Alternative Dispute Resolution and the Public Interest: The Arbitration Experience

Leo Kanowitz
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By

LEO KANOWITZ*

I. Introduction

In recent years, the legal profession has become increasingly enchanted with nonjudicial dispute resolution mechanisms: negotiation, conciliation, mediation, fact-finding, mini-trials, settlement, rent-a-judge, and arbitration, among others. Although most, if not all, of these devices have been with us for a long time, they have recently been applied in innovative ways to new types of cases and have generated widespread enthusiasm among lawyers, judges, legislators, and members of the general public. The enthusiasm is not universally shared, however. Professor Owen Fiss of the Yale University School of Law is a major critic of the alternative dispute resolution (ADR) movement. Although the principal target of his 1984 article, Against Settlement, is, as its title suggests, settlement itself, the article also decries, albeit less explicitly, all processes that assist, induce, or compel parties to avoid judicial resolution of their legal disputes. Indeed, Professor Fiss appears to treat settlement and ADR as roughly equivalent, or at least intimately related, concepts.  


3. Id. Although there is considerable warrant for equating settlement and ADR as Professor Fiss does, individual ADR devices differ in how they relate to settlement. Conciliation, mediation, and fact-finding, for example, are mechanisms that assist parties to settle their own disputes. Final and binding arbitration, by contrast, represents the imposition of a solution by
Settlement, according to Professor Fiss, is the civil analogue of plea bargaining. Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.4

Professor Fiss' criticism of settlement and ADR appears to rest on three fundamental grounds: (1) his perception of potential conflicts between public and private interests in the private resolution of disputes that are otherwise amenable to judicial resolution;5 (2) his apparent belief in the ability of courts to render more or better justice than can be obtained through private dispute resolution mechanisms; and (3) his view that adjudication has broader purposes than the achievement of peace between the disputing parties.

With his usual eloquence, Professor Fiss states his central thesis as follows:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.6

Although Professor Fiss does not expressly mention arbitration in his critique of ADR, it is clear that it is not excluded from the range of his criticism.7 However, he does not examine any arbitration cases for the light they might shed on his central thesis. The major purpose of this

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4. Fiss, supra note 2, at 1075.
5. Implicit, although not expressed, in Professor Fiss' preference for adjudication over settlement and other nonjudicial dispute resolution mechanisms is the assumption that the disputed matter is capable of judicial resolution. Even with regard to disputes that are not subject to judicial resolution, however, the decision to employ alternative dispute resolution techniques can significantly affect public interests. See infra Sections III, VIII.
6. Fiss, supra note 2, at 1085.
7. In Against Settlement, Professor Fiss specifically mentions "negotiation and mediation prior to suit." Id. at 1073. Although he does not expressly discuss arbitration in his 1984
Article is to examine what courts have said and continue to say about arbitration for the light such statements can shed on the relative capacity of nonjudicial and traditional judicial dispute resolution processes to serve public interests.

As will be more fully discussed below, judicial pronouncements in arbitration cases yield useful insights into the alleged "public interest" shortcomings—and strengths—of all alternative dispute resolution devices. One such insight is that the term "public interest" is open to multiple definitions; its meaning will differ with the context in which, and the purpose for which, it is used. Another is that in determining how disputes should be resolved, public interests need not always transcend private interests; stated differently, and somewhat paradoxically, public interests are often best served by dispute resolution devices which appear to satisfy only the concerns of the disputing parties. Still another is that courts (including the United States Supreme Court) often acknowledge the tension between private and public interests in arbitration cases; they

The methods of ADR do not generate the social power or remedies sometimes needed to deal with a recalcitrant reality. This is obviously the case when the resolution is dependent on the consent of both parties, as in negotiation and mediation, but it is also true with a third-party ADR process like arbitration. The third party envisioned by the ADR is, by definition, not a judge, and therefore, does not have the coercive machinery of the state at his disposal; he does not have the public visibility and respect of a judge; and perhaps most importantly, his judgment is not based on the factual and legal inquiries that typify the exercise of the judicial power.

The third-party methods of ADR that eventuate in a judgment include the presentation of the facts and the law—a trial—but that trial is markedly less thorough and far-reaching than a judicial one. In some cases, it is also less structured or formal. This is obviously so with minitrials or summary jury trials, as the labels imply, but it is also true of more standard third-party ADR methods such as arbitration; that is a principal source of their attractiveness. And although something is gained from the informality and brevity (namely, money), something is also lost; the normative power that is generated by a process that is deliberate and meticulous. . . .

Some of the other methods of ADR aspire to something more than peace. Here I am thinking of arbitration, which seeks not simply to resolve a dispute but to resolve it justly. For that reason there is a greater similarity between arbitration and adjudication than between negotiation or mediation and adjudication, and yet, there is still a gap. Arbitration, like all the ADR methods, is essentially private in its structure and its aims, and thus cannot be understood as a full substitute for adjudication. The arbitrator is chosen and paid for by the parties and his jurisdiction is determined by an agreement between the parties. The norms of the arbitrator are either supplied by the parties (for example, in a contract) or are derived from localized practices or custom. And the arbitrator is only to apply or construe the norms; he is not to create new ones.

Fiss, Second-Class Justice, Conn. Law Tribune, Mar. 17, 1986, at 1, 10.
have, however, devised assorted techniques and justifications for favoring one rather than the other in specific situations. Conflicting public policies are often implicated in the use of particular alternative dispute resolution devices. In such cases, courts identify the relevant policies, weigh one against the other, and decide which is to prevail. Finally, neither judicial nor alternative dispute resolution devices (including arbitration) are flawless; each method has strengths and weaknesses and choosing one over another inevitably requires trade-offs, calculations of relative costs and benefits, and a variety of value judgments.

II. The Aim and Purpose of Professor Fiss’ Criticisms

As a preliminary matter one should note that, regardless of whether adjudication actually serves the public interest better than settlement or other forms of alternative dispute resolution, the vast majority of civil and criminal cases are disposed of by settlement rather than by litigation.8 The widespread use of settlement and alternative dispute resolution mechanisms appears, therefore, to respond to a felt need on the part of disputants. Whether their purpose is to avoid the cost, delay, complexity, uncertainty, or anxiety of adjudication, disputants commonly resolve their conflicts in ways other than a full-blown trial. Clearly, there are social as well as personal advantages in avoiding litigation. Were every potentially litigable dispute actually submitted to a full judicial trial, present adjudicatory resources—judges, courthouses, bailiffs, etc.—would have to be augmented exponentially.

To extol the virtues of adjudication over settlement and ADR, as Professor Fiss does, is not likely to have much effect on those who are inclined to avoid trial. It is doubtful, then, that, in arguing against settlement and ADR, Professor Fiss was seeking to change the conduct of disputants or their attorneys. Attempting to do so would have been like arguing against unpleasant but unavoidable natural phenomena, such as death, fire, flood, and pestilence. Rather, despite the general nature of his attack, Professor Fiss’ arguments appear to be addressed to other constituencies.

One apparent target of his remarks was the Advisory Committee on the Federal Rules of Civil Procedure, which in 1983 recommended revision of Rule 68 to increase the penalty against litigants who, though prevailing in court, do not receive awards higher than their opponents’

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8. See National Institute, supra note 1, at 7; Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 27-28 (1983).
settlement offers. The effect of Rule 68's proposed revision would have been to force parties to attempt to settle their legal disputes, rather than permitting them to pursue judicial determination.

Another probable target was the then recent revision of Rule 16 of the Federal Rules of Civil Procedure, which encouraged pretrial consideration of and action on "the possibility of settlement or the use of extra-judicial procedures to resolve the dispute." Even under the earlier version of Rule 16, federal judges had played an increasingly interventionist role in pressuring parties to forego judicial resolution of their disputes and instead to pursue settlement efforts, either through direct negotiations, referral to mediators, or the holding of "summary trials" in which a "jury" is asked to render a nonbinding verdict after hearing a truncated version of each side's evidence and arguments.

Professor Fiss' criticisms could also have been directed at federal and state judges and legislators who, in his opinion, have been seduced by the alleged benefits of settlement and ADR. His article seeks to remind them that before disputants are nudged or compelled into abandoning their right to have their disputes decided by publicly accountable judges, the costs and benefits of alternative devices should be calculated. Indeed, as he notes in his article, "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."

These intended audiences have been influenced to a considerable extent by the criticisms of settlement and ADR. As a result, in their arbitration decisions, they have been increasingly forced to reckon with the insights provided by Professor Fiss and other critics of ADR.

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11. Fiss, supra note 2, at 1073, 1075. As indicated earlier, Professor Fiss maintains similar views about other forms of ADR. See supra note 7.
12. See, e.g., Stroh Container Co. v. Delphi Indus., 783 F.2d 743 (8th Cir. 1986). In upholding an arbitration award in favor of a wholesaler against a brewer, the court noted:

Counsel for Schlitz has suggested to us that if the appellate courts are in effect unwilling to provide the same review of an arbitration proceeding as is given to a judgment of a district court, that commercial arbitration will cease and the courts will be further inundated with more litigation. Such threats should scare no one. Certainly it should not intimidate the federal judiciary who presently are doing all they can humanly do to maintain the judicial process as expeditious and just. Such comments need to be made, however, for parties to the arbitration process to realize that it is not the most perfect alternative to adjudication. The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law. The mere fact that arbitration is deemed highly successful in labor disputes overlooks the rea-
III. Disputes that Are not Amenable to Judicial Resolution: "Interests" Disputes vs. "Rights" Disputes

Professor Fiss and others who assert that courts serve public interests better than do private dispute mechanisms generally focus on existing, legal disputes. It is important to recall, however, that many disputes are not prone to judicial resolution. For example, Article III of the United States Constitution limits the federal judicial power to certain "Cases" or "Controversies," and federal courts will not entertain suits involving "political questions," or render "advisory opinions."

Among other things, the latter prohibition means that federal courts lack jurisdiction if a difference of opinion between parties has not ripened into a live controversy or has become moot. Similarly, federal courts will

son for its legitimacy: that it substitutes for labor's right to strike in a quid pro quo exchange with management. No one ever deemed arbitration successful in labor conflicts because of its superior brand of justice.

We write this response not to denigrate the use of arbitration in commercial transactions. We write only to provide notice that where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication. Professor Owen Fiss provides the realism overlooked by many when he writes:

Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini-trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason. What we need at the moment is not another assault on this form of public power, whether from the periphery or the center, or whether inspired by religion or politics, but a renewed appreciation of all that it promises.

Id. at 751 n.12 (quoting Fiss, Out of Eden, 94 YALE L.J. 1669, 1673 (1985)).

13. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.


15. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

refuse to entertain a suit by a person who lacks "standing" to complain of the defendant's alleged conduct. Although not bound by Article III, state courts often observe similar standards.

For related reasons, "interests" disputes, as opposed to "rights" disputes, are also not amenable to judicial resolution in either state or federal courts. The distinction between interests disputes and rights disputes is similar to the difference between "interests" and "rights" arbitration, which I have described elsewhere as follows:

In "interests" arbitration, the parties do not claim rights under an existing contract or law; instead, they seek to establish the terms of a contract, have reached an impasse in their efforts to do so, and either voluntarily or, in some cases, under compulsion of law, resort to a third-party arbitrator to, in effect, fill in those terms for them. By contrast, in "rights" arbitration, one or both parties are relying upon the terms of an existing contract between them, or upon "rights" conferred by law. Because a disagreement has arisen concerning the interpretation or application of those contractual terms, or whether other legally conferred rights have been violated, resort may be had to a third-party arbitrator who, normally, is authorized to render a final and binding determination of the dispute.

Thus, if A offers B $100,000 for B's house, but B refuses to sell unless A agrees to pay $150,000, a dispute exists between A and B. No court, however, would venture to determine the appropriate price for the

In Brown v. Oregon State Bar, 293 Or. 446, 648 P.2d 1289 (1982), the Oregon Supreme Court stated:

Id. at 449, 648 P.2d at 1292 (citations omitted) (emphasis added).

Some state constitutions, however, do authorize the rendition of advisory opinions to designated state bodies and officials. See, e.g., ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. II; N.H. CONST. pt. 2, art. LXXIV.

20. L. Kanowitz, supra note 1, at 39.
property. The A-B conflict is a prototypical "interests" dispute, in which
the parties are trying to establish a legal relationship.

By contrast, if, having complied with all legal requirements, A and B
had previously agreed that A would pay $150,000 for the property, but A
now insists that he will pay only $100,000, a court would ordinarily en-
tertain the case if B sued for specific performance or damages. In such a
case, B would be asserting his rights under a contract, rights expressly
protected by statute or the common law. Because this is a "rights" dis-
pute, judicial resolution would be possible, absent other impediments to
judicial jurisdiction.21

A preliminary question, then, is whether the tension between public
and private interests can be meaningfully addressed in interests disputes.
Because such disputes are nonjusticiable, the choice is clearly not be-
tween nonjudicial and judicial resolution. Nevertheless, public interests
can play a significant role even in such situations.

Among other areas, this principle can be observed in federal and
state labor relations statutes which require employers and unions repre-
senting majorities of their employees in appropriate bargaining units to
bargain in good faith over wages, hours, and other terms and conditions
of employment.22 While such statutes do not compel particular resolu-
tions of underlying disputes,23 or even require that they be resolved at all,
they impose a positive, legally enforceable bargaining duty upon the par-

21. Another type of "rights" dispute which superficially resembles an "interests" dispute
can sometimes be seen in condemnation cases: Suppose the city in which B's house is located
decides to acquire the property for a public purpose. The city offers B $100,000 for it, but B
insists that he will not accept less than $150,000. The city then exercises its power of eminent
domain and brings an action to condemn the property. The court must, among other things,
determine the true market value of the property. At first blush, it appears that the parties have
merely reached an impasse in negotiating a purchase price for the property (a pure "interests"
dispute). Upon closer examination, however, the "rights" nature of this dispute becomes ap-
parent. Here, although price is in dispute, the more fundamental issues ultimately derive from
"rights" under the fifth amendment's prohibition against a governmental "taking" without just
compensation.

23. See, e.g., id. § 8(d), 29 U.S.C. § 158(d), which provides:

For the purposes of this section, to bargain collectively is the performance of the
mutual obligation of the employer and the representative of the employees to meet at
reasonable times and confer in good faith with respect to wages, hours, and other
terms and conditions of employment, or the negotiation of an agreement, or any
question arising thereunder, and the execution of a written contract incorporating
any agreement reached if requested by either party, but such obligation does not
compel either party to agree to a proposal or require the making of a concession.
Id.; see also NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 405 (1952) (NLRB may not
compel concessions or otherwise adjudicate substantive terms of collective-bargaining
agreements.).
ties. In contrast to the contemplated sale of B's property, described above, where neither A nor B would violate any law by refusing to negotiate about it, an employer or a union that violated its statutory bargaining duty would incur legal sanctions.\textsuperscript{24}

The availability of legal sanctions against employers or unions who violate a legally imposed bargaining duty (i.e., a duty to try to settle a dispute) reflects important public interests. Under the National Labor Relations Act (NLRA), for example, an obvious interest is that of equalizing the bargaining power between individual employees and their employers, in order to protect employees' purchasing power and thus strengthen the national economy.\textsuperscript{25} The NLRA also preserves unobstructed channels of interstate commerce by remedying the former absence of a legally enforceable bargaining duty, an absence that had led to disruptive strikes.\textsuperscript{26}

To be sure, the Congress that enacted and amended the NLRA did so pursuant to what Professor Fiss describes, when referring to courts, as "a power that has been defined and conferred by public law, not by private agreement."\textsuperscript{27} In this respect, the bargaining duty imposed by the NLRA reflects values that have been formulated by public officials,

\textsuperscript{24} The duty to bargain in good faith may require an employer to furnish a union with information about its finances when the employer pleads an inability to meet the union's bargaining demands. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956). Further, an employer will be held to have committed a per se refusal to bargain by unilaterally changing a term or condition of employment that is a mandatory bargaining subject. NLRB v. Katz, 369 U.S. 736, 738-39 (1962).

\textsuperscript{25} See, e.g., N.L.R.A. § 1, 29 U.S.C. § 151 (1982), entitled "Findings and Policies," which states:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

\textsuperscript{26} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43 (1936).

\textsuperscript{27} See supra text accompanying note 6. In the Labor Management Relations Act (LMRA), Congress also encouraged, without requiring, private resolution of "rights" or "grievance" disputes. Section 203(d) of the LMRA, 29 U.S.C. § 173(d) (1982), provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." By contrast, under the Railway Labor Act, 45 U.S.C. §§ 151-181 (1982), "minor" disputes (i.e., "rights" or "grievance" disputes), as opposed to "major" disputes (i.e., "interests" disputes) must be arbitrated if arbitration is requested by any party to the dispute. Id. § 153. See Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 33-35 (1957).
rather than private parties. Moreover, it is significant that the choice Congress faced in enacting the NLRA was not between negotiation and adjudication, but rather between negotiation and what might be called the "right" not to negotiate.

