

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-5

**THE CONSTITUTIONALITY OF ARBITRATION
IN FEDERAL PROGRAMS**

by

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Our "administrative state" evolved in order to shift decisionmaking from the constitutional branches to administrative agencies, which were to apply expert judgment through speedy and informal procedures.¹ Recently, however, increasing formality has beset the administrative process.² Consequently, agencies have begun experimenting with Alternative Dispute Resolution (ADR) procedures,³ which employ private parties to resolve issues that are related to federal programs and that otherwise would be decided by executive officers or the courts.

This development reveals a third model for public decisionmaking, supplementing the traditional ones of decision by the constitutional branches themselves and delegation to agencies under the procedures of the Administrative Procedure Act⁴ or other applicable statutes. Today, the legitimacy of the administrative state is generally thought to rest on the nature and strength of the relationships between the agencies and the constitutional branches.⁵ Accordingly, concerns have arisen that ties to the constitutional branches become overly attenuated when private parties are authorized to determine or to apply public policies.⁶

¹ See generally Rabin, Federal Regulation in Historical Perspective, 38 Stan. L.Rev. 1189 (1986).

² ABA Comm. on Law and the Economy, Federal Regulation: Roads to Reform, Ch. 6 (1979); 4 Senate Comm. on Government Operations, Study on Federal Regulation, Delay in the Regulatory Process (1977).

³ For a general overview of these procedures, see S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985).

⁴ 5 U.S.C. § 551 et seq.

⁵ Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

⁶ The Department of Justice has expressed concerns that the use of ADR techniques might violate the delegation doctrine, or might infringe the President's responsibilities to control execution. Office of Legal Counsel, Memorandum for Stephen J. Markman Re:

Continued on next page

In a series of recommendations, the Administrative Conference of the United States has urged the use of ADR techniques in federal programs.⁷ Most ADR procedures present no serious constitutional issues because they leave final authority with government officers, although private parties influence the agency's decision. Examples include negotiated rulemaking⁸ and mediation to aid settling litigation.⁹ These procedures do not differ sharply enough from other avenues for private influence on public policymaking to justify constitutional distinctions, as I will explain. Alone among the recommended procedures, arbitration delegates decisionmaking to private individuals, with quite limited review by the government.¹⁰

Existing law authorizes agencies to employ arbitration in a variety of contexts, which comprise three broad categories for purposes of analysis. The first is money claims by or against the government. For example, claims of Medicare beneficiaries for reimbursement of certain medical expenses are arbitrated by private insurance carriers.¹¹ The second is disputes between the government and its employees, including both grievances under existing law or contract¹² and the

Continued from previous page

- ⁶ Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques, April 24, 1986. I discuss these issues in parts I and II *infra*. The Department has, however, recently advocated the use of arbitration to resolve fair housing disputes. Statement of Asst. Attorney General Reynolds Before the Subcommittee on Constitution, U.S. Senate Committee on the Judiciary, April 7, 1987.
- ⁷ See generally 1 CFR § 305.86-3.
- ⁸ Negotiated rulemaking consists of agency-sponsored negotiation among groups interested in a contemplated regulation. The process generates a proposal which the
(Continued on page 3)
- ⁹ 1 CFR § 305.86-3. See also *id.* §.84-4.
- ¹⁰ 1 CFR § 305.86-3.
- ¹¹ 42 U.S.C. § 1395u(b)(3)(C); 42 CFR § 405.801-.872.
- ¹² See generally Comment, Federal Sector Arbitration Under the Civil Service Reform Act of 1978, 17 U. San Diego L. Rev. 857 (1980).

determination of future contractual relations.¹³ The third is disputes between private parties that are related to program administration. Examples include claims against the "Superfund" for cleanup of toxic wastes,¹⁴ the ascertainment of employers' liability for withdrawal from pension plans that are overseen by the Pension Benefit Guaranty Corporation,¹⁵ and the determination of compensation that a pesticide manufacturer must pay for the use of another's data in obtaining federal registration.¹⁶

My purpose here is to analyze the constitutional issues surrounding these arbitral schemes, and to suggest ways to structure them to minimize constitutional concerns.¹⁷ The constitutional issues take several forms. First, does article I forbid Congress to delegate government functions to private

Continued from previous page

⁸ agency issues as a notice of proposed rulemaking, initiating the usual procedure for informal rulemaking. See 1 CFR § 305.82-4 and -.85-5; see generally Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

¹³ 5 U.S.C. § 7119; 39 U.S.C. § 1207; see generally Craver, The Judicial Enforcement of Public Sector Interest Arbitration, 21 B.C. L. Rev. 557 (1980).

¹⁴ 42 U.S.C. § 9612(b)(4); 40 CFR § 305.10-.52.

¹⁵ 29 U.S.C. § 1381; 29 CFR § 2641.1-.13.

¹⁶ 7 U.S.C. § 136a(c)(1)(D)(ii); 29 CFR § 1440.1.

¹⁷ Concerns may also arise that there be statutory authority for agencies to refer matters to arbitration. The Comptroller General has sometimes been reluctant to find statutory authority for government arbitration. See generally Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Contract L.J. 66 (1986). Much of the analysis here, seeking controls on arbitration sufficient to meet constitutional concerns, identifies characteristics of arbitration schemes that may also alleviate concerns about their consistency with statutory authority, because principles of fairness and accountability to executive authority are pertinent to both inquiries. The discussion that follows assumes the presence of adequate statutory authority for any particular referral to arbitration.

deciders? Second, is arbitration consistent with article II's grant of executive power to the President? Third, is it consistent with article III's grant of judicial power to the federal courts? Fourth, if these structural concerns are satisfied, are there assurances of due process?

I. A FRAME OF REFERENCE: PUBLIC PROGRAMS, PRIVATE POWER.

A. The Nature of Arbitration.

Arbitration, which was known to the common law, has always been employed in America for the resolution of some disputes.¹⁸ In modern times, it has gained widespread use in labor relations and commercial practice.¹⁹ Arbitral schemes seek to produce speedy and final decisions at low cost.²⁰ Accordingly, they share certain general characteristics, although their details vary substantially. The arbitrator, a private individual with no personal interest in the dispute, is often selected by the parties, sometimes with reference to expertise in the subject matter. Such organizations as the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) maintain rosters of arbitrators and promulgate codes of ethics and procedure.²¹ The standard for decision may be a contract provision or a specified body of law. Procedure is informal, with limited discovery and relaxed evidentiary strictures. The outcome is an award, perhaps accompanied by a brief recitation of the underlying facts and conclusions.

The courts have developed a special relationship with arbitration. Until this century, hostile common law courts

¹⁸ See generally Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L.Rev. 443 (1984).

¹⁹ In 1984, nearly 40,000 labor, commercial, construction, and accident cases were filed with the American Arbitration Association. Meyerowitz, The Arbitration Alternative, 71 A.B.A.J. 78, 79 (1985).

²⁰ See generally S. Goldberg, E. Green & F. Sander, supra note 3, at 189-243.

²¹ See, e.g., American Arbitration Association Commercial Arbitration Rules, in R. Coulson, Business Arbitration--What You Need to Know 33-40 (3d ed. 1986); Code of Ethics for Arbitrators in Commercial Disputes, id. 141-49.

lent it little or no aid.²² The courts distrusted the reliability of arbitral process and perceived a threat to their own jurisdiction.²³ Today, courts are more hospitable to an alternative forum that reduces large caseloads. Also, legislatures have endorsed arbitration and have defined its relation to the courts. The U.S. Arbitration Act²⁴ and its analogues in most states²⁵ authorize courts to enforce arbitration agreements and to review awards on very limited grounds (such as the corruption of the arbitrator and the consistency of the award with the arbitrator's authority). Modern cases often emphasize the need to honor contracts. For example, in Dean Witter Reynolds, Inc. v. Byrd,²⁶ the Supreme Court held that the Arbitration Act required enforcement of an agreement to arbitrate a securities dispute, although the consequence was to sever pendent claims from a suit properly in federal court. The Court thought that some potential inefficiency was a tolerable price to pay for the benefits of enforcing contracts.

Judicial deference to arbitration has important limits, however. First, courts do not allow arbitrators to determine their own jurisdiction. Under the Arbitration Act, that function is for the courts,²⁷ which resolve doubts in favor

²² See Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 138 (1934).

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Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 *Hast. L.J.* 239, 251-55 (1987). As Justice Story put it:

arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. . . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is

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²⁴ 9 U.S.C. §§ 1-14 (1982).

²⁵ These are usually based on the Uniform Arbitration Act, 7 U.L.A. 5 (1985).

²⁶ 470 U.S. 213 (1985).

²⁷ See, e.g., AT & T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415 (1986).

of arbitrability.²⁸ Second, the Supreme Court has held that certain statutes confer nonwaivable rights to federal court enforcement. For example, in Alexander v. Gardner-Denver Co.,²⁹ the Court held that a collective-bargaining agreement to arbitrate discrimination charges did not foreclose resort to a Title VII suit. Third, the preclusive effect of arbitration on later lawsuits is often either unclear or nonexistent.³⁰

B. Delegation to Private Parties in American Law.

Questions about the permissibility of placing governmental power in private hands occur throughout American law.³¹ Unfortunately, analysis of "delegation to private parties" is hampered by a tendency of courts, confronting particular aspects of the phenomenon, to make broad statements that are inconsistent with both theory and practice in related contexts. Therefore, to provide a frame of reference for analysis in the context of administrative adjudication, I briefly review the major cases and survey the public/private distinction in American law.

1. The Supreme Court Cases.

The Supreme Court has sometimes considered the permissibility of delegations to private parties. The most prominent case is Carter v. Carter Coal Co.,³² in which the

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²³ but rusticum iudicium.

Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845)(No. 14,065).

²⁸ Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

²⁹ 415 U.S. 36 (1974).

