Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs

Harold H. Bruff
University of Colorado Law School

Follow this and additional works at: http://scholar.law.colorado.edu/articles
Part of the Administrative Law Commons, Constitutional Law Commons, Courts Commons, Dispute Resolution and Arbitration Commons, and the President/Executive Department Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
Texas Law Review

Volume 67, Number 3, February 1989

Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*

Harold H. Bruff**

I. Introduction ............................................ 442
II. Arbitration: An Expanding Alternative to Litigation .... 445
   A. Statutory and Judicial Endorsement of Arbitration .... 445
   B. Contractual Values in the Federal Arbitration Act
      Cases ............................................. 447
   C. Enforcing Public Policy: Limits to Arbitrability .... 449
   D. Summary ........................................... 454
III. Delegation to Private Parties in American Law .......... 455
   A. The Delegation Doctrine ............................. 455
   B. The Public/Private Distinction ....................... 458
      1. The Impossibility of a Clear Boundary Between
         Public and Private Activity ....................... 458
      2. The Public Uses of Private Interest ................ 460
IV. An Approach to the Constitutional Issues ............... 463
V. Granting Judicial Power to Agencies and Arbitrators .... 464
   A. Delegation of Adjudicative Power in Administrative
      Law ................................................ 465
   B. Public Rights, Private Rights, and Federal Arbitration. 468
   C. Limiting Judicial Review ............................ 477
VI. Due Process ............................................ 478
   A. Schweiker v. McClure and General Due Process ....... 479

* An earlier version of this Article constituted a report to the Administrative Conference of the United States. I thank the Conference and its staff for their help and support; they bear no responsibility for the views expressed herein.

** John S. Redditt Professor of Law, The University of Texas School of Law. I thank Douglas Laycock and Glen Robinson for their helpful criticisms of drafts of this Article.

441
## B. Analysis of the Particular Attributes of Arbitral Schemes

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>VII. Executive Branch Supervision</td>
<td>483</td>
</tr>
<tr>
<td>A. Adjudicative Activities and Executive Responsibility</td>
<td></td>
</tr>
<tr>
<td>1. Subject Matter</td>
<td>483</td>
</tr>
<tr>
<td>2. Structure</td>
<td>484</td>
</tr>
<tr>
<td>3. Procedure</td>
<td>485</td>
</tr>
<tr>
<td>4. Applying the Constitutional Criteria</td>
<td>485</td>
</tr>
<tr>
<td>5. Neutral Deciders and Public Policy</td>
<td>486</td>
</tr>
<tr>
<td>B. The Scope of the Appointments Clause</td>
<td>488</td>
</tr>
<tr>
<td>C. Selecting Arbitration and Arbitrators</td>
<td>490</td>
</tr>
<tr>
<td>D. Supervising Arbitrators</td>
<td>493</td>
</tr>
<tr>
<td>E. Arbitration and Enforcement Functions</td>
<td>495</td>
</tr>
<tr>
<td>VIII. Conclusion</td>
<td>497</td>
</tr>
</tbody>
</table>

## I. Introduction

The "administrative state" evolved from the constitutional branches' desire to shift many decisions to administrative agencies, which were to apply expert judgment through use of speedy and informal procedures.¹ Eventually, however, increasing formality beset the administrative process.² To reverse this trend, agencies began experimenting with alternative dispute resolution (ADR), a diverse group of informal procedures that typically employ private parties to resolve legal controversies.³ Federal agencies rely on these procedures to make decisions that would otherwise be assigned to courts or executive officers. The use of private deciders in public programs, however, raises fundamental constitutional concerns, for the very legitimacy of the administrative state rests on the nature and strength of the relationships between federal agencies and the constitutional branches.⁴ The use of ADR techniques may lead to constitutional infirmities by overly attenuating the ties be-

---

¹ See generally Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1189-96 (1986) (discussing the historical development of regulatory agencies and the political and economic factors contributing to the growth of the regulatory system).

² See 4 Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation: Delay in the Regulatory Process 21 (Comm. Print 1977); Commission on Law and the Economy, Am. Bar Ass'n, Federal Regulation: Roads to Reform ch. 6 (1979) [hereinafter 'ROADS TO REFORM'].


⁴ See Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 578 (1984) (arguing for abandonment of a "rigid separation-of-
Arbitration in Federal Programs

tween private decision makers and constitutional officers. 5

In a series of recommendations, the Administrative Conference of the United States (ACUS) has urged the use of ADR techniques in federal programs. 6 Many ADR procedures, such as negotiated rulemaking 7 and mediation to help settle litigation, 8 avoid serious constitutional challenge, because although private parties influence the agencies' decisions, government officers retain final authority. These procedures do not differ sharply enough from other avenues of private influence on public policy making to justify constitutional distinctions. 9 Alone among the recommended procedures, arbitration delegates decision making to private individuals and allows only limited governmental review. 10

Arbitration has always played a role in America in the resolution of some disputes. 11 In modern times, it enjoys widespread use in labor relations and commercial practice, 12 because it can provide speedy and final decisions at low cost. 13 Arbitral schemes share certain general characteristics, but the details vary substantially. A common trait that helps en-

powers compartmentalization of governmental functions" in favor of an analysis focusing on the relationship between the agency and each of the three branches).

5. The Department of Justice has expressed concerns that the use of ADR techniques might violate the delegation doctrine or might infringe the President's responsibilities to control execution. See Memorandum from the Office of Legal Counsel to Stephen J. Markman (Apr. 24, 1986) (copy on file with the author). The Department, however, has also advocated the use of arbitration to resolve fair housing disputes. Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 454-70 (1987) (statement of William Bradford Reynolds, Assistant Attorney General).

6. See ACUS SOURCEBOOK, supra note 3, at 113-18; see also 1 C.F.R. § 305.86-3 (1988) (recommending agency use of ADR techniques).


8. Mediation requires a neutral third party to provide assistance to the parties in their negotiations but not to render a decision. See, e.g., 1 C.F.R. § 305.86-3 (1988) (calling on agencies to adopt alternatives to litigation, such as mediation, if not inconsistent with their statutory authority); see also id. § 305.84-4 (providing for negotiated cleanups and government suits to determine costs for cleanups under Superfund).

9. See infra text accompanying notes 302-04.


sure the acceptability of arbitration—and a primary difference from civil trials and agency adjudications—is the selection of arbitrators through the mutual preferences of the parties. One common method of selection allows disputing parties to rank names on a list provided by an arbitral organization, such as the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service, which maintain rosters of arbitrators and promulgate codes of ethics and procedure. The goal is to select one or more private individuals having no interest in the dispute, and parties often choose someone with expertise in the subject matter. The standard for decision may be a contract provision or a specified body of law. Procedures are informal, with limited discovery and relaxed evidentiary strictures, and the arbitrator may or may not keep a record. The outcome is an award and, perhaps, a brief recitation of the underlying facts and conclusions.

Existing law authorizes or requires federal agencies to employ arbitration in a variety of contexts, which fall into three broad categories for analytical purposes. The first is money claims by or against the government. For example, private insurance carriers arbitrate claims of Medicare beneficiaries for reimbursement of certain medical expenses. The second encompasses disputes between the government and its employees, including both the resolution of grievances under an existing law or contract and the determination of future contractual relations. The third is disputes between private parties related to program administration. Examples include claims against the “Superfund” for cleanup of toxic wastes, the ascertainment of employers’ liability for withdrawal from pension plans overseen by the Pension Benefit Guaranty Corporation, and the determination of compensation that a pesticide manufacturer

16. Whether an award is explained often depends on the context: labor arbitrators usually explain their awards and commercial arbitrators usually do not. See J. MURRAY, A. RAU & E. SHERMAN, supra note 13, at 398.
Arbitration in Federal Programs

must pay for the use of another's data in obtaining federal registration.22

This Article analyzes the constitutionality of these arbitral schemes
and suggests ways of structuring them to minimize constitutional
doubts.23 Part II traces the increasing judicial acceptance of arbitration
as a valid dispute resolution mechanism and then discusses the values
courts have emphasized in considering arbitration outside the context of
federal programs. These values pertain to federal program arbitration,
both by suggesting reasons why courts will support it generally and by
identifying limits to its use in particular contexts. Part III briefly reviews
the public/private distinction in American law and suggests that it is
inappropriate to condemn arbitration in federal programs for the sole
reason that private persons wield some public power.

Against this background, Part IV sets out a general approach ad-
dressing the concerns raised by arbitration in federal programs. These
issues, discussed in Parts V, VI, and VII, take several forms. The use
of private deciders may violate separation of powers principles associated
with the grant of judicial power to the federal courts. Alternatively, the
informality of arbitral schemes may result in an unacceptable threat to
the due process rights of persons affected by arbitration. Finally, delega-
tion of decision-making authority may improperly intrude on executive
prerogatives. This Article concludes that if certain safeguards are
adopted, arbitration in federal programs can surmount all of these
obstacles.

II. Arbitration: An Expanding Alternative to Litigation

A. Statutory and Judicial Endorsement of Arbitration

Arbitration has not always enjoyed judicial favor. Until this cen-
tury, common-law courts refused to enforce agreements to
arbitrate.24 The courts distrusted the informality of arbitration and perceived it as a

23. Concerns may also arise about the existence of statutory authority for agencies to refer
matters to arbitration. The Comptroller General has sometimes been reluctant to find statutory
authority for government arbitration. See Behre, Arbitration: A Permissible or Desirable Method for
Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 PUB. CONT. L.J. 66,
74-79 (1986), Braucher, Arbitration Under Government Contracts, 17 LAW & CONTEMP. PROBS.
473, 477-78 (1952). Controls on arbitration designed to meet constitutional concerns may also as-
sure consistency with statutory authority, because principles of fairness and accountability to execu-
tive authority are pertinent to both inquiries. The discussion that follows assumes the presence of
adequate statutory authority for any particular referral to arbitration.
24. See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-85 (2d Cir.
1942); Hirshman, The Second Arbitration Trilogy: The Federalization of Arbitration Law, 71 VA. L.
REV. 1305, 1309-18 (1985). See generally Wolaver, The Historical Background of Commercial Arbi-
tration, 83 U. PA. L. REV. 132, 138-44 (1934) (surveying the growth in legitimacy of commercial
arbitration from the seventeenth to the twentieth century).
threat to their own jurisdiction. Justice Story captured the prevailing view:

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

Statutes eventually endorsed arbitration and defined its relation to the courts. The Federal Arbitration Act of 1925 (FAA) attempted to "revers[e] centuries of judicial hostility to arbitration agreements . . . and to place [them] 'upon the same footing as other contracts.'" The FAA applies to contracts within the federal maritime and commerce powers and makes agreements to arbitrate "enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." The Act authorizes federal courts to compel arbitration and allows them to overturn awards only on very limited grounds, such as corruption of the arbitrator or the granting of an award in "manifest disregard of the law."

As arbitration became a familiar feature of commercial and labor practice, regularized by its own institutions and mores, courts were less likely to view it as unacceptable "rough justice." Recent Supreme Court

25. See Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 Hastings L.J. 239, 251-55 (1987). Indeed, in the early days there was a threat to judges' pocketbooks, because "judges depended mainly or almost entirely on fees" for their income. Wovlaver, supra note 24, at 141-42.


30. Section 3 of the FAA provides for a stay of proceedings when a court encounters an arbitrable issue; § 4 authorizes federal courts that otherwise have subject matter jurisdiction to order parties to honor arbitration agreements. See id. §§ 3-4.

31. See Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 745-46 (9th Cir. 1985); Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568, 572-73 (2d Cir. 1968). The statute sets forth the following grounds for overturning an award:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators . . . .

(c) Where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers . . . .

Arbitration in Federal Programs

cases generally embrace arbitration.\textsuperscript{32} One likely explanation for this reversal is the judicial self-interest in reducing burdensome case loads. Many observers—including some federal judges—argue that the case load threatens the federal judiciary's capacity to perform essential functions.\textsuperscript{33} The search for case load solutions may skew legal doctrine,\textsuperscript{34} and one would expect the Court to err toward excessive receptivity to alternative fora so long as they do not displace the courts' most valued function of deciding major statutory and constitutional cases.

Arbitration in federal programs provides one solution by reducing judicial case loads. Of course, statutory allocation of adjudicative responsibilities to administrative agencies relieves the courts of initial responsibility for vast numbers of cases.\textsuperscript{35} Nevertheless, the courts retain a major supervisory role through routine judicial review of agency adjudications.\textsuperscript{36} Shifting from agency adjudication to arbitration reduces this portion of judicial case loads, because review of arbitration is so limited. Congress can provide courts further relief by assigning to agencies those aspects of review that are high in volume and low in importance.\textsuperscript{37} Therefore, the availability of arbitration in federal programs should appeal to a harried judiciary.