Protection of the right not to negotiate, however, risks engendering socially destructive economic warfare: strikes, boycotts, and lockouts. Although these weapons are normally available to unions and employers, they are less likely to be employed if good faith negotiations are in progress. With or without the assistance of third parties, negotiations, after all, hold out a possibility that the parties' underlying dispute can somehow be resolved. On the other hand, unions, employers, and employees who resort to economic weapons can themselves incur major financial and other harm as a result of such activities. An employer who locks out employees to pressure them to accept the employer's bargaining position risks the permanent loss of customers who will take their business to other employers during the lockout, not to speak of the loss of profits caused by the production interruption. Striking employees suffer immediate wage losses, which are not likely to be offset by strike benefits or future overtime work opportunities. Unions may lose members if a strike does not succeed. In the light of the potential for such drastic consequences to those who resort to economic weapons in an effort to prevail in an employer-employee dispute, the conclusion is inescapable that the NLRA's imposition upon covered employers and unions of a duty to attempt to settle their dispute reduces the number and scope of

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28. Constitutional principles may be violated when a legislature imposes a duty to adopt an "alternative" dispute resolution device that is not intended to be a substitute for adjudication. Dearborn Fire Fighters Union Local 412 v. City of Dearborn, 394 Mich. 229, 254-58, 231 N.W.2d 226, 234-36 (1975). In Dearborn, two of the four members of the Michigan Supreme Court who heard the case held that a state statute providing for compulsory arbitration of police and fire department labor "interest" disputes represented an unconstitutional delegation of legislative-political power to private, politically unaccountable decision-makers. Id. at 241-42, 231 N.W.2d at 228. Accord Salt Lake City v. International Ass'n of Firefighters Local 1645, 563 P.2d 786, 790 (Utah 1977). Contra Harney v. Russo, 435 Pa. 183, 192, 255 A.2d 560, 564 (1969); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 112-13, 256 A.2d 206, 208-09 (1969); State v. City of Laramie, 437 P.2d 295, 301-02 (Wyo. 1968). Dearborn is examined in greater detail in Section VIII of this Article.

29. However, under NLRA § 8(d), no party to an existing collective-bargaining contract may terminate or modify the contract unless it notifies the other party in writing 60 days before its expiration date or, if the contract contains no expiration date, 60 days before the date of the proposed termination or modification. Section 8(d)(4) also requires that the party desiring termination or modification must continue to observe "in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." 29 U.S.C. § 158(d) (1982).
socially disruptive economic disturbances—disturbances that would not only affect the immediate parties but that could have a profound impact on the well-being of the nation, or at least a local or state community. In other words, although such quarrels may involve only a limited number of immediate participants, they can drastically affect larger public interests.

These principles bear on the public versus private interest dichotomy in which the choice, at least in part, is between settlement (or other forms of ADR) and adjudication. The fact is that, despite the pendency of a judicial proceeding, disputing parties can inflict extra-judicial harm on one another in many situations—not necessarily to influence the outcome of their quarrel, but as an extension of their conflict. The infliction of that harm can strongly implicate public interests.

In a marriage dissolution proceeding, for example, how a court resolves a dispute over the custody of a minor child can have important consequences not only for the parents and the child, but for society at large. A parent, disgruntled at the outcome of a custody issue, can direct his or her displeasure at the child in ways that are difficult to detect, but which can cause the child to suffer in its development, and eventually to engage in behavior that could injure large numbers of other people. If a conciliated or mediated settlement of the custody issue, approved by a court, produces greater post-marital harmony between the former spouses and between them and the child or children who were the objects of the custody dispute—as the proponents of such settlements suggest—are not public interests better served than if the matter had been determined solely by a court?

In an intercorporate dispute over an alleged patent infringement, does not society benefit from a negotiated settlement, whether resulting from face-to-face negotiations, mediation, or a mini-trial, in ways that it would not if the matter were fully litigated? Do not negotiated settlements free corporate managers from the distractions of pending law suits, so they can devote their full energies to the management of the enterprise, presumably for the benefit of shareholders, employees, and the general public?

Examples can be multiplied. The point is that, just as in “interests”

30. Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1936).
disputes, where a policy favoring negotiated settlements can be seen to bestow important public benefits, similar policies with respect to "rights" disputes can often yield similar benefits to the general public while serving the private interests of the disputing parties.

IV. Public vs. Private Interests in Arbitration

In arbitration cases, the tension between public and private interests can arise in different contexts. One is in deciding whether disputing parties should be allowed to submit their legal disputes to private arbitrators in the first place. Despite the current hospitable attitude of courts and legislatures toward arbitration, courts will customarily ask whether something about the parties' particular dispute cautions against permitting them to choose private rather than public adjudicators; that is, would allowing them such a choice be consistent with public policy?

Public policy issues also arise in the context of judicial review of arbitration awards. The Federal Arbitration Act (FAA) and state arbitration statutes generally describe only narrow, technical grounds for judicial refusal to enforce arbitration awards. Nevertheless, in many situations courts deny enforcement or vacate an award because, in the court's view, the award violates one or another important public policy. The public policy issues in this context can assume diverse forms. Should the award be vacated because the arbitrator has granted a remedy, such as punitive damages, that public policy declares is beyond the power of arbitrators to award? Has the arbitrator manifestly disregarded applicable legal doctrine? Did the arbitration hearing comply with statutorily prescribed standards? Did a union, which represented


For a discussion of the possible creation of a federal interpretation of the FAA that would permit arbitrators to award punitive damages, and which would be binding on state courts in cases covered by the FAA, see infra text accompanying notes 92-96.

34. See, e.g., Wilko v. Swan, 346 U.S. 427, 436-37 (1953); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214-16 (2d Cir. 1972) (arbitration awards will be set aside only for "manifest disregard" of legal standards, and not for mere mistaken interpretation of law).
a grievant in arbitration, violate its duty of fair representation by excluding the grievant from the hearing?36

Public interest considerations can also arise in deciding what, if any, preclusive effect a court is to accord an arbitration award that is pleaded in a subsequent statutory or common-law cause of action based upon the same underlying facts as those involved in the arbitration proceeding. For example, if a purchaser of securities unsuccessfully arbitrates a state law claim that she has been defrauded by the seller, would—or should—the purchaser be bound in a subsequent judicial proceeding by the arbitrator's earlier fact determinations?37 If a collective bargaining agreement prohibits an employer from discriminating against its employees on racial grounds, what effect, if any, should an arbitrator's ruling that the employee was discharged solely for malperformance have on the employee's right to seek a judicial remedy under Title VII of the 1964 Civil Rights Act for race-based employment discrimination?38

The diverse settings in which public interest considerations can enter into the arbitral process give courts great flexibility in resolving conflicts between private and public interests. In weighing public versus private interests, courts can and have accorded separate treatment to various phases of the arbitration process. Courts can, for example, decide that public policy would be violated if a particular type of dispute were arbitrated. They can also decide that, although no public policy reasons prevent the arbitration of a particular issue, the resulting award violates one or more public policies. In such situations, if a court has lingering doubts about its conclusion that a subject was arbitrable, it can ensure that public interest considerations are not slighted by subjecting the award to a heightened level of judicial review.39 It is also possible for a court to say or imply that the public interest is well served by allowing a particular case to be arbitrated in the first place, as well as by enforcing the award, but to hold that other public interests may require that the award not preclude judicial proceedings based on similar facts.

A. Historical Judicial Antagonism Towards Arbitration

Agreements to arbitrate future disputes historically have met with

judicial hostility. In the past, although courts generally enforced arbitrators' awards, they refused to grant specific enforcement of executory agreements to arbitrate future disputes, or to stay judicial proceedings that were instituted in breach of such agreements. While many of the reasons advanced by judges for these policies have been harshly criticized, some may have been less irrational and more principled than we have been led to believe. For example, courts often invoked what some have regarded as a meaningless justification that disputing parties could not be permitted to "oust" the courts of their jurisdiction. At first blush, this reason appears to conflict with those same courts' willingness to enforce awards once they had been rendered. It is not unreasonable to suggest, however, that the oft-repeated admonition against permitting disputants to oust the courts of their jurisdiction represented a shorthand, if somewhat unrefined, expression of the kinds of concerns expressed by Professor Fiss—namely, that settlement and ADR prevent judges from performing their duty to interpret and implement the values embodied in constitutions, statutes, and other authoritative texts.

40. The history of, rationale for, and commentary on this hostility are thoroughly examined in Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942).
41. Id. at 982-84.
42. United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1009 (S.D.N.Y. 1915). Lord Campbell explained the hostility of the English courts to arbitration as follows:

The doctrine had its origin in the interests of the judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salaries, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil. And they had great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into Kings Bench, nor the Common Pleas, nor the Exchequer. Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so. That really grew up only subsequently to the time of Lord Coke, and a saying of his was the foundation of the doctrine.

Scott v. Avery, 25 L.J.Ex. 308, 313 (H.L. 1856), quoted in Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 n.14 (2d Cir. 1942). Commenting on Lord Campbell's explanation, the Second Circuit noted: "Indignation has been voiced at this supposition; perhaps it is unwarranted. Perhaps the true explanation is the hypnotic power of the phrase 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark." Kulukundis, 126 F.2d at 983-84 (footnotes omitted).
43. Fiss, supra note 2, at 1085. The willingness of earlier courts to enforce covenants not to sue, while refusing to enforce executory arbitration agreements, does not contradict the hypothesis advanced in the text. A covenant not to sue has been defined as "a covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action." Pacific States Lumber Co. v. Bargar, 10 F.2d 335, 337 (9th Cir. 1926). Because the right of action already exists, judicial recognition of a covenant not to sue is functionally similar to recognition of an arbitration award. Moreover, it is one thing for courts to say that a person may waive whatever rights he or she has against
The distinction between enforcement of executory agreements to arbitrate future disputes and enforcement of arbitration awards may also have been more logical than earlier critics suggested. Analogous distinctions have been drawn by contemporary courts even under modern arbitration statutes which specifically validate agreements to arbitrate future disputes. For example, in Wilko v. Swan, a customer sued a securities brokerage firm for damages under section 12(2) of the Securities Act of 1933. The firm and the customer had agreed to refer future disputes to arbitration, and the Federal Arbitration Act provided that such an agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA also required a federal court to stay a suit or judicial proceeding upon the application of a party if the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under" a written agreement. Notwithstanding the FAA, the Supreme Court held that the agreement to arbitrate violated the policy expressed in section 14 of the Securities Act. That policy declared void "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act. The provisions that the Wilko Court believed had been waived by the arbitration agreement included section 12(2) itself, which created "a special right to recover for misrepresentation which differ[ed] substantially from the common-law action," as well as section 22, which allowed suit in any state or federal court of competent jurisdiction and provided for nationwide service of process. Because the agreement to arbitrate contravened the policies of the Securities Act, the Court held that the firm's motion to stay the trial should have been denied, notwithstanding the FAA's provision requiring a stay.

The Court's refusal to honor the arbitration agreement in Wilko did not mean, however, that it would not have honored an arbitration award had the plaintiff pursued arbitration in compliance with the agreement. The Court stressed that "[b]y the terms of the agreement to arbitrate, petitioner is restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require petitioner to sue,

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44. 346 U.S. 427 (1953).
47. Id. § 3.
49. Id. at 431-33 (citing 15 U.S.C. §§ 77l(2), 77v(a)).
a waiver in advance of a controversy stands upon a different footing. 50
In a brief concurring opinion, Justice Jackson expressly suggested that
present, as opposed to future, Securities Act controversies were
arbitrable. 51

In light of the distinction between existing and future controversies,
courts in subsequent cases have upheld arbitration awards encompassing
claims that were otherwise covered by the Securities Acts 52 by distin-
guishing a postcontroversy submission from the precontroversy waiver in
Wilko. 53 Thus, not unlike their eighteenth- and nineteenth-century
counterparts, even modern courts armed with the insights of contempo-
rary arbitration statutes often distinguish between honoring executory
agreements to arbitrate future disputes and enforcing arbitration awards
determining disputes that arose prior to their submission. 54

The former judicial hostility toward arbitration reflected quality-of-
justice concerns that resemble those expressed in Professor Fiss' current
criticism of settlement and ADR. 55 Thus, in 1845, Judge Story offered,
among other arguments, the observation that

arbitrators, at the common law, possess no authority whatsoever, even
to administer an oath, or to compel the attendance of witnesses. They
cannot compel the production of documents, and papers and books of
account, or insist upon a discovery of facts from the parties under
oath. They are not ordinarily well enough acquainted with the prin-
ciples of law or equity, to administer either effectually, in complicated
cases; and hence it has often been said, that the judgment of arbitrators
is but rusticum judicium. Ought then a court of equity to compel a
resort to such a tribunal, by which, however honest and intelligent, it
can in no case be clear that the real legal or equitable rights of the
parties can be fully ascertained or perfectly protected? 56

Here, too, modern courts recognize the potential "rough justice"

50. Id. at 438.
51. Id. at 438-39 (Jackson, J., concurring).
52. For a discussion of possible differences in treating arbitrability of claims based on the
Securities Act of 1933 and those based on the Securities Exchange Act of 1934, see infra note
68 and accompanying text.
53. See Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 245-46 (3d Cir. 1968);
54. In both the commercial and labor areas, courts tend to defer to arbitration awards.
Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969). Nevertheless, statu-
tory and nonstatutory standards for judicial review of arbitration awards provide a vehicle for
public officials to protect the public interest against private awards that slight it.
55. E.g., Fiss, supra note 2, at 1082-83 (Pre-judicial resolution does not provide an ade-
quate basis for subsequent judicial involvement in the controversy, and "findings of fact" and
"conclusions of law" in a nonjudicial resolution may represent "the product of a bargain
between the parties rather than of a trial and an independent judicial judgment.").
quality of the arbitral process. In *McDonald v. City of West Branch*,\(^{57}\) which involved an action under 42 U.S.C. section 1983, the Supreme Court refused to give collateral estoppel or res judicata effect to a prior arbitration award, declaring:

> [A]rbitral factfinding is generally not equivalent to judicial factfinding. As we explained in *Gardner-Denver*, "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."\(^{58}\)

In sum, the reasons underlying Professor Fiss' denunciation of settlement and ADR echo not only those voiced in arbitration cases of an earlier era, but also those expressed in the opinions of modern judges in contemporary arbitration cases. As exemplified in *McDonald* and the cases cited therein, courts have recognized, and continue to recognize, that the specific alternative dispute resolution device called "arbitration" may be inferior to traditional judicial dispute resolution in the quality of justice it accords to individual disputants as well as in its ability to protect public interests.

B. Legislative Encouragement of Arbitration

Despite its perceived shortcomings, arbitration is capable of serving many important interests, both public and private. For the parties, it is usually a much speedier process than judicial dispute resolution. Not only can private interests be more readily vindicated, but the quicker resolution of disputes reduces the threats to the public peace and safety that long-festering private quarrels can generate. Arbitration is also usually much less expensive than judicial dispute resolution, thereby freeing the parties' financial resources for other, more socially productive purposes. By diverting cases from the regular judicial system, arbitration also facilitates the efficient performance of the judicial function in other cases. In addition, by allowing the parties to choose who will decide their dispute, rather than having that choice imposed upon them by governmental authority, arbitration offers two other benefits: the likelihood that the dispute resolvers will know more about the disputed subject than ordinary judges or juries; and the probability that the parties will be more comfortable with the ultimate outcome, regardless of who wins or loses.

In recognition of some or all of these factors, the arbitration situa-

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tion has changed dramatically. Starting with the New York Arbitration Act of 1920, and followed by the United States Arbitration Act of 1925 (also known as the Federal Arbitration Act) and extensive state enactments of the Uniform Arbitration Act, Congress and most state legislatures have essentially repudiated the traditional judicial hostility toward arbitration. Under these statutes, agreements to arbitrate, with some exceptions, are now valid, irrevocable, and enforceable. Thus, the arbitration statutes honor parties' agreements to entrust the resolution of their disputes to nonpublic neutral parties. Nevertheless, in response to the apprehensions expressed by Professor Fiss, it can be said that, in each of these statutes, the fundamental decision to honor the private agreements has been made by publicly elected and politically accountable legislators.