³⁰ See generally Carlisle, Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?, 55 Fordham L. Rev. 63 (1986); see McDonald (Continued on page 7)

³¹ For an able, comprehensive review, see Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L. J. 650 (1975).

³² 298 U.S. 238 (1936).

Court invalidated a federal statute that allowed a majority of miners and the producers of two-thirds of the annual tonnage of coal to set maximum hours and minimum wages for the industry.³³

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business.

The Court stated an absolute principle condemning delegations to interested private deciders to regulate others: "in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially that of a competitor." Although its rhetoric suggested reliance on the delegation doctrine, the Court held that the statute denied due process.

The Court had earlier suggested the delegation doctrine basis, in A.L.A. Schechter Poultry Corp. v. United States.³⁴ While overturning the National Industrial Recovery Act's authorization to the President to approve codes of fair competition generated by industry, the Court asked:³⁵

But would it be seriously contended that Congress could delegate its legislative authority to trade . . . groups so as to empower them to enact the laws they deem to be wise and beneficent for . . . their trade or industries? . . . Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The Schechter Court stressed the breadth of the field within which the President and the code drafters could roam, rather than the potential for interested private decisions to be rubber-stamped by harried bureaucrats-- although the Court was

Continued from previous page

³⁰ v. City of West Branch, 104 S.Ct. 1799 (1984) (unappealed arbitration does not preclude civil rights litigation).

³³ 298 U.S. at 311.

³⁴ 295 U.S. 495 (1935).

³⁵ 295 U.S. at 537.

well aware that the administration of the NIRA posed the latter problems.³⁶

Notwithstanding the New Deal Court's confident dicta, the path of the case law has wavered. In some earlier cases, the Court had struck down land use regulations authorizing groups of propertyowners to control some uses of their neighbors' property.³⁷ Yet the Court has repeatedly upheld delegations to interested private decisionmakers.³⁸ Distinctions offered to explain the inconsistencies have been thin to the vanishing point (for example, that a restriction is being relieved rather than imposed). There is little profit in reviewing these cases here.³⁹ It is enough to say that delegations to private deciders are in jeopardy if the decider has an interest in the outcome. To see why there is no broader rule that all private delegations are unconstitutional,⁴⁰ it is necessary to widen our inquiry.

2. The Public/Private Distinction.

The boundary of the public sector in American life has never been distinct.⁴¹ Many "private law" arrangements bind

³⁶ See L. Jaffe, *Judicial Control of Administrative Action* 61-62 (1965).

³⁷ *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

³⁸ E.g., *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Curran v. Wallace*, 306 U.S. 1. 15-16 (1939); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577-78 (1939).

³⁹ See generally Liebmann, *supra* note 31; Jaffe, *Law Making by Private Groups*, 51 *Harv. L. Rev.* 201 (1937).

⁴⁰ Recent state cases considering the validity of private delegations have often involved public employee interest arbitration. Most courts have upheld these schemes against delegation attacks, see Craver, *supra* note 13. For example, see *City of Richfield v. International Firefighters Ass'n.*, 272 N.W.2d 42 (Minn. 1979); *Wyoming v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). Cases
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⁴¹ See generally Symposium, *The Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1289 (1982).

persons not consenting to them. Ancient doctrines of property and contract allow private persons to make law, for example by imposing restrictive covenants on land.⁴² Similarly, private groups are often authorized to exert coercive powers over others. One prominent example is the collective-bargaining agreement, by which a majority of workers in a bargaining unit select a representative who may bind them all.⁴³ Another is the formation of local governments by petition of some residents in a territory, against the wishes of the others.⁴⁴

Formally private action sometimes becomes legally public for some purposes. Thus, we struggle to define the kinds of relationships between private institutions and the state that suffice for "state action" and the invocation of constitutional restrictions. The Supreme Court has recently been unwilling to characterize private activity as state action notwithstanding substantial public financial support and close regulation; instead, the Court looks for direct coercion or encouragement of the particular decision in question.⁴⁵

Per contra, formally public action sometimes has dominant private aspects. Statutes sometimes authorize agencies to transform private industry standards into government regulations.⁴⁶ And federal judges enforce consent

Continued from previous page

- ⁴⁰ invalidating such schemes include *Salt Lake City v. International Ass'n of Firefighters*, 563 P.2d 786 (Utah 1977); *Greely Police Union v. Greely City Council*, 191 Colo. 419, 553 P.2d 790 (1976).
- ⁴² The classic exposition of this point is by Jaffe, supra note 39.
- ⁴³ See, e.g., *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943) (under Railway Labor Act, majority of workers choose a representative; Board resolves disputes without judicial review).
- ⁴⁴ See generally Liebmann, supra note 31, at 672-75.
- ⁴⁵ See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).
- ⁴⁶ R. Dixon, *Standards Development in the Private Sector* (1978); Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health, 56 Tex. L. Rev. 1329 (1978).

agreements in public law litigation, as negotiated by private parties.⁴⁷

A number of modern institutions are public/private hybrids. These often take the form of government corporations, such as the Tennessee Valley Authority, the Postal Service, or Amtrak.⁴⁸ The most important of these hybrids is the Federal Open Market Committee (FOMC), which forms and executes the nation's monetary policy.⁴⁹ The FOMC consists of the seven members of the Board of Governors of the Federal Reserve System, who are government officers, and five private bankers.

In Melcher v. Federal Open Market Committee,⁵⁰ a district court upheld the constitutionality of the FOMC. The court noted that the private members do not have the "decisive voice" in policymaking, because the Board of Governors holds a majority. The court also distinguished the coercive functions of government from monetary policymaking, which is executed through private market transactions.⁵¹ Conceding the importance of monetary policy to the nation's economy, the court observed that many private institutions also have great impact. Finally, it relied partly on tradition-- monetary policy has been committed to a combination of public and private decisionmakers since the days of the Bank of the United States.⁵²

Melcher is symptomatic of our lack of any satisfactory normative or positive theories of the public/private boundary.⁵³ Plainly, an a priori constitutional principle condemning private delegations would require wholesale rearrangements in our law and institutions. Nevertheless, some

⁴⁷ Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

⁴⁸ Tierney, Government Corporations and Managing the Public's Business, 99 Pol. Sci. Q. 73 (1984).

⁴⁹ See generally W. Melton, Inside The Fed, Making Monetary Policy Ch. 2 (1985).

⁵⁰ 644 F.Supp. 510 (D.D.C. 1986).

⁵¹ 644 F.Supp. at 523 n. 26.

⁵² McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which upheld the constitutionality of the Second Bank, did not discuss problems of private delegation.

⁵³ This note is sounded throughout the Symposium, supra note 41.

delegations are more justifiable than others-- the concerns expressed in the cases have substance. For now, we must content ourselves with the articulation of principles and controls in particular contexts, aided by the broader perspective.

C. Delegation of Adjudicative Power in Administrative Law.

The constitutionality of delegating adjudicative power to administrative agencies was established by Crowell v. Benson.⁵⁴ The context was a worker's compensation scheme for longshoremen. Congress had authorized an agency to decide claims under adjudicative procedures resembling those later codified in the Administrative Procedure Act (APA).⁵⁵ (An examiner was to conduct informal evidentiary hearings on a record.) The Court rejected a due process assault on administrative factfinding, because judicial review could assure the presence of substantial evidence for the award. Nor did article III require that the subject matter, which was within the federal judicial power, be allocated to the courts. It sufficed that reviewing courts retained power to decide issues of law. The Court did hold, however, that courts must perform independent review of issues of constitutional or jurisdictional fact going to the power of the agency in the premises, such as whether an accident had occurred on the navigable waters.

Although Crowell set the stage for modern administrative adjudication, much has happened since. First, the two limitations that the Court relied on to justify shifting article III business to agencies have eroded. Courts now defer to agency determinations of law as well as fact,⁵⁶ and the doctrines of constitutional and jurisdictional fact have fallen into desuetude.⁵⁷ Second, administrative adjudication and

⁵⁴ 285 U.S. 22 (1932).

⁵⁵ 5 U.S.C. §§ 554-57.

⁵⁶ Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); see generally Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283 (1986) (noting, however, the marked inconsistency with which the Court has applied this doctrine).

⁵⁷ Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 247-63 (1985).

its surrounding doctrines have evolved in ways that merit brief summary here.

Crowell evinced two concerns that remain pertinent today, the extent of Congressional power to allocate judicial power to other entities and the fairness of adjudication performed outside court. I discuss each in detail below, and pause to introduce the latter now. Modern administrative law ensures fair adjudication partly through structure, and partly through procedure. Many agencies draw their membership from regulated groups, in stated pursuit of expertise. Typically, such an agency both investigates and adjudicates. The combination aids policymaking; problems of bias and interest, however, necessarily arise. These are dealt with partly by organizational separation of the investigative and adjudicative staffs below the level of the heads of the agency.⁵⁸ Also, administrative law judges enjoy statutory guarantees of their independence,⁵⁹ and are required to follow specified procedures designed to balance informality and accuracy.⁶⁰

The Supreme Court has upheld this general arrangement against due process attack.⁶¹ The Court is prepared to credit the protections flowing from separation of functions and procedural guarantees.⁶² Moreover, the Court recognizes that obtaining the policymaking advantages of combined functions at the top of the agency has some cost to adjudicative neutrality.⁶³ Nevertheless, the Court has made

⁵⁸ See generally Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 Colum. L. Rev. 759 (1981).

⁵⁹ See 5 U.S.C. §§ 3105, 5372, 7521.

⁶⁰ See 5 U.S.C. §§ 554-57.

⁶¹ Withrow v. Larkin, 421 U.S. 35 (1975) (state board of medical examiners could both investigate and decide charges against a doctor).

⁶² See Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency; administrative law judge adjudicated the penalties.)

