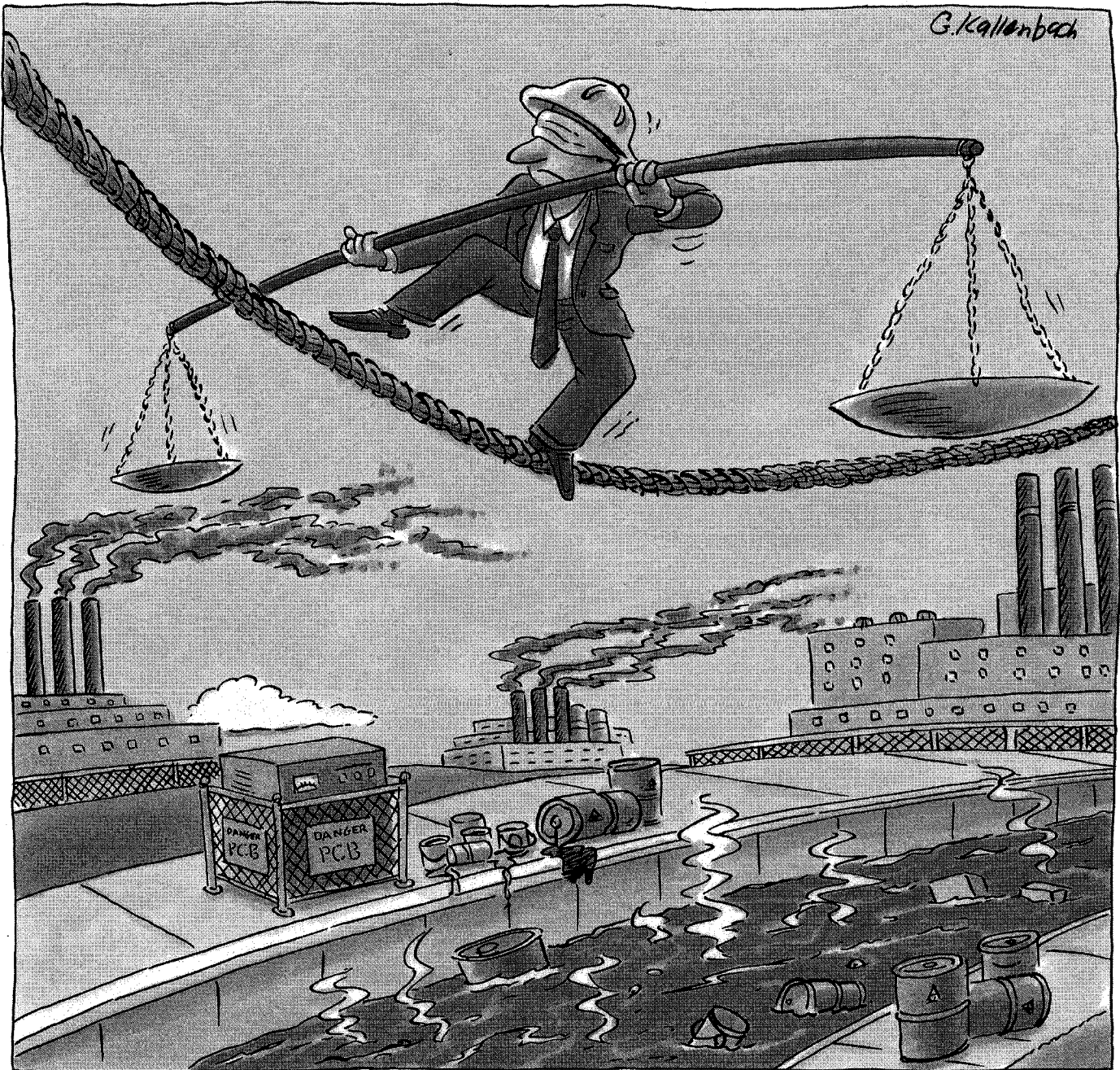


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