It is significant, moreover, that despite the persistence of shortcomings in the arbitration process, courts frequently refer to the "public

59. Modern statutes have not entirely eliminated arbitration's procedural shortcomings. Discovery rights in arbitration, for example, are generally limited to the "taking of depositions of witnesses who cannot be subpoenaed or who are unable to attend the hearing." United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 117, 597 P.2d 290, 302 (1979). In arbitrations of disputes under collective-bargaining agreements between parties covered by the NLRA, the good-faith bargaining duty imposed upon employers and unions provides a broader, but still extremely limited, range of discovery. See, e.g., NLRB v. Acme Indus. Co., 385 U.S. 432, 435-37 (1967).

Evidence rules in arbitration remain highly informal. Section 10(c) of the Federal Arbitration Act, 9 U.S.C. § 10(c) (1982), provides that an award may be vacated "[w]here the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." No similar sanction is provided for cases in which arbitrators have received prejudicial evidence that was neither pertinent nor material to the controversy.

Although they are often required to interpret legal doctrines that affect contracts, see, e.g., Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 35 Cal.3d 312, 317 n.2, 673 P.2d 251, 253 n.2, 197 Cal. Rptr. 581, 583 n.2 (1983), or that have been incorporated into contracts, arbitrators need not be trained in the law. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), Justice Black observed that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so.

Id. at 407 (Black, J., dissenting).

In Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), the Supreme Court noted other infirmities in the arbitration process:

Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . .

Id. at 203 (citing Wilko v. Swan, 346 U.S. 427, 435-438 (1953)).
interest” in nonjudicial dispute resolution when applying modern arbitration statutes. In the labor field, for example, the Supreme Court has recognized arbitration as playing a “‘central role . . . in effectuating national labor policy’ and preventing industrial strife.” In a case arising under the Railway Labor Act, the Court stated:

The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, . . . enforce statutes commanding performance of arbitration agreements.

Similar statements appear in many commercial arbitration cases. To cite only one example, in Sauer-Getriebe KG v. White Hydraulics, Inc., the Seventh Circuit stated: “[T]he public interest is served by granting this injunctive relief because there is a strong policy in favor of carrying out commercial arbitration when a contract contains an arbitration clause. Arbitration lightens courts’ workloads, and it usually results in a speedier resolution of controversies.

V. Resolving Conflicts Between Opposing Public Interests

Despite the strong proarbitration policies of the Federal Arbitration Act and similar state statutes, courts have often grappled with the question of whether other statutory or judicially recognized public policies absolve parties who willingly agree to arbitrate future disputes (or even existing disputes) of their commitment. For example, in Wilko v. Swan, the Supreme Court held that, despite the arbitration agreement, suit could be brought to redress an alleged violation of section 12(2) of

64. Id. at 352. Although the goals of reducing courts’ workloads and promoting speedier conflict resolution ignore Professor Fiss’ concerns about the purpose of adjudication, they nevertheless reflect other public interests that should be weighed in particular cases.
65. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

the Securities Act of 1933. In effect, the Court weighed the strong pro-arbitration policy of the FAA against the strong policy favoring judicial resolution of disputes expressed in section 12(2) of the Securities Act. At least with respect to agreements to arbitrate future controversies, the Court concluded that the Securities Act's prohibition against waiving its provisions indicated Congress' intention that the prohibition should outweigh the policy of the FAA under the circumstances of that case.

In *Wilko* the Court's choice was relatively straightforward. Two conflicting public policies or interests, each defined by Congress, had to be reconciled. One strongly favored arbitration of commercial disputes; the other strongly favored protection of special benefits conferred upon securities buyers, including the right to judicial dispute resolution.

In some cases, however, public interests that appear to conflict can be reconciled by finding that they do not conflict at all. Thus, even in *Wilko*, the Court stressed that the arbitration agreement covered future controversies, intimating that arbitration of an existing Securities Act dispute would not constitute the kind of waiver of Securities Act provisions envisioned by section 14 of the Act. Justice Jackson expressly endorsed this view in his concurring opinion, and lower courts have since taken a similar position. In effect, the Court in *Wilko* read the public policy expressed in section 14 of the Securities Act as protecting only the right not to bind oneself to arbitrate a dispute before it has arisen. If, when confronting an actual controversy, a securities buyer willingly agrees to submit that dispute to arbitration, the policy of the Securities Act would not, according to the Court, be violated.

A. Conflicting Policies in Securities Cases After *Wilko*

Although there is considerable overlap between the Securities Act of 1933 and the Securities and Exchange Act of 1934, they are marked by certain procedural differences, among others. Because of these differ-

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The principle that emerges from the cases evaluating the validity of arbitration clauses is that, while a waiver *in futuro* will not be permitted under *Wilko*, an agreement to arbitrate an existing dispute made when a party has full knowledge of the facts therein will be excepted from the *Wilko* doctrine.

*Id.* ¶ 98,449.

68. The Securities Act of 1933, 15 U.S.C. §§ 78a-78kk (1982), has been described in general terms as requiring "the registration of securities publicly offered by a company or persons controlling a company, and the use of a prospectus in connection with such public offering. The Securities Act also regulates fraud in connection with the sale of securities." H. BLOOMENTHAL, SECURITIES LAW HANDBOOK 15 (1984). By contrast, in addition to a number of other important requirements, the Securities Exchange Act of 1934, 15 U.S.C. §§ 77a-77bbbb
ences, the Supreme Court in Scherk v. Alberto-Culver Co.\(^6^9\) and Dean Witter Reynolds, Inc. v. Byrd\(^7^0\) expressed reservations about the applicability of Wilko’s reasoning to the 1934 Act. As noted in Justice White’s concurring opinion in Byrd:

While § 29 of [the 1934] Act, 15 U.S.C. § 78cc(a), is equivalent to § 14 of the 1933 Act, counterparts of the other two provisions are imperfect or absent altogether. Jurisdiction under the 1934 Act is narrower, being restricted to the federal courts. 15 U.S.C. § 78aa. More important, the cause of action under § 10(b) and Rule 10b-5, involved here, is implied rather than express. . . . The phrase “waive compliance with any provisions of this chapter,” 15 U.S.C. § 78cc(a) (emphasis added), is thus literally inapplicable. Moreover, Wilko’s solicitude for the federal cause of action—the “special right” established by Congress, 346 U.S. at 431—is not necessarily appropriate where the cause of action is judicially implied and not so different from the common law action.\(^7^1\)

In Byrd the Court assumed, but did not decide, that Wilko’s reasoning applied to the 1934 Act—that one could not be bound to an agree-

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69. 417 U.S. 506 (1974); see infra note 78.
71. Id. at 1244 (White, J., concurring). With regard to Justice White’s argument concerning the literal inapplicability of the phrase “any provisions of this chapter,” see Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970); Local 174, Int’l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Lincoln Mills held that § 301(a) of the Labor Management Relations Act, which appeared to be only a jurisdictional statute, authorized the federal courts to fashion a body of federal common law governing the enforcement of collective-bargaining agreements in commerce. 353 U.S. at 451. Lucas Flour held that state courts had to participate in fashioning that federal common law, and that one of its principles was that, despite the absence of a no-strike promise in a collective-bargaining agreement, a union is impliedly bound not to strike over any matter that the contract makes subject to arbitration. 369 U.S. at 105. Finally, in Boys Markets, the Court, looking back at what it had done in Lucas Flour, stated that it had sustained “an award of damages by a state court to an employer for a breach by the union of a no-strike provision in its contract.” 398 U.S. at 243. Thus, if the Court can characterize an implied no-strike provision as a “provision in the contract,” it would not be too difficult for it to conclude that the implied cause of action under § 10 of the Securities Exchange Act of 1934 is “a provision of the law.” This conclusion finds further support in evidence that Congress intended to create a private cause of action for violation of § 10. See H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934). Recently, the United States Courts of Appeals have disagreed on whether customer claims arising from a broker’s alleged violation of § 10(b) of the Securities Exchange Act are arbitrable. Compare Conover v. Dean Witter Reynolds, Inc., 55 U.S.L.W. 2076 (9th Cir. 1986) and Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 55 U.S.L.W. 2114 (3d Cir. 1986) (both holding such claims nonarbitrable) with Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 55 U.S.L.W. 2075 (8th Cir. 1986) (holding them arbitrable). The Supreme Court has recently granted review in Shearson/Am. Express v. McMahon, 788 F.2d 94 (2d Cir. 1986), in which one of the questions presented is: “Are federal district courts barred from enforcing agreements to arbitrate claims arising out of contractual relationships if those claims assert [an] implied right of action under § 10(b) of the 1934 Securities Exchange Act?” 55 U.S.L.W. 3197 (U.S. Oct. 7, 1986) (No. 86-44).
ment to arbitrate a future controversy that was cognizable under the 1934 Act. The Court did decide, however, that otherwise arbitrable state law claims governed by the FAA should neither be stayed nor required to be tried in federal court together with the nonarbitrable federal Securities Act claim—even if the two were "intertwined."73

In reaching its result, the Court engaged in a process that it has frequently employed in resolving apparent conflicts between the public policies expressed in different statutes, namely that of determining a statute's primary purpose. In Byrd, the statute subjected to this process was the FAA itself. The court of appeals had reasoned that the FAA's "goal of speedy and efficient decision-making is thwarted by bifurcated proceedings, and that, given the absence of clear direction on this point, the intent of Congress in passing the Act controls and compels a refusal to compel arbitration [of the state law claims]." Although the Supreme Court noted in response that Congress was not "blind to the potential benefit of the legislation for expedited resolution of disputes," it concluded that "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation."74 In other words, according to the Court, speedy and efficient decision-making is merely an incidental by-product of the FAA, whereas enforcement of agreements to arbitrate is its primary goal. The Court's conclusion on this point is an example of how characterizing a statute's primary purpose can be a vehicle for reconciling apparently conflicting public interests by determining that they do not conflict at all.75

72. "In the District Court, Dean Witter did not seek to compel arbitration of the federal securities claims. Thus, the question whether Wilko applies to § 10(b) and Rule 10b-5 claims is not properly before us." Byrd, 105 S. Ct. at 1240 n.1.

73. Id. at 1241.

74. Id. at 1242 (emphasis added). The court of appeals also relied on the argument that the award disposing of the state law claims could have a collateral estoppel effect on the Securities Act claim. The Supreme Court disposed of this argument by observing that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding. Since preclusion doctrine comfortably plays this role, it follows that neither a stay of the arbitration proceedings, nor a refusal to compel arbitration of state claims is required in order to assure that a precedent arbitration does not impede a subsequent federal-court action. Id. at 1243.

75. In Byrd, the Court relied heavily on the FAA's legislative history for its characterization. See 105 S. Ct. at 1242 n.7; see also 65 CONG. REC. 1931 (1924) (The FAA "creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts."). By contrast, the Supreme Court's recent examination
Byrd also exemplifies another setting in which courts have reconciled seemingly competing public interests in arbitration cases—namely when more than two public policies affect the arbitrability of disputes. In Byrd, the FAA required enforcement of arbitration agreements in commerce. The Court assumed, however, that the policies of the Securities Act of 1933, which sustained Wilko's result, applied to the Securities Exchange Act of 1934, therefore pulling in the opposite direction, against enforcing agreements to arbitrate future disputes. By contrast, the state law claims were clearly covered by the FAA, and no statutory policy outside the FAA exerted an opposite pull. Although the FAA's policy of encouraging expedited dispute resolution arguably disallowed bifurcation of the proceedings when the clearly arbitrable disputes were "inter-twined" with a nonarbitrable dispute, thereby pulling the entire case in the direction of judicial resolution, the Court rejected these arguments, and held, in effect, that the FAA's basic proarbitration policy required the state law claims to be arbitrated, despite the resulting loss of efficiency.

There are many more common examples of cases in which more than two public policies affect the arbitrability of a dispute. Typically, one policy pulls toward allowing arbitration, while a second pulls in the opposite direction. Finally, a third public policy, such as the importance of international comity, can lead a court to retreat toward the original proarbitration direction. Antitrust arbitration cases provide a clear example of the tensions created by such competing policies.

B. Public Policies in Antitrust Arbitration

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*76 is a recent example of the Court finding that an apparently conflicting statutory or common-law public policy does not actually conflict with the proarbitration policy of the FAA. The plaintiff, Mitsubishi, had sought a federal court order requiring the defendant, Soler, to arbitrate a dispute in accordance with a provision of their sales agreement. Soler counterclaimed that Mitsubishi and another party had committed antitrust violations, and sought a mandatory treble damage award under the antitrust laws. The Supreme Court held that the arbitration clause of the Mitsubishi-Soler sales agreement was binding on the parties because it was contained "in an agreement embodying an international transaction."77

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77. Id. at 3349.

of the "primary" purpose of the antitrust law's treble damage remedy did not address the legislative history of that statute. *See infra* Section V.B.
The Mitsubishi Court’s reasoning purported to be essentially based on that of the earlier Scherk case, which reasoned that: (1) arbitration clauses are a species of forum selection clause which, in an international setting, had been approved by the Court in Bremen v. Zapata Off-Shore Co.; (2) the international character of the transaction created the possibility that a foreign litigant who lost in an American court action could obtain a foreign court order enjoining the enforcement of the American judgment; (3) not allowing the matter to be arbitrated abroad risked conveying to the international business and legal communities an impression that the American legal system was preoccupied with "parochial" concerns; and (4) the Convention on the Enforcement of Foreign Arbitral Awards, which Congress had ratified in 1970, indicated Congress’ intention that special deference be paid to foreign arbitral agreements.

In reaching its conclusion, the Court rejected the rationale of American Safety Equipment Corp. v. J.P. McGuire & Co., a 1968 decision of the Second Circuit which had been widely followed by other courts. In that case, which involved an entirely domestic transaction, the Second Circuit held that public policy considerations rendered antitrust claims nonarbitrable. In rejecting this holding in an international context, the Mitsubishi Court first noted “the absence of any explicit support for such an [antitrust] exception in either the Sherman Act or the Federal Arbitration Act.” Thus, unlike the conflict between two federal statutory policies in Wilko, the American Safety rationale for removing antitrust claims from arbitration did not rest on statutory grounds, but stemmed instead from other public policy considerations. The considerations that had been identified by the lower courts were described by the Supreme Court as follows:

First, private parties play a pivotal role in aiding governmental en-

78. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), was the forerunner of both Mitsubishi and Justice White’s concurring opinion in Byrd. Scherk, like Byrd, involved the applicability of the Wilko doctrine to a claim under the Securities Exchange Act of 1934. In Scherk, the Court noted first that "a colorable argument could be made that even the semantic reasoning of the Wilko opinion does not control the case before us," 417 U.S. at 513, for the reasons repeated ten years later in Justice White’s concurring opinion in Byrd. As in Byrd, however, the Scherk Court did not decide the applicability of Wilko. Rather, it merely assumed that "the operative portions of the language of the 1933 Act relied upon in Wilko are contained in the Securities Exchange Act of 1934." Id. at 515. A decision on whether the policy and language of the 1934 Act itself required courts to honor predispute arbitration agreements was rendered unnecessary by the fact that "the contract to purchase the business entities belonging to Scherk was a truly international agreement." Id. That fact, according to the Court, made Wilko "inapposite" to Scherk. Id. at 517.


80. 391 F.2d 821 (2d Cir. 1968).

81. Mitsubishi, 105 S. Ct. at 3355.
force of the antitrust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion against automatic forum determination by contract." Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our law and values." 82

Without ruling on the arbitrability of antitrust disputes in domestic situations, the Mitsubishi majority rejected these underlying justifications for the American Safety doctrine. In its view, the "mere appearance of an antitrust dispute" did not warrant a presumption that an arbitration provision was the result of an adhesion contract. 83 The Court also dismissed the potential complexity of antitrust disputes as a reason for holding them nonarbitrable, noting that even courts that had followed the American Safety rule had "agreed that an undertaking to arbitrate antitrust claims entered into after the dispute arises is acceptable." 84 The Court also declined "to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." 85

Most important was the Court's rejection of what it described as "the core of the American Safety doctrine—the fundamental importance to American democratic capitalism of the regime of the antitrust laws." 86 The court of appeals in Mitsubishi had observed that "[a] claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." 87 The response of the Supreme Court majority to this argument is particularly instructive:

The importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court.

82. Id. at 3357 (citing American Safety, 391 F.2d at 826-27).
83. Id. at 3346.
84. Id. (citing Cobb v. Lewis, 488 F.2d 41, 48 (5th Cir. 1974); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1215 (2d Cir.), cert. denied, 406 U.S. 949 (1972)).
85. Id. at 3358.
86. Id.
87. Id. (quoting American Safety, 391 F.2d at 826).
Notwithstanding its important *incidental* policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act, 15 U.S.C. § 15, and pursued by Soler here by way of its third counterclaim, seeks *primarily* to enable an injured competitor to gain compensation for that injury.\textsuperscript{88}

Although the majority acknowledged that the antitrust treble-damage remedy serves important public interests transcending those of the private plaintiff, it determined that the *primary* purpose of that cause of action is compensatory. In effect, the majority resorted to the familiar device of characterization to conclude that, despite the apparent conflict between private and public interests, Congress really intended private interests to prevail when it created the private treble damage action for antitrust violations.