⁶³ See Friedman v. Rogers, 440 U.S. 1, 18 (1979) (legislature can draw administrators from an organization sympathetic to the rules to be enforced); Hortonville

it clear that a scheme's particular characteristics can present unacceptable dangers of bias or interest.⁶⁴

D. An Approach to the Constitutional Issues.

At this point in the discussion, we can derive some general precepts for analysis. First, both administrative law and the private delegation cases display a basic ambivalence about the decider's neutrality-- the benefits of obtaining knowledgeable or autonomous decisionmaking are gained at the risk of introducing unacceptable levels of bias or interest. This ambivalence also affects administrative law outside the adjudicative context, in ways that are pertinent to the analysis here. Traditional views of policymaking as the neutral and expert elaboration of the public's will have given way to theories that recognize and try to control private influences. Current theories of legislation emphasize its capacity to provide private goods for special interests;⁶⁵ controversy surrounds the extent to which courts should try to offset this tendency.⁶⁶ And administrative law has recently

Continued from previous page

⁶³ Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed); FTC v. Cement Institute, 333 U.S. 683 (1948) (FTC Commissioners could both testify before Congress regarding the illegality of a practice and later adjudicate the matter).

⁶⁴ For example, in Gibson v. Berryhill, 411 U.S. 564 (1973), the Court would not allow a licensing board drawn from one-half of a state's optometrists to decide whether the other half were engaged in unprofessional conduct. See also Tumey v. Ohio, 273 U.S. 510 (1927) (town mayor could not adjudicate where fines paid his salary); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (Tumey controlled where fines formed a substantial part of municipal revenues).

⁶⁵ See generally Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Corn. L. Rev. 1 (1982).

⁶⁶ Compare, e.g., Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223 (1986), with Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263 (1982).

seen the ascendancy of an interest representation model of policymaking.⁶⁷ Here too, there are countercurrents. Some views of the administrative process emphasize the opportunity-- and the duty-- of administrators to seek their best conception of the public interest, constrained as decision may be by the reality of private pressure.⁶⁸

To promote public-regarding policy, modern administrative law relies on simultaneously fostering and controlling the oversight activities of all three branches of government.⁶⁹ When decision is shifted from public to private hands, we lose some or all of these monitoring devices. If we can identify substitutes that will tolerably conform private decision to the public interest, a delegation should survive.

It may be that in most situations where private delegations are upheld, the courts perceive an overall congruence of interest between the private deciders and the public. Thus, in monetary policymaking the private bankers and the members of the Board of Governors share an interest in the long-run stability of the currency. Similarly, we allow self-regulation by securities exchanges or government regulation by members of professional groups because of their need to maintain public confidence. Manifestly, reliance on private interest to achieve public purposes produces imperfect results, but so do the alternatives.

We also use shared interests within groups to promote fairness when they regulate themselves. For example, a premise of collective bargaining is that workers derive net advantages from negotiating with management as a group, whatever their internal disagreements.⁷⁰ And the state bar is expected to understand the pressures that lawyers face. Here, the danger is that shared group interests will subordinate the interests held in common with the public.

The foregoing considerations suggest that arbitration can find a place in the administrative state. The central premise of arbitration, that the parties' consent to the process and practical guarantees of the decider's neutrality justify informal and final procedure, serves the important purpose of

⁶⁷ Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

⁶⁸ Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).

⁶⁹ See generally Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207 (1984).

⁷⁰ Jaffe, supra note 39, at 235.

neutralizing bias. The overall similarity of arbitral and administrative processes demonstrates the extent to which their purposes are the same. Indeed, the nature of arbitration calls to mind an observation that Judge Friendly made while discussing administrative procedure: "the further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards."⁷¹

Two principles should guide our approach to the constitutional issues. First, the optimal level of specificity for constitutional rules that organize the government is low. This is true for several reasons. The government is vast and diverse; perforce, even statutes with government-wide effect (e.g., the APA) are phrased in generalities. Moreover, prediction of the effects of rules on institutions is hazardous, even in the short run.⁷² And the obstacles to altering constitutional rules are considerable, even when they are generated by the courts.

Second, deference is due to agency choice of procedure, whether the issue is statutory authorization⁷³ or constitutionality.⁷⁴ Whether analysis of process is characterized as policy, statutory authority, or constitutionality, the acceptability of procedure is a function of the particular issues to be decided.⁷⁵ Agencies are usually best situated to weigh the factors bearing on choice of procedure, in search of the best alternative.

Appraising the consistency of government arbitration with articles II and III of the Constitution involves separation of

⁷¹ Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1279 (1975).

⁷² For an illustrative account of the unanticipated effects of constitutional jurisprudence on bureaucracies and their clients, see Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims, 59 Corn. L. Rev. 772 (1974).

⁷³ Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

⁷⁴ Mathews v. Eldridge, 424 U.S. 319 (1976).

⁷⁵ See Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. Pa. L. Rev. 485, 536-37 (1970).

powers analysis. Here a fundamental distinction must be made in order to understand the cases. Separation of powers cases involving the aggrandizement of one branch at the expense of another present greater problems than those involving only a possible interference with the prerogatives of one branch.⁷⁶ In the aggrandizement cases, the Court has favored a formalist approach that reasons logically from the constitutional text and what is known about the framers' intentions.⁷⁷ The consequence is to draw relatively bright lines between the functions of the branches.⁷⁸ In the interference cases, the Court has used a functional approach that inquires whether the core responsibilities of the branch in question have been impaired.⁷⁹

There may be several reasons for the use of two doctrinal approaches. In cases involving the relationships of the constitutional branches inter se, formalism offers the advantages of preserving clear lines of political accountability and of minimizing evasions of constitutional strictures.⁸⁰ In cases involving the distribution of functions within the "fourth branch" of the bureaucracy, however, the simplicities of formalism fit so badly with the complexities of administration that the Court shifts to a functional inquiry into the overall relationships between the constitutional branches and the agencies.⁸¹ The functional test is far more permissive of diverse government structure than is formalism.

Thus, several considerations suggest that formalist analysis will prove inapposite to government arbitration. First, the aggrandizement concerns that prompt use of the approach are absent. Second, we are wise to minimize constitutional prescription in this area. And third, the need

⁷⁶ Strauss, Separation of Powers in Court, A Foolish Inconsistency?, -- *Corn. L. Rev.* --- (forthcoming, 1987).

⁷⁷ E.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 106 S.Ct. 3181 (1986).

⁷⁸ See generally Bruff, On the Constitutional Status of the Administrative Agencies, 36 *Am. U. L. Rev.* 491 (1987).

⁷⁹ E.g., *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *CFTC v. Schor*, 106 S. Ct. 3245 (1986).

⁸⁰ Bruff, supra note 78, at 506-09.

⁸¹ Strauss, supra note 5.

to defer to legislative or administrative choice of process suggests a constitutional test containing flexibility.

II. EXECUTIVE BRANCH SUPERVISION.

The President's constitutional powers "are not fixed, but fluctuate,"⁸² depending on the context in which they are considered. His needs to supervise administration vary according to the subject matter. His claims are strongest where he has independent constitutional powers, as in foreign affairs, and weakest where individual liberties enjoy their own constitutional protection.⁸³ In addition, Congress may control executive oversight within limits that are presently uncertain.⁸⁴ For example, by placing some functions in independent agencies, Congress has expressed its desire that executive oversight be minimized.⁸⁵

It is possible for Congress to insulate a function from the oversight of all three constitutional branches in a way that hampers political accountability or allows arbitrariness. Courts often approach this question as a due process issue of the permissibility of private delegations, as I noted above. Still, there is a distinct question here that relates to executive supervision. Some functions are neither reviewable in court nor readily amenable to effective congressional oversight. Examples include foreign affairs and monetary policymaking. For such functions, the nature and extent of ties to the executive largely define the sufficiency of governmental control. Therefore, weak ties to the executive

⁸² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

⁸³ Bruff, *Presidential Power and Administrative Rulemaking*, 88 *Yale L.J.* 451, 495-98 (1979).

⁸⁴ See generally G. Robinson, E. Gellhorn & H. Bruff, *The Administrative Process* 117-31 (3d ed. 1986).

⁸⁵ Notwithstanding a current debate on the constitutional status of the independent agencies, see generally Symposium, "The Uneasy Constitutional Status of the Administrative Agencies," 36 *Am. U. L. Rev.* 277 (1987); Miller, *Independent Agencies*, 1986 *Sup. Ct. Rev.* 41, the Supreme Court continues to treat them as a viable part of the government. E.g., *CFTC v. Schor*, 106 S.Ct. 3245 (1986); see *Bowsher v. Synar*, 106 S.Ct. 3181, 3188 n. 4 (1986).

are less justifiable if oversight by the other branches is disabled, and more justifiable if it survives.

Agency procedure also affects presidential power. Adjudication enjoys constitutional⁸⁶ and statutory⁸⁷ protections from outside interference by anyone, including the President. In contrast, rulemaking is subject to increasingly ambitious executive management.⁸⁸

Relationships between the executive and private deciders should fluctuate according to these variables of subject matter, government structure, and procedure. If ties of certain kinds between officers and deciders can be identified as consistent with the nature of the executive's supervisory needs for the particular context, article II concerns should be satisfied.

A. The Scope of the Appointments Clause.

In Buckley v. Valeo,⁸⁹ the Supreme Court held that Congress could not appoint members of the Federal Election Commission. The Court read the appointments clause⁹⁰ to govern the selection of anyone "exercising significant authority pursuant to the laws of the United States."⁹¹ In defining that phrase, the Court distinguished informational and investigative functions, which did not need to be performed by "Officers of the United States," from the FEC's enforcement powers, such as litigating, rulemaking, and adjudicating, which could only be performed by officers or their employees.⁹²

⁸⁶ Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

⁸⁷ 5 U.S.C. § 557(d).

⁸⁸ See generally Symposium, Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291, 23 Ariz. L. Rev. 1195 (1981).

⁸⁹ 424 U.S. 1 (1976).

⁹⁰ U.S. Const., Art. II, § 2, cl. 2.

⁹¹ 424 U.S. at 126.

⁹² The Court noted that employees are "lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.