\textbf{B. Contractual Values in the Federal Arbitration Act Cases}

The Supreme Court has not articulated a general constitutional theory for allocating adjudicative responsibilities among the federal courts, state courts, federal agencies, and private deciders. In the FAA cases, however, the Court has allocated authority between the federal courts and either the state courts or the private sector, considering issues such

\begin{itemize}
\item[32.] See infra subpart II(B).
\item[34.] For example, the Supreme Court’s administrative law doctrine may reflect an attempt to reduce judicial case loads. See Strauss, \textit{One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action}, 87 COLUM. L. REV. 1093, 1117-22 (1987).
\item[35.] In 1984, there were 1121 administrative law judges (up from 196 in 1947), performing functions that could have been assigned to federal district judges. Lubbers, \textit{Federal Agency Adjudications: Trying to See the Forest and the Trees}, 31 FED. B. NEWS & J. 383, 383 (1984). The Social Security Administration holds the largest number of these adjudications. See J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 18-19, 196 (1983) (noting that the Social Security Administration decides approximately 1.3 million cases each year).
\item[36.] For example, in 1983 there were 20,309 filings in district court for review of Social Security Administration decisions. R. POSNER, supra note 33, at 64.
\item[37.] See infra notes 241-44 and accompanying text.
\end{itemize}
as parties' consent to arbitration, the limits of arbitral expertise, the acceptability of arbitration of public policy issues, and the nature of judicial review of awards. Because these same issues arise in cases reviewing arbitration in federal programs, the FAA cases provide some guidance for these disputes as well.

In recent FAA cases, the Court has emphasized the need to enforce agreements to arbitrate. This contractual value has repeatedly subordinated values that the Court ordinarily promotes, such as the efficient resolution of disputes. In Dean Witter Reynolds, Inc. v. Byrd,\textsuperscript{38} for example, the Court compelled arbitration of the state-law portion of a securities dispute, even though the judgment severed pendent claims from a suit properly in federal court. Rejecting an argument that the FAA's sole purpose was to allow the speedy and efficient resolution of disputes, the Court concluded that the Act's principal objective was "to enforce agreements into which parties had entered."\textsuperscript{39} Therefore, "federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement."

Federalism also yields to the contractual values embodied in the FAA. In Perry v. Thomas,\textsuperscript{41} the Court held that the FAA preempted a California statute forbidding arbitration of wage disputes. The Act's "liberal federal policy favoring arbitration agreements . . . create[s] a body of federal substantive law of arbitrability."\textsuperscript{42} The Court's interpretation of the FAA as displacing state policies, however, places a substantial gloss on the Act. Congress perhaps intended only to provide procedure in federal court suits.\textsuperscript{43}

The Court's devotion to contract, as illustrated in Byrd and Perry, may reflect a desire to reduce federal dockets. Disputes forced into court by statutes such as that involved in Perry could often appear in federal court under diversity jurisdiction. Similarly, pendent jurisdiction could open federal courts to many state-law claims that might be resolved through arbitration. By emphasizing contractual values, the Court

\textsuperscript{39} Id. at 220.
\textsuperscript{40} Id. at 221 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)).
\textsuperscript{42} Id. at 2525 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
\textsuperscript{43} See Southland Corp. v. Keating, 465 U.S. 1, 25-27 (1984) (O'Connor, J., dissenting); see also Hirshman, supra note 24, at 1313-18 (noting that Congress could have intended the FAA to be (1) only a procedural rule, (2) substantive law for cases in federal court, or (3) substantive law applicable in state and federal court).
serves its own interest in reducing the federal judiciary’s work load and requires the parties to absorb the inefficiencies of bifurcated disputes.

The contractual value, however, also suggests an important limit to arbitration. Fearing that arbitrators will display insufficient sensitivity to the limits of consent to their authority, courts do not allow arbitrators to determine their own jurisdiction. Instead, courts construe the underlying contracts, resolving doubts in favor of arbitrability. In the related field of labor arbitration, the Court has explained that the judicial check on jurisdiction actually fosters arbitration by removing the disincentive to enter into arbitration agreements that might arise if arbitrators could decide jurisdiction limited only by their "understanding and conscience." The presumption favoring arbitrability also reflects the "greater institutional competence" of arbitrators than courts in such matters as interpreting collective bargaining agreements.

C. Enforcing Public Policy: Limits to Arbitrability

Traditionally, courts frowned upon the notion that arbitrators should attempt to implement public policy through their decisions. Courts expected them to confine their attention to interpreting the parties’ contracts. Two important cases involving arbitration in the securities industry, however, reveal a shift in the Supreme Court’s willingness to allow arbitrators to enforce public policy norms.

In Wilko v. Swan, the Court adopted the traditional view by holding that a customer’s misrepresentation claims against brokers under the Securities Act of 1933 were not subject to compulsory arbitration.
notwithstanding an agreement to arbitrate. The Court concluded that
a provision in the 1933 Act forbidding waiver of compliance with its
requisites superseded the policies of the FAA. The Court feared that
disparities in bargaining power between securities sellers and buyers
could debase consent to arbitration. It concluded that, because of the
"manifest disregard of the law" standard used by courts under the FAA,
judicial review of arbitral awards was insufficient to protect the cus-
tomer’s statutory rights.

In Shearson/American Express v. McMahon, the Court sharply
limited Wilko. The McMahons had signed customer agreement forms
providing for arbitration of any controversy arising out of their accounts
with Shearson. They sued in district court, alleging fraudulent conduct
and breach of fiduciary duties under the Securities Exchange Act of
1934 and the Racketeer Influenced and Corrupt Organizations Act
(RICO). The court of appeals held the claims nonarbitrable under both
federal statutes.

Reaffirming the contractual values that dominate recent FAA cases,
the Court reversed the Second Circuit and upheld the enforceability of
predispute arbitration agreements between brokerage firms and their cus-
tomers. In a broadly phrased opinion for the majority, Justice O’Connor
emphasized that the duty to enforce arbitration agreements “is not di-
minished” for claims founded on statutory rights, absent a showing
that arbitration “is inadequate to protect the substantive rights at is-
ssue.” Addressing the Securities Exchange Act issues, the McMahon
Court characterized Wilko as an embodiment of traditional judicial sus-
picion of arbitration. This attitude conflicted with more recent cases
that both recognized the capability of arbitrators to resolve factual and

50. Wilko, 346 U.S. at 438. For discussions of Wilko and its aftermath, see Fletcher, Privatizing
Securities Disputes Through the Enforcement of Arbitration Agreements, 71 MINN. L. REV. 393, 404-
20 (1987) (analyzing the development of securities arbitration from 1953 to 1985); Kanowitz, supra
note 25, at 257-61 (discussing conflicting policies in securities arbitration cases).
53. In Noble v. Drexel, Burnham, Lambert, Inc., 823 F.2d 849, 851 (5th Cir. 1987), the court
held that McMahon had retroactive application.
55. The claims were brought under § 10(b), 15 U.S.C. § 78j(b) (1982).
57. McMahon v. Shearson/American Express, 788 F.2d 94, 96-97 (2d Cir. 1986), rev’d, 107 S.
Ct. 2332 (1987). For the RICO claim, “public policy” considerations made arbitration inappropriate,
because issues of public interest required a judicial forum. For the securities claims, the court
felt bound by Wilko. See id. at 98-99.
59. Id. at 2339.
60. See id. at 2341.
Arbitration in Federal Programs

legal complexities and acknowledged the sufficiency of judicial review to conform awards to statutory requirements. Indeed, since its decision in *Wilko*, the Court had twice enforced agreements to arbitrate statutory claims in international contracts. Justice O'Connor also noted that Congress had given the Securities and Exchange Commission (SEC) the power to ensure the adequacy of the exchanges' arbitral procedures. The Court confined *Wilko* to its holding under the 1933 Act.

Proceeding to the RICO claims, the Court rejected the McMahan's argument that the combination of compensatory and policing purposes in the Act rendered arbitration inappropriate. The Court thought that the "'adaptability and access to expertise' characteristic of arbitration" permitted satisfactory arbitral resolution of even these complex and important statutory claims. Accurate assessments of liability would yield an appropriate level of deterrence. Therefore, the Court upheld the parties' agreement to arbitrate.

In *McMahon*, the Court demonstrated its willingness to expand the category of rights that parties can agree to protect through arbitration. The extent of the Court's willingness to sanction such developments, however, is open to question, because the Court has held that certain federal statutes confer nonwaivable rights to judicial enforcement. In *McDonald v. City of West Branch*, a former police officer went to arbitration, claiming that the department discharged him without "proper cause" and thereby violated a collective bargaining agreement. The officer lost the arbitration but later prevailed in a section 1983 suit, in which he alleged that the discharge abridged his first amendment rights.

61. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (antitrust); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (trademark and securities). In both cases, however, the Court emphasized the special needs of parties to international contracts to select their fora.

62. *McMahon*, 107 S. Ct. at 2341-42. Justices Blackmun, Brennan, and Marshall dissented, arguing that the majority had not shown SEC supervision of arbitration to be adequate to overcome the disparities in bargaining power that the securities acts were designed to redress. See *id.* at 2353-58 (Blackmun, J., dissenting). Earlier cases upholding securities arbitration had relied partly on SEC oversight. See *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir.) (Frank, J.), *cert. denied*, 344 U.S. 855 (1952); see also Fletcher, * supra* note 50, at 452 n.384 (pointing out that the SEC's oversight of arbitration adequately protects investors in an investor/broker-dealer dispute, because the SEC has the power to change unfair exchange arbitration rules). See generally Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 285-91 (1984) (discussing the development of securities arbitration and concluding that the arbitration process must become more centralized and independent, with greater public participation).

63. *See McMahon*, 107 S. Ct. at 2341-43. In *Schultz v. Robinson-Humphrey/American Express*, 666 F. Supp. 219 (M.D. Ga. 1987), the court held that *McMahon* had not overruled *Wilko*. But in *Rodriguez De Quijas v. Shearson/Lehman Bros.*, 845 F.2d 1296, 1298 (5th Cir. 1988), the court held that *McMahon* has so undermined *Wilko* that even § 12(2) claims, involved in *Wilko* itself, are now arbitrable.


of speech and association. The Supreme Court refused to accord the arbitration any preclusive effect in the subsequent trial. Drawing on earlier cases, the Court held that arbitration “cannot provide an adequate substitute” for a trial in protecting federal statutory and constitutional rights under section 1983.

The McDonald Court gave four reasons for denying arbitration preclusive effect. Each requires reappraisal in light of McMahon. Writing for the majority in McDonald, Justice Brennan began by quoting the maxim that an arbitrator’s expertise “pertains primarily to the law of the shop, not the law of the land.” He thought that arbitrators, many of whom are not lawyers, might lack the expertise necessary to resolve complex legal questions. In contrast, McMahon recognized that arbitrators can have expertise in both the law of the shop and the law of the land. Similarly, Judge Edwards has stressed that the legal skills required to interpret statutes do not differ sharply from those required to interpret contracts. This is not to say, however, that arbitrators should be able to act without guidance. Echoing McDonald’s concern, Edwards has suggested that although arbitrators can safely apply clearly defined rules of law, federal courts should articulate important public-law norms. Such an allocation of responsibilities might maximize the efficiency of the judiciary.

These are not appropriate instances for judicial restraint, however, because under the Edwards formula, courts should defer only to arbitration that

66. Id.
69. McDonald, 466 U.S. at 292.
70. The Court also noted that its holding might foster the informal resolution of grievances through arbitrations that would not occur if they precluded access to court. Id. at 292 n.11. Thus, even in McDonald the Court evinced some concern for federal case loads.
71. Id. at 290 (quoting Gardner-Denver, 415 U.S. at 57).
Arbitration in Federal Programs

is confined to applying known statutory criteria.\(^7\)

As its second justification, the *McDonald* Court advanced the traditional view that an arbitrator's jurisdiction derives solely from the contract and does not include general authority to invoke public law that conflicts with contractual terms.\(^5\) As *McMahon* illustrates, however, an arbitrator's charge can specifically require enforcement of public-law obligations.\(^7\) Moreover, the Court has recently reaffirmed that arbitral awards may be set aside if they conflict with an "explicit" public policy—that is, one contained in "the laws and legal precedents" rather than "general considerations of supposed public interests."\(^7\) Thus, arbitrators are now expected to recognize the supremacy of clearly defined public policy over contract.

The *McDonald* Court also thought that a union's acceptance of arbitration should not necessarily be imputed to its individual members.\(^7\) Although shared interests make the union a reliable proxy for most economic issues, member interests are likely to diverge on issues of individual liberty.\(^0\) Unlike labor arbitration, *McMahon* did not involve issues of adequacy of representation. Still, *McMahon* evinced concern that consent to arbitration be meaningful and found that concern satisfied by

\(^7\) The ACUS disfavors voluntary arbitration in federal programs when precedent is to be set or when maintaining established norms is of "special importance." See 1 C.F.R. § 305.86-3 B.5(b) (1988). The recommendation on mandatory arbitration contains a similar limitation for precedential effect and requires an ascertainable norm for decision, but it does not explicitly refer to cases involving the need to maintain norms. See id. § 305.86-3 C.8.

\(^5\) Indeed, in cases of conflict, the arbitrator must enforce the contract or risk invalidation of the award. See *McDonald*, 466 U.S. at 290-91 (citing *Gardner-Denver*, 415 U.S. at 36, and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)).