The Court’s conclusion is difficult to accept, however, when one contemplates the nature of treble damage remedies. To characterize as primarily compensatory a remedy that allows injured plaintiffs to recover greater damages than they have actually suffered defies both logic and history. Treble damage awards, like exemplary damages, are designed to punish and deter wrongdoers from engaging in similar conduct in the future. The ultimate beneficiaries of such punishment and deterrence are third parties—other potential victims of such conduct. Indeed, the *Mitsubishi* majority’s exercise in characterization would have been much more convincing had it concluded that, despite its “incidental” compensatory function, the “primary” purpose of the private treble-damage remedy in antitrust suits was to police the conduct of antitrust violators.

Several problems, underscored in the dissenting opinion of Justice Stevens, joined by Justices Brennan and Marshall, emerge from the *Mitsubishi* decision. In Justice Stevens’ view, a close reading of the FAA indicates that Congress did not intend it to apply to any federal statutory claim, and especially not to one based on such strong public policy factors as the need to maintain free competition in the American marketplace.\textsuperscript{89} For many of the same reasons advanced by Professor Fiss, Justice Stevens asserted that courts rather than privately selected arbitrators are the proper tribunals to decide such claims. Moreover, noted the dissent, the main factor that had justified the *Scherk* result was absent in *Mitsubishi*. In *Scherk*, the parties to the international agreement had faced a potential choice-of-law problem. By contrast, the Court’s deter-

\textsuperscript{88} *Id.* at 3358-59 (emphasis added). Although the Court did not expressly reject American Safety’s holding that, in a domestic situation, parties are not bound by their agreement to arbitrate future antitrust disputes, this discussion of private actions as “incidental” suggests that it will do so in an appropriate case.

\textsuperscript{89} *Id.* at 3364 (Stevens, J., dissenting).
mination in Mitsubishi that the Japanese arbitrators were required to apply the Sherman Act, the same law that would be applied by an American court, removed that element from the case. In addition, the fear of being perceived as "parochial" by insisting upon American court adjudication of American antitrust claims was unwarranted since most industrialized countries, including Japan, have strong antitrust policies. Finally, in Justice Stevens' opinion, the Convention on the Enforcement of Foreign Arbitral Awards explicitly recognizes that a signatory state does not have to enforce an arbitration agreement if it violates a strong public policy of another signatory state whose law is to be applied.90

The central question in Mitsubishi was whether the public interest would be properly served by enforcing an international arbitration agreement that conferred upon foreign arbitrators the right to decide whether a party's conduct had violated American antitrust laws. In addressing this question, the Court first had to identify the relevant public interests. Clearly, the FAA, including the Convention on the Enforcement of Foreign Arbitral Awards, militated in favor of allowing the case to be arbitrated. However, the doctrine of nonarbitrability of antitrust disputes that had been developed by the lower courts in domestic situations argued against allowing the dispute to be arbitrated. In the end, however, the Court determined that "international comity," with all its constituent elements, required it to uphold the arbitrability of this dispute.

One way of describing the process the Court engaged in has already been suggested: the Court determined that apparently conflicting public interests did not conflict at all. Another is to say that the Court, after determining that apparently conflicting public policies conflicted in fact, reconciled the conflict by holding that one public policy (or interest) outweighed the others.

C. Judicial Review of Arbitration and the Public Interest

After assessing the competing policies implicated in the arbitration of antitrust claims, the Mitsubishi Court employed still another technique that deals, albeit imperfectly, with some of the issues raised by Professor Fiss' criticism of settlement and ADR. Specifically, Professor Fiss has argued that nonjudicial dispute resolution "mistakenly assumes judgment to be the end of the process" and therefore fails to provide an adequate foundation for subsequent judicial involvement if the parties continue or renew their dispute.91 The Mitsubishi opinion suggests that

90. Id. at 3371 (Stevens, J., dissenting).
91. Fiss, supra note 2, at 1082.
the Supreme Court was aware of this shortcoming in arbitration cases. Although the Court held that the case could be arbitrated by Japanese arbitrators, it indicated that "the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."92

Among other things, this could mean that if the Japanese arbitrators find that Mitsubishi Motors had violated the Sherman Act, they would have to award treble damages to Soler as a result of such violation. Such a holding would appear to contravene prevailing principles governing the authority of arbitrators to render punitive awards. Despite some recent cases to the contrary,93 courts have generally held that public policy considerations prohibit arbitrators from awarding punitive or exemplary damages.94 The basic rationale for such rulings is that the power to punish wrongdoers is a nondelegable monopoly possessed by the sovereign. Despite the Court's characterization of the treble damage remedy as primarily compensatory, it would be somewhat anomalous for the Court to require the Japanese arbitrators to award treble damages if they find an antitrust violation—unless this feature of the Mitsubishi ruling augurs the development of new federal doctrine governing the remedial authority of arbitrators under the FAA,95 which arguably would be binding on state courts in cases to which the FAA otherwise applies.96

92. Mitsubishi, 105 S. Ct. at 3360. The Court also offered the following pertinent observations:

At oral argument, . . . counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. . . . We therefore have no occasion to speculate on [whether an arbitration panel would read a choice-of-law clause in this contract as not merely governing interpretation of the contract terms, but wholly displacing American law]. . . . Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 3359 n.19.


96. See Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984); see also Hirshman, The
A more plausible explanation is that the Court did not intend to develop a general federal rule permitting arbitrators to award punitive damages. Rather, it departed from the general rule in order to accommodate the competing public interests in the *Mitsubishi* case. Despite the majority's gallant words about requiring arbitration in the interest of international comity, the arguments against permitting arbitration of antitrust disputes in a domestic context are in certain respects more persuasive when applied to international situations. Although potential Japanese arbitrators might be expert in the intricacies of American antitrust law, American arbitrators selected by the parties to such disputes are likely to have superior knowledge and understanding of this field. By permitting the judiciary to review whether the foreign arbitration panel has properly applied the Sherman Act to the case, therefore, the *Mitsubishi* Court appeared to provide an extraordinary measure of judicial review to accommodate the public interests which call for judicial, rather than arbitral, determination of the underlying dispute.98

Similar techniques of reconciling competing public interests have been employed by other courts. In *Faherty v. Faherty*, for example, the New Jersey Supreme Court examined the public interest considerations affecting agreements to arbitrate postmarital disputes over spousal support, child support, and child custody. Calculations of the character and intensity of relevant public interests produced different results with respect to each of these types of disputes.

Determining that the spouses themselves could freely settle the issue of a postmarital support obligation, the court found no public policy ob-

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97. "[T]he arbitration panel selected to hear the parties' claims here is composed of three Japanese lawyers, one a former law school dean, another a former judge, and the third a practicing attorney with American legal training who has written on Japanese antitrust law." *Mitsubishi*, 105 S. Ct. at 3358 n.18.

98. In *Wilko*, the Court stated that "[i]n unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. 427, 436-37 (1953) (emphasis added). In *Reynolds Sec. v. Macquown*, 459 F. Supp. 943, 945 (W.D. Pa. 1978), the court stated: "In order to have an award vacated on grounds of manifest disregard of law, the complaining party must establish that the arbitrator understood and correctly stated the law but proceeded to ignore it." Accord *Local 771, I.A.T.S.E. v. R.K.O. Gen.*, 546 F.2d 1107, 1113 (2d Cir. 1977).

By contrast, it would appear that in *Mitsubishi*, even if the Japanese arbitrators mistakenly decided that the Sherman Act was not applicable, their award could be set aside since the Supreme Court has decided, as a matter of federal law, that the Sherman Act must be applied in such a case. In effect, the Court has promulgated a federal choice-of-law for arbitrators in such situations.

jections to allowing them to refer such questions to arbitration. Not all jurisdictions, however, favor arbitration to such an extent. In many states, for example, courts will not approve support provisions in marital dissolution settlement agreements unless they are fair and adequate in the light of the needs and financial abilities of the wife and husband.100

The public interest in equitable postmarital support arrangements is clear. Suppose, for example, that a couple had been married for thirty years, that one spouse earned $100,000 per year, and that the other was physically incapacitated. Suppose further that the couple concluded that their marriage was no longer viable, and decided to dissolve it. Even if the disabled spouse were willing to waive financial support, the public would have a strong interest in not having a court permit such a waiver, since the disabled spouse might therefore become a public charge. Would the public policy factors be any different if the decision to forego spousal support had been made not by the spouses themselves, but by an arbitrator to whom they had delegated the power to decide? It seems not. Nevertheless, Faherty appears to permit unfettered recourse to arbitration of postmarital support obligations, even though the results could be contrary to the public interest.

Notwithstanding its strong endorsement of arbitration in the area of postmarital child support, the Faherty court recognized a special public interest arising from the state's parens patriae role in the welfare of the child. As a result, although it concluded that child support issues are arbitrable, the court created a special standard of judicial review, over and above the state's statutory standards,101 to ensure that an arbitrator has not slighted the "substantial best interest" of the child (and thus the public's interest). In the process, normal judicial deference to arbitral awards is abjured. According to Faherty, after the normal statutory review of the award, "the courts should conduct a de novo review unless it is clear on the face of the award that the award could not adversely affect


101. New Jersey's statutory standards for judicial review of arbitration awards, which resemble those under the FAA and other state arbitration statutes, provide:

[T]he court shall vacate the award in any of the following cases: a. Where the award was procured by corruption, fraud or undue means; b. Where there was either evident partiality or corruption in the arbitrators, or any thereof; c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party; d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

the substantial best interests of the child.”

D. Res Judicata, Collateral Estoppel, and Admission of Arbitration Decisions into Evidence

Another technique for protecting public interests after arbitration awards have been rendered is to limit the awards’ issue- and claim-preclusive effect in subsequent proceedings. Here, too, courts and administrative agencies have devised fragile compromises which arguably provide less than adequate safeguards for important public policies.

In a series of cases starting with *Alexander v. Gardner-Denver Co.*, the Supreme Court has been faced with a recurring situation: An employee has been discharged or otherwise allegedly mistreated by an employer for reasons that arguably violate a federal law that provides specific remedies for such violations. At the same time, the employee is represented by a labor union that has concluded a collective-bargaining agreement with the employer which provides that the employer will not engage in the type of conduct that is prohibited by the federal law—although the agreement does not refer to federal law as such. The agreement also contains a grievance-arbitration mechanism for resolving disputes that arise under it. The employee grieves the employer’s conduct, and the case is arbitrated. The arbitrator concludes that the employee was discharged for just cause or that the alleged mistreatment did not occur. The employee then seeks relief under the applicable federal law—Title VII of the 1964 Civil Rights Act in *Gardner-Denver*; the Fair Labor Standards Act in *Barrentine v. Arkansas-Best Freight System*, 42 U.S.C. section 1983 in *McDonald v. City of West Branch*.

In each of these cases, the Supreme Court rejected arguments that, because of the prior arbitral award and the principles of res judicata, collateral estoppel, waiver, or election of remedies, the employee should be precluded from pursuing the federal statutory remedy. The Court also refused to adopt a rule that would require federal courts to defer to

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102. *Faherty*, 97 N.J. at 110, 477 A.2d at 1263. The *Faherty* court did not decide the arbitrability of child custody and visitation rights, but did recognize that the issue also presented a conflict between the state’s policy of encouraging arbitration and the danger of infringement of the court’s *parens patriae* role. Nevertheless, the court stated that “the development of a fair and workable mediation or arbitration process to resolve [custody and visitation] issues may be more beneficial to the children of this state than the present system of courtroom confrontation.” *Id.* This statement suggests that the court may permit arbitration of such issues subject to possible de novo review to ensure protection of the children’s best interest, as the court required for child support disputes.


an arbitrator’s decision in such cases.106 Many of the Court’s reasons for the results in this series of cases resemble those suggested by Professor Fiss’ general criticism of settlement and ADR: (1) an arbitrator’s expertise “pertains primarily to the law of the shop, not the law of the land”;107 (2) an arbitrator has “no general authority to invoke public laws that conflict with the bargain of the parties”;108 (3) in the usual case, “the union has exclusive control over the ‘manner and extent to which an individual grievance is presented’”;109 thus, “were an arbitration award accorded preclusive effect, an employee’s opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union’s interest to press his claim vigorously”;110 and (4) “[a]rbitral factfinding is generally not equivalent to judicial factfinding. . . . [T]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.”111

Had the Court merely decided that the prior arbitral awards in these cases did not preclude subsequent suit on the federal causes of action, the results would have been substantially congruent with Professor Fiss’ views about the respective roles of judicial and nonjudicial dispute resolution. The Court, however, did not stop there. In each case, it also held

106. In McDonald, the Court also rejected the contention that the federal full faith and credit statute, 28 U.S.C. § 1738 (1982), requires a federal court to give the same preclusive effect to a state court arbitration award as would the courts of the state rendering the judgment. Kremer v. Chemical Constr. Co., 456 U.S. 461, 477 (1982), had previously held that “[a]rbitration awards are not . . . subject to the mandate of § 1738.” The McDonald Court noted that the Kremer conclusion followed from the plain language of § 1738, which by its terms governs only judicial proceedings: “Arbitration is not a ‘judicial proceeding’ and, therefore, § 1738 does not apply to arbitration awards.” McDonald, 466 U.S. at 288. In Dean Witter Reynolds, Inc. v. Byrd, discussed supra text accompanying notes 70-75, the Court suggested that “McDonald also establishes that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding.” 105 S. Ct. 1238, 1243 (1985) (emphasis added). In light of Southland Corp. v. Keating, 465 U.S. 1 (1984), which held that the FAA preempted a state law voiding an arbitration clause in a contract that was subject to the federal statute, it would appear that if the Supreme Court were to determine that a particular state arbitration award has no collateral estoppel effect in a federal court suit based on a federal statute, a similar result would obtain if the suit had been brought in state court, regardless of any collateral estoppel effect accorded the award under state law.

108. Id. at 53.
109. McDonald, 466 U.S. at 291 (quoting Gardner-Denver, 415 U.S. at 58 n.19.)
110. Id.
111. Id. (quoting Gardner-Denver, 415 U.S. at 57-58).
that the arbitral decision may be admitted as evidence in the federal court suit seeking to vindicate federal statutory rights.

In discussing the weight to be accorded the arbitral award in the judicial proceeding, however, the Court revealed the central dilemma pervading this entire area. In *McDonald*, restating principles that had already been enunciated in *Gardner-Denver* and in *Barrentine*, the Court declared:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with [the statute or Constitution], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue [in the judicial proceeding], and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should be ever mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of [these] claims. It is the duty of courts to assure the full availability of this forum.\(^\text{112}\)

Under traditional evidence doctrine, absent a question of res judicata, waiver, estoppel, or election of remedies, one tribunal's earlier decision is generally excluded as hearsay or opinion in a subsequent judicial proceeding in a second tribunal.\(^\text{113}\) By permitting evidence of the arbitral decision to be admitted in the federal statutory proceeding, therefore, the Court plainly departed from established principles.

One can only guess why the Court abandoned these principles under the circumstances of *Gardner-Denver*, *Barrentine*, and *McDonald*. It is not unreasonable, however, to suggest that, in a fundamental sense, the Court was engaging in a process similar to the one it later employed in *Mitsubishi* and which the New Jersey Supreme Court followed in *Faherty*—namely the crafting of a compromise between the values of judicial and nonjudicial dispute resolution.

Intimations of this flexibility in reconciling conflicts between arbi-

\(^\text{112}\) *Id.* at 292 (quoting *Gardner-Denver*, 415 U.S. at 60 n.21).

\(^\text{113}\) "[T]he doctrine is accepted that a judgment in another cause, finding a fact now in issue, is ordinarily not receivable." 5 J. WIGMORE, EVIDENCE § 1671a (Chadbourne rev. ed. 1974) (emphasis in original); \textit{see also} Weak v. Weak, 202 Cal. App. 2d 632, 636, 21 Cal. Rptr. 9, 11 (1962) (interlocutory order inadmissible); Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 497-501, 424 N.E.2d 586, 595-97 (1981) (Brown, J., dissenting) (admission of arbitration decision violates equal protection).
tration and judicial dispute resolution can also be seen in another aspect of the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd.*\(^{114}\) In *Byrd,* the Court rejected the argument that federal courts should decline to compel arbitration of pendent state law claims that are otherwise arbitrable although they are "intertwined" with a nonarbitrable federal claim, finding that the FAA's purpose of making arbitration agreements enforceable outweighed its incidental promotion of efficient dispute resolution.