Buckley is a rather formalist opinion with no obvious limits to its logic.⁹³ It can easily be read to require that all execution of the laws be kept in the hands of federal employees. Nevertheless, the Court's distinctions are surely related to the context of the case. The Court was considering whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation outside the government of some functions that could be performed by the executive. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere.⁹⁴ The need to prevent interference with core functions suggests an inquiry whether the President is denied a supervisory role that is necessary to his duty to oversee the execution of the laws.

Thus, Buckley raises but does not resolve the question of most interest here: what relationships between an officer and a decider are necessary to satisfy concerns related to the appointments clause? A priori, the variety of possible relationships between the executive and those who actually make policy suggests the inadvisability of a constitutional rule that focuses on formal appointment or employment provisions.

This point is illustrated by Melcher, in which the district court declined to extend Buckley to condemn the composition of the Federal Open Market Committee. Seven FOMC members (the Board of Governors of the Federal Reserve System) are unquestionably "Officers of the United States." The other five are private bankers selected by the boards of directors of the regional Federal Reserve Banks.⁹⁵ The court declined to characterize the private members of the FOMC as government officers, although the Board of Governors supervises them in their other capacity as officers of the various Reserve Banks.⁹⁶ The court pointed to the absence of any clear

⁹³ Bruff, supra note 78, at 500.

⁹⁴ See Melcher v. Federal Open Market Committee, 644 F. Supp. 510, 520 (D.D.C. 1986) (distinguishing both Buckley and Bowsher v. Synar, 106 S. Ct. 3181 (1986), as involving "attempts to enlarge the legislative authority at the expense of that of the Executive Branch.")

⁹⁵ The boards, in turn, are composed of two-thirds private members and one-third Board of Governors appointees.

⁹⁶ The Board of Governors approves their selection and compensation, and can dismiss them for cause. 12 U.S.C. §§ 248(f), 307, 341.

authority for the supervision of these individuals in their role as FOMC members.

This conclusion is consistent with any of three readings of Buckley. First, courts could ask only whether a decider is technically a government employee. Second, they could ask whether the decider is in substance a government employee. As Melcher illustrates, there are many possible relationships short of full-time employment. Courts could assess each one to determine whether the person is effectively under the control of an officer. Third, the courts could ask a more focused question: is the particular activity in question sufficiently controlled by an officer? This third inquiry seems the most appropriate, since it draws attention to the precise needs of the executive for a supervisory role.

The functions that Buckley denied to Congressional appointees all involve the coercion of primary conduct by government. Perhaps in that context the executive may never delegate its responsibilities. Buckley, however, distinguished investigation from enforcement for an unrelated reason, the need for Congress to investigate as an aid to legislation. Moreover, it is easy to exaggerate the differences between coercive and noncoercive governmental action. As economists are fond of reminding us, the carrot and the stick both influence behavior. Nevertheless, legal controls on government monitor coercive activities most closely.⁹⁷ Functional analysis can give some weight to the degree of coercion present in an activity, without resting decision exclusively on that factor. The diverse subject-matter of federal policymaking suggests that all should not hinge on a single characteristic.

Suggestions have arisen that arbitration be employed in some enforcement contexts, such as the revocation of permits for hazardous waste facilities.⁹⁸ It should be possible to define a role for arbitration in enforcement, if certain limits are set. The executive has traditionally enjoyed wide prosecutorial discretion, because the component activities of gathering information, setting priorities, and allocating resources affect many of the agency's responsibilities and are difficult to monitor effectively from the outside.⁹⁹ Hence

⁹⁷ See, e.g., Heckler v. Chaney, 105 S.Ct. 1649, 1656 (1985).

⁹⁸ Robinson, U.S. Environmental Protection Agency Institutes Alternative Dispute Resolution in its Enforcement Program, 18 Dis. Res. News (ABA Com. on Dis. Res. 1986).

⁹⁹ See Heckler v. Chaney, 105 S.Ct. 1649, 1656 (1985); FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967).

it would divest the executive of core functions to allow an arbitrator to decide whom to prosecute, or to decide other issues that implicate general enforcement policy.

Private neutrals could, however, play a number of other roles. First, they could influence enforcement in ways that do not formally displace executive discretion. Here, illustration is provided by ADR procedures other than arbitration. A portion of the ACUS recommendation would apply various ADR techniques to settlement of litigation, including negotiation, mediation, and "minitrials."¹⁰⁰ All of these techniques leave actual settlement authority in the hands of government officers. The recommendation would, however, expose settlements involving major public policy issues or third party effects to notice and comment.¹⁰¹ This reminds us of the values served by exposing deciders to outside influences-- the process does not rely solely on interested parties and the ADR neutral, whose perspective may be limited, in settling cases having implications beyond their facts.

Second, it should be permissible to arbitrate fact questions underlying an enforcement dispute. Here, efficiency gains from informal process are possible without sacrificing the executive's needs to set overall enforcement priorities and policy.

Finally, although the issue is more difficult, it should be permissible to arbitrate the application to a particular respondent of settled criteria for such sanctions as permit revocation. The executive retains control of overall policy by formulating the standards for sanctions. Still, an important aspect of prosecutorial discretion concerns law-applying-- the decision whether to compromise a charge or to take it to trial. And as I have noted, administrative law has accommodated the combination of prosecutorial and adjudicative functions in a single agency, with appropriate safeguards.¹⁰²

¹⁰⁰ 1 CFR § 305.86-3, part D. Minitrials are abbreviated summaries of trial evidence, presented before principal officers of the litigants who are authorized to settle the case.

¹⁰¹ At present, consent agreements are sometimes subjected to notice and comment procedures. G. Robinson, E. Gellhorn & H. Bruff, *supra* note 84, at 549.

¹⁰² See *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency; administrative law judge adjudicated the penalties.)

Nevertheless, due process values are served by reducing the potential for bias that attends the selection of sanctions by the investigating office.¹⁰³

Thus, government arbitration creates tension between two constitutional values, executive power and due process. We can accommodate them by retaining executive control over broad issues of policy, while allocating some functions of applying policy to private neutrals. The consequent reduction in executive power, although real, should be kept in perspective. Comparison of a private delegation with the government function it displaces should include consideration of the legal constraints on that function, to see how much discretion the executive is actually losing.

A brief look at the use of ADR techniques in rulemaking will illustrate this point. Rulemaking draws the President's supervisory role directly into question, because it concerns generalized policy.¹⁰⁴ Nevertheless, we subject rulemakers to various "outside" influences. The original purpose of the APA's notice and comment procedures was simply to provide affected persons an opportunity to educate the policymakers.¹⁰⁵ Today, administrative law pursues a more ambitious goal-- to use diverse outside pressures to encourage rulemakers to follow the public interest.¹⁰⁶

Under the ACUS recommendation on negotiated rulemaking, private groups negotiate a proposed rule, which then undergoes the usual notice and comment process. This process does not differ sharply from the bargaining that can occur informally

¹⁰³ See Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed). In Hortonville, provision of a neutral decider would have eliminated the need for the Court to inquire whether the facts raised a sufficient danger of bias to deny due process.

¹⁰⁴ Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975).

¹⁰⁵ Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721, 754-55 (1975).

¹⁰⁶ See generally Office of the Chairman, Administrative Conference of the United States, A Guide to Federal Agency Rulemaking (1983).

under notice and comment procedures.¹⁰⁷ Final policy decisions remain with the government.¹⁰⁸ Nothing in Buckley suggests that an officer may not be influenced by others, as long as he retains the power to decide.¹⁰⁹

It is one thing, however, to constrain executive discretion, and another to shift decisions to private hands. The possibility of unduly sacrificing executive responsibility in favor of due process values attends the use of arbitration in any policy-laden context, such as public employee labor relations and money claims against the government. Here we must seek appropriate and effective ways for the executive to control private neutrals. If such controls are available, it should be permissible for Congress or the agencies to choose arbitration.

B. Selecting Arbitrators.

The ACUS recommendations concerning voluntary or mandatory arbitration involve adjudication.¹¹⁰ Here, as I will discuss, the federal courts assert a supervisory role. Nonetheless, Buckley retains some force. Even where the President's supervisory powers are limited, as with independent agencies and adjudicators, he retains his power to appoint the deciders, and a general interest in their performance.¹¹¹

¹⁰⁷ Moreover, modern agencies often employ private consultants in rulemaking, and may rely substantially on them in the deliberative process, as long as they do not abdicate the ultimate statutory responsibility for decision. United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980).

¹⁰⁸ 1 CFR § 305.82-4: "The final responsibility for issuing the rule would remain with the agency." See Harter, supra note 8, at 109.

¹⁰⁹ See also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (coal producers may propose minimum prices to agency that can approve, disapprove, or modify them).

¹¹⁰ 1 CFR § 305.86-3, parts B & C.

¹¹¹ See, e.g., J. Landis, Report on Regulatory Agencies to the President-Elect, Sen. Comm. on the Judiciary, 86th Cong., 2d Sess. 33 (Comm. Print 1960): "The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies

Moreover, administrative adjudication is often used for policymaking;¹¹² to that extent, the President has a substantial claim to overall supervision, not including intervention in a particular pending case.¹¹³

The ACUS recommends against arbitration in cases involving major new policies or precedents, significant third party effects, or special needs to honor existing precedent. These are cast as broad generalizations; at that level, they are unexceptionable. I discuss the last of them in connection with judicial power; for the others, discretion should be exercised within rather than outside the government. All three constitutional branches have oversight claims. And affected third parties, who have not consented to the use of private deciders, are entitled to the protections that administrative law and government structure provide. Still, it is necessary to guard against overgenerality. Adjudication often has visible effects beyond the parties. Within limits, the presence of such effects should not rule out arbitration.