\(^7\) *McDonald*, 466 U.S. at 291.

agency supervision of arbitral schemes.\textsuperscript{81}

Finally, the \textit{McDonald} Court observed that arbitral fact-finding is not the equivalent of judicial fact-finding, because of the informality of arbitral processes.\textsuperscript{82} The "reasons" for this conclusion merely describe the ways in which arbitration usually deviates from trial processes.\textsuperscript{83} The Court's unarticulated concern may have been that the arbitration of civil rights or constitutional issues threatens core judicial responsibilities.\textsuperscript{84} The \textit{McMahon} decision did not address this issue, but in constitutional litigation generally, the Court exercises relatively independent review of the facts found below.\textsuperscript{85} Arbitration, on the other hand, leaves fact determinations in the hands of the arbitrator and, because of the absence of a detailed record, disables intensive fact review.

Perhaps, then, arbitration should never be used in constitutional or civil rights controversies, even when the governing norm is clear. Such a limitation, however, threatens to sweep too broadly. Some prisoners' grievances, for example, might be better resolved through arbitration than through federal court litigation.\textsuperscript{86} Yet prisoners prove astute at converting their grievances into constitutional claims,\textsuperscript{87} and they might successfully manipulate this limitation to avoid arbitration. Thus, although the presence of a colorable constitutional claim identifies situations in which courts are likely to treat federal court enforcement as mandatory, no categorical distinction seems appropriate.

\textbf{D. Summary}

Arbitration in federal programs can draw several lessons from commercial and labor arbitration. First, agency oversight can allay concerns that unequal bargaining power between private parties undermines their consent to arbitration.\textsuperscript{88} Second, arbitrators can apply clearly defined public policy norms. Finally, review by a government entity, such as a

\textsuperscript{81} \textit{See McMahon}, 107 S. Ct. at 2356.
\textsuperscript{82} \textit{McDonald}, 466 U.S. at 291.
\textsuperscript{83} \textit{See Gardner-Denver}, 415 U.S. at 57-58.
\textsuperscript{84} The \textit{Gardner-Denver} Court emphasized that "the resolution of statutory or constitutional issues is a primary responsibility of courts." \textit{Id.} at 57.
\textsuperscript{88} \textit{See Cohen v. Wedbush}, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988) (relying partly on the existence of SEC supervision in rejecting claims that brokerage agreements to arbitrate are unconscionable contracts of adhesion).
Arbitration in Federal Programs

court, is needed both to identify arbitrable issues in case of dispute and to conform awards to the law. For arbitration in federal programs, however, the traditional "manifest disregard of the law" standard is too relaxed. This standard reflects its originating context in contractual, private law. Although the arbitral process is not suited to ordinary appellate review, it is feasible to require enough explanation of the basis of an award to allow review for facial violation of a governing public-law norm.

The commercial and labor arbitration cases consider one aspect of the boundary between public and private decision making. But arbitration in federal programs, because of its nexus with public policy making, raises broader issues. Part III introduces a general frame of reference identifying activities that must be kept within government or defining relationships that public officials must have with private deciders to whom they delegate power.

III. Delegation to Private Parties in American Law

Questions about the permissibility of placing governmental power in private hands occur throughout American law. Unfortunately, courts tend to make broad statements that are inconsistent with both theory and practice and that hamper analysis of "delegation to private parties." A brief survey of the public/private distinction illustrates this point and guides further analysis.

A. The Delegation Doctrine

The Supreme Court has occasionally considered the permissibility of delegations to private parties. The most prominent case is *Carter v. Carter Coal Co.*, in which the Court invalidated a federal statute that

89. See Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 28 (1987) (noting that the "manifest disregard" standard generally does not allow setting aside awards for "mere mistaken legal interpretations").

90. See, e.g., United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 370 (1987): Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

91. See, e.g., Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968) (encouraging district court to ask arbitrators to explain the basis of their award); Sargent v. Paine Webber, Jackson & Curtis, Inc., 674 F. Supp. 920, 923 (D.D.C. 1987) (vacating arbitral award and remanding to arbitration panel for explanation as to how damages were computed).

92. For a comprehensive review, see Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

93. 298 U.S. 238, 311 (1936).
allowed a majority of miners in cooperation with the producers of two-thirds of the annual tonnage of coal to set maximum hours and minimum wages for the industry:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.94

The Court announced an absolute principle condemning delegations to interested private deciders to regulate others: "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor."95 Although its rhetoric suggests reliance on the delegation doctrine, the Court held the statute invalid because it denied the miners and producers in the minority due process.96

The Court had earlier considered the delegation doctrine in A.L.A. Schechter Poultry Corp. v. United States.97 In that case, the Court overturned the portion of the National Industrial Recovery Act (NIRA) that authorized the President to approve industry-generated codes of fair competition. The majority asked whether "it be seriously contended that Congress could delegate its legislative authority to trade... groups so as to empower them to enact the laws they deem to be wise and beneficent for... their trade or industries?"98 Such a delegation of legislative power, the Court continued, "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."99 In rejecting the grant of authority, however, the Court stressed the breadth of the field within which the President and the code drafters could roam100 rather than the potential for interested private decisions to be rubber-stamped by busy bureaucrats—though the Court was well aware that chaos pervaded the National Recovery Administration.101

The Schechter Poultry Court failed to distinguish clearly between three possible grounds for objecting to the NIRA: that the delegation was too broad to be exercised by anyone, that government should have retained discretion granted to private parties, or that government super-

94. Id.
95. Id.
96. Id. at 310-12.
98. Id. at 537.
99. Id.
100. Id. at 538-39, 541-42.
vision of private decision making was insufficient. Any of these objections could be called a violation of the Constitution’s grant of legislative powers to Congress, but they have different implications.

Both Schechter Poultry and Carter Coal inveigh against the delegation of legislative powers to private actors. Notwithstanding the New Deal Court’s confident dicta, the path of the case law wavers. In early cases, the Court sometimes struck down land-use regulations authorizing groups of property owners to control some uses of their neighbors’ property. Yet the Court has repeatedly upheld delegations of power to interested private persons, allowing Congress to condition the operation of regulatory schemes on their granting or withholding of consent. For example, the issuance of federal milk marketing orders, which regulate prices, depends on the consent of dairy farmers and milk handlers. The Court’s efforts to distinguish the issues and resolve inconsistencies in the cases have been very weak. It can be said, however, that delegations to interested private deciders are in jeopardy, even if Carter Coal and Schechter Poultry overstate the prohibition. The inquiry must widen in order to derive additional guidance and to explain the absence of a rule that all private delegations are unconstitutional.

102. See, e.g., Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-23 (1928) (striking down zoning ordinance that required permission from surrounding property owners prior to erecting a home for the aged); Eubank v. City of Richmond, 226 U.S. 137, 143-44 (1912) (striking down ordinance that authorized adjoining property owners to establish building line before the erection of a new building). But see Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529-30 (1917) (upholding such a limitation). For an example of a modern court struggling with the Court’s distinctions, see Silverman v. Barry, 845 F.2d 1072, 1086-87 (D.C. Cir. 1988).


105. See Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 221-34 (1937) (attempting to sort out irregularities in the Court’s decisions); Liebmann, supra note 92, at 655-61 (concluding that the Court’s doctrine is “nonsense”).

457
B. The Public/Private Distinction

1. The Impossibility of a Clear Boundary Between Public and Private Activity.—The boundary of the public sector in American life has never been distinct.106 Our history has not produced any clear tradition allocating some functions to government and others to the private sphere, from which a positive theory of government might be drawn.107 Nor has any satisfactory normative theory emerged.108 Scholars, businessmen, and government officials still disagree over the appropriate scope of the public sphere.

This uncertainty has not prevented groups from calling for “privatization” of many government functions, in hopes of obtaining private sector efficiencies.109 Congress has created public/private hybrids in the form of statutory corporations, such as the Tennessee Valley Authority, the United States Postal Service, and Amtrak, that perform many important functions.110 Controversy surrounds the constitutionality of the Federal Open Market Committee (FOMC), a blend of public and private individuals that forms and executes the nation’s monetary policy.111

111. In Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510 (D.D.C. 1986), aff’d, 836 F.2d 561 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2034 (1988), a district court upheld the constitutionality of the FOMC. The court noted that the private members do not have the “decisive voice” in policy making, because the Board of Governors of the Federal Reserve System holds a majority. Id. at 523 & n.26. The court also distinguished the coercive functions of government from monetary policy making and noted that the FOMC exercises no direct governmental authority. Id. at 523 n.26. Conceding the importance of monetary policy, the court observed that many private institutions also greatly affect the nation’s economy. Id. at 520-22. Finally, the court relied partly on tradition—a combination of public and private decision makers have formulated monetary policy since the days of the Bank of the United States. Id. at 521-22. The court of appeals vacated the district court opinion on standing grounds, without reaching the merits. Melcher v. Federal Open Mkt. Comm., 836 F.2d 561, 565 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2034 (1988).
Faced with great difficulties in categorization, analysts often retreat to the notoriously conclusory distinction between inherently "governmental" functions, which must be kept in official hands, and "proprietary" functions, which may be exercised privately. In identifying administrative functions that private contractors may perform, for example, the President's Office of Management and Budget (OMB) says merely that government employees must continue to perform "those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government." Such statements, of course, provide no useful guidance, and it thus remains unclear which activities are properly subject to privatization.

The difficulties in defining what functions must be public are matched by difficulties in deciding when formally private actions become legally public for some purposes. In identifying those relationships between private institutions and the state that invoke constitutional restrictions on "state action," the Supreme Court has refused to characterize private activity as state action, notwithstanding substantial public financial support and close regulation. Instead, the Court looks for direct state coercion or encouragement of the particular decision in question. Given the pervasiveness of government regulation and subsidy in modern life, a test that looks only for government entanglement would risk snaring the private sector in the legal restraints that apply to government. The Court's analysis, however, does little to clarify which private delegations are constitutionally improper.

These uncertainties about the public/private boundary occur partly because private influence permeates even formal, public decision making. Traditional views of government as the neutral and expert elabo-


114. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1003-12 (1982) (finding no state action by a regulated private nursing home because the state was not responsible for the specific conduct in the complaint); Rendell-Baker v. Kohn, 457 U.S. 830, 839-42 (1982) (finding no state action by private school that accepted public funds but operated free of state regulation or compulsion); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-59 (1974) (finding no state action by an exclusively licensed and heavily regulated utility because its conduct was not sufficiently connected to the state); see also Cass, Privatization: Politics, Law, and Theory, 71 Marq. L. Rev. 449, 502-08 (1988) (explaining that courts have been reluctant to extend "special inhibitions on public activity" to private actions, except possibly with regard to racial discrimination).

115. See T. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public
ration of the public's will have given way to theories that recognize and try to control private influences. Current theories of legislation emphasize its capacity to provide not only "public goods" for all but also "private goods" for special interests. Controversy surrounds the extent to which courts should try to offset this tendency.

Similarly, administrative law recently experienced the ascendancy of an interest representation theory of policy making. Competing views of the administrative process emphasize the opportunity—and the duty—of administrators to seek their best conceptions of the public interest, although private pressures may constrain decisions. To promote public-regarding policy, modern administrative law relies on fostering and controlling the oversight activities of all three branches of government. But shifting decision making from public to private hands vitiates these monitoring devices. For a delegation to survive, then, substitutes must tolerably conform private decision to the public interest.

2. The Public Uses of Private Interest.—Many "private law" arrangements bind unconsenting persons and are to that extent "public" in effect. Ancient doctrines of property and contract allow private persons to make law, for example, by imposing restrictive covenants on land. Similarly, government often authorizes private groups to exert coercive powers. One prominent illustration is the collective bargaining agreement, by which a majority of workers in a bargaining unit selects a repre-

AUTHORITY 298-99 (1969) (arguing that positive government power has been distributed among interest groups to the detriment of the general public interest).

116. For a recent summary and critique of these theoretical developments, see Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. PA. L. REV. 1567 (1988).

117. See, e.g., Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 37-52 (1982) (describing Congress as the primary agent responsible for generating the production of private benefits and agencies as facilitating the regulatory production of such benefits).

118. Compare Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 240-56 (1986) (arguing that the "public-regarding" Constitution permits judges to regulate special interest groups by applying traditional statutory interpretation to impose subtle pressures on Congress and to exact costs from more selfish groups) with Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. CHI. L. REV. 263, 290-91 (1982) (applying economic theory to view courts primarily as agents who are ill-disposed to oppose legislation benefiting special interests because statutory amendment can nullify courts' policy-making interpretations).


120. See, e.g., Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 81-83 (1985) (advocating a "Madisonian" approach whereby administrators "maximize aggregate utility" as defined by "reference to public desires").

sentative who may bind them all. Another is the formation of special taxing districts by petition of some residents in a territory, against the wishes of the others.

Analysis of these examples reveals justifications for private delegations that the *Carter Coal* Court did not perceive. Because of market-based incentives, decisions of private groups may be acceptable as proxies for more widely shared interests. In *Carter Coal*, if all workers in the industry had similar interests in higher wages and all companies had similar interests in lower ones, the outcome of bargaining by a subset of both groups might have been fair within the industry. Also, shared interests within a group may promote the fairness of self-regulation. A premise of collective bargaining is that whatever their internal disagreements, workers derive net advantages from negotiating as a group with management.