In *Byrd,* the Court also noted that it had been suggested, "and some Courts of Appeals have held, that district courts should decide arbitrable pendent claims when a nonarbitrable federal claim is before them, because otherwise the findings in the arbitration proceeding might have collateral-estoppel effect in a subsequent federal proceeding."\(^{115}\) The Court's response to this suggestion was to observe that "it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims."\(^{116}\) It characterized *McDonald* as establishing that "arbitration proceedings will not necessarily have a preclusive effect on subsequent federal court proceedings" and "that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding."\(^{117}\) Noting that the effect of an award in *Byrd* could be determined only after the award had been rendered, the Court added: "Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection."\(^{118}\)

Because the Court did not define or describe the "federal interests" that must be taken into account in deciding what, if any, preclusive effect is to be accorded a prior arbitral award in a subsequent judicial proceeding under the Securities Act of 1934, lower courts may face difficult problems of interpretation. Some guidance might be gleaned from the factors the Court considered relevant in determining the weight to be accorded prior arbitral decisions in actions under Title VII, the Fair Labor Standards Act, or 42 U.S.C. section 1983,\(^{119}\) but the cases discussing those factors had first decided that evidence of the arbitral decision could be admitted in the federal statutory proceeding—presumably because the federal interests involved in such cases permitted it. Is this necessarily

114. 105 S. Ct. 1238 (1985); see supra notes 70-75 and accompanying text.
116. *Id.*
117. *Id.*
118. *Id.* at 1244.
119. See supra text accompanying note 112.
true of all federal interests? Ultimately, the answer will depend upon the breadth or narrowness of the Court's characterization of particular federal interests—an extremely manipulable undertaking at best. More- over, in McDonald the Court had stressed that the arbitration award in that case had been "unappealed," a circumstance noted again by the Byrd Court. This emphasis implied that an "appealed" award could trigger the federal full faith and credit statute, thereby requiring federal courts to give the appellate judgment the same effect it would receive in the courts of the state in which it was rendered. While the Supremacy Clause might prevent a state appellate judgment from having a claim-preclusive effect in suits under the Securities Exchange Act of 1934, the arbitrator's factual findings, upheld "on appeal" by a state court, could have issue-preclusive effect in federal suits. Thus, in a case like Byrd, a state court's acceptance of an arbitral board's factual finding that the securities purchaser had not been defrauded by the seller could well dispose of the nonarbitrable federal claim under the Securities Exchange Act of 1934.

An additional complication arises, however, because of some uncertainty about the meaning of the word "unappealed" as used in McDonald and Byrd. Normally, appeals are dealt with by appellate courts. Review of an arbitration award by a court of first instance may also be referred to as an appeal. Thus, if a person who has lost in arbitration seeks to vacate

120. Arguably, there is no stronger federal interest than in ensuring the vindication of rights protected by the United States Constitution. Since, in an action under 42 U.S.C. § 1983, which is designed to vindicate such rights, the McDonald Court permitted the arbitral award to be received in evidence, the same result would very likely obtain in a federal court suit under the Securities Exchange Act of 1934 or any other federal statute, absent other relevant factors. A strong argument can be made, however, that the deference due labor arbitration awards, evidence of which is admissible in federal court suits on federal statutory claims, is not necessarily due an award in a commercial arbitration. Professor David Feller, for example, has described labor arbitration as "the adjudicatory phase of a system of government." Feller, Arbitration: The Days of its Glory Are Numbered, 2 INDUS. REL. L.J. 97, 105 (1977). Collective bargaining agreements are a species of private legislation promulgated by employers and unions to govern the economic existence of groups of employees. Because disputes over alleged securities fraud or other commercial matters do not share these characteristics, courts could construct a justification for excluding evidence of an arbitral decision from a Securities Act suit.

121. McDonald, 466 U.S. at 285.
123. See supra note 106.
124. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.
the award as being in violation of statutory standards, it can be reasonably contended that the award has been "appealed." If the "appellant" then loses in court, it can be further claimed that the court has placed its imprimatur upon the arbitrator's factual findings. But what if the loser does not seek to set the award aside, but the winner in arbitration invokes a state's summary procedure for confirming the award? If the loser contests the petition for confirmation, and the court confirms the award, can an equally strong argument be made that it has been appealed? Finally, if the loser does not contest the petition for confirmation, but defaults instead, has there been an appeal?

These interpretive problems will have to be resolved in future cases. Significant for present purposes, however, is that in explicating *McDonald* the *Byrd* court promoted one public interest as expressed in the FAA's proarbitration policy, but sought to defend other public interests by suggesting that an arbitral decision's collateral estoppel effect in a suit on a federal nonarbitrable claim must be determined on a case-by-case basis.

A similar reconciliation of interests can be seen in both *Mitsubishi* and *Faherty*, in which the courts allowed the arbitration of matters in which strong public interests were implicated. At the same time, they sought to protect those interests by providing for extraordinary types of judicial review. This was a technique for accommodating, or compromising, competing public interests: on the one hand, the desire for amicable resolution of postmarital disputes in *Faherty* and the imperatives of international comity in *Mitsubishi*; and, on the other, the "best interests" of children in *Faherty* and the at least incidental benefit to the public conferred by private treble-damage actions for antitrust violations in *Mitsubishi*.

*Mitsubishi*’s and *Faherty*’s basic thrust was to uphold arbitration against claims that to do so would violate important public interests, but to accommodate those public interests by providing for an exceptional degree of judicial review. By contrast, the basic thrust of *Gardner-Denver, Barrentine*, and *McDonald* was to uphold judicial dispute resolution, but to take account of the values of labor arbitration by departing from established doctrine to allow in evidence the arbitrator's decision for whatever


126. See supra notes 91-102 and accompanying text.
weight a trial court might accord it under the Supreme Court's general criteria. Although the first set of decisions upheld arbitration and the second judicial dispute resolution, each recognized that the issue was not black and white, that strong arguments had been made for contrary conclusions. In short, courts have understood that philosophical absolutism in reconciling tensions between private and judicial dispute resolution is to be avoided; that, from a public policy perspective, each has merits and defects; that greater experience with alternative dispute resolution mechanisms is required before these tensions can be finally resolved, and that, in the interim, courts must deal with those issues on a case-by-case basis, recognizing that legislative intervention is always a possibility.  

VI. The Public Interest and the NLRB’s Deferral Policies

In Against Settlement, Professor Fiss has extolled the virtues of adjudication over private dispute resolution. Although his references to adjudication appear to focus on judicial dispute resolution, his arguments also encompass adjudication by administrative agencies, for administrative agencies, like courts, are public bodies charged with interpreting and implementing the values embodied in the statutory provisions that fall within their jurisdictions.

Among administrative agencies, the National Labor Relations Board (NLRB) is one in which the relationship between public and private interests takes on a special character. The National Labor Relations Act (NLRA) confers primary jurisdiction upon the Board to decide whether employers or unions have violated the Act by committing unfair labor practices. This jurisdiction covers claims that an employer has unilaterally instituted changes in hours, wages, or working conditions, in violation of its duty to bargain over such matters with the employees’ designated bargaining representative, the union; that an employer has...

127. See, e.g., S. 2038, 99th Cong., 2d Sess. (1986), introduced by Senator McConnell of Kentucky. The bill, if enacted, would further amend Federal Rule of Civil Procedure 16(c) by permitting monetary sanctions to be imposed against attorneys who fail to inform their clients of the availability of alternative dispute resolution techniques. The bill would also amend Rule 68 by permitting costs, including attorney’s fees, to be assessed against a party who unreasonably refused an opponent’s offer to resolve a conflict through an alternative dispute resolution mechanism. The latter aspect of the bill is clearly insensitive to Professor Fiss’ concerns in Against Settlement. The former raises serious questions about the propriety of prescribing the content of certain communications between an attorney and a client. See Costly Lawsuits: Senate Bill Touts Alternative, A.B.A. J., July 1, 1986, at 19.

128. Whether by settlement or, as he referred to it later, any other “contrivance of ADR.” Fiss, Out of Eden, 94 Yale L.J. 1669, 1673 (1985).

129. Fiss, supra note 2, at 1085.

130. Section 8(a)(5) makes it “an unfair labor practice for an employer . . . to refuse to
discharged employees because they engaged in statutorily protected union activities;\(^1\) that a union has restrained or coerced employees in the exercise of their right to refrain from asserting rights guaranteed in the NLRA;\(^2\) that a union caused or attempted to cause an employer to discriminate against an employee;\(^3\) or that it has refused to bargain with an employer whose employees it represents.\(^4\)

Professor Robert Gorman has noted that "Board regulations provide that [an unfair labor practice] charge may be filed by 'any person' and it is usually filed by the aggrieved employee or his union when an employer is the charged party or by the aggrieved employee or employer when a union is the charged party."\(^5\) Charges are investigated by the appropriate regional offices of the Board. If the Board issues a complaint, the Board's General Counsel prosecutes the case before an administrative law judge who makes findings and conclusions and files a recommended order. In the vast majority of cases, the NLRB adopts the recommended orders of the administrative law judges. Those orders are not self-executing, however, and the Board must seek enforcement in an appropriate United States Court of Appeals. Either party may seek further review in the United States Supreme Court.

The NLRA prescribes the NLRB's elaborate role in, and the detailed public process for, determining whether an employer or union has committed an unfair labor practice. Often, however, conduct that arguably violates the Act is also subject to challenge as a breach of a collective bargaining agreement between an employer and a union. Most agreements, for example, contain clauses prohibiting the employer from discharging employees except for just cause. An employee or a union might claim that the employer discharged the employee for activity which would not constitute a basis for a dismissal for "just cause." At other times, an employer might claim that its statutory duty to bargain, which

\(^1\) Bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5) (1982). Section 9(a) grants exclusive bargaining rights to the representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." Id. § 159(a).

\(^2\) Except for its authorization of certain collective-bargaining agreements requiring employees, after a designated time period, to become members of the union that is signatory to the agreement, § 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Id. § 158(a)(3).

\(^3\) See id. §§ 157, 158(b)(1)(A).

\(^4\) Id. § 158(a)(3), (b)(2).

\(^5\) Section 8(b)(3) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Id. § 158(b)(3).

\(^6\) R. Gorman, Basic Text on Labor Law 7 (1976).
normally continues during the life of the agreement, was waived by the union in contractual language that requires interpretation. In such cases, although the Board would have the power to interpret the contractual language in dispute, the question arises whether the Board should do so when the contract contains an arbitration clause. Indeed, because almost all collective bargaining agreements contain arbitration provisions, the Board has, in a variety of contexts, grappled with this issue.

The NLRB's fluctuating position on this question has tended to reflect changes in political administrations. Boards dominated by members appointed by conservative presidents have been more likely to defer to arbitration than Boards controlled by appointees of liberal presidents. The Board's major decisions in this area need to be viewed against that background.

In the 1955 case of Spielberg Manufacturing Co., the Board dismissed charges on behalf of discharged employees against an employer on the ground that the true reason striking employees had been fired was, according to an already rendered arbitration award, their misconduct during a strike. In explaining its disposition of the case, the Board stated:

[T]he [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will be best served by our recognition of the arbitrators' award.138

In Raytheon Co., a 1963 decision, the Board modified the Spielberg standards so as to condition deferral on the arbitrator's having "considered the unfair labor practice issue," a standard which proved difficult to apply. Eight years later, in Collyer Insulated Wire Co.,141 a refusal-to-bargain case, the Board expanded its deferral policy by declining to hear a case in which arbitration had not yet been held. Although it dismissed the unfair labor practice complaint, the Board retained jurisdiction of the case solely for the purpose of entertaining a motion for further consideration upon a showing that either (a) the dispute was not properly settled or submitted to arbitration, or (b) the grievance or arbitration

137. 112 N.L.R.B. 1080 (1955).
138. Id. at 1082.
procedures were unfair or reached a result contrary to the Act.\textsuperscript{142} The Board's rationale for its deferral policy was based on a variety of factors: (1) the language of the Labor Management Relations Act (LMRA) which states that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement";\textsuperscript{143} (2) the presumed expertise of arbitrators in deciding such disputes; and (3) the importance of requiring parties to abide by their contractual commitments to submit such disputes to arbitration.\textsuperscript{144}

Not long after it decided \textit{Collyer}, the Board held that it would defer to prospective arbitration awards not only in refusal-to-bargain cases, but also in any case alleging union or employer unfair labor practices directed against individual employees.\textsuperscript{145} Five years later, the Board reversed itself, limiting prospective deferral to refusal-to-bargain cases, largely on the strength of the swing vote of Chairman Murphy, who argued that "the Board should stay its processes in favor of the parties' grievance arbitration machinery only in those situations where the dispute is essentially between the contracting parties and where there is no alleged interference with individual employees' basic rights under Section 7 of the Act."\textsuperscript{146}

In two recent decisions, \textit{United Technologies Corp.}\textsuperscript{147} and \textit{Olin Corp.},\textsuperscript{148} however, the Board once again broadened its deferral practices. Under \textit{United Technologies}, the Board now defers to arbitration in cases alleging union or employer unlawful activity directed against individual employees as well as in refusal-to-bargain cases. According to the Board majority in that case:

Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.\textsuperscript{149}

At the same time, \textit{Olin} purported to clarify the factors that the Board will take into account in determining whether an arbitrator has adequately considered the unfair labor practice: the arbitrator will be

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 843.
\item LMRA § 203(d), 29 U.S.C. § 173(d) (1982).
\item See \textit{Collyer}, 192 N.L.R.B. at 840.
\item National Radio, 198 N.L.R.B. 527, 530 (1972).
\item \textit{United Technologies}, 268 N.L.R.B. at 559.
\end{enumerate}
\end{footnotesize}
deemed to have done so if the contractual issue and the unfair labor practice issue are factually parallel, the arbitrator has been presented with the facts relevant to resolving the unfair labor practice claim, and the arbitrator's decision is not inconsistent with the Act.\textsuperscript{150}

Thus, in deferring to an existing or prospective award the Board, in effect, examines that award to determine whether the arbitrator has vindicated public policy in the labor field. Under the criteria enunciated in \textit{Olin}, however, that examination is extremely shallow, creating the strong possibility that the Board will dismiss unfair labor practice charges on the basis of an award that did not actually dispose of them. Indeed, by adopting its various deferral policies, the Board has left itself open to the charge, lodged by dissenting members\textsuperscript{151} and outside commentators,\textsuperscript{152} that it is abandoning to private arbitrators its statutory function of deciding unfair labor practice charges. Indeed, the Board has frankly acknowledged that its deferral policy is motivated in large part by a desire to ease its own work load.\textsuperscript{153}

The argument that the Board's deferral policy represents an abandonment of its statutory obligations has much force and is consistent with Professor Fiss' overall critique of settlement and alternative dispute resolution mechanisms. In many ways, the tensions here resemble those existing between judicial and private adjudication. In one important respect, however, they are heightened in the case of the NLRB's deferral policy. A fundamental feature of the NLRA is to confer upon the Board a status akin to that of a statutory ombudsman.\textsuperscript{154} Thus, employees, unions, or employers who believe that they have been injured by an unfair

\begin{itemize}
    \item 150. \textit{Olin}, 268 N.L.R.B. at 574. In \textit{Olin}, the NLRB also returned to an earlier rule by placing the burden upon the Board's General Counsel to demonstrate that deferral was not necessary. \textit{Id.} at 575.
    \item 151. \textit{See}, e.g., \textit{Collyer}, 192 N.L.R.B. at 851-52 (Jenkins, member, dissenting).
    \item 153. "Being keenly aware of the limited resources of this Agency, we are not particularly desirous of inviting any labor organization . . . to bypass their own procedures and to seek adjudication by this Board of the innumerable individual disputes which are likely to arise in the day-to-day relationship between employees and their immediate supervisors . . . ." \textit{United Technologies}, 268 N.L.R.B. at 559 (quoting United Aircraft Corp., 204 N.L.R.B. 879 (1973)).
    \item 154. This status has been recognized by the federal courts:
\end{itemize}

[T]he authors of the CSRA [Civil Service Reform Act] apparently expected the Special Counsel to act as an ombudsman responsible for investigating and prosecuting violations of the Act. The Special Counsel was modeled after the General Counsel of the National Labor Relations Board (NLRB) who performs an independent prosecutorial role with respect to employment relations in the private sector. Furthermore, the reports and debates concerning the CSRA are replete with characterizations of the Special Counsel as a "prosecutor" or "watchdog" of merit system abuses.
labor practice can, by filing a charge, entrust the handling of the case to the Board thereafter. If a complaint issues on a charge, the Board's General Counsel will litigate the case before an administrative law judge, a United States Court of Appeals and, if necessary, before the United States Supreme Court—all without cost to the charging party. Although charging parties are permitted formally to intervene in these proceedings, they are not required to do so. Many unions, employers, or employees will, in fact, refrain from intervening altogether, or do so only to a limited extent, because they cannot afford the financial costs of full-scale intervention.155

The Act's structure for processing unfair labor practice claims thus illustrates that a major objective in Congress' policy establishing the NLRB's enforcement role was to minimize the parties' costs in obtaining definitive dispositions of their claims. However, the increased cost to the parties of having these questions resolved by privately selected arbitrators, which is the result of the Board's expansive deferral practice, seriously frustrates that policy. Nor is this difficulty alleviated by the fact that the parties are merely being required to resort to the mechanism they had voluntarily selected for the resolution of disputes, for, in the overwhelming majority of cases, their arbitration agreements are limited to disputes arising under the contract, and not those arising under statutory law for which Congress has provided a specialized dispute resolution mechanism implemented by public officials responsible to the public and applying public norms.