Under the recommendations, agencies usually control whether to resort to arbitration. Mandatory arbitration is suggested only for controversies between private parties, not those involving the government as a party. The need for executive choice of process is weak when the government is acting only as arbiter of disputes between citizens. Where the government's own interests are at stake, voluntary arbitration allows agencies to choose the use of a private neutral, either before or after controversy arises. For example, if an officer is authorized to settle claims, efficiency gains can result from referring some of them to a third party for expeditious handling. That frees the officer's time for more important cases. Due process values are also served by referral of claims against the government-- the avoidance of undue interest, or an appearance of it, in the outcome. Moreover, voluntary arbitration can draw some support from Buckley and Melcher, because of its noncoercive nature.

Where the executive has a substantial interest in the outcome, methods of structuring arbitration and selecting arbitrators can reflect that interest in a compromise with

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¹¹¹ pursuant to basic statutory requirements are all a part of the President's constitutional concern to see that the laws are faithfully executed."

¹¹² NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

¹¹³ See ABA Comm. on Law and the Economy, supra note 2, at 79, 82.

strict neutrality. The legality of a private delegation often depends on a court's judgment whether the composition of the deciding group is representative of the interests affected.¹¹⁴ Thus, the goal of arbitral schemes should be balance rather than unalloyed neutrality. Frequently, those selecting private deciders must weigh the benefits of expertise in the subject matter against the costs to neutrality from the source of the expertise, for instance prior service in the agency or industry. The Administrative Conference has recognized the inevitability of these tradeoffs in its recommendation on acquiring the services of ADR neutrals.¹¹⁵

There are several ways to pursue balance in arbitration. First, the choice to arbitrate can be vested with a public/private body. For example, arbitration of contract impasses with federal workers occurs on the approval of the Federal Service Impasses Panel, a part-time body composed partly of government employees.¹¹⁶ This approach responds to the fact that "interest" arbitration, which resolves distributional issues between the parties on a prospective basis, is materially more policy-oriented than "grievance" arbitration, which considers rights under preexisting arrangements.¹¹⁷

Second, if a multimember panel is used, its composition can reflect affected interests in appropriate proportions.¹¹⁸ For example, bargaining impasses between the Postal Service and its employees are submitted to an arbitral board composed of one member selected by the Service, one by the union, and a

¹¹⁴ Note, Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv. L. Rev. 1871, 1883 & n.66 (1981).

¹¹⁵ 1 CFR § 305.86-8; see generally Ruttinger, Acquiring the Services of Neutrals for Alternative Disputes Resolution and Negotiated Rulemaking, Report for the Administrative Conference of the United States (1986).

¹¹⁶ 5 U.S.C. § 7119.

¹¹⁷ See generally Kanowitz, supra note 23, at 244-50; Craver, supra note 13; Note, Binding Interest Arbitration in the Public Sector: Is it Constitutional?, 18 Wm. & Mary L. Rev. 787 (1977).

¹¹⁸ See Melcher v. Federal Open Market Committee, 644 F.Supp. 510, 523 (D.D.C. 1986) (Buckley concerns alleviated by the presence of a government majority on the FOMC)

third selected by the other two members.¹¹⁹ In another example of a mixed panel, the Department of Education adjudicates certain disputes with its grant recipients through a board formed of a minority of federal employees and a majority of private members.¹²⁰

Third, even if a single arbitrator is employed, the selection procedure can take the preferences of both sides into account. In commercial arbitration, the American Arbitration Association sends a list of names to the parties, who strike those to whom they object and number the others in order of preference. The AAA selects the arbitrator according to mutual preference.¹²¹ Federal agencies have borrowed these practices, sometimes by direct referral to the AAA.¹²²

These techniques should furnish the executive sufficient tools to meet supervisory needs related to selecting the deciders. Compare administrative adjudication, usually performed in the first instance by Administrative Law Judges. In both cases, an agency can consider the overall neutrality and competence of the pool of deciders when deciding whether to utilize their services instead of alternative processes. In arbitration, agencies can also influence the choice of a decider for the case at hand. In contrast, ALJs are usually assigned in rotation.¹²³ This comparison does not consider, though, the nature of an appropriate role for executive supervision of adjudicators. I now turn to that topic.

¹¹⁹ 39 U.S.C. § 1207. Failing agreement on a third member, the Director of the Federal Mediation and Conciliation Service chooses one.

¹²⁰ 20 U.S.C. § 1234(c); see generally Boasberg, Klores, Feldesman & Tucker, Federal Grant Dispute Resolution, A Report for the Administrative Conference of the United States, in Mezines, Stein & Gruff, Administrative Law § 54.05 (1983).

¹²¹ Coulson, supra note 21, at 34. The person selected is required to disclose "any circumstances likely to affect impartiality," and is subject to disqualification by the AAA. Id. at 35.

¹²² E.g., 29 CFR § 1440 App. (pesticide registrations); 40 CFR § 305.31 (Superfund).

¹²³ 5 CFR § 930.212. The Supreme Court, however, has approved some agency discretion to match an ALJ's background to the subject matter. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139-40 (1953).

C. Supervising Arbitrators.

Arbitration in federal programs should be subject to two kinds of executive monitoring. First, there should always be some overall scrutiny of whether it is meeting expectations. Like any procedure, arbitration is more successful for some disputes than others.¹²⁴ Especially in an era of experimentation with ADR techniques, the executive has a continuing monitoring responsibility. Federal arbitration programs often concern large stakes, such as millions of dollars of aggregate expenditures of public or private money.¹²⁵ For some arbitral programs, then, "wholesale" review is more important to the executive than is "retail" review of a particular decision.

Generalized oversight also helps to protect private delegations from judicial invalidation. For example, many disputes between securities dealers and their customers are arbitrated by the self-regulatory organizations of the industry; courts approving this scheme have relied partly on federal approval of the arbitral procedures.¹²⁶ Oversight has its perils, though: when the government is a party to arbitration, monitoring must steer a careful course, assessing the overall accuracy of the process without intervening in particular cases.¹²⁷

¹²⁴ See Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916 (1979) (emphasizing the connection between the collective bargaining relationship and the success of labor arbitration).

¹²⁵ A number of specific examples are discussed in §§ III and IV infra.

¹²⁶ Todd & Co., Inc. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977); R. H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir.) (Frank, J.), cert. denied, 344 U.S. 855 (1952); see generally Fletcher, Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements, 71 Minn. L. Rev. 393 (1987); Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279 (1984).

¹²⁷ Compare Ass'n of Administrative Law Judges, Inc. v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984) (generalized executive review of ALJ performance is legitimate, as long as it does not skew the outcome of particular adjudications); see also Note, Administrative Law Judges, Performance Evaluation, and Production Standards:

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Second, agencies need to control the conduct of particular arbitrations, within limits. They can do so in two primary ways: by providing a standard for decision, and by reviewing awards to determine fidelity to it.¹²⁸ Ordinarily, an agency can elaborate its statutory standards through rulemaking. Therefore, even where statutes mandate use of arbitration, the executive can control it. Of course, the specificity of standards should vary with the subject matter.¹²⁹ Instructions should be more detailed for relatively policy-laden subjects (such as interest arbitration in labor relations) than for more fact-intensive ones.¹³⁰

Some arbitration uses standardless norms such as substantial justice. Here, executive supervision would occur only in the choice to resort to arbitration. Therefore, such a standard should not be used where significant policy effects are present. For example, it would be inappropriate for claims against the government, because it could allow payments unauthorized by law.

Review of arbitration can occur either in the agency or in court under the criteria of the U.S. Arbitration Act, which allows vacating awards on very narrow grounds that include corruption and facial illegality.¹³¹ The ACUS recommendation facilitates this limited review by calling for a brief, informal discussion of the factual and legal basis for an award. When the government is not a party to arbitration, agencies have little reason to displace judicial review. When the government is a party, supervisory needs may call for

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¹²⁷ Judicial Independence Versus Employee Accountability, 54 G.W. L. Rev. 591 (1986).

¹²⁸ Also, if an arbitrator is exceeding delegated authority in a pending case, an agency may seek redress by invoking the familiar jurisdiction of the courts to determine an arbitrator's jurisdiction. See text at notes 27-8 supra.

¹²⁹ I discuss the sufficiency of standards in § IV infra as they relate to fairness to affected individuals; here the concern is with the executive's needs.

¹³⁰ See Craver, supra note 13, at 566-67, for examples of varying standards used for interest arbitration.

¹³¹ 9 U.S.C. § 10. The grounds include: (a) "corruption, fraud, or undue means," (c) "refusing to hear evidence pertinent . . . to the controversy," and (d) "exceed[ing] their powers"

administrative review.¹³² If so, there would be no need for the courts to exercise duplicative "retail" review, although they could examine issues concerning the "wholesale" validity of the scheme, as I will discuss.

Administrative review under the Arbitration Act's standards should satisfy the executive's supervisory needs. Again, it is instructive to compare administrative adjudication, which is structured to reflect its greater policy content. Agencies may overturn ALJ decisions readily, as long as the final decision is supported by substantial evidence.¹³³ Indeed, final adjudicative authority is often lodged with the political executives at the head of the agency.¹³⁴ In arbitration, the executive loses ordinary fact review, but gains the speedier resolution of disputes. More intensive review would vitiate the distinctive advantages of arbitration, because it would force arbitrators to provide the procedural formalities necessary to build a suitable record.

III. THE SCOPE OF ARTICLE III.

A. Allocating Judicial Power to Agencies and Arbitrators.

To what extent may adjudicative authority that could be assigned to the federal courts be granted to private deciders? Before addressing this question directly, we must consider a preliminary issue: to what extent may executive officers exercise or supervise potential article III functions? Until recently, one would have thought that the latter issue was settled by Crowell v. Benson,¹³⁵ which upheld the placement of adjudicative authority in an administrative agency. The problems stem from some implications of the Court's recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,¹³⁶ in which a badly divided Court held that the

¹³² As limited by the Arbitration Act, this function would not threaten introducing impermissible levels of bias.

¹³³ E.g., FCC v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955).