In these shared-interest delegations, the creation of a small "government" promotes fairness. Such an entity makes a series of decisions that will not predictably advantage any particular participant. But this justification, which can be offered for entities as diverse as water districts, collective bargaining units, and homeowners' associations, does not apply to single-decision delegations. Therefore, whether this reasoning supports the use of arbitration in government programs depends on the presence or absence of repeat players. Interest arbitration of a labor contract between an agency and its employees, for example, could openly consider distribution issues ("How well did the union do last time around?") that would be out of place in the arbitration of an individual's Medicare claim.

Courts often uphold private delegations when the private deciders share interests with the general public. Thus, effective self-regulation by securities exchanges serves to maintain the public confidence on which the exchanges depend for their business. Clear boundaries to these private delegations do not always exist—consider government regulation by

122. See, e.g., *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300 (1943) (holding that the National Mediation Board's certification of a collective bargaining representative, elected by a majority of workers, was not subject to judicial review under the Railway Labor Act).

123. See *Liebmann*, supra note 92, at 672-75 (commenting that imposition of judicial checks on local taxing districts seems inappropriate).

124. See *Gillette*, *Who Puts the Public in the Public Good?: A Comment on Cass*, 71 MARQ. L. REV. 534, 538-39 (1988) (suggesting that permissibility of delegation should depend on the sufficiency of either political accountability or market forces to give delegate incentives to consider all affected interests).

125. *Jaffe*, supra note 105, at 249-50. Of course, this conclusion would depend on the nature of bargaining power in the industry, but the *Carter Coal* Court failed to reach any such empirical question.

126. *Id.* at 235.
agencies staffed by members of regulated professional groups. These situations present informational advantages: doctors can assess the sufficiency of medical training, and the state bar understands the pressures that lawyers face. Of course, the danger remains that shared group interests will subordinate the interests held in common with the public. But these concerns only suggest that such delegations should be controlled rather than avoided; the results may be imperfect, but so are the alternatives.

One possible public control is a standard to which the delegate must conform. Standards, however, help only when the decisions are amenable to them. A test of industrial bargaining power, as in *Carter Coal*, may not admit of a standard, although grievance arbitration under a resulting contract presupposes one. For standards to be effective, some government entity must check the delegate's compliance. In *Schechter Poultry*, the statute contained criteria for the President's approval of privately drafted codes—for example, that the private groups be truly representative of the industry. Although these standards may have sufficed for facial validity of the private delegation, the adequacy of the President's discharge of his monitoring duties pursuant to them raised an entirely different question.

As *Schechter Poultry* illustrates, the importance of asking whether government supervision is real or merely nominal is greatest when formally public action has dominant private aspects. For example, statutes sometimes authorize agencies to transform private industry standards into government regulations. Federal judges also enforce consent agreements in public-law litigation, as negotiated by private parties. Whether adequate public control exists for such delegated powers depends on both the selection of the governmental monitor and the articulation of its role; these decisions depend on the structure of a particular program.

127. See *United Farm Workers v. Arizona Agric. Employment Relations Bd.*, 727 F.2d 1475, 1479-80 (9th Cir. 1984) (upholding constitutionality of a statute requiring interest-group representation on a regulatory body).


IV. An Approach to the Constitutional Issues

Several principles guide the analysis of the constitutionality of arbitration in federal programs. First, as the preceding survey of the public/private boundary suggests, the optimal specificity of constitutional rules that regulate the organization of government is low. The size and diversity of government and the use of arbitration in a wide range of programs means that no single set of detailed constitutional criteria can readily be crafted to fit them all. Moreover, predicting the effects of rules on institutions is hazardous, even in the short run. Arbitration in government is still experimental; courts should not shackle evolving procedures with rigid constitutional doctrine.

Second, courts should defer to administrative or legislative choice of procedure, whether the issue is statutory authorization or constitutionality. The acceptability of a procedure is a function of the particular issues to be decided, and both Congress and administrative agencies are capable of evaluating the factors relevant to choosing a procedure.

Finally, as the "private delegation" cases demonstrate, powers granted to private deciders must be structured so that both internal incentives and outside supervision conform their decisions to the public interest. This judgment is necessarily specific to each particular program.

The remainder of this Article employs separation of powers analysis to determine the consistency of government arbitration with articles II and III of the Constitution. Here a fundamental distinction must be made to understand the cases. Separation of powers cases involving the aggrandizement of one branch at the expense of another present greater problems than those posing only a possible interference with the prerogatives of one branch. In the aggrandizement cases, the Court favors a formalist approach that reasons logically from the constitutional text and what is known about the framers' intentions. The Court consequently

132. See supra section III(B)(1).
137. See supra section III(B)(2).
draws relatively bright lines between the functions of the branches. In
the interference cases, the Court uses a functional approach that evalu-
ates the impairment of a branch's core responsibilities.140

These two doctrinal approaches reflect their underlying values. In
cases addressing the relations of the constitutional branches inter se, for-
malism offers the advantages of preserving clear lines of political ac-
countability and of minimizing evasions of constitutional strictures.141
For the organization of the “fourth branch” of the bureaucracy, how-
ever, formalism’s simplicities would not permit the complexity that ad-
ministrative structure requires. The Court accordingly shifts to a
functional inquiry that evaluates the overall relationships between the
constitutional branches and the agencies.142 The functional test is far
more permissive of diverse government structure than is formalism. It is
well suited to conforming arbitration in federal programs to the values
embodied in both articles II and III of the Constitution, as the following
analysis demonstrates.

V. Granting Judicial Power to Agencies and Arbitrators

To what extent may adjudicative authority that could be assigned to
the federal courts be placed in other hands, including those of arbitra-
tors? Article III creates the “judicial Power of the United States,” but
the federal courts are not its sole repository.143 State courts also decide
federal questions and cases within federal diversity jurisdiction.144 This
distribution of business results partly from Congress’s disinclination to
vest exclusive jurisdiction in the federal courts and partly from parties’
selection of state courts. The FAA also shifts business away from the
federal courts by fostering the use of private arbitrators for many cases

Congress from exercising executive functions); INS v. Chadha, 462 U.S. 919, 951-59 (1983) (invali-
dating legislative vetoes as equivalent to legislation that evades article I strictures).

140. See, e.g., Morrison v. Olson, 108 S. Ct. 2597, 2608-09, 2621 (1988) (upholding the vesting of
prosecutorial functions in an independent counsel partially insulated from executive supervision);
Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 850-54 (1986) (declining to adopt
formalistic rules to determine when Congress impermissibly threatens the integrity of the judiciary);
tion of powers in favor of a flexible assessment of the extent to which a statute prevents the executive
branch from accomplishing its constitutionally assigned functions).

141. See generally Bruff, supra note 133, at 506-09 (arguing that formalism may rest on a judg-
ment that the executive branch should be solely responsible for administration).

142. See Strauss, supra note 4, at 667-68.

143. See Crowell v. Benson, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting). For an over-
view of the issues discussed in this Part, see Fallon, Of Legislative Courts, Administrative Agencies,

144. Indeed, state courts have always carried part of the federal work load. Congress did not
grant general federal question jurisdiction to the lower federal courts until 1875. See F. FRANK-
within the federal judicial power. Not surprisingly, clear limits to congressional power over federal jurisdiction have never emerged, resulting in confusion over limits in particular contexts.145

A. Delegation of Adjudicative Power in Administrative Law

Even within the federal government, no obvious theory underlies the distribution of adjudicative business among the available fora. Variations appear in both institutional characteristics and procedural formality. The catalogue includes article III district courts, article III adjuncts (such as bankruptcy courts), "legislative" courts (such as the Tax Court), administrative agencies employing the full adjudicative procedures of the Administrative Procedure Act (APA),146 and agencies employing more informal procedures.147 The last category, informal executive adjudication, includes much case-by-case decision making.148 Hence it includes a vast number and range of decisions, such as personnel promotions and contract awards. Agencies often conduct this adjudication without any statutorily specified procedure, but in many instances the results are subject to meaningful judicial review.149

The federal courts could conceivably adjudicate many of these kinds of cases under federal question jurisdiction, but a vastly bloated judiciary and an equally shrunken executive would result. More importantly, some functionally adjudicative activities are "executive" in the constitutional sense and may not be transferred to the courts. An obvious example is the President's exercise of law-applying judgment pursuant to responsibilities conferred on him by the Constitution or by statute.150 On a more mundane level, the Supreme Court, in delineating the boundary between legislative and executive responsibilities, has noted that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."151 Yet this defini-

147. See Lubbers, supra note 35, at 387 (listing informal procedures).
148. Chief Justice Marshall perceived this problem in 1833: That [a Treasury officer's setting of the amount of a duty] may be, in an enlarged sense, a judicial act, must be admitted . . . . In this sense the act of the President in calling out the militia under [a statute] or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558).
tion also describes a principal activity of the federal courts.\textsuperscript{152} Plainly, a simple formalist distinction will not suffice for separation of powers purposes.\textsuperscript{153}

The Court has struggled to identify adjudicative functions that \textit{must} remain in federal courts, those that \textit{may} be placed in the executive, and those that \textit{must} be placed in the executive.\textsuperscript{154} Despite these uncertainties, the legitimacy of administrative adjudication bears on the constitutionality of arbitration in federal programs. Theories that justify transferring judicial power to agencies may also provide support for the further step of delegating it to arbitrators.

In administrative law, analysis of agency adjudication usually begins with the relatively formal model for which the APA provides a code of procedure. The trier of fact is an administrative law judge (ALJ), and the agency performs appellate-style review of the ALJ’s decision. This discussion reviews the Supreme Court’s analysis of this decision-making model, noting variations explicitly.

\textit{Crowell v. Benson}\textsuperscript{155} established the constitutionality of delegating adjudicative power to administrative agencies. Congress had created a workers’ compensation scheme for longshoremen and had authorized an agency to decide claims under procedures resembling those later codified in the APA.\textsuperscript{156} The Court rejected a due process assault on administrative fact-finding, because judicial review could assure the presence of substantial evidence for the award.\textsuperscript{157} Article III did not require that the subject matter, which was within the federal judicial power, be allocated to the courts. It sufficed that reviewing courts retained power to decide issues of law.\textsuperscript{158} The Court did hold, however, that courts must perform independent review of issues of constitutional or jurisdictional fact going to the power of the agency over the dispute,\textsuperscript{159} such as whether an accident had occurred on navigable waters.

Although \textit{Crowell} set the stage for modern administrative adjudication, much has happened since. The two limitations on which the Court

\begin{itemize}
\item \textsuperscript{153} See \textit{Bowsher}, 478 U.S. at 741-53 (Stevens, J., concurring) (noting the difficulty of drawing lines between the powers exercised by different branches, because particular functions “often take on the aspect of the office to which [they] are assigned”).
\item \textsuperscript{154} This subpart discusses the first two categories and Part VI addresses the third in connection with article II doctrine.
\item \textsuperscript{155} 285 U.S. 22, 31 (1932).
\item \textsuperscript{156} An examiner was to conduct evidentiary hearings on a record. \textit{Id.} at 47-48.
\item \textsuperscript{157} \textit{Id.} at 46, 49.
\item \textsuperscript{158} See \textit{id.} at 49.
\item \textsuperscript{159} \textit{Id.} at 63-64.
\end{itemize}
Arbitration in Federal Programs

relied to justify shifting article III business to agencies have eroded. Courts now defer to agency determinations of law as well as fact, and the doctrines of constitutional and jurisdictional fact have fallen into disuse. These developments reflect the evolving nature of administrative adjudications, which have developed attributes that promote competence and fairness.

Crowell evinced concern about the fairness of adjudication performed outside court. Modern administrative law responds partly through structure, partly through procedure. Ostensibly pursuing expertise, many agencies draw their membership from regulated groups. Typically, such agencies both investigate and adjudicate. This combination aids policy making but also gives rise to problems of bias and interest that the organizational separation of investigative and adjudicative staffs attempts to solve. For similar reasons, administrative law judges enjoy statutory guarantees of their independence and must normally follow APA procedures that attempt to balance informality and accuracy.

The Supreme Court has upheld this general arrangement against due process attack because of the protections flowing from the separation of functions and procedural guarantees. Moreover, the Court tolerates some loss of neutrality as the cost of obtaining the policy-making advantages of combined functions at the top of an agency. Notwithstanding the Court’s general approval, however, the characteristics of a particular scheme can present unacceptable dangers of bias or interest.


161. Crowell held that reviewing courts should not only exercise independent judgment on these issues but also compile an independent record. Justice Brandeis dissented from the latter conclusion and has since been vindicated. See Monaghan, supra note 85, at 247-63.


164. See, e.g., Withrow v. Larkin, 421 U.S. 35, 46-55 (1975) (finding that state board of medical examiners could both investigate and decide charges against a doctor).


166. See, e.g., Friedman v. Rogers, 440 U.S. 1, 18 (1979) (finding no constitutional objection to a legislature drawing administrators from an organization sympathetic to the rules to be enforced); Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass’n, 426 U.S. 482, 492-96 (1976) (holding that a school board could both negotiate with teachers and discharge them for illegally striking after negotiations failed); FTC v. Cement Inst., 333 U.S. 683, 700-03 (1948) (holding that members of the Federal Trade Commission could both testify before Congress regarding the illegality of a practice and later adjudicate the matter).