The NLRB's policy of deferral to arbitration is particularly ironic when viewed in light of the Supreme Court's frequent rulings that, because the NLRA gives the Board primary jurisdiction to entertain cases alleging unfair labor practices, state courts and agencies, as well as federal courts, are normally pre-empted from deciding cases that would affect the resolution of those charges.156 The rationale for this pre-emption is that Congress has devised a particular scheme of administration, substantive rules, and remedies governing unfair labor practices and, except when the question implicates strong local interests or the question is

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155. Although arbitration expenses are usually much lower than costs incurred in judicial litigation, this is not always the case. Even when they are lower, arbitration costs can still be extremely burdensome.

156. It has been held, for example, that state courts may not entertain certain tort suits seeking damages against unions for acts that are arguably unfair labor practices. Motor Coach Employees v. Lockridge, 403 U.S. 274, 293 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).
merely of peripheral concern to the NLRA, tribunals other than the NLRB are without jurisdiction to hear cases that will affect those matters. Yet, under the Board's deferral policy, privately selected arbitrators are permitted not only to decide the contractual disputes entrusted to them, but effectively to determine public disputes under the NLRA.

To be sure, the LMRA expressly encourages arbitration of contractual grievance disputes. However, the NLRA provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." To rely so heavily upon the LMRA's policy of encouraging arbitration thus undermines the NLRA's more fundamental policy conferring upon the Board the primary responsibility for enforcing the Act's unfair labor practices prohibitions. Moreover, the manner in which the Board defers to arbitration represents an even more serious erosion of the Board's responsibilities under the NLRA. Under the standards set forth in Olin, the mere fact that an arbitrated dispute and the alleged unfair labor practice involved "parallel facts" raises a presumption that the arbitrator considered the unfair labor practice question, though in reality the arbitrator may not have considered it at all.

Sensitivity to these concerns has always caused some members of the NLRB to dissent from the Board's policy of deferring to arbitration, whether the deferral is to an already rendered award or to a prospective award. Occasionally courts, too, will balk at aspects of the deferral doctrine because of what strikes them as an abandonment of the NLRB's

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158. "Employees' Section 7 rights are public rights charged to the Board's protection." United Technologies, 268 N.L.R.B. at 563 (Zimmerman, member, dissenting) (emphasis added).


160. Nowhere in the [National Labor Relations] Act itself, its legislative history, or in its judicial interpretation is there authority for the proposition that the Federal labor policy favoring arbitration requires or permits the Board to abstain from effectuating the equally important Federal labor policy entrusted to the Board under Section 10(a).

Olin, 268 N.L.R.B. at 579 (Zimmerman, member, dissenting); see United Technologies, 268 N.L.R.B. at 563 (Zimmerman, member, dissenting) ("Employees' Section 7 rights are public rights charged to the Board's protection."); Collyer, 192 N.L.R.B. at 853 (Jenkins, member, dissenting) ("So far as Congress has expressed any view concerning the desirability of shutting off access to the Board where arbitration is available, apart from the enactment of statutory terms which prohibit it, the view of Congress has plainly been against denying access."
statutory obligations. For example, in *Taylor v. NLRB*, the Eleventh Circuit rejected major components of the *Olin* doctrine. In the court's view, "By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the NLRB's responsibility under the NLRA."\(^{162}\)

According to the Eleventh Circuit, *Olin* either overlooked or ignored instances when contract and statutory issues may be factually parallel but involve distinct elements of proof and questions of relevance. It further ignored the practical reality of many bipartite proceedings, in which individual rights may be negotiated away in the interest of the collective good. In the court's view, the *Olin* standard cannot satisfy the first Spielberg requirement that the proceedings below appear to have been fair and regular.\(^{163}\)

The Board, however, is not bound to follow the Eleventh Circuit's disposition of its *Olin* doctrine in other Circuits. Until the United States Supreme Court rules on the question, the Board can continue to apply the *Olin* deferral standards and seek to have them enforced in other federal appeals courts.\(^{164}\)

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161. 786 F.2d 1516 (11th Cir. 1986).
162. *Id.* at 1521.
163. *Id.* at 1522. Elsewhere in its opinion, the court observed that the plaintiff in *Taylor* "contends that factual parallelism does not always guarantee legal parallelism and sets forth several instances in which *Olin*'s 'factually parallel' test will result in inadequate or no litigation of the unfair labor practice issue." *Id.* at 1520. Those instances were:

1. The facts relevant to establishing a contract violation may differ from those facts relevant to unfair labor practice violations, although there may be some overlap. Example: An arbitrator's finding of just cause for an employee's termination may overlook a real underlying reason for discharge arising from some protected activity.
2. The standard of review for a contract violation may differ from a Board [standard] for an analogous unfair labor practice claim. Example: The amount of allowable insubordination by an employee differs for Board and arbitral purposes.
3. The interest of the union may be to establish a favorable interpretation of a contract, not to protect an employee from a specific unfair labor practice. Example: A group of cases may be resolved jointly on a compromise basis, despite the wishes of one grievant to proceed with an unfair labor practice complaint.
4. A bipartite grievance committee issues a decision denying a grievance but giving no indication of whether, and if so what, evidence or issues were considered in reaching that decision. Example: The majority of Teamster grievance committee decisions do not include written explanations, as demonstrated in the decision to deny Taylor's grievance.

*Id.* at 1520 n.5.
164. [T]he Board does not consider itself bound by Court of Appeals' rejection of the Board's perception of what "the law" is or should be as to a particular issue. If the Board is strongly enough minded on the issue, it persists in the application of its own point of view in subsequent cases, hoping to achieve approval by some other Courts of Appeals, thus producing a conflict in decisions among the Courts of Appeals.
It is difficult to reconcile the Supreme Court's apparent approval of NLRB deferral to arbitration\(^{165}\) with the Court's refusal to adopt a deferral policy in Title VII cases. The factors that argue against deferral in Title VII cases—the difference between the statutory claim and the contractual claim, the procedural and evidentiary shortcomings of the arbitral process, congressional designation of an appropriate forum—also exist in cases arising under the NLRA and related collective-bargaining agreements.\(^{166}\) While \textit{Mitsubishi} has since held that private arbitrators may resolve federal statutory questions,\(^{167}\) that decision involved an arbitration clause which contained wording broad enough to embrace an antitrust claim. By contrast, the typical arbitration clause in a collective-bargaining agreement usually refers to disputes involving the interpretation or application of the agreement. \textit{Mitsubishi}, therefore, would hardly authorize labor arbitrators to dispose of federal statutory claims under standard arbitration clauses in collective-bargaining agreements.

When the NLRB defers to arbitration, it is the Board itself and, at times, the federal courts which have interpreted the NLRA as permitting, or even encouraging, this practice. As indicated above, in view of the apparent conflict between the NLRA's express preference for arbitration and the NLRA's equally clear delegation of responsibility to the NLRB to prevent unfair labor practices, it is far from clear that Congress intended such a result. However, Congress' long-standing and persistent failure to overrule the NLRB's deferral policies suggests that the continuation of those policies meets with congressional approval, although not necessarily in all respects.\(^{168}\)

\(^{165}\) See NLRB v. City Disposal Sys., 104 S. Ct. 1505, 1515 (1984) ("[T]o the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the Board may defer to that process." (citing Collyer Insulated Wire Co., 192 N.L.R.B. 837 (1971); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955))).

\(^{166}\) See Alexander v. Gardner-Denver Co., 415 U.S. 36, 55-57 (1974). In declining to adopt a deferral rule for Title VII claims involving facts that had been the subject of arbitration under a collective-bargaining agreement, the \textit{Gardner-Denver} Court noted that such a rule would be "analogous to the NLRB's policy of deferring to arbitral decisions on statutory issues in certain cases." \textit{Id.} at 56 n.17 (citing Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955)); \textit{see supra} notes 103-13 and accompanying text.

\(^{167}\) Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985); \textit{see supra} text accompanying notes 76-90.

\(^{168}\) The Board's decisions in \textit{United Technologies} and \textit{Olin} are too recent for congressional inaction to be interpreted as approval.
Measured against Professor Fiss' concerns, however, public officials (i.e., democratically elected members of Congress) are ultimately responsible for what can be described as a preference for an informal, alternative dispute resolution mechanism over the more formal administrative-judicial process they themselves have created for the vindication of certain statutory rights. Even if final responsibility for these policies could not be laid at the feet of the legislature, the fact remains that members of the NLRB are, to use Professor Fiss' language, "not strangers chosen by the parties but public officials chosen by a process in which the public participates." Whenever the NLRB confronts a deferral issue, the parties are, by definition, in dispute over whether it is appropriate for the agency to defer to arbitration. In ordering—or in refusing to order—deferral, the agency, in a sense, does exactly what Professor Fiss expects of public officials: it explicates and gives force to the values embodied in an authoritative text, a statute.

At the same time, when the agency defers to arbitration, it relegates to persons who are not public officials the resolution of the underlying disputes which brought the parties to the agency in the first place. As we have seen, strong public policy reasons exist for the agency to decide the underlying disputes: its greater familiarity with the statutory provisions; avoidance of arbitration's informality and other shortcomings; the lower cost to the charging party resulting from the agency's role as a statutory ombudsman; and the danger under Olin that arbitrators who never really considered unfair labor practice issues can effectively preclude parties from having them decided by the agency created by the legislature to do so.

At the same time, countervailing public policies argue for deferral. The parties did, after all, voluntarily agree to arbitrate their disputes. Further, because the agency operates under a limited budget, it cannot process all cases over which it has statutory jurisdiction. By deferring to arbitration in certain cases, it can more adequately address nondeferrable cases, thereby serving public interests. Moreover, arbitration typ-

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169. Historically, the Board has declined jurisdiction over certain employers because it has considered the nature of their industries or the dollar volume of their activities to have only a slight effect on interstate commerce. Before 1959, there was some doubt as to whether the Board was authorized to exclude selected categories of employers from its jurisdiction. See, e.g., Hotel Employees Union v. Leedom, 358 U.S. 99, 99 (1958) (per curiam); Office Employees Union v. NLRB, 353 U.S. 313, 320 (1957). However, the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, tit. VII, §§ 701-707, 73 Stat. 541 (codified as amended in scattered sections of 29 U.S.C.), which, among other things, amended the NLRA, conferred statutory approval on this practice as it existed at the time the Act was passed. NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1973).

170. Presumably, a solution to the problem of agencies' inadequate resources is for legisla-
ically resolves disputes much more quickly than the cumbersome procedures of the NLRA.\textsuperscript{171} This speedier dispute resolution is clearly within the public interest. In addition, it can be argued that, by virtue of their experience, arbitrators have developed expertise in deciding whether employees have been discharged for just cause, for example, or whether a contractual provision allows an employer to take unilateral action in certain areas.\textsuperscript{172}

In sum, in this area as in others we have examined, the NLRB, like the courts, weighs conflicting public interests and decides accordingly. Whatever it decides, the Board will advance some public interests and frustrate others. Administrative agencies, like courts, are undoubtedly...
guided by their members’ sincere appraisals of the relative force of the competing public interests; however, their resolution of these conflicts is probably influenced to a considerable extent by the political and jurisprudential predilections of those members.173

VII. Compulsory Arbitration

Legislatures have often been much more direct in not only encouraging, but mandating, arbitration or other alternative procedures for resolving particular types of disputes. Compulsory arbitration has long existed, for example, for so-called minor disputes, i.e., grievance disputes, under the federal Railway Labor Act.174 Under the Act, employers may not engage in lockouts nor unions strike over grievance disputes, nor may either resort to the courts to resolve such disputes, other than to seek limited review of arbitration awards.175 In recent years, state legislatures have required arbitration in medical malpractice cases, while providing for a judicial trial de novo at the behest of a party aggrieved by the arbitral award.176 In some states, lawmakers have imposed a general arbitration requirement for cases in which the amount in controversy is under a certain sum, while providing a right to a judicial trial de novo subject to conditions that tend to deter dissatisfied parties from availing themselves of that right.177 As of 1983, a similar requirement had been imposed on an experimental basis in selected federal district courts.178 Primarily because of the almost universal prohibition against public employee strikes,

173. Unlike adjudicatory bodies, which are at least expected to be nonideological when performing their duties, the role of legislatures in the American governmental system is acknowledged as political and ideological. Some states, in fact, have enacted legislation codifying a deferral policy quite similar to that of the NLRB. For example, the California Public Employment Relations Board (PERB) is charged with enforcing the Educational Employment Relations Act, and the Act specifically provides that “the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or by binding arbitration.” CAL. GOV’T CODE § 3541.5(a) (West Supp. 1986). PERB has declared that this statute “essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards.” Dry Creek Teacher’s Ass’n, PERB Order No. Ad-81a (July 21, 1980).


177. See, e.g., CAL. CIV. PROC. CODE § 1141.11, .20-.21 (West Supp. 1986).

178. See generally E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (rev. ed. 1983). More recently, it has been reported that “Sixteen states and ten federal district courts have authorized court-ordered arbitration programs.” Edwards, Alternative Dispute Resolution: Panacea or Anathema? 99
arbitration of bargaining impasses, i.e., interests disputes, between public employee unions and the public entities with which they negotiate has often been compelled by law.\textsuperscript{179}

Professor Fiss has stated that "settlement . . . should be neither encouraged or praised."\textsuperscript{180} It is clear that his objections to mandatory arbitration and other types of compelled alternative dispute resolution procedures\textsuperscript{181} would be even stronger. In all instances of mandatory arbitration, however, legislators, although not unmindful of political and ideological considerations, have struck a balance between competing public interests in enacting such procedures for particular types of disputes.

A. Arbitration Under the Railway Labor Act

The alternatives to compulsory arbitration of grievance disputes in the railroad (and airline) industries,\textsuperscript{182} for example, are limited. They consist of: (1) permitting unions or employees to sue employers to redress alleged breaches of collective bargaining agreements; (2) permitting unions to strike and employers to lockout when either alleges that the other has breached a collective-bargaining agreement; or (3) allowing unions and employers the choice of substituting arbitration for either or both of the first two alternatives.

The latter model has been chosen for employers and unions that are covered by the NLRA. Despite this freedom of choice, however, the vast majority of collective-bargaining agreements in NLRA-covered enterprises provide for final and binding arbitration of grievance disputes.\textsuperscript{183}

\textsuperscript{179} See Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn, 394 Mich. 229, 241, 231 N.W.2d 226, 228 (1975), and cases discussed therein.

\textsuperscript{180} Fiss, supra note 2, at 1075.

\textsuperscript{181} Aside from compelling arbitration, legislatures have also mandated a variety of other alternative dispute resolution devices. California, for example, requires pretrial mediation of child custody and visitation issues in marriage dissolution proceedings. Cal. Civ. Code \textsuperscript{182} Airlines have been covered under the Railway Labor Act since 1936.