¹³⁴ See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

¹³⁵ 285 U.S. 22 (1932).

¹³⁶ 458 U.S. 50 (1982).

allocation of certain functions to bankruptcy judges violated article III.

In Northern Pipeline, Congress had created bankruptcy judges without article III status,¹³⁷ but with powers closely resembling those of federal judges. The bankruptcy judges were authorized to decide all issues pertinent to the proceedings, including claims arising under state law, with review by article III judges.¹³⁸ A plurality of four justices¹³⁹ signed a formalist opinion that defined some matters as inherently judicial in the sense that they must be performed by federal courts, rather than supervised by them. Bankruptcy matters did not come within a set of exceptions to mandatory article III jurisdiction that the plurality identified.

The exception pertinent to us is the one for adjudication of "public rights," which the plurality defined narrowly as claims against government that Congress could commit entirely to executive discretion, but not controversies between private persons arising incident to a federal program. The public rights doctrine originated in a conclusory passage in Murray's Lessee v. Hoboken Land & Improvement Co.,¹⁴⁰ in which the Court upheld a summary procedure for government recoupment of its funds from one of its customs collectors:

[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable

¹³⁷ Instead of life tenure, they had 14-year terms; there were no protections against salary diminution.

¹³⁸ Review was to be by the "clearly erroneous" standard, 458 U.S. at 55-56 n. 5.

¹³⁹ Brennan, Marshall, Blackmun, and Stevens.

¹⁴⁰ 18 How. 272, 284 (1856). Murray's Lessee appears to overturn an earlier case, United States v. Ames, 24 F.Cas. 784 (C.C.C. Mass. 1845, No. 14,441), in which a court refused to enforce an arbitration award involving water rights of the United States and another riparian owner. As an alternate ground of decision, the court stated a principle forbidding the delegation of article III judicial power outside the courts.

of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

The Court has never provided a satisfactory explanation of the public rights doctrine. Instead, the Court, groping for appropriate limits to the jurisdiction of legislative or administrative courts, has used it to label outcomes.¹⁴¹ That is unfortunate because of the difficulty of the problem.

The Northern Pipeline plurality thought that public rights cases could be committed to agencies, at least with judicial review.¹⁴² It appeared to be more willing to accept nonjudicial decision of issues of fact than of law, since it characterized Crowell as involving only the former.¹⁴³ The plurality conceded, however, that the doctrines Crowell relied on to preserve plenary review of issues of law had eroded in the interim.¹⁴⁴ This line of analysis cast doubt on the permissibility of ordinary delegations of adjudicative power to agencies, because the plurality did not specify the relationship between agencies and courts that was necessary to pass constitutional scrutiny.

The plurality explained the dichotomy between public and private rights as resting partly on sovereign immunity. Congress, free to deny all relief for claims against the government, may take the lesser step of allocating the claims to an alternative forum. Accordingly, the plurality would not define public rights as everything created pursuant to the substantive powers of Congress, because that would include some displaced private rights of action.¹⁴⁵ This rationale does not persuasively explain, however, why Congress may more readily shift federal questions out of the courts than diversity cases.¹⁴⁶

¹⁴¹ See generally Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197.

¹⁴² 458 U.S. at 67-68 & n. 18.

¹⁴³ 458 U.S. at 78-82.

¹⁴⁴ Id. at 82 n. 34.

¹⁴⁵ 458 U.S. at 80 n. 32.

¹⁴⁶ Redish, supra note 141, at 208-11.

Two concurring justices¹⁴⁷ would have required only that removed state law claims be decided by an article III court. The dissenters¹⁴⁸ pointed out the inconsistency of the plurality's formulation with the nature of much administrative adjudication.¹⁴⁹ They thought that the bankruptcy scheme satisfied a functional inquiry. They were prepared to examine the strength of the legislative interest in placing decision in another forum (in this case, a heavy caseload and a need for specialization). They gave weight to the preservation of judicial review. They found no danger that the other branches were aggrandizing themselves at the expense of the courts as long as the subject matter was not of special significance to the political branches.

The reason that Northern Pipeline cast broad and troubling implications beyond its bankruptcy context lies in the plurality's formalist approach.¹⁵⁰ The broad sweep of formalism is inappropriate for deciding how to allocate adjudicative power among the branches. The justifications for formalism (preventing aggrandizement and assuring political accountability) are minimal here.¹⁵¹ Functional analysis focuses the Court's attention on the policies underlying article III, and permits the diverse procedural arrangements that the structure of our government demands. Fortunately, later cases have employed functionalism to curtail the implications of Northern Pipeline.

In Thomas v. Union Carbide Agr. Products Co.,¹⁵² the Court upheld mandatory arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁵³ Under the Act, manufacturers wishing to register a pesticide must give the EPA their research data on the product's effects. The EPA considers the data for both the accompanying

¹⁴⁷ Rehnquist and O'Connor.

¹⁴⁸ White, Burger, and Powell.

¹⁴⁹ 458 U.S. at 101-02.

¹⁵⁰ Strauss, supra note 5, at 629-33.

¹⁵¹ See Bruff, supra note 78, at 502-09.

¹⁵² 105 S. Ct. 3325 (1985); see generally Note, FIFRA Data-Cost Arbitration and the Judicial Power: Thomas v. Union Carbide Agricultural Products Co., 13 Eco. L. Q. 609 (1986).

¹⁵³ 7 U.S.C. § 136a(c)(1)(D)(ii).

registration and later ones for similar products, submitted by other manufacturers. Later registrants must compensate earlier ones for the use of the data, in amounts determined by arbitration if the manufacturers cannot agree. The agency uses the AAA's roster of commercial arbitrators and its usual methods for mutual selection by the parties; there are special AAA procedures for conducting FIFRA arbitrations.¹⁵⁴ The arbitrator's findings and determination can be set aside in federal court only for "fraud, misrepresentation, or other misconduct."¹⁵⁵

Justice O'Connor's majority opinion rejected "doctrinaire reliance on formal categories" as a guide to article III, in favor of attention to the origin of the right at issue and the congressional purpose behind the scheme. The majority characterized FIFRA as creating a compensatory right with many public characteristics, as in use of private data by the EPA.¹⁵⁶ It concluded that Congress could authorize an agency to "allocate costs and benefits among voluntary participants" in a regulatory program without providing an article III adjudication.

Justice O'Connor characterized Northern Pipeline as holding only that Congress could not give a non-article III court power to decide state law contract actions without consent of the litigants and subject only to ordinary appellate review. She rejected an argument that FIFRA had created a "private right," explicitly disapproving the definition advanced by the Northern Pipeline plurality insofar as it turned on whether "a dispute is between the Government and an individual."¹⁵⁷ Justices Brennan, Marshall, and Blackmun concurred, explaining their Northern Pipeline position as focusing on the state law nature of the claims involved, and

¹⁵⁴ 29 CFR § 1440 App.

¹⁵⁵ 7 U.S.C. § 136a (c)(1)(D)(ii). The EPA can enforce compliance with the award through sanctions including denial of compensation or cancellation of a party's registration, as the case may be.

¹⁵⁶ The Court had already held EPA's consideration of the data to be a "public use," although the "most direct beneficiaries" of that use were the later applicants. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984)(holding that in certain circumstances this public use effected a compensable taking).

¹⁵⁷ 104 S.Ct at 3335-36.

abandoning any restriction of public rights cases to those in which the government is a party.¹⁵⁸

In passing, the Court squelched the Northern Pipeline plurality's threat to the structure of the administrative state. The Court said that because the statute in Crowell replaced a common law action with a statutory one, it fell within mandatory article III jurisdiction.¹⁵⁹ Nevertheless, the Court recognized that judicial review of administrative adjudication is often limited or even unavailable.¹⁶⁰ Thus the Thomas majority removed any question that the continued vitality of Crowell rests on the outmoded doctrines requiring stringent judicial review that the Crowell Court employed.¹⁶¹

Turning to the use of arbitration, the Court noted Congress' need to streamline compensation controversies.¹⁶² The Court perceived a close nexus between use of arbitration and effective administration of the pesticide registration program. And it emphasized the consent of affected firms: it considered the danger of encroachment on the judiciary's central role to be "at a minimum when no unwilling defendant is subjected to judicial enforcement power."

The Court accepted the statute's limitations on judicial review, which it read to allow reversing arbitrators "who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."¹⁶³ The concurring Justices, like the majority, echoed the "manifest disregard for the law" standard that has widespread use in judicial review of arbitration.¹⁶⁴ The Court also held that review for

¹⁵⁸ Id. at 3341-41. Justice Stevens, also concurring, thought the challengers lacked standing.

¹⁵⁹ 105 S.Ct. at 3336.

¹⁶⁰ Id. at 3334.

¹⁶¹ See text at notes 56-57 supra.

¹⁶² Arbitration replaces an earlier procedure by which EPA adjudicated compensation, subject to judicial review. This proved cumbersome and unworkable; in 1978 Congress turned to arbitration. 105 S.Ct. at 3328-30.

¹⁶³ 105 S. Ct. at 3339.

¹⁶⁴ Id. at 3344; see Fletcher, Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements, 71 Minn. L. Rev. 393, 456 (1987).

constitutional error was available; that alleviated any due process concerns about the extent of review.¹⁶⁵

Thomas suggests that common law claims must be left with the judiciary. The Court has since modified its stance. In Commodity Futures Trading Com'n v. Schor,¹⁶⁶ the Court upheld the CFTC's power to entertain state law counterclaims in reparation proceedings, in which disgruntled customers seek redress for brokers' violations of statute or regulations. Agency adjudicators were authorized to decide counterclaims arising out of the transactions in the complaint, if the respondent chose to assert them there. Schor filed a claim for reparations, and was met with a counterclaim for debt.