167. See, e.g., Gibson v. Berryhill, 411 U.S. 564, 581 (1973) (refusing to allow a licensing board
Like the private delegation cases, therefore, administrative law displays a basic ambivalence about the deciders' neutrality—the benefits of obtaining knowledgeable or autonomous decision making inure at the risk of introducing unacceptable levels of bias or interest. Arbitration can ameliorate these problems. Its central premise is that consent to the process and practical guarantees of deciders' neutrality justify an informal and final procedure. Indeed, the nature of arbitration calls to mind an observation that Judge Friendly made in discussing administrative procedure: "[T]he further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards."168

B. Public Rights, Private Rights, and Federal Arbitration

The Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.169 cast into doubt matters long thought settled by Crowell. The statute at issue in Northern Pipeline authorized bankruptcy judges to decide all issues pertinent to the proceedings in their courts—including claims arising under state law—with review by article III judges.170 A badly divided Court held that the allocation to bankruptcy judges of authority to decide state-law claims violated article III. The bankruptcy judges lacked article III status171 but had powers closely resembling those of federal judges. A plurality of four justices172 signed a formalist opinion that defined some matters as inherently judicial in the sense that federal courts must decide them in the first instance rather than supervise them in appellate review. Existing exceptions to mandatory article III jurisdiction failed to include bankruptcy matters.

The exception pertinent here concerned "public rights," which the plurality defined narrowly as claims against government that Congress could commit entirely to executive discretion, but not controversies between private persons arising incident to a federal program.173 Thus, the

drawn from one-half of a state's optometrists to decide whether the other half were engaged in unprofessional conduct); Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) (finding a due process violation because mayor trying petitioner was responsible for municipal finances and fines formed a substantial part of municipal revenues); Tumey v. Ohio, 273 U.S. 510, 523-31 (1927) (finding that a town mayor's personal pecuniary interest in convicting a defendant violated due process because the fines paid his salary). This line of cases has deep roots in the common law. See Plucknett, Bonham's Case and Judicial Review, 40 HARV. L. REV. 30, 34 (1926).


170. Review was to be by the "clearly erroneous" standard. See id. at 55 n.5.

171. Instead of life tenure, the bankruptcy judges had 14-year terms, and they had no protections against salary diminution. Id. at 53.

172. Justice Brennan wrote for the plurality, joined by Justices Marshall, Blackmun, and Stevens. Id. at 52.

173. See id. at 67-69.
Arbitration in Federal Programs

dichotomy between public and private rights rested partly on sovereign immunity. Congress, free to deny all relief for claims against the government, could take the lesser step of allocating the claims to an alternative forum. The plurality thus refused to define public rights as everything created pursuant to the substantive powers of Congress, an interpretation that would have displaced some private rights of action.

The plurality thought that Congress could commit public rights cases to agencies, if it assured judicial review. Nevertheless, the Justices emphasized that Crowell had endorsed nonjudicial decision only for issues of fact. Yet the plurality conceded the erosion of the doctrines of constitutional and jurisdictional fact on which Crowell relied to preserve close supervision of agencies. This analysis casts doubt on the permissibility of ordinary delegations of adjudicative power to agencies, because the plurality did not specify the relationship between agencies and courts that was necessary to pass constitutional scrutiny.

Two concurring justices took the more limited position that state-law claims removed from a state tribunal must go to an article III court. The dissenters pointed out the inconsistency of the plurality's formulation with the ordinary pattern of administrative adjudication. They thought that the bankruptcy scheme satisfied a functional inquiry, which entailed examining the strength of congressional interests in placing decision-making authority in another forum. Moreover, they emphasized the statute's preservation of judicial review and found no danger of aggrandizement by the other branches at the expense of the courts as long as the subject matter was not especially significant to the political branches.

The use of the public rights doctrine, which the Court has never explained coherently, sowed much confusion in Northern Pipeline. The doctrine originated in a conclusory passage in Murray's Lessee v. Hoboken Land & Improvement Co., in which the Court upheld a sum-

174. See id. at 80 n.32.
175. See id. at 67-68 & 67 n.18.
176. See id. at 78-82.
177. See id. at 82 n.34.
178. See id. at 91 (Rehnquist, J., concurring, joined by O'Connor, J.).
179. See id. at 101-02 (White, J., dissenting, joined by Burger, C.J., and Powell, J.).
180. See id. at 117.
181. See id. at 116.
183. 59 U.S. (18 How.) 272, 284 (1856). Murray's Lessee appears to overturn an earlier case,
mary procedure for the government to recoup funds from one of its customs collectors:

[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.¹⁸⁴

The Court, groping for appropriate limits to the jurisdiction of legislative and administrative courts, has used the public rights doctrine to label outcomes. For example, in Atlas Roofing Co. v. Occupational Safety & Health Review Commission,¹⁸⁵ the Court considered whether the seventh amendment applies to the assessment of civil penalties in an administrative adjudication. The Court held that when the government "sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact," the seventh amendment does "not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible."¹⁸⁶

Although it replaced analysis with assertion, the Court did suggest a functional basis for its holding. The seventh amendment does not require Congress to "choke the already crowded federal courts with new types of litigation," nor does it prevent it from "committing some new types of litigation to administrative agencies with special competence in the relevant field."¹⁸⁷ The Court observed that this conclusion would follow even if the seventh amendment would require a jury had Congress assigned the adjudication of "those rights . . . to a federal court of law

United States v. Ames, 24 F. Cas. 784, 789-90 (C.C.D. Mass. 1845) (No. 14,441), in which a court refused to enforce an arbitration award involving the water rights of the United States and another riparian owner. As an alternate ground of decision, the court stated a principle forbidding the delegation of article III judicial power outside the courts. Id. at 789.

¹⁸⁴ Murray's Lessee, 59 U.S. (18 How.) at 284. The Court's difficulty in articulating its distinction comprehensibly probably stemmed from its recognition of the overlap of judicial and executive functions, which it drew from Chief Justice Marshall's insight in Ex parte Randolph (quoted at supra note 148). The Murray's Lessee Court acknowledged "[t]hat the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act . . . . So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." Murray's Lessee, 59 U.S. (18 How.) at 280.

¹⁸⁶ Id. at 450.
¹⁸⁷ Id. at 455.
Arbitration in Federal Programs

instead of an administrative agency." The result of *Atlas Roofing*, then, appears to be that Congress may choose the forum for adjudicating "public rights," and the forum choice dictates procedural requisites.

The Court's recognition of congressional interests in reducing judicial case loads and obtaining executive policy-making skills supports administrative adjudication directly, and arbitration indirectly. Case loads burden administrators as well as judges, and the executive's "special competence" extends to choice of administrative process as well as choice of policy. The choice of either administrative adjudication or arbitration often reflects the advantages of providing a fact finder far more expert in technical subject matter than the lay members of a jury.

The *Northern Pipeline* plurality did not persuasively explain why Congress may shift federal questions out of the courts more readily than diversity cases. The Court's reliance on sovereign immunity, itself a nineteenth century judicial construct, is patently unrealistic. Congress is not likely to dismantle the administrative state and restore federal jurisdiction to its 1850 contours, so that complainants would bring federal questions in state court and present claims against the government to Congress. Moreover, the plurality's "the greater includes the lesser" argument is vulnerable to theoretical rejoinders. Congress, having the power to withhold federal jurisdiction in diversity cases, could allocate those cases to bodies other than federal courts. A similar argument applies to arbitration: Congress, having authority under the FAA to place adjudication entirely in private hands, may authorize arbitration within executive branch programs.

Indeed, the plurality's formulation appears to be exactly backwards—article III's protections for federal judges aim principally to ward off assaults from the other two branches, not to assure correct decisions of state law. If the Court is struggling to identify core judicial

---

188. Id.

189. In *Tull v. United States*, 481 U.S. 412 (1987), the Court considered the applicability of the seventh amendment to civil penalty actions brought in federal district court under the Clean Water Act, 33 U.S.C. § 1319 (1982). The Court unanimously held that the right to a jury attaches to a federal court determination of liability for penalties. In a footnote, the Court distinguished *Atlas Roofing* as "holding that the Seventh Amendment is not applicable to administrative proceedings." *Tull*, 481 U.S. at 418 n.4.

190. See *Redish*, *supra* note 182, at 208-11.


192. For a description of the shift to judicial resolution of claims against the United States, see Glidden Co. v. Zdanok, 370 U.S. 530, 552-58 (1962).

193. For an argument that article III's tenure protections are also important in diversity cases, see Geras v. Lafayette Display Fixtures, 742 F.2d 1037, 1051-52 (7th Cir. 1984) (Posner, J., dissenting).
functions that Congress cannot assign elsewhere, diversity cases seem an odd place to begin. Of course, the plurality's doctrine had to accommodate some existing administrative adjudication of public rights. Correctly viewed, however, the problem is not one of labeling but rather one of limits.

The Court has recognized several justifications for placing adjudicative functions in the executive. One is the use of adjudication to form policy. The Court's doctrine of deference to an agency's judgments of law and policy extends to the adjudicative context. This deference often permits agencies substantial latitude, because the policy-making component of agency adjudication varies across a wide spectrum. Compare the broad policy orientation of the Federal Communications Commission's hearings on renewal of broadcast licenses, for example, with the narrow factual focus of a Social Security Administration determination of an individual's disability.

The justification for transferring adjudication out of federal court does not evaporate when an agency, like an arbitrator, focuses on application of an established legal criterion to disputed facts. A traditional justification for creating agencies has been to obtain speedy and informal adjudication by a fact finder with expertise in the subject matter. Courts give weight to congressional judgments about the appropriateness of administrative rather than judicial processes. By shunting fact-intensive adjudications to agencies or arbitrators, Congress frees the federal courts to carry out their central responsibilities of interpreting the Constitution and statutes.

*Northern Pipeline* demonstrates that formalism's broad sweep is inappropriate for allocations of adjudicative power among the branches. The justification for formalism in preventing aggrandizement is likely to be absent. Functional analysis focuses the Court's attention on the

195. See, e.g., NLRB v. Hearst Publications, 322 U.S. 111, 130-32 (1944) (finding that lower courts should uphold a NLRB determination of how a broad statutory term should apply if the determination is supported by the record and has a reasonable basis in law).
198. For a helpful summary of administrative law distinctions between issues of fact and law, see NLRB v. Marcus Trucking Co., 286 F.2d 583, 590-91 (2d Cir. 1961) (Friendly, J.).
201. The other justification for formalism, drawing clear lines of political accountability, see Bruff, *supra* note 133, at 502-09, suggests allocating adjudicative functions with a strong policy-making component to the executive, to allow accountability to operate.
policies underlying article III and permits the diverse procedural ar-
rangements that the structure of our government demands. Fortunately,
later cases have employed functionalism to curtail the implications of
Northern Pipeline.

In *Thomas v. Union Carbide Agricultural Products Co.*,202 the Court
upheld the mandatory arbitration requirements of the Federal Insecti-
cide, Fungicide, and Rodenticide Act (FIFRA).203 Under the Act, man-
ufacturers wishing to register and market a pesticide must give the
Environmental Protection Agency (EPA) their research data on the
product's effects. The EPA considers the data for both the initial regis-
tration and later filings for similar products submitted by other manufac-
turers. Later registrants must compensate the earlier ones for use of the
data, in amounts determined by arbitration if the manufacturers cannot
agree.204 A federal court can set aside an arbitrator's award only for
"fraud, misrepresentation, or other misconduct."

Writing for the majority in *Thomas*, Justice O'Connor rejected
"doctrinaire reliance on formal categories"206 as a guide to article III and
instead favored an analysis focusing on the right at issue and the congres-
sional purposes behind the scheme. The majority characterized FIFRA
as creating a compensatory right with many public characteristics.207 It
concluded that Congress could authorize an agency to “allocate costs
and benefits among voluntary participants” in a regulatory program
without providing an article III adjudication.208

Justice O'Connor interpreted *Northern Pipeline* as holding only that
Congress could not give a non-article III court power to decide state-law
contract actions without the litigant's consent and subject only to ordi-
nary appellate review.209 She rejected an argument that FIFRA had cre-

the Judicial Power: Thomas v. Union Carbide Agricultural Products Co.*, 13 ECOLOGY L.Q. 609,
619-23 (1986) (discussing the Court's failure to provide a clear test for determining the extent to
which nonjudicial forums may be used to resolve such federal disputes).
204. The agency uses the AAA's roster of commercial arbitrators and its usual methods for
mutual selection by the parties, although there are certain special AAA procedures for conducting
205. 7 U.S.C. § 136a(e)(1)(D)(ii) (1982). The EPA can enforce compliance with the award
through sanctions, including denial of compensation or cancellation of a party's registration, as the
case may be. *See id.*
207. *See id.* at 589. During the previous term, the Court held the EPA's consideration of the
data to be a "public use," although the "most direct beneficiaries" of that use were the later appli-
stances this public use effected a compensable taking).
209. *See id.* at 584.
ated a "private right," explicitly disapproving the definition advanced by the *Northern Pipeline* plurality insofar as it turned on whether "a dispute is between the Government and an individual."210 Justices Brennan, Marshall, and Blackmun concurred, abandoning any implication that public rights cases are restricted to those in which the government is a party and explaining that their *Northern Pipeline* position focused on the state law nature of the claims at issue.211

In passing, the Court squelched the *Northern Pipeline* plurality's threat to the structure of the administrative state. The Court stated that *Crowell* fell within mandatory article III jurisdiction because it concerned a statute that replaced a common-law action.212 The Court also recognized that judicial review of administrative adjudication is often limited or unavailable.213 The *Thomas* majority thus made clear that the continued vitality of *Crowell* does not rest on outmoded doctrines requiring stringent judicial review.