\textsuperscript{183} The grievance procedure is one of the most universal and important provisions in the collective agreement. Virtually all (ninety-nine percent) of the 1,717 major contracts studied in a national survey included such a procedure . . . [and] about ninety-four percent provided for the arbitration of grievances between the parties." R. Smith, L. Merrifield & T. St. Antoine, Labor Relations Law 762, 764 (5th ed. 1974) (citing Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 1425-1, Major Collective Bargaining
A similar result would probably occur in industries covered by the Railway Labor Act if they were permitted this option. Congress has decided, however, that the critical nature of the railroad and airline industries is such that the nation should not risk the possibility of disruptive work stoppages every time a union or employer believes that its collective-bargaining agreement has been violated. If the parties did not voluntarily choose binding arbitration, the potential frequency and impact of such disputes, Congress believed, could cause overwhelming crises in the nation's economic life. If, instead of resorting to economic warfare, the parties litigated such contract disputes in the courts, existing judicial institutions could soon be seriously disrupted.\(^{184}\)

To be sure, the right to strike is a hallmark of a democratic society.\(^{185}\) In the private sector, it is legislatively protected.\(^{186}\) There would, nevertheless, appear to be at least tacit agreement with the observation of Jean Jaurès, the early French Socialist leader, that the strike is a necessary but barbarous mode of struggle against society itself.\(^{187}\) The same can no doubt be said of the lockout and other weapons of economic conflict. It is one thing to protect strikes, and perhaps lockouts,\(^{188}\) when

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\(^{184}\) Thus, even under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), which confers jurisdiction on the federal courts to entertain suits for the enforcement of collective-bargaining agreements between unions and employers covered by the Act, individual employee suits to enforce an agreement will be dismissed if they are subject to arbitration and the union has not breached its duty of fair representation by refusing to arbitrate those disputes, Vaca v. Sipes, 386 U.S. 171, 184-85 (1967), or in its prosecution of the grievances in the arbitration hearing. Hines v. Anchor Motor Freight, 424 U.S. 554, 564 (1976). See also Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), in which the Supreme Court gave a restricted reading to § 301(a). This reading was broadened in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957), and in Drake Bakeries v. Local 50, Am. Bakery & Confectionery Workers, 370 U.S. 254, 263-64 (1962). In *Westinghouse*, Justice Frankfurter, writing for the Court, defended the narrow construction of § 301 in part by asserting that "Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, [had not] intended to open the doors of the federal courts to a potential flood of grievances . . . ." 348 U.S. at 460.


\(^{188}\) The United States Supreme Court has held that, after a bargaining impasse has occurred, an employer violates neither § 8(a)(1) nor § 8(a)(3) of the NLRA by engaging in an offensive lockout designed to pressure the union and employees to accept the employer's contract terms. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965). Whether a pre-
unions and employers seek to negotiate the terms of collective-bargaining agreements. It is quite another to encourage the potentially interminable social turmoil that could result if absolute protection were accorded to these weapons when used to resolve problems of interpreting or applying those agreements. Society can endure only so much struggle against itself.

The sheer volume of such disputes militates against their judicial resolution as well—especially when the grievance-arbitration process has, despite admitted shortcomings, proved relatively satisfactory to employers, unions, employees, and the public. In addition, much can be said for Professor David Feller's observation that "labor arbitration is really the adjudicatory phase of a system of government," and his further suggestion that judicial deference to arbitration really reflects the treatment of "that system of government as another jurisdiction, to whose judgments [the courts] must give full faith and credit when there was jurisdiction to enter those judgments."189

Weighing against these considerations is the fact that, to employ Judge Story's 1845 description of commercial arbitration,190 labor arbitration retains many of the elements of rusticum judicium.191 Also, the presence of an arbitration provision in a collective-bargaining agreement will normally deter individual employees from pursuing their own claims in the courts.192 Only when a union has violated its "duty of fair representation" in processing an employee's contract-based grievance will the employee be able to pursue a judicial remedy against an employer for the alleged contract violation.193 Because a union's burden to show that it did not violate its fair-representation duty is modest,194 employees will rarely be permitted to sue their employers for breach of collective-bargaining agreements that contain arbitration provisions. When one adds

impasse bargaining lockout is permissible is unclear, although at least one federal appellate court has treated both situations alike. Lane v. NLRB, 418 F.2d 1208, 1212 (D.C. Cir. 1969).

189. Feller, supra note 120, at 105. Although different factors are present, such considerations might also play a role in the NLRB's deferral policy. See supra note 172.

190. See supra text accompanying note 56.


193. Id.; see also Hines v. Anchor Motor Freight, 424 U.S. 54 (1976) (contractual grievance dispute requirements may be waived when union breaches duty of fair representation).

194. The union is "limited only by the standard of arbitrariness." Vaca v. Sipes, 386 U.S. 171, 208 (1967) (Black, J., dissenting); see Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 74 (1975) (Douglas, J., dissenting) ("[T]he burden on the employee is heavy.").
that, under the unique American labor law regime, employees may be bound by a collective-bargaining agreement although they oppose representation by the union that entered into it, or indeed by any union at all, this result seems particularly harsh. That situation flows, however, from a considered legislative decision that the exclusivity principle in labor relations serves the public interest.\textsuperscript{195}

When the reasons for and against compulsory arbitration of grievance disputes under the Railway Labor Act are weighed, Professor Feller's observation that "labor arbitration is really the adjudicatory phase of a system of government"\textsuperscript{196} appears to recognize a principle that would offset whatever public interest exists in contract interpretation by "public officials," as well as the perceived or actual infirmities in the arbitration process. Both the major railroad employers and the vast majority of railroad unions supported the Railway Labor Act when it was originally passed by Congress,\textsuperscript{197} and the widespread use of voluntary, binding grievance arbitration under the NLRA suggests that unions and employers, as well as the public, have significant interests in avoiding continuous resort to economic warfare or to the courts. Mandatory arbitration of "minor" disputes in industries covered by the Railway Labor Act appears to reflect a proper balancing of competing public interests.

B. Compulsory Medical Malpractice Arbitration

Medical malpractice is simply a species of tort. If a legislature prescribed arbitration as the exclusive dispute-resolution mechanism for such cases, it would collide with the constitutionally guaranteed right to a jury trial.\textsuperscript{198} While arbitration of medical malpractice claims is often

\textsuperscript{195} "Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one." Aboud v. Detroit Bd. of Educ., 431 U.S. 209, 219 (1977).
\textsuperscript{196} Feller, supra note 120, at 105.
\textsuperscript{197} As appears in the Railway Clerks opinion [Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 48 (1930)], the Railway Labor Act of 1926, a seminal statute in the scheme of labor relations in the United States, was the product of a broad consensus among railroads and railway brotherhoods. Indeed, it might be characterized as an industry-wide collective bargaining agreement which was then ratified by congressional action.
\textsuperscript{198} See, e.g., U.S. Const. amend. VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no
compelled by statute it is, therefore, not made exclusive. Dissatisfied parties in a compelled medical malpractice arbitration are entitled to a trial de novo in the regular courts.199 If they pursue their claims in the courts, however, the prior arbitration award is not a nullity. Despite traditional rules excluding the judgments of other tribunals as hearsay and opinion, it will be admitted as a form of expert’s opinion.200

What, then, are the competing public interests in compelled arbitration of medical malpractice claims? On the one hand are the concerns expressed by Professor Fiss about the responsibility of public tribunals to decide legal disputes, reinforced by the constitutional jury-trial guarantee. On the other is the discerned medical malpractice “crisis.” Although opinions vary, many legislators worry that physicians will be forced from practice or will engage in expensive and unnecessary precautionary procedures as a result of ever-increasing jury awards in medical malpractice cases and the consequent rise in insurance premiums. Legislatures and courts seek to resolve these public policy tensions by permitting dissenting arbitrators’ opinions to be received in evidence along with those of majority arbitrators.

At first glance, Professor Fiss’ preference for judicial dispute resolution over settlement and other forms of ADR would appear to be honored, if not as a result of his policy arguments, then at least because of constitutional considerations. The dispute will ultimately be disposed of by a court, indeed by a jury. Upon further examination, however, it would be an extraordinary jury that could ignore the influence of the prior arbitral award. Whether the arbitral board was composed of true experts or of lay persons, most juries would tend to regard the arbitration panel as a type of court, which had already heard the evidence and rendered its decision.201

Because reducing the size of medical malpractice awards is a pri-

200. Id.; see supra note 113 and accompanying text.
201. In Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 424 N.E. 2d 586 (1981), the Ohio Supreme Court stressed that the jury would be carefully instructed that the award was not conclusive, that it was being received only as an “expert’s opinion,” and that the ultimate decision on the merits was for the jury to make. In addition, the Ohio statute in that case provided that the dissenting opinion of any of the arbitrators could also be received in evidence. Despite these safeguards, there is much merit in the view of the dissenting judge in Beatty that “[u]se of the panel’s report as evidence impermissibly delegates the jury’s fact finding functions to a panel of arbitrators.” Id. at 497, 424 N.E.2d at 595 (Brown, J., dissenting).
mary, if not always acknowledged, goal of compelling arbitration in such cases, the jury is clearly intended to be greatly influenced, if not controlled, by the arbitral award. The public policy identified by the legislature to support arbitration thus undermines a constitutionally identified policy favoring jury resolution of certain disputes. Although the jury right is not absolutely denied, a strong argument can be made that the constitutional policy ought to be accorded greater weight—especially when the countervailing policy does not implicate external concerns such as the efficient use of judicial resources or the promotion of peaceful labor-management relations but instead centers on a perceived deficiency in the jury system itself. When the competing factors are weighed, the case for mandatory arbitration in medical malpractice cases is less compelling than it is in other areas. Once again, however, we see how the extremely flexible, if not manipulable, technique of balancing is employed in this area.

C. Judicial Arbitration

In judicial arbitration, or, as it has often been called, court-annexed arbitration, the calculus of competing public interests differs somewhat. Here, the goal of reducing the courts' caseload is paramount, although legislators hope that arbitration's relative informality, speed, and inexpensiveness will also enhance party satisfaction in the dispute's ultimate resolution.202

Although mandatory judicial arbitration schemes differ in their particulars,203 the broad contours of the California statute204 are fairly typical. The California Judicial Council's 1983 Report and Recommendation on Effectiveness of Judicial Arbitration205 describes the background and operation of the statute as follows:

Effective July 1, 1979, the Legislature enacted a comprehensive program for mandatory judicial arbitration in superior courts having 10 or more judges and in all other courts which elect through local rule to make the program available . . . . Judicial Arbitration was also provided in any case where the plaintiff elects or the parties stipulate to

202. See, e.g., CAL. CIV. PROC. CODE § 1141.10 (West 1982) (legislative finding that "litigation involving small civil claims has become so costly and complex . . . that courts are unable to efficiently resolve the increased number of cases filed each year, and that the resulting delays and expenses deny parties their right to a timely resolution of minor civil disputes").

203. In a 1983 article, Professor Leo Levin noted that "[c]urrently, court-mandated arbitration is being used in nine states, the District of Columbia, and two United States district courts." Levin, Court Annexed Arbitration, 16 U. MICH. J.L. REF. 537, 539 (1982-83).


205. SUPER. CT. COMM., REPORT AND RECOMMENDATION ON EFFECTIVENESS OF JUDICIAL ARBITRATION 1983 (copy on file with The Hastings Law Journal) [hereinafter REPORT].
it. The act originally applied to cases which the court determined had an amount-in-controversy of $15,000 or less and which did not require equitable relief. The amount was raised to $25,000 for [designated] counties . . . . The $25,000 limit also applies to any county where the board of supervisors agrees to the increased limit . . . .

Since January 1, 1982, the law provides for the assignment of a case to the arbitration hearing list within 90 days after a party declares the case to be at issue . . . . After a case is placed on the arbitration hearing list, either by court order, election of plaintiff, or stipulation of the parties, an arbitration hearing is generally held within 90 days. A neutral arbitrator—who is usually an attorney selected from a list maintained by the court, but sometimes a retired judge—hears the evidence and must make an award within 10 days after the conclusion of the hearing. Any party wishing to reject the award must file a request for trial de novo within 20 days after the award is filed with the court. If the request is timely, the case is restored to the list of civil cases awaiting trial and processed in the same manner as conventional cases. A case which is eventually tried and results in a judgment that is not more favorable than the arbitration award may subject the requesting party to paying various costs and fees, such as the arbitrator’s fee and the expert witness costs of the other party.\(^{206}\)

As in the area of mandatory arbitration of medical-malpractice cases, the availability of a trial de novo at the behest of a party wishing to reject the award renders judicial or court-annexed arbitration constitutional. In effect, this type of arbitration, though mandatory, is not binding. Because parties who do not improve their position in a trial de novo must bear costs and fees, however, their willingness to seek such a trial is significantly deterred. Whether this feature of the law deters more strongly than the receipt in evidence of an arbitration panel’s award in mandatorily arbitrated medical malpractice claims can only be a matter of conjecture without further data. However, the California Judicial Council’s report states that, as of 1983, the “statewide trial de novo rate for cases placed on the arbitration hearing list appears to be 1.4 percent (2.7 percent, excluding Los Angeles),” and that “since the beginning of the program, dispositions by trial as a percentage of total dispositions have declined dramatically for personal injury cases—the type most likely to be judicially arbitrated.”\(^{207}\) Although the report cautions that “no satisfactory means are available to rule out other independent causes which may be implicated in this trend,”\(^{208}\) these figures suggest rather strongly that the judicial arbitration scheme deflects numerous disputes from the judicial system, and that a significant percentage of these re-

\(^{206}\) Id. at 1-2 (citations and footnotes omitted).

\(^{207}\) Id. at 24-25.

\(^{208}\) Id. at 25.
main deflected as a result of the potential penalty imposed on parties who obtain, but do not improve their position in, a trial de novo.

In short, despite the theoretical "escape valve" of a trial de novo, judicial arbitration is virtually obligatory under the California statute and similar schemes.\textsuperscript{209} As a result, this area presents most starkly the issues posed by Professor Fiss. Is lightening the courts' caseloads a sufficient justification for forcing the transfer of the decision-making responsibility from courts to private adjudicators?

In answering that question, one must first acknowledge that, although making court dockets more manageable may be a major goal in requiring judicial arbitration, it is by no means the only one. In enacting the judicial arbitration statute, the California Legislature expressed its concern about the cost and complexity, as well as the delays, in litigating minor claims.\textsuperscript{210} By imposing a monetary limitation on claims subject to judicial arbitration (either $15,000 or $25,000)\textsuperscript{211} the legislature indicated its concern that these deficiencies in judicial adjudication most severely affect people with modest claims. When a plaintiff hires counsel on an hourly fee basis, for example, a significant portion of a judgment may normally be consumed by attorney's fees. Even if one assumes that an attorney who represents a plaintiff on a contingent fee basis will charge the same amount regardless of whether the case is tried before a judge or an arbitrator, the expense for attorney's fees that a prevailing defendant is likely to incur would be much smaller if the case is resolved in arbitration than in court.

Of course, this problem can be dealt with, as it is in England and other countries, by assessing attorney's fees as part of the costs against a losing party. At first glance, it would seem that, were that done, publicly responsible officials would not be ousted of their jurisdiction to decide legal questions concerning publicly promulgated norms—although the

\textsuperscript{209} In 1978, mandatory court-annexed arbitration went into effect on an experimental basis for certain types of cases in three federal district courts: the Eastern District of Pennsylvania, the District of Connecticut, and the Northern District of California. E. LIND \& J. SHAPARD, supra note 178, at 7. Of the three, only in the District of Connecticut did "no prejudice [attach] to the demand for trial de novo." Id. By 1983, however, that district's arbitration program had been terminated. See Levin, supra note 203, at 539 n.13.

\textsuperscript{210} "The legislature's declared purpose in creating judicial arbitration was to reduce the cost, complexity, and increasing delay of litigating modest civil claims." REPORT, supra note 205, at 3; see also CAL. CIV. PROC. CODE § 1141.10 (West 1982).

\textsuperscript{211} In the federal district courts that have adopted court-annexed arbitration, the jurisdictional amount varies. "Cases subject to the rule are generally those involving personal injury or contract actions, in which no more than $100,000 is demanded (the amount limit is $50,000 in the Eastern District of Pennsylvania)." E. LIND \& J. SHAPARD, supra note 178, at 7-8.
problems of delay and complexity in judicial proceedings, among others, would remain. Were attorney's fees assessed against losing parties, however, it would have a chilling effect on parties' desires to seek judicial vindication of their claims and defenses. The ante would be raised. Not only would litigants run the risk of not prevailing on the merits, but they would face the additional risk of having to finance their opponents' prosecution of the case.212

The goal of making efficient use of finite judicial resources by diverting some cases from the judicial system addresses significant public interests in its own right. The size of the judicial plant is simply not limitless. Disputes cannot be allowed to fester. Even if one assumes that the results in settlement or other forms of ADR are less "just" than those reached in a judicial proceeding—an assumption that may or may not be warranted—there is virtue in terminating disputes, not only for the immediate parties but for society in general as well. Finally, some studies indicate that the principal effect of judicial arbitration is merely to speed up the settlement process, but that the basic rate of settlement does not appreciably differ from when disputants negotiate in the shadow of a pending or imminent lawsuit.213 As noted throughout this Article, the vast majority of suits are disposed of before trial. Judicial efficiency is clearly enhanced when courts do not have to consider the pleadings and pretrial motions of parties who will otherwise settle.