Justice O'Connor's opinion for seven justices relied in part on consent-- Schor chose the CFTC's "quicker and less expensive" procedure, instead of a lawsuit.¹⁶⁷ Indeed, the Court compared this option to arbitration, and thought that choice of alternate procedure minimized separation of powers concerns.¹⁶⁸ The Court then asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in article III courts," and whether the latter retained the "essential attributes of judicial power." Only the jurisdiction over counterclaims differed from the usual agency model.¹⁶⁸ The Court saw no reason to deny agencies all pendent jurisdiction,¹⁶⁹ especially where it allowed informal resolution of disputes arising under the federal program.¹⁷⁰ Thus, Schor suggests that agencies may resolve

¹⁶⁵ The parties had abandoned due process objections to the nature of statutory review of the arbitrations, so the Court did not formally address that issue. 105 S. Ct. at 3339.

¹⁶⁶ 106 S.Ct. 3245 (1986).

¹⁶⁷ 106 S.Ct. at 3260.

¹⁶⁸ The CFTC's jurisdiction was specialized; its enforcement powers were limited; its orders received normal judicial review.

¹⁶⁹ Concerns for federalism were insufficient to condemn the scheme, since federal courts could have entertained the claims.

¹⁷⁰ Justices Brennan and Marshall, dissenting, argued that the majority was allowing the undue dilution of judicial authority in service of legislative convenience.

any state-law claim that is closely related to a federal issue within their jurisdiction.

In both Thomas and Schor the Court associated coercion with inherent judicial power. That casts some doubt on strictly nonconsensual arbitration, for example in regulatory enforcement. Nevertheless, the Court's characterization of FIFRA registrations as "voluntary" may signal its intention to employ a narrow definition of coercion. Therefore, the Court's article III concerns may be satisfied when either participation in the federal program or resort to arbitration has voluntary aspects. The Court sometimes examines consent more closely, however, in cases directly presenting issues about the fairness of arbitration to affected persons.¹⁷¹

Another of the Court's concerns is to honor the original purpose of article III's tenure protections: "to guarantee the independence of adjudication from political pressure emanating from the executive or Congress. In Thomas, the Court remarked that shifting from agency adjudicators to private arbitrators "surely does not diminish the likelihood of impartial decision-making, free from political influence."¹⁷² And in Schor it noted that Congress had placed adjudication in an independent agency, which would be "relatively immune from the 'political winds that sweep Washington.'"¹⁷³ This suggests that arbitration, compared to the alternative of agency adjudication, promotes article III values by increasing the independence of the decider.

Today, it seems unlikely that Congress will run afoul of Northern Pipeline unless no substantial purpose is served other than shifting business out of the federal courts, and the powers of the new tribunal (and, perhaps, the tenure of the deciders) closely approximate those of the courts. In such situations, courts are likely to find interference with their core functions. In contrast, where expeditious process clearly serves non-article III functions, such as ordinary program administration, the courts are not likely to insist that their already heavy caseload be increased. Therefore, arbitration should be safe from a successful article III assault as long as it is confined to specialized subject matter within federal programs that have related executive functions. Indeed, allocating such matters to agencies or arbitrators can free the courts to perform their most important responsibilities.

¹⁷¹ See § III. B. infra.

¹⁷² 105 S.Ct. at 3338.

¹⁷³ 106 S.Ct. at 3250.

B. Nonarbitrable Subject Matter.

Judicial deference to agreements to arbitrate has limits. The Court has held that certain federal statutes confer nonwaivable rights to federal court enforcement. The doctrine stems from Wilko v. Swan,¹⁷⁴ in which the Court refused to enforce an arbitration agreement between a securities customer and a brokerage firm. The Court held that the policies of the Arbitration Act were overridden by a provision in the Securities Act of 1933 forbidding waiver of compliance with the Act's requisites. The Court was concerned that disparities in bargaining power could debase consent to arbitration. Nor did the Court consider judicial review of arbitral awards sufficient to protect the customer's statutory rights, in view of the "manifest disregard of the law" standard used by courts under the Arbitration Act.¹⁷⁵

Wilko thus demonstrates the potential for tension between the contractual values of the Arbitration Act and the paternal values of much regulatory legislation. Not surprisingly, the Court has wavered between these values in subsequent cases.¹⁷⁶ For example, the Court recently enforced an agreement to arbitrate antitrust claims.¹⁷⁷ It was unwilling to assume that arbitration was an inadequate mechanism to resolve public law issues, even in view of the minimal nature of judicial review.

Confusion and inconsistency in this body of case law probably result from the presence of a number of competing considerations. To sort them out, let us consider a prominent recent case. In Alexander v. Gardner-Denver Co.,¹⁷⁸ the Court held that a collective-bargaining agreement to arbitrate discrimination charges did not foreclose resort to a Title VII

¹⁷⁴ 346 U.S. 427 (1953).

¹⁷⁵ 346 U.S. at 436-37.

¹⁷⁶ See generally Fletcher, supra note 126, at 404-20; Kanowitz, supra note 23, at 257-61. Another securities case pends in the Supreme Court. McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir.), cert. granted, 107 S.Ct. 60 (1986)(No. 86-44).

¹⁷⁷ Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346 (1985)

¹⁷⁸ 415 U.S. 36 (1974).

suit.¹⁷⁹ The Court appeared to take a careful approach to consent issues: it suggested that the union's acceptance of arbitration should not be imputed to its individual members for claims of discrimination as opposed to economic issues, for which shared interests would make the union a more reliable proxy.¹⁸⁰ The courts should examine the adequacy of consent in arbitration programs; as in Alexander, they can do so for the general context without delving into the circumstances of each individual referral.

The Alexander Court emphasized that "the resolution of statutory or constitutional issues is a primary responsibility of courts."¹⁸¹ Judge Edwards has suggested that although the elaboration of important public law norms should be left to the federal courts, the application of clearly defined rules of law can safely be left to arbitrators-- indeed, such an allocation of responsibilities might maximize the efficiency of public law.¹⁸² This recognizes that the legal skills required to interpret statutes do not differ sharply from those required to interpret contracts.¹⁸³ Still, there is no bright line between law-making and law-applying-- Alexander noted the broad language of Title VII, suggesting that the application of this norm cannot yet be readily separated from its elaboration. That suggests that courts may countenance arbitration only when it steers well clear of the line.

The Alexander Court thought that the fact-finding process of arbitration was inferior to a trial for the resolution of Title VII claims, but its "reasons" for this conclusion simply described the ways that arbitration usually deviates from trial process.¹⁸⁴ The Court's sense that arbitration may be

¹⁷⁹ See also McDonald v. City of West Branch, 104 S.Ct. 1799 (1984)(unappealed arbitration does not preclude civil rights litigation); Carlisle, supra note 30.

¹⁸⁰ 415 U.S. at 51. Compare Fiss, Against Settlement, 93 Yale L.J. 1073, 1078-82 (1984) (expressing concerns for the adequacy of representation in settlements).

¹⁸¹ 415 U.S. at 57.

¹⁸² Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 680 (1986).

¹⁸³ Devine v. White, 697 F.2d 421, 438-39 (D.C. Cir. 1983) (Edwards, J.). But see Alexander v. Gardner-Denver Co.,

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¹⁸⁴ 415 U.S. at 57-58.

inappropriate for claims related to constitutional rights was sound. In constitutional litigation generally, the Court exercises relatively independent review of the facts found below.¹⁸⁵ Arbitration, though, leaves fact determinations in the hands of the arbitrator and disables intensive fact review.

Perhaps, then, judicial fact-finding should always be preserved for the enforcement of constitutional rights, even when resort to arbitration appears to be truly voluntary. I think such a limitation could sweep too broadly. For example, it might be best to arbitrate some prisoner's grievances instead of flooding the federal courts with their lawsuits. Yet prisoners have proved astute at converting everything into constitutional claims.¹⁸⁶ Thus, although the presence of a colorable constitutional claim identifies situations where courts are likely to treat federal court enforcement as mandatory, no categorical distinction seems appropriate.

The ACUS disfavors voluntary arbitration where precedent is to be set or where maintaining established norms is of "special importance."¹⁸⁷ Under present law, it is difficult to be much more specific than that.¹⁸⁸ A somewhat more adventuresome formulation would authorize arbitration for all law-applying, and might make an exception where constitutional rights are implicated.

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¹⁸³ 415 U.S. 36, 57 (1974): "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."

¹⁸⁵ See generally Monaghan, supra note 57.

¹⁸⁶ E.g., Parratt v. Taylor, 451 U.S. 527 (1981) (negligent loss of a hobby kit as constitutional deprivation of property); overruled, Daniels v. Williams, 106 S. Ct. 662, 665 (1986).

¹⁸⁷ 1 CFR § 305.86-3 B.5.(b). The recommendation on mandatory arbitration contains a similar limitation for precedential effect, and requires an ascertainable norm for decision, but does not explicitly refer to cases involving the need to maintain norms. Id. C.8.

¹⁸⁸ See, e.g., Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238, 1244 (White, J., concurring) (substantial doubt and controversy often surround the waivability of federal court enforcement of particular public rights).

C. Limiting Judicial Review.

Judicial review of arbitration has always been more limited than review of administrative adjudication. Here I consider the minimum level that should be preserved. Thomas suggests that the courts will review at least the facial consistency of an arbitral award with statutory criteria and constitutional norms. The ACUS recommendation aids such review by calling for a brief statement of the basis of an award. Courts could perform these inquiries without straining the criteria of the Arbitration Act and without probing the factual basis of awards, which would destroy the informality that accounts for the virtues of arbitration.