Turning to the use of arbitration, the Court noted Congress's need to streamline compensation controversies.214 It perceived a close nexus between the use of arbitration and effective administration of the pesticide registration program. The Court also emphasized the existence of consent by the affected firms; it considered the danger of encroachment on the judiciary's central role to be "at a minimum when no unwilling defendant is subjected to judicial enforcement power."215

The Court accepted the statute's limitations on judicial review, which it read to allow reversal of arbitrators "who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."216 The concurring Justices, like the majority, echoed the traditional "manifest disregard for the governing law" standard of review.217 The Court also held that review for constitutional error was available, alleviating any due process concerns about the extent of review.218

*Thomas* demonstrates the absence of clear distinctions between pub-

210. Id. at 586.
211. See id. at 595-97 (Brennan, J., concurring). Justice Stevens, also concurring, thought the challengers lacked standing. Id. at 605 (Stevens, J., concurring).
212. Id. at 587 (O'Connor, J.).
213. See id. at 583.
214. Arbitration replaced an earlier procedure by which the EPA adjudicated compensation, subject to judicial review. This scheme proved cumbersome and unworkable; in 1978 Congress turned to arbitration. Id. at 571-75.
215. Id. at 591.
216. Id. at 592.
217. Id. at 601 (Brennan, J., concurring, joined by Blackmun and Marshall, JJ.); see Fletcher, supra note 50, at 456.
218. The parties had abandoned due process objections to the nature of statutory review of the arbitrations, so the Court did not formally address that issue. See *Thomas*, 473 U.S. at 592-93.
Arbitration in Federal Programs

lic and private rights in federal programs. Congress had a substantial "public" purpose in choosing arbitration in FIFRA—to relieve the executive of tangled administrative adjudications. Congress, however, could have shifted the compensation controversies into federal court without offending article III. Aware of that alternative and its consequence for judicial case loads, the Court embraced arbitration and accorded the courts a minimal supervisory role.

Although some of the language in Justice O'Connor's opinion in Thomas suggests that article III courts must hear common-law claims, the Court has since modified its stance. In Commodity Futures Trading Commission v. Schor, the Court upheld the authority of the Commodity Futures Trading Commission (CFTC) to entertain state-law counterclaims in reparation proceedings when disgruntled customers seek redress for brokers' violations of statutes or regulations. The Commodity Exchange Act authorized CFTC adjudicators to decide counterclaims arising out of transactions properly alleged in a complaint. Schor filed a claim for reparations, and the defendants counterclaimed for debt.

Justice O'Connor's opinion for seven Justices relied in part on consent—Schor chose the CFTC's "prompt" and "inexpensive" procedure instead of a lawsuit. Indeed, the Court compared this option to arbitration and concluded that the voluntary choice of informal procedures minimized separation of powers concerns. The Court then asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in Article III courts" and whether the latter retained the "essential attributes of judicial power." Only the jurisdiction over counterclaims differed from the usual agency model. The Court saw no reason to deny agencies all pendent jurisdiction and found federalism concerns minimal, because federal courts could have entertained the claims. Thus, Schor suggests that agencies may resolve any state-law claim closely related to a federal issue within their jurisdiction. Agencies' exercise of pendent jurisdiction reduces federal court case

221. Schor, 478 U.S. at 830.
222. Id. at 850-51.
223. Id. at 851.
224. Id. at 852 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). Justices Brennan and Marshall, dissenting, argued that the majority was allowing the undue dilution of judicial authority in service of legislative convenience. Id. at 861-62 (Brennan, J., dissenting).
225. The CFTC's jurisdiction was specialized, its enforcement powers limited, and its orders enforceable only by order of the district court. Id. at 852-53 (O'Connor, J.).
226. See id. at 857-58.
loads by resolving potential diversity cases; arbitration accompanied by minimal judicial supervision maximizes this benefit.

In both *Thomas* and *Schor*, as in the FAA cases, the Court emphasized the consent of the participants as a justification for nonjudicial processes. *Schor* was an easy case, because the plaintiff could choose between a lawsuit and agency adjudication. *Thomas*, however, was another matter. The Court strained to characterize FIFRA registrations as “voluntary”—the choice available to a chemical company is to forgo marketing a pesticide it does not register. In the labor relations cases, the Court inquired more carefully into consent to arbitration, especially when the process affected important individual liberties. Indeed, at times participants could not waive judicial process. *Thomas*, then, perhaps heralded a looser standard of consent for federal regulatory programs, allowing public values to offset concern for the autonomy of the regulated party. The subject matter of a dispute certainly should affect the stringency of judicial scrutiny of consent to arbitration. Nevertheless, courts should not simply avoid an article III inquiry by employing a fiction that the parties consented.

The schemes in both *Thomas* and *Schor* promoted the original purpose of article III’s protections: to guarantee the independence of adjudication from political pressure emanating from the executive or Congress. In *Thomas*, the Court remarked that shifting from agency adjudicators to private arbitrators “surely does not diminish the likelihood of impartial decision-making, free from political influence.” Similarly, in *Schor* it noted that Congress had placed adjudication in an independent agency, which would be “relatively immune from the ‘political winds that sweep Washington.’” Arbitration is superior to agency adjudication in this regard, because it increases the decider’s independence.

Today it seems unlikely that Congress will run afoul of *Northern Pipeline* unless the subject matter involves prized judicial responsibilities. Also, jeopardy arises when the powers of a new tribunal (and, perhaps, the tenure of the deciders) closely approximate those of courts. In such

227. *See supra* notes 79-81 and accompanying text.
228. *See supra* note 80.
229. In *Thomas*, the Court also noted that affected companies had given some prior consent by participating in the political compromise that led to the arbitral scheme. *Thomas* v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 575 (1985). A more extreme case than *Thomas* in imputing consent to arbitration is *Geldermann* v. Commodity Futures Trading Comm’n, 836 F.2d 310, 323 (7th Cir. 1987), which upheld a CFTC regulation requiring brokerage firms to submit customer complaints to arbitration as a condition of doing business.
situations, judges are likely to find interference with their core functions. On the other hand, when expeditious process clearly serves non-article III functions—such as ordinary program administration—the courts are not likely to insist that Congress increase their already heavy case loads. Therefore, arbitration should be safe from a successful article III assault as long as Congress confines it to specialized subject matter in federal programs with related executive functions.

C. Limiting Judicial Review

Judicial review of arbitration has always been more limited than review of administrative adjudication. Nevertheless, a minimum level of oversight of awards should be preserved. Thomas suggests that courts will review at least the facial consistency of an arbitral award with statutory criteria and constitutional norms. These inquiries require only a brief statement of the basis for an award. They also accord with the FAA's general criteria for review of arbitration and would not require probing the factual basis of awards. More intensive review would destroy the informality that accounts for the virtues of arbitration.

In general, courts seem most likely to reach issues that concern the overall structure and validity of a statutory scheme rather than its application to particular facts. Thus, courts routinely permit constitutional inquiry of statutes that appear to preclude all review. Judges thereby avoid reaching troubling issues about the power of Congress to insulate administrative action completely.

The Supreme Court recently considered whether arbitration of Medicare claims denies procedural due process. In a companion case, United States v. Erika, Inc., the Court found that Congress did not authorize judicial review of particular awards. The preclusion, however, covered only the processing of individual claims and not initial determinations of entitlement to participate in the Medicare program. Similarly, the Court subsequently held that the preclusion did not encompass

232. See Thomas, 473 U.S. at 592-93.
233. The ACUS recommends such a statement. See Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 1 C.F.R. § 305.86-3 (1988).
234. See Fallon, supra note 143, at 975-82.
238. Id. at 207. The Court did not reach issues concerning any constitutional right to review. See id. at 211 n.14.
statutory issues concerning the overall method for the computation of claims, as opposed to particular determinations under the general criteria.\textsuperscript{239} So limited, the review scheme prevents "the overloading of the courts with trivial matters."\textsuperscript{240}

By deferring to agency review of arbitrator's decisions, courts can further reduce the burden on their docket. Because arbitration is inappropriate for elaborating public-law norms, most arbitrations should be free of substantial constitutional or statutory issues. Agencies can handle "retail" review for misconduct and for inconsistency with statutory standards and thereby reduce judicial case loads; the important goal is to check the arbitrators' actions.\textsuperscript{241} If courts typically defer to interpretations of statutes by administering agencies, there seems equal reason to defer to an agency that reviews an arbitrator.\textsuperscript{242}

Forgoing judicial review of some aspects of arbitration in federal programs is consistent with the tradition that courts do not review all law-applying decisions that occur within the executive branch.\textsuperscript{243} The aspects of arbitration that would escape judicial review would resemble some kinds of executive functions that courts presently decline to review. Like arbitration programs, these functions feature needs for expertise, informality, and expedition; a large volume of potentially appealable actions; and the presence of methods other than judicial review for preventing abuses of discretion.\textsuperscript{244}

VI. Due Process

The allocation of adjudicative functions under federal programs raises due process concerns about the adequacy of procedural protections for affected persons. This Part addresses those concerns. It first looks at the Court's due process analysis of one aspect of the Medicare program. It then draws on those principles to suggest a general approach to protecting due process rights in arbitral schemes.


\textsuperscript{240} Erika, 456 U.S. at 210 n.13 (quoting 118 CONG. REC. 33992 (1972) (statement of Sen. Bennett)).

\textsuperscript{241} Thus, Congress might also shift determinations of the arbitrability of particular issues from the courts to the agencies when the government is not a party.

\textsuperscript{242} See International Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 336 (D.C. Cir. 1988) (upholding ICC's authority to review arbitral awards for "recurring or otherwise significant issues of general importance").

\textsuperscript{243} See Heckler v. Chaney, 470 U.S. 821, 828-32 (1985); Young, supra note 182, at 795-801.

A. Schweiker v. McClure and General Due Process

In *Schweiker v. McClure*, a unanimous Court upheld the authority of private insurance carriers to resolve disputed Medicare claims without a right of appeal. The program at issue in *McClure* is financed by federal appropriations and premiums from participants and is a voluntary supplement to basic Medicare that covers most of the cost of certain medical services. As the Court noted, the program resembles subsidized private insurance on a massive scale: in one year there were 27 million participants, 10 billion dollars paid in benefits, and 158 million claims.

Congress authorizes the Department of Health and Human Services (HHS) to contract with private insurers, such as Blue Cross, to administer these claims payments. HHS pays administrative costs and specifies the claims process. Upon receiving a claim, the carrier makes an initial determination of the reasonableness of the charge for covered services. If the claim is denied, the claimant is allowed a de novo redetermination on a written appeal to a new decider. If the claim is for more than one hundred dollars, a claimant who is still dissatisfied may receive an oral hearing in front of a carrier employee who was not involved in the prior decisions and who writes a decision based on the record. At the time *McClure* was decided, the claimant received no further appeal.

The Court began by rejecting a due process charge of bias on the part of the deciders. It found that the carriers and their employees had no financial interest in denying claims. The Court then turned to the argument that due process requires additional administrative or judicial review by a government officer. Applying the familiar criteria of *Mathews v. Eldridge*, the Court assumed that the weight of the private

246. See id. at 190.
248. See id. § 1395u(b).
249. Congress has since amended this statute to grant beneficiaries with claims over $500 a hearing before an administrative law judge; those with claims over $1000 also receive judicial review. Claims between $100 and $500 are decided as before. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(I)(C), 100 Stat. 1874, 2038 (codified at 42 U.S.C. § 1395ff(b)(2) (Supp. IV 1986)).
251. 424 U.S. 319, 335 (1976).

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *(Id.)*
interest was "considerable." The weight of the government's interest in efficiency was unclear, but the Court assumed that providing review by an administrative law judge would not be "unduly burdensome." Focusing on the risk of erroneous decision and the value of additional process, the Court stressed the HHS requirements that deciders be both qualified to conduct hearings on medical matters and thoroughly familiar with the program and its governing law and policy. Because of these requirements, the Court perceived no constitutional deficiencies in the adjudicative procedures nor any need that the deciders be attorneys.

B. Analysis of the Particular Attributes of Arbitral Schemes

Voluntary arbitration should usually satisfy due process criteria. In general, a party's consent to a particular procedure is the best guarantee of fairness, if the alternatives are also acceptable. (Here, the alternative would be ordinary administrative process.) Of course, there are limits to what a citizen may bargain away for the benefits of an expeditious decision. To steer clear of those limits, Congress should avoid authorizing arbitration for disputes in which constitutional or statutory rights are evolving and need the special contributions of both administrators and judges.