212. Cf. Marek v. Chesny, 105 S. Ct. 3012 (1985). In Marek the Court construed Federal Rule of Civil Procedure 68, which provides that a party who rejects a settlement offer that is more favorable than the judgment eventually obtained at trial must pay the other party's "costs" incurred after the making of the offer. The Court held that a party who had rejected an offer to settle a 42 U.S.C. § 1983 lawsuit and then obtained a judgment less favorable than the offer was precluded by Rule 68 from recovering attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Act. Justice Brennan, joined by Justices Marshall and Blackmun, noted in dissent:

> Congress intended for "private citizens . . . to be able to assert their civil rights" and for "those who violate the Nation's fundamental laws" not to be able "to proceed with impunity." Accordingly, civil rights plaintiffs "appear before the court cloaked in a mantle of public interest"; to promote the "vigorous enforcement of modern civil rights legislation," Congress has directed that such "private attorneys general" shall not "be deterred from bringing good faith actions to vindicate the fundamental rights here involved." Yet requiring plaintiffs to make wholly uninformed decisions on settlement offers, at the risk of automatically losing all of their post-offer fees no matter what the circumstances and notwithstanding the "excellent" results they might achieve after the full picture emerges, will work just such a deterrent effect.

_Id._ at 3029 (Brennan, J., dissenting) (emphasis in original) (citations omitted).

213. "The results of the evaluation suggest that more expeditious settlement has been achieved, while frequent termination by acceptance of an award has not." E. LIND & J. SHAPARD, _supra_ note 178, at xii.
The policies of increasing court efficiency and creating an affordable forum for litigants with claims of modest value thus significantly support the institution of judicial arbitration. Although this practice effectively limits the availability of jury trials for certain cases, arbitration under schemes such as California's does not overtly seek to undermine the constitutional policy favoring jury trials. At a trial de novo, a jury will decide the issues without being influenced by an arbitrator's findings. It would appear, therefore, that the move toward judicial arbitration has struck a proper balance between competing public interests. At the same time, legislatures and courts must be ever mindful of the warning flag raised by Professor Fiss. The balance is a delicate one, and slight factors can tip the scales in one direction or another. The important point is that this form of mandatory arbitration, as well as any other alternative dispute resolution mechanism, must be subject to rigid scrutiny. We cannot simply assume that, because the judicial system has its faults, an alternative device is necessarily superior.\textsuperscript{214}

VIII. Public Sector “Interests” Disputes

Mandatory arbitration of bargaining impasses between unions and employers in the public sector is designed to resolve “interests” rather than “rights” disputes.\textsuperscript{215} This area would thus appear to be unrelated to Professor Fiss' preference for judicial adjudication over settlement and other forms of ADR, since disagreements over the terms of a collective-bargaining agreement are beyond judicial competence. An examination of the cases dealing with mandatory public-sector arbitration, however, reveals that courts have had to grapple with questions not unlike those identified by Professor Fiss in *Against Settlement*.

Perhaps the most thorough judicial examination of those questions appears in *Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn*,\textsuperscript{216} decided by the Michigan Supreme Court. In *Dearborn*, the Michigan Legislature had provided for compulsory binding arbitration by ad hoc tripartite arbitration panels as the final step in the bargaining process between municipalities and their police and firefighters. Under the statute, the municipality and the union were each to choose a “dele-

\textsuperscript{214} With regard to Professor Fiss' concerns about ADR, it can be argued that persons appointed to a judicial arbitration panel have become, by virtue of that appointment, public officials. If that argument prevailed, the decisions of court-annexed arbitrators could be regarded as satisfying the need for public accountability in dispute resolution. Cf. *Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975), discussed in Section VIII of this Article.

\textsuperscript{215} See supra notes 20-30 and accompanying text.

\textsuperscript{216} 394 Mich. 229, 231 N.W.2d 226 (1975).
gate” to the arbitration panel. These two would then choose a neutral third party who would serve as the panel’s arbitrator/chairman. The statute also provided that if the delegates chosen by the union and the city failed to agree on a third party, “either of them may request the chairman of the state labor mediation board to appoint the arbitrator.”\textsuperscript{217}

The city of Dearborn had reached an impasse in negotiating new labor agreements with unions representing its police and firefighters. The unions then invoked arbitration, and each chose a delegate to its respective arbitration panel; however, the city’s refusal to name a delegate to either panel precluded selection of a third person to act as arbitrator/chairman. Pursuant to the statute, the third person was appointed by the chairman of the Michigan Employment Relations Commission (MERC).\textsuperscript{218} The panels conducted hearings and rendered decisions, but the city refused to comply with the awards. The unions then sought judicial enforcement.

All four members of the court who participated in the decision agreed that mandatory arbitration of interests disputes in the public sector was constitutional and desirable as an alternative to public employee strikes, which are generally prohibited by law. They also agreed that the statute would have presented no constitutional problem had it entrusted the arbitration function to a state governmental panel of arbitrators. The principal issue dividing the \textit{Dearborn} court, however, was whether the arbitration scheme devised by the legislature was an unconstitutional delegation of legislative power to private ad hoc arbitrators. Two members of the court held that it was unconstitutional, but gave their ruling only prospective effect. A third maintained that the statute was constitutional in all respects. The fourth, Justice Williams, expressed severe doubts about the statute’s constitutionality had the unions and the public employer each selected their respective delegates and had the latter chosen the third-party neutral arbitrator. He nevertheless concluded that the Act was constitutional under the facts of the case.

Justice Levin, writing for the two members of the court who held the statute unconstitutional, explained his conclusion as follows:

The arbitrator/chairman of the panel is entrusted with the authority to decide major questions of public policy concerning the conditions of public employment, the levels and standards of public services and the allocation of public revenues. Those questions are legislative and political, not judicial or quasi-judicial. The act is structured to insulate the

\textsuperscript{217}. \textit{Id.} at 242, 231 N.W.2d at 228 (citing Mich. \textit{Comp. Laws} § 423.235 (1978)).

\textsuperscript{218}. \textit{Id.} at 241, 231 N.W.2d at 228.
arbitrator/chairman's decision from review in the political process. It is not intended that he be, nor is he in fact, accountable within the political process for his decision. This is not consonant with the constitutional exercise of political power in a representative democracy.219

Elsewhere in his opinion, Justice Levin observed:

There are innumerable "disputes" difficult of resolution which may become hot political issues—e.g., zoning, the location of public buildings, school hours and school programs. These can all be viewed as "disputes" or "differences" between the property owners, parents or school teachers immediately affected and the government. It would be an enormous departure from present concepts of responsible exercise of governmental power if the practice were to develop of resolving difficult political issues in an arbitrator's conference room as an alternative to facing up to vexing problems in the halls of state and local legislatures.

Reposing power to resolve political issues in a person called an arbitrator and characterizing the issue a "dispute" or "difference" and his decision an "adjudication" does not obviate the need for political accountability of the manner in which political issues are resolved.220

It is significant that, following the decision in Dearborn, the Michigan Legislature enacted a new law prescribing compulsory arbitration of interests disputes involving police and firefighters.221 Under the new statute, such arbitration must be conducted by a governmental panel rather than by ad hoc independent arbitrators. This new scheme would appear to meet the concerns expressed by three of the four Michigan Supreme Court Justices who participated in Dearborn.222 It would also appear to meet the underlying philosophical objections of Professor Fiss to settlement and ADR, for, although Dearborn dealt with whether a delegation of legislative power violated a state constitution, the concerns expressed in Justice Levin's opinion resemble to a remarkable degree those voiced in Professor Fiss' general criticism of settlement and ADR. To be sure, Professor Fiss is troubled by the possibility that publicly responsible judges will be displaced by private parties in the elaboration of legal doctrine. By contrast, Justice Levin is concerned that politically unaccountable arbitrators will replace the legislature in the promulgation of legal norms. The common thread that runs through their concerns,

219. Id. at 241-42, 231 N.W.2d at 228.
220. Id. at 267, 231 N.W.2d at 240.
222. Although Justice Williams in his dissent questioned the statute's constitutionality for reasons similar to those expressed in the opinion of the court, he would have upheld the statute as applied because the neutral arbitrator had been appointed by the chairman of the Michigan Employment Relations Commission. Dearborn, 394 Mich. at 323, 231 N.W.2d at 267 (Williams, J., dissenting); see infra text accompanying notes 231-33.
however, is the notion that public issues should be decided by public officials who are responsible to the public.

Other courts that have had occasion to consider the constitutionality of similar statutes have not shown similar sensitivity to the concerns identified by Professor Fiss and the Michigan Supreme Court. In *City of Warwick v. Warwick Regular Firemen's Association*,223 the Rhode Island Supreme Court characterized the three members of the party-designated arbitration panel as public officials who performed a public function, primarily because they enjoyed the legislative "power to fix the salaries of public employees . . . without control or supervision from any superior."224 The court concluded that there had been no unconstitutional delegation of legislative power to private persons. In *Dearborn*, Justice Levin rightly criticized such "nominalistic reasoning," which, in his view, "both begs the question and reduces the analysis of the issue to a reason-free debate over labels. Such reasoning could countenance the syllogism that all enactments of the Legislature are constitutional because the Legislature cannot pass an unconstitutional law."225

The Wyoming Supreme Court offered other rationalizations when it upheld a similar statute in *State v. City of Laramie*.226 Those were: (1) that arbitration concerning public employees does not differ from that in business and industrial affairs and therefore cannot be considered a municipal function; and (2) that arbitration panels do not make law, but only execute it.227 The first reason, however, ignores the potential impact upon taxpayers of interest arbitration awards in the public sector. The second overlooks the precedential effect of an initial award upon negotiated and arbitrated settlements in other parts of the public sector within the state.

Perhaps the most convincing rationale—aside from those found in decisions based on specifically local grounds228—was advanced by the Supreme Judicial Court of Maine in *City of Biddeford v. Biddeford Teachers Association*.229 There the court concluded that governmental employees who are aggrieved should not have to look only to govern-

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224. *Id.* at 116, 256 A.2d at 210.
227. *Id.* at 300-01.
229. 304 A.2d 387 (Me. 1973).
ment for redress. Despite the force of this argument, it ignores the problem of public accountability.

In my opinion, the most satisfactory treatment of Dearborn-type arbitration is found in Justice Williams' Dearborn dissent, which accomplished a pragmatic balancing of the competing public policies presented by an effective arbitration scheme that encroached on the legislative domain. Justice Williams observed that, no matter how it was phrased, the central question in such a case was "what the people can or cannot give away," and the people could not give away "public responsibility and accountability in the management of [their] business, whatever the managers are called."

The arbitration method at issue in Dearborn, according to Justice Williams, retained sufficient public accountability because (1) the chairman of the arbitration panel had been selected by the Michigan Public Employment Relations Commission, a publicly accountable body; (2) the arbitration was conducted pursuant to extensive statutory standards and could be subjected to judicial review at the request of a party; (3) community interest in the dispute was likely to place the arbitration panel under public scrutiny, making the arbitrators publicly accountable to some extent; and (4) the powers exercised by the arbitrators were limited and well defined.

In reaching this conclusion, Justice Williams relied heavily on the observation of Professor Frank Cooper in his treatise State Administrative Law that courts "weighing the advantage of delegation against the hazards involved make a pragmatic judgment as to whether the constitutional protections have been observed." As discussed in the following section, this pragmatic balancing technique is equally appropriate in assessing the desirability of other ADR devices.

IX. The Meaning of the Arbitration Experience for Public Interest Questions in Alternative Dispute Resolution

Professor Fiss' criticism of settlement and ADR is based on policy,
rather than constitutional, considerations. In all the arbitration cases we have examined, courts and administrative bodies have made pragmatic attempts to balance competing public policy concerns when deciding whether to permit particular issues to be arbitrated, whether a legislature properly subjected certain types of disputes to mandatory arbitration, and the effect to be given an arbitral award in a subsequent judicial or administrative proceeding.

This type of balancing is equally appropriate, if not inevitable, in evaluating all alternative dispute resolution devices. The courts have not been unmindful, for example, of the special problems of settlements in class action suits mentioned by Professor Fiss in Against Settlement.\textsuperscript{234} Under Rule 23(e) of the Federal Rules of Civil Procedure, a federal court will not approve a class action settlement unless it is fair, adequate, and reasonable.\textsuperscript{235} Courts have insisted that in assessing the adequacy of a settlement, the underlying dispute will not be adjudicated, for the "very purpose of compromise is to avoid the delay and expense of such a trial."\textsuperscript{236} Nevertheless, in assessing a settlement, the court's evaluation of the plaintiff's chance of succeeding on the merits plays a significant role in determining whether the court will approve the proposed settlement. Although this consideration does not take the form of a full-fledged trial, the settlement is subjected to close judicial scrutiny. The process, therefore, significantly involves public officials in the dispute's ultimate resolution.

In the area of antitrust law, the Antitrust Procedures and Penalties Act (APPA)\textsuperscript{237} requires a federal district court to determine that a consent judgment, which has characteristics of both a settlement agreement and a judicial decree, is in the public interest before it may be entered.\textsuperscript{238} This statute also sets forth guidelines to aid a court in deciding whether to enter a consent judgment in an antitrust action.\textsuperscript{239}

\textsuperscript{234} Fiss, \textit{supra} note 2, at 1081-82.
\textsuperscript{236} Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971).
\textsuperscript{238} 15 U.S.C. § 16(e) (1982).
\textsuperscript{239} These considerations are:

1. the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

2. the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.
Notwithstanding these guidelines, the function of the courts in passing upon antitrust consent judgments has been extremely limited. As described by the Ninth Circuit in *United States v. Bechtel Corp.*:

The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." If, instead of approving a consent decree, the court had issued a decree after a trial, could it not have devised a remedy that would "best serve society"? Indeed, would it not have been obligated to do so? The courts' limited role in reviewing consent judgments under the APPA thus underscores Professor Fiss' major argument. Although public officials—courts—are involved in the process, the shaping of the relief is largely dictated by the parties rather than by these public officials who subject the terms of the consent decree only to limited scrutiny. Moreover, by allowing settlement the courts forego an opportunity to interpret the antitrust laws, or at least to apply those laws with full judicial authority.

Once again, however, one can discern offsetting pragmatic considerations that arguably justify this procedure. For example, had the case gone to trial, the government might have lost. In that event, not only would the relief not have been shaped to "best serve society," but there would have been no relief at all. Even if one assumes that the government would have prevailed at trial, it operates with limited funds and is confronted with an ever-mounting caseload. Freeing the government to attend to other cases in which antitrust defendants are not disposed to join a consent judgment would appear to benefit the public. From the defendant's viewpoint, settlement is advantageous because there is no guarantee that it would have prevailed at trial. Even if it had, the expense, the anxiety, and the distraction from its other activities would have ultimately redounded to the detriment of the public in the form of increased prices for the defendant's products or services.

X. Conclusion

Whether we examine the area of arbitration or other forms of alternative dispute resolution, we see that legislatures, courts, and administra-
tive agencies weigh a variety of pragmatic and policy considerations in deciding whether to allow such devices in the first place, and how to respond to them once they are invoked. On the basis of the experience in the arbitration area, several things are clear about these devices: (1) as indicated by their widespread use, they respond to a felt need on the part of the public; (2) satisfying the interests of individual disputants can, at the same time, satisfy broader public interests; and (3) quick and certain resolution of disputes in ways that are acceptable to the parties can keep the peace, a matter in which the entire public has a deep interest.

Despite these considerations, it is important that the dangers and countervailing considerations surrounding these devices be calculated before resorting to them. The most significant concern is the one identified by Professor Fiss, which the courts have also recognized in many of the arbitration cases discussed in this Article: namely, the importance of preserving the role of institutions that have been entrusted with the task of promulgating and interpreting behavioral norms and which are ultimately responsible to the public for the manner in which they discharge those tasks. As we have seen, in balancing these factors the courts have resorted to a variety of analytical techniques. A principal purpose of this Article has been to identify and critically evaluate those techniques. It is hoped that this will prove helpful in dealing with the fundamental questions raised by the alternative dispute resolution movement.

A final comment on Professor Fiss' *Against Settlement* article. Despite its title, it does not in my opinion advocate the abolition of settlement or other alternative dispute resolution devices. By suggesting that they should be "neither encouraged nor praised," Professor Fiss is merely cautioning against their being exalted as the best way to resolve disputes. He has hoisted a warning sign that reads: "Consider what you are giving up before heading down this road." Although, as indicated earlier, the courts have not been insensitive to the concerns expressed by Professor Fiss, the legal profession and the public owe him a great debt for having raised his objections so cogently, coherently, and eloquently.