As a method of dispute resolution, labor arbitration falls somewhere in between non-binding forms of dispute resolution and more formal dispute resolution processes. This “in-between” status has made it difficult at times for the participants in labor arbitration to decide what role the law and legally related constructs should play in labor arbitration.

For many years, practitioners and scholars intensively debated the extent to which labor arbitration was becoming too legalistic. While little attention was paid to this issue in the 1990s, recent developments have made the “creeping legalism” issue particularly relevant. First, the increased regulation of the employment relationship has placed labor arbitrators in a position to interpret issues of external law when deciding collective bargaining disputes. Second, the proliferation in the use of individual employee rights arbitration, which by nature is more legalistic, might have affected the practice of labor arbitration. To the extent that some of the same players participate in both, labor and employee rights arbitration, one would expect the legalistic character of individual employee rights arbitration to spillover to labor arbitration, and perhaps other forms of alternative dispute resolution. The recent United States Supreme Court’s decision in 14 Penn Plaza LLC v. Pyett, which holds that a bargaining contract provision requiring employees to arbitrate age discrimination claims is enforceable and thus precludes later litigation of such claims, accentuates the importance of this issue.

This symposium seeks to reignite the discussion on the legalization of labor arbitration. The presenters will explore the history of “creeping legalism” and evaluate its effect on the practice of labor arbitration. The presenters will also assess the effect of the legalization of labor arbitration in other forms of dispute resolution, as well as identify future trends.
Declension myths – or in simpler language, stories of decline and fall – are a common way to describe an individual’s or an institution’s development. Those myths share certain features: the belief that there once was a time of perfection and harmony, when the lion lay with the lamb and all was right under the heavens; the identification of something, usually human sins or errors, that destroyed perfection; and the optimistic hope that we can, by purifying ourselves of our sins, recreate the golden age. The story of Adam and Eve is the archetype, but the charge of “creeping legalism” in labor arbitration fits the pattern perfectly.

In this paper I suggest that the story of arbitration’s fall from grace because of increasing “legalism” is wrong in all three elements. There never was a time of arbitration perfection. The changes in labor arbitration came about because the parties’ needs and desires for their dispute resolution processes shifted as their bargaining relationships matured, not because of practitioners’ mistakes. There is no way we could return to the innocent days of completely informal arbitration, nor should anyone conversant with labor dispute resolution even want to do so.

Nevertheless, there are ways in which arbitration could be made simpler, faster, and cheaper. Indeed, many parties already use those methods for certain cases. The difficulty is that simplicity comes at a price that parties are only rarely willing to pay.