Some arbitration schemes involve consent of a different kind. As in McClure, participation in a federal program may be voluntary, even though there is no assent to arbitral techniques. Courts should not relax their inquiry into procedural fairness in these situations. The doctrine of unconstitutional conditions, checkered as its history may be, sets limits on the government's power to bargain for citizens' rights with program benefits. Thus, in McClure it was significant that the underlying entitlement to participate in Medicare was not subject to arbitration, unlike the amount of particular claims. McClure thereby accords with the Eldridge formulation, under which the acceptability of arbitration depends to a large extent on an individual's interest in a program's benefits.

An important consideration from the functional portion of the Eldridge calculus is whether the arbitral scheme assures the neutrality and

253. Id. The district court decision had called for a de novo hearing before an administrative law judge. Id. at 195. The Court did not separately consider whether due process might require more limited administrative review, such as review of the decider's written decision.
254. See id. at 198-200.
255. See id. at 199 n.4.
256. See supra notes 79-81 and accompanying text.
Arbitration in Federal Programs

competence of the decider. Recall Judge Friendly's point that assurances of neutrality reduce the need for other procedural safeguards. In McClure shows that the Court does not regard agency deciders as necessarily fairer or more reliable than private ones.

In McClure, as in Eldridge, some guarantees of neutrality stem from the functions assigned to the decider. These nonadversarial hearings do not include government representation, and the decider must assist the private applicant in developing the case. In such an atmosphere, any incentive to favor one side probably benefits the claimant. The McClure Court mentioned the government's interest in avoiding overpayment of claims only in passing—in the context of rejecting a bias claim based on HHS attempts to encourage carriers to detect overpayments. This suggests that agencies should avoid instructions to arbitrators that seem to promote bias for either side.

The Court seems prepared to accept practical considerations of background and training, without regard to formal affiliation or status, as guarantees of decider competency. The Court has also indicated that the need for lawyers in federal programs turns on the extent to which formal rules of evidence apply and on the need for other kinds of expertise in the decider. For example, the Court effectively excluded lawyers from Veterans Administration claims proceedings by upholding a ten-dollar fee limit: "Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment." Under any particular program, the appropriateness of arbitral process depends on the nature of the participants and the issues. In Gray Panthers v. Schweiker, for example, the court held that the Medicare procedure for claims under one hundred dollars failed to satisfy due process in two respects. First, notice of procedural options needed to be adapted to the capacities of elderly and infirm claimants. Second, oral hearings were necessary for claims raising issues of credibility. It sufficed, however, to shape the process to accommodate "the generality of

258. See supra text accompanying note 168.
259. See McClure, 456 U.S. at 197 & n.11.
260. Id. at 197 n.11.
261. Id. at 196 n.9.
262. See id. 198-200 (upholding selection criteria for deciders because they included a requirement of "thorough knowledge" of the Medicare program, although they did not require a decider to hold a law degree).
264. 652 F.2d 146, 172 (D.C. Cir. 1980).
265. Id.
266. Id.
cases, not the rare exceptions.' "267

The fairness of arbitration derives partly from the specificity of the governing standard. A standard should be specific enough to meet the primary needs of the parties, the arbitrator, and the reviewing entities. The parties need enough information to exercise meaningful consent to the use of arbitration and to present their cases. The arbitrators need enough guidance to make awards that will be consistent with each other. The reviewing entities must be able to judge the facial validity of awards. In Thomas, arbitrators were to provide "compensation" to pesticide registrants for the use of their data.268 The vagueness of this standard raised fundamental questions: for example, does it mean the cost of creating the data or the value to the later registrant?269 An agency presented with such a vague statutory directive should elaborate it through rulemaking before asking arbitrators to apply it.270

Provisions for review by an agency or a court under the standards of the FAA also help to ensure the accuracy of arbitrations. Review focuses on the two most important ways in which arbitration can go awry—loss of neutrality in the decider and an award exceeding the bounds of the ex ante expectations of the parties. It would be difficult to provide added checks without radically formalizing the process.

The strength of the government's interest in informality varies. It is relatively great in high volume, small dollar contexts, such as Medicare, in which fact questions predominate. When expeditious processes are available, it is possible to devote more resources to the formal processes needed for resolution of policy or formation of precedent. Insofar as the government's fiscal interest concerns payment of awards as well as provision of process, however, the government's advantage is not a simple matter of minimizing procedural costs. Instead, the government should seek a process that optimally balances accuracy and cost. Such a balance is a peculiarly executive function, and as Eldridge emphasizes, the agency's choice of process is entitled to deference by a court weighing the dictates of due process.271


270. This elaboration would provide at least a partial response to the argument by Fallon, supra note 143, at 991, that Thomas was wrongly decided because decisions "of federal law" were committed to arbitrators, with very limited judicial review.

Arbitration in Federal Programs

VII. Executive Branch Supervision

Execution of the laws typically entails a complex mix of law-interpreting, policy making, and fact-finding. Much execution occurs through adjudication, performed by a variety of processes. The acceptability of arbitration depends in large part on the extent to which Congress or the executive may transfer these decisions to private arbitrators, consistent with the Constitution’s vesting of “[t]he executive Power” in the President and his subordinates. Executive preference for a delegation may mute a constitutional inquiry, but it will not foreclose one, because article II joins responsibility with power in its command to “take Care that the Laws be faithfully executed.”

A. Adjudicative Activities and Executive Responsibility

The President’s constitutional powers “are not fixed but fluctuate,” depending on the context in which they are considered. The extent of presidential authority to supervise administration depends on several variables: subject matter, government structure, and procedure. These variables affect relationships between the executive and private deciders, interacting to yield a judgment about appropriate kinds of supervision for particular functions. Arbitration should satisfy article II concerns if the structure and procedure used allow executive supervision appropriate to the particular context.

1. Subject Matter.—The first variable is subject matter, as it relates to the text and structure of the Constitution. A President’s strongest powers derive directly from the Constitution, as in foreign affairs, whereas the powers are at their weakest when actions affect individual liberties that enjoy their own constitutional protection. Our “political Constitution” plays a role here. Decisions that have a relatively high policy content implicate the President’s unique national political constituency and maximize the need for supervision. By contrast, the ap-

274. Id. § 3.
277. See Cutler & Johnson, Regulation and the Political Process, 84 YALE L.J. 1395, 1411 (1975) (explaining that the President’s unique ability to intervene in critical situations derives from being the only nationally elected officer).
278. See Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981) (recognizing “the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy”).
plication of policy to particular individuals introduces a competing constitutional value—due process.  

Administrators frequently make policy through adjudication; the President, therefore, has a substantial claim to overall supervision, not including intervention in a particular pending case. Of course, the policy-making content of adjudication varies substantially. For example, in McClure no one thought to raise article II objections to the arbitration of Medicare claims, presumably because of their fact intensiveness.

2. Structure.—Congress imposes limits on executive oversight, but the ultimate reach of this congressional power has always been uncertain. To minimize executive oversight, Congress allocates adjudicative functions to federal courts, legislative courts, or independent agencies. Courts have honored these attempts to insulate adjudication from presidential influence. The cases establishing the special constitutional status of independent agencies emphasize the due process concerns of agency decision makers. The current debate over the constitutional status of these agencies centers on presidential authority to supervise their policy-making functions. Meanwhile, the Supreme Court continues to treat the independent agencies as a viable part of government.


281. See supra notes 196-97 and accompanying text.

282. Of course, executive power over these entities varies, but the President retains his appointment power for all of them. See Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that the President cannot remove a member of the War Claims Commission without cause); Humphrey's Ex'r v. United States, 295 U.S. 602, 623 (1935) (holding that the President cannot remove a member of the Federal Trade Commission without cause).


284. Of course, executive power over these entities varies, but the President retains his appointment power for all of them. See Diver, Presidential Powers, 36 AM. U.L. REV. 519, 519-21 (1987) (discussing the uncertain place of agencies in the constitutional order); Miller, Independent Agencies, 1986 SUP. CT. REV. 41, 45 (discussing the implications of growing presidential power over administrative agencies).

3. **Procedure.**—Congress also affects presidential power by specifying agency procedure. Formal adjudication enjoys constitutional and statutory protections from outside interference by anyone, including the President. Rulemaking, on the other hand, is subject to increasingly ambitious executive management. Informal adjudication occupies a gray area in which Congress often fails to specify procedures, leaving the courts to define the permissibility of outside contacts.

4. **Applying the Constitutional Criteria.**—The Supreme Court has emphasized since Crowell that federal courts must retain a relationship to executive adjudication that preserves the rule of law. This requirement dominates the doctrines that define judicial review of administrative action and has led to a system in which executive oversight of adjudication is usually shared with the judiciary. Consequently, it is easy to confuse the sufficiency of governmental control of adjudication with the sufficiency of executive control to meet the distinctive needs of the executive branch.

Where, then, is the boundary between performance or oversight of adjudication that Congress may grant the executive and that which it must grant the executive? The Supreme Court’s definition of “execution” for purposes of forbidding Congress from intruding on executive prerogative is overbroad: “Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.” Manifestly, this formulation also encompasses the duties of federal courts. A focus on “policy making” is also oversimplified, because federal courts make policy every day by interpreting statutes—for example, by forming antitrust policy under the vague charter of the Sherman Act.

---

288. See Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (stating that congressional intervention in agency adjudicative functions raises concerns about the constitutional right to due process).


292. See Fallon, supra note 143, at 938-45 (arguing that preservation of judicial review of executive action satisfies article III interests).

293. Id. at 923-26.


Recall the Court's struggle to define adjudicative functions that may be placed in the executive branch. The policy component of "public rights" meant that Congress could, but need not, allocate them to the executive. Plainly, within wide limits Congress may decide whether adjudication should be performed in a federal court, an executive agency, or a constitutional hybrid, such as a legislative court or independent agency. Moreover, considering that Congress may require formal adjudicative procedure wherever it places decision-making authority, the "organization chart" aspects of the placement do not necessarily make a sharp difference.

Congress, however, may insulate a function from the oversight of all three constitutional branches in a way that hampers political accountability or allows arbitrariness. Courts frequently approach this question as a due process issue of the permissibility of private delegations. These delegations also raise a distinct question relating to executive supervision. Some functions are neither reviewable in court nor readily amenable to effective congressional oversight. Examples include foreign affairs and monetary policy making. For such functions, the nature and extent of executive supervision determines the sufficiency of governmental control. Therefore, weak ties to the executive are less justifiable if oversight by the other branches is disabled and more justifiable if it survives.

When Congress authorizes or requires a delegation to arbitrators, its allocative decision merits deference, as would the alternatives of delegating to judges or executives. The amenability of arbitration to judicial or executive review of the kinds outlined above provides a legitimating element of governmental control.

5. Neutral Deciders and Public Policy.—Arbitration in government programs raises special considerations relating to both executive power and due process. Arbitration promotes due process because it alleviates bias problems that attend administrative adjudication. Yet this gain may be won at the cost of sacrificing executive responsibility for policy. Congress may accommodate these constitutional values by retaining executive control of policy making and allocating some functions of policy prosecution regardless of whether he was acting in a representative capacity); cf. Winters v. New York, 333 U.S. 507, 537-38 (1948) (noting that the Court has rejected the argument that the Sherman Act is unconstitutionally vague).

296. See supra subpart V(A).
297. See supra subpart V(B).
298. See supra Part VI.
299. See supra sections VII(A)(1)-(3).
application to private neutrals. This principle provides a valuable general guideline but does not create a simple solution, because the line between making and applying policy is indistinct. In addition, it may be desirable for arbitrators to discharge a limited role in generating policy, and certainly some fact-finding should remain in executive hands. These judgments hinge on the particular contexts discussed below.

Government arbitration always affects policy in some way. At a minimum, awards constrain the options subsequently open to administrators. Arbitration of money claims against the government, as in Medicare, implicates budgetary concerns. Arbitration in public employee labor relations determines aspects of personnel policy. Even arbitration between private parties indirectly affects the affiliated federal program. Success or failure of the FIFRA arbitrations in Thomas, for example, should eventually impinge on the pace of pesticide registrations.

This Article's analysis of the FAA cases stresses the contract basis of the Court's modern approach to arbitration. Consent is also relevant to the acceptability of arbitration in federal programs. Nevertheless, the impossibility of excluding all policy effects raises special concerns for affected third parties, who have not consented to the use of private deciders. If kept within limits, the presence of third-party effects should not rule out arbitration.

Arbitration reduces executive power, but its effects should be kept in perspective. Comparison of a private delegation with the government function it displaces must include consideration of the legal constraints on that function, to see how much discretion the executive actually loses and to what extent the executive retains control over arbitration.