Courts often read statutes that appear to preclude all review to permit constitutional inquiry.¹⁸⁹ In that way, they avoid reaching troubling issues about the power of Congress to insulate administrative action completely. Nevertheless, some functions are unreviewable. Like arbitration programs, these functions often feature broad agency discretion, needs for expertise, informality, and expedition, a large volume of potentially appealable actions, and the presence of other methods of preventing abuses of discretion.¹⁹⁰

In general, the courts seem most likely to reach issues that concern the overall structure and validity of a statutory scheme, rather than its application to particular facts. Thus, the Court recently considered whether arbitration of Medicare claims denies procedural due process.¹⁹¹ A companion case, United States v. Erika, Inc.,¹⁹² found that no judicial review of particular awards was authorized. The Court noted that the preclusion did not extend to initial determinations of entitlement to participate in the Medicare program, but only to the processing of particular claims. So limited, the

¹⁸⁹ E.g., Johnson v. Robison, 415 U.S. 361 (1974); Bartlett v. Bowen, --- F.2d --- (D.C. Cir. March 17, 1987) (limitation on judicial review in Medicare Act does not apply to constitutional challenges to Act).

¹⁹⁰ Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion", 82 Harv. L. Rev. 366 (1968).

¹⁹¹ Schweiker v. McClure, 456 U.S. 188 (1982); see § IV infra.

¹⁹² 456 U.S. 201 (1982).

preclusion prevented "the overloading of the courts with trivial matters."¹⁹³

Since the ACUS does not recommend arbitration for elaborating public law norms, most arbitrations should be free of substantial constitutional issues. Therefore, "retail" review for misconduct and for inconsistency with statutory standards can probably be placed in the agencies. Here the important goal is to have an outside check on the arbitrator's action.¹⁹⁴ If the courts are ordinarily willing to defer to interpretations of statutes by agencies which are administering them, there seems equal reason to defer to an agency that is reviewing an arbitrator.

The ACUS recommendation would allow parties to consent to arbitration under a substantial justice standard. The absence of standards for an arbitrator's decision may trouble the courts, because the check of judicial review would be less effective.¹⁹⁵ In light of the recommended limitations on the use of arbitration, which would exclude it from situations involving the generation of precedent, the maintenance of important public rights, or the presence of third party effects, the recognition of a role for standardless arbitration should be acceptable. No interference with core functions of the courts would occur. The courts have recognized that some decisions cannot be confined by meaningful standards. For example, highly discretionary executive functions are often unreviewable in court.¹⁹⁶

IV. DUE PROCESS.

In Schweiker v. McClure,¹⁹⁷ a unanimous Court upheld the decision of disputed Medicare claims by private insurance carriers, without a right of appeal. The program in question

¹⁹³ 456 U.S. at 210 n.13, quoting the legislative history. The Court did not, however, reach issues concerning any constitutional right to review. Id. at 211 n.14.

¹⁹⁴ Thus, determinations of the arbitrability of particular issues might also be shifted from the courts to the agencies when the government is not a party.

¹⁹⁵ Review for misconduct or corruption of the arbitrator would be available, but not review for excess of authority.

¹⁹⁶ See generally Heckler v. Chaney, 105 S.Ct. 1649 (1985).

¹⁹⁷ 456 U.S. 188 (1982).

is a voluntary one that supplements basic Medicare by covering most of the cost of certain medical services. It is financed by federal appropriations and premiums from participants. As the Court noted, the program resembles subsidized private insurance on a massive scale: 27 million participants, \$10 billion in annual benefits, and 158 million claims in one year.

Congress authorizes HHS to contract with private insurers, such as Blue Cross, to administer claims payments.¹⁹⁸ HHS pays administrative costs and specifies the claims process. The carrier makes an initial determination whether a claim is a reasonable charge for covered services. On denial, the claimant receives a de novo redetermination on a written appeal to a new decider. Disputes over \$100 then receive an oral hearing before a carrier employee not involved in the prior decisions, with a written decision based on the record, but with no further appeal.

The Court began by rejecting a due process charge of bias against the deciders. It could find no financial interest in the carriers or their employees in denying claims. The Court then turned to the argument that due process required additional administrative or judicial review by a government officer. Applying the familiar criteria of Mathews v. Eldridge,¹⁹⁹ the Court assumed that the weight of the private interest was "considerable." The weight of the government's interest in efficiency was unclear, but the Court assumed that providing ALJ review would not be "unduly burdensome." Focusing on the risk of erroneous decision and the value of additional process, the Court stressed HHS requirements that deciders be both qualified to conduct hearings on medical matters and thoroughly familiar with the program and its governing law and policy. The Court perceived

¹⁹⁸ 42 U.S.C. § 1395u.

¹⁹⁹ 424 U.S. 319, 335 (1976): [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

no deficiencies in this, nor any need that deciders be attorneys.

Voluntary arbitration should ordinarily satisfy due process criteria. In general, there is no better guarantee of fairness than a party's consent to a particular procedure, if the alternatives are also acceptable. (Here, the alternative would be ordinary administrative process.) Granted, somewhere there are limits to what we will allow a citizen to bargain away for the benefits of expeditious decision. Those limits should not be tested by the ACUS recommendation, which disfavors arbitration for decision of important public rights.

Consent of a different kind attends some arbitration. As in McClure or Thomas, there is voluntary participation in the federal program, but not assent to arbitral techniques. Here one should be circumspect in relaxing inquiry into procedural fairness. The doctrine of unconstitutional conditions, checked as its history may be, sets limits to the government's power to bargain for rights with benefits.²⁰⁰ Thus, in McClure it was significant that the underlying entitlement to participate in Medicare was not subject to arbitration, unlike the amount of particular claims.

Under the Eldridge formulation, the acceptability of arbitration depends on the importance of the individual's interest in the program's benefits. The ACUS recommends mandatory arbitration only for disputes between private parties, not for claims against the government. Since McClure involves de facto claims on the public purse, the recommendation seems unnecessarily cautious in this respect. It could be reformulated to invoke the Eldridge calculus.

In regard to the accuracy of process and the need for additional safeguards, an important consideration is whether the arbitral scheme gives the parties a role in selecting the decider. Recall Judge Friendly's point that assurances of neutrality reduce the need for other procedural safeguards.²⁰¹ McClure shows that the Court does not regard agency deciders as necessarily more fair or reliable than private ones, as long as indicia of bias or interest are absent and assurances of competency are present.

The fairness of arbitration is in part a function of the specificity of the governing standard. A standard should be specific enough to meet the primary needs of the parties, the arbitrator, and the reviewing entities. The parties need

²⁰⁰ See generally Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984).

²⁰¹ See text at note 71 supra.

enough information to exercise meaningful consent to the use of arbitration and to present their cases. The arbitrators need enough guidance to make awards that will be consistent with each other. The reviewing entities must be able to judge the facial validity of awards. Consider the standard involved in Thomas: arbitrators are to provide "compensation" to pesticide registrants for the use of their data.²⁰² This standard is very unconfining-- for example, does it mean the cost of creating the data or the value to the later registrant?²⁰³ An agency presented with such a vague statutory directive should elaborate it through rulemaking.

In McClure, as in Eldridge, some guarantees of neutrality stem from the functions assigned to the decider. Hearings are meant to be nonadversary. The government is not represented, and the decider is charged with helping the private applicant develop his case.²⁰⁴ In such an atmosphere, any incentive to favor one side probably benefits the claimant, who enjoys direct contact with the decider. The McClure Court mentioned the government's interest in avoiding overpayment of claims only in passing,²⁰⁵ in the context of rejecting a bias claim based on HHS attempts to encourage carriers to detect overpayments. This suggests that agencies should avoid instructions to deciders that seem to promote bias for either side.²⁰⁶

For guarantees of decider competency, the Court seems prepared to accept practical considerations of background and training, without regard to formal affiliation or status. Whether lawyers are needed should depend on the extent to which formal rules of evidence are to be followed, and on the need for other kinds of expertise in the decider. As the Court remarked in the context of upholding the Veterans Administration's \$10 fee limit for lawyers in claims proceedings, which effectively excludes them: "Simple factual questions are capable of resolution in a nonadversarial

²⁰² The Court did not reach a delegation doctrine challenge to the adequacy of this standard. 105 S.Ct. 3339-40.

²⁰³ See Sathon, Inc. v. American Arbitration Ass'n, 20 ERC 2241 (N.D. Ill. 1984) (challenge to delegation not reached); PPG Industries, Inc. v. Stauffer Chemical Co., 637 F. Supp. 85 (D.D.C. 1986) (upholding the standard).

²⁰⁴ 456 U.S. at 197 n. 11.

²⁰⁵ 456 U.S. at 196 n. 9.

²⁰⁶ See text at note 127 supra.

context, and it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment."²⁰⁷

Under any particular program, the appropriateness of the arbitral process supplied depends on the nature of the participants and the issues. For example, in Gray Panthers v. Schweiker,²⁰⁸ the court held that the Medicare procedure for claims under \$100 failed to satisfy due process in two respects. First, notice of procedural options needed to be adapted to the capacities of elderly and infirm claimants. Second, oral hearings were necessary for claims involving issues of credibility. Still, the court emphasized that process can be geared to "the generality of cases, not the rare exceptions."²⁰⁹ Therefore, if credibility disputes were rare, overall process would not need to be geared to them.

Provision for review by agency or court under the standards of the Arbitration Act is another check on the accuracy of arbitrations. It focuses on the two most important ways in which arbitration can go awry-- loss of neutrality in the decider, and an award exceeding the bounds of the ex ante expectations of the parties. And it would be difficult to provide added checks without radically formalizing the process.

The strength of the government's interest in informality varies. For example, it is large in high-volume, small-dollar contexts such as Medicare. In all the situations that fall within the ACUS recommendation, fact questions predominate. If expeditious process is available here, more resources will be left for the formal process needed for resolution of policy or formation of precedent. Insofar as the government's fiscal interest involves payment of awards as well as provision of process, however, the government's advantage is not a simple matter of minimizing procedural costs. Instead, the government should seek process that optimally balances accuracy and cost. And as Eldridge emphasizes, this choice deserves deference.

²⁰⁷ Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3194 (1985).

²⁰⁸ 716 F.2d 23 (D.C. Cir. 1983).

²⁰⁹ Id. at 36, quoting Eldridge, 424 U.S. at 344.