A brief look at the use of ADR techniques in rulemaking demonstrates these principles. Rulemaking draws the President's supervisory role directly into question, because it concerns generalized policy. Nevertheless, private groups influence rule makers. Although the original purpose of the APA's notice and comment procedures was only to provide affected persons an opportunity to educate the policy makers, administrative law presently pursues a more ambitious goal—to use diverse outside pressures to encourage rule makers to follow the public

300. See supra subpart II(B).
301. See supra notes 227-29 and accompanying text.
302. See Cutler & Johnson, supra note 277, at 1411 (discussing the President's unique situation and capability to act quickly in formulating and articulating national policy goals).
interest. 304

Under the ACUS recommendation on negotiated rulemaking, private groups negotiate a proposed rule, which then undergoes the usual notice and comment process. This process does not differ sharply from the bargaining that occurs informally under notice and comment procedures. 305 Private parties have a substantial influence on the process, but final policy decisions remain with the government. 306 Similarly, delegation to arbitrators need not equal abdication, because constraints on arbitration can satisfy the executive’s supervisory needs. As administrative adjudication demonstrates, much depends on the program’s structure, which is the topic of the next subpart.

B. The Scope of the Appointments Clause

In Buckley v. Valeo, 307 the Supreme Court held that Congress could not appoint members of the Federal Election Commission (FEC). The Court read the appointments clause 308 to govern the selection of anyone “exercising significant authority pursuant to the laws of the United States.” 309 In defining that phrase, the Court distinguished informational and investigative functions, which need not be performed by “Officers of the United States,” from the FEC’s enforcement powers—such as litigating, rulemaking, and adjudicating—which could only be performed by officers or their employees. 310

Buckley is a formalist opinion with no obvious limits to its logic. 311 A plausible interpretation is that it requires all adjudicative activities to be kept in the hands of federal employees. Nevertheless, the context of the case framed the Court’s distinctions. The Court considered whether Congress could assume the President’s appointments power, not whether


305. Moreover, modern agencies often employ private consultants in rulemaking and may rely substantially on them in the deliberative process as long as the agencies do not abdicate the ultimate statutory responsibility for decision. United Steelworkers v. Marshall, 647 F.2d 1189, 1217 (D.C. Cir. 1980).

306. See, e.g., 1 C.F.R. § 305.82-4 (1988) (“The final responsibility for issuing the rule would remain with the agency.”); see also Harter, supra note 7, at 109 (suggesting that because the agency retains final rulemaking authority, this type of regulatory negotiation does not constitute an “impermissible delegation of governmental authority to a private group”).

307. 424 U.S. 1, 143 (1976) (per curiam).

308. U.S. CONST. art. II, § 2, cl. 2.

309. Buckley, 424 U.S. at 126.

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

311. See Bruff, supra note 133, at 500 (arguing that Buckley was primarily formalist and that the Court did not address Congress’s ability to exclude the President from a supervisory role).
it could authorize or require the delegation to private parties of some functions the executive could perform. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere. The need to prevent interference with core functions remains and requires an inquiry into whether the President lacks supervisory powers necessary to oversee the execution of the laws.

The Buckley Court adopted a broad definition of the executive activities that are subject to the appointments clause. The Court emphasized that execution of the laws includes diverse functions typical of all three constitutional branches. Granted, but Buckley had no occasion to consider less than a complete displacement of power to select deciders. Nor did the Court consider constitutional values other than the separation of powers, such as due process. Thus, Buckley does not resolve the question of most interest here: What minimum relationships between an officer and a decider are necessary to satisfy concerns related to the appointments clause?

Two possible approaches may satisfy Buckley. First, courts could ask only whether a decider is technically a government employee. Under this approach, arbitrators could be government employees from any agency not involved in a particular dispute. The purpose would be to obtain neutrality while keeping discretion in government hands. Yet if Buckley is meant to preserve accountability for and control of execution by executive officers, it is not the formal affiliation of an arbitrator with the government that matters. Instead, the officer having statutory responsibility for administering the program must retain control.

Thus, courts could ask a more focused question: Is the particular activity in question sufficiently controlled by the responsible officer?


313. See Morrison, 108 S. Ct. at 2619.

314. Buckley, 424 U.S. at 140-41.

315. For example, nothing in Buckley forbids exposing an officer to private influence, as long as the officer retains the power to decide. See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940) (holding that coal producers may propose minimum prices to agency, which can approve, disapprove, or modify them).

316. This inquiry is illustrated by Melcher, 644 F. Supp. at 523, which involved the formation of monetary policy by the FOMC. The district court considered the FOMC's status under Buckley. Seven members (the Board of Governors of the Federal Reserve System) are unquestionably "Officers of the United States." The other five are private bankers selected by the boards of directors of the regional Federal Reserve Banks. The court declined to characterize the private members of the FOMC as government officers, see id. at 519, although the Board of Governors supervises them in their other capacity as officers of the various Reserve Banks. The court pointed to the absence of any clear authority for the supervision of these individuals in their role as FOMC members. Id.
This is the appropriate inquiry, because it isolates the executive’s supervisory needs. Recognizing the variety of possible relationships between the executive and its delegates, such as part-time employment and independent contractor status, this approach would avoid considering only formal appointment or full-time employment. Courts could assess each relationship to determine the extent to which an officer controls delegated discretion.

Available methods of controlling arbitration can meet the executive’s constitutional responsibilities. Absent these controls, the constitutionality of federal arbitration will not be preserved by the formal status of the arbitrator as an officer or employee of the United States, because that status will lack a nexus to the performance of delegated governmental powers. On the other hand, the presence of the controls prevents interference with core executive functions.

C. Selecting Arbitration and Arbitrators

The appropriateness of arbitration for resolving a particular type of dispute depends on a variety of factors, including the identity of the parties, the nature of their interests, the issues raised, and expressed congressional goals. This subpart examines the interrelationships of these factors in various contexts.

Congress frequently authorizes but does not require agencies to resort to arbitration when the government is a party to the controversy. Voluntary arbitration of such disputes allows agencies to satisfy executive interests, whether the choice of procedure occurs before or after a controversy arises. The primary executive interest is efficiency. By referring some claims to a third party for expeditious handling, an officer minimizes process costs and saves time for more important cases. Arbitration also promotes efficiency indirectly by relying on a neutral decider and thereby increasing the acceptability of outcomes and reducing appeals. Referral of claims against the government also addresses a second concern—due process values—by avoiding undue interest, or an appearance of it, in the outcome.

In certain contexts, such as the determination of minor Medicare claims, the nature of the issues and the governmental interest in efficiency are such that arbitration is particularly appropriate. Here, Congress should have the power to make arbitration mandatory. Indeed,

317. See infra notes 333-38 and accompanying text.
318. The ACUS recommends mandatory arbitration only for disputes between private parties incident to a federal program, and not for those to which the government is a party. See 1 C.F.R. § 305.86-3 (1988).
Arbitration in Federal Programs

Congress typically specifies procedures for administrative adjudication. Arbitration, of course, offers the unique consideration of some loss of executive control over policy effects of the process. Nevertheless, the executive does not ordinarily enjoy unrestricted dominion even for policy, and requiring certain methods for selecting and supervising arbitrators should preserve opportunities for the executive to control the formation of policy and to influence its application.319

When the government acts only as arbiter of disputes between citizens, as in securities arbitration, the need for executive choice of process declines. Nevertheless, the executive retains responsibilities that arise out of the public purposes underlying the related administrative program. The nature of the obligation can be seen in the FAA cases, in which the Court held that contract values can support the acceptability of arbitration.320 The basis of these decisions was the freedom of contract notion that parties can negotiate for any dispute resolution procedure they desire. Even in such formally voluntary arbitral programs the executive should monitor the relative bargaining power of the parties to determine the genuineness of consent to arbitration. To the extent doubts arise about consent, the executive should use its supervisory powers to adjust the nature of arbitration in pursuit of fairness—for example, by specifying the qualifications for arbitrators.321 Mandatory arbitration, as in FIFRA, presents heightened responsibilities of this kind. Executive control of the process can forestall fears that one party will oppress another.322

For programs in which the executive has a substantial interest in arbitration, methods of structuring the scheme and selecting arbitrators can reflect that interest in a compromise with strict neutrality. The legality of a private delegation typically depends on whether a court concludes that the composition of the deciding group represents the interests affected.323 Persons selecting private deciders, however, frequently must weigh the benefits of expertise in the subject matter against the costs to neutrality from the source of the expertise.324 Hence, balance, rather

319. See infra notes 333-35 and accompanying text.
320. See supra subpart II(B).
322. Such fears appear to be the basis for many of the private delegation decisions, such as Carter v. Carter Coal Co., 298 U.S. 238 (1936). See supra subpart III(A).
324. One example is prior service in the agency or industry. The ACUS has recognized the inevitability of these trade-offs in its recommendation on acquiring the services of ADR neutrals.
than unalloyed neutrality, should be the predominant goal of arbitral schemes.

There are several ways to pursue balance in arbitration. First, a mixed public/private body can determine whether to arbitrate. Arbitration of contract impasses with federal workers, for example, occurs on the approval of the Federal Service Impasses Panel, a part-time body composed partly of government employees. This approach reflects the policy orientation of "interest" arbitration, which resolves distributional issues between the parties on a prospective basis. Such prior approval is typically unnecessary when policy concerns are not in issue, as in "grievance" arbitration, which considers rights under preexisting arrangements.

Second, the composition of multimember panels can reflect interests in appropriate proportions. Sucli a scheme is employed to resolve labor disputes in the United States Postal Service. An arbitral board composed of one member selected by the Service, one by the union, and a third selected by the other two members, adjudicates bargaining impasses between the Service and its employees. The Department of Education also employs mixed panels, formed of a minority of federal employees and a majority of private members, to adjudicate certain disputes with its grant recipients.

Moreover, even single-arbitrator schemes can reflect the preferences of both sides. In commercial arbitration, the AAA sends a list of names to the parties, who strike those to whom they object and number the others in order of preference. The AAA selects the arbitrator according


326. See generally Craver, supra note 19, at 559-61 (arguing that "interest" arbitration involves issues that can drastically affect the services received by the public and the expenditure of governmental revenues); Kanowitz, supra note 25, at 244-50 (arguing that "interest" arbitration reduces the number and scope of socially disruptive economic disturbances); Note, Binding Interest Arbitration in the Public Sector: Is it Constitutional?, 18 WM. & MARY L. REV. 787, 819-21 (1977) (asserting that binding interest arbitration statutes should be carefully worded to harmonize the conflicting interests of the general public, public employers, and public employees).


328. See 39 U.S.C. § 1207 (1982). Failing agreement on selection of a third member, the Director of the Federal Mediation and Conciliation Service chooses one. Id. § 1207(c)(1).

Arbitration in Federal Programs

to mutual preference. Federal agencies borrow these practices, sometimes by direct referral to the AAA.

These techniques furnish the executive with sufficient tools to balance supervisory and neutrality concerns that arise in the selection of deciders. Compare these procedures with ordinary administrative adjudication, which administrative law judges usually perform in the first instance. For either adjudication or arbitration, an agency may consider the overall neutrality and competence of the pool of deciders when deciding whether to utilize their services instead of alternative processes. But an agency sometimes has more power to select a private decider than a public one, because in arbitration agencies can influence the choice of a decider for a particular case, whereas ALJs usually rotate in assignments.

D. Supervising Arbitrators

Although presidential authority to supervise independent agencies and adjudicators is limited, the President enjoys the constitutional power to appoint the deciders and retains a general interest in their performance. Accordingly, arbitration in federal programs should be subject to two kinds of executive monitoring. First, the program should contain some overall scrutiny to determine whether the scheme meets expectations. Like any procedure, arbitration is more successful for some disputes than others. In the present era of experimentation with ADR techniques, the executive has a continuing monitoring responsibility. Federal arbitration schemes often concern large stakes, such as millions of dollars of aggregate expenditures of public or private money. For

330. See COMMERCIAL ARBITRATION RULES, supra note 15, at 34. The person selected must disclose "any circumstances likely to affect impartiality" and is subject to disqualification by the AAA. Id. at 35. Similarly, the Court has read the FAA to require disclosure of possible bias. See, e.g., Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147 (1968) (stating that provisions requiring courts to vacate fraudulent awards "show a desire of Congress to provide not merely for any arbitration but for an impartial one").


332. See 5 C.F.R. § 930.212 (1988). The Supreme Court, however, has approved some agency discretion to match an ALJ's background to the subject matter. See Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139-40 (1953) (approving a rotation scheme of ALJs on the basis of their ability to handle complex and difficult cases).

333. See SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 33 (Comm. Print 1960): "The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all part of the President's constitutional concern to see that the laws are faithfully executed."

334. See Getman, LABOR ARBITRATION AND DISPUTE RESOLUTION, 88 YALE L.J. 916, 918-34 (1979) (emphasizing the connection between the collective bargaining relationship and the success of labor arbitration).
some arbitral programs, the so-called “wholesale” review is more important to the executive than “retail” review of a particular decision. Of course, oversight does have its perils; when the government is a party to arbitration, monitoring must steer a careful course, assessing the overall accuracy of the process without intervening in particular cases.335

Second, agencies must exercise some control over the conduct of particular arbitrations by providing a standard for decision and by reviewing awards to ensure fidelity to it.336 Ordinarily, an agency elaborates its statutory standards through rulemaking. The executive thus controls arbitration even when statutes mandate it.337 Of course, the specificity of standards should vary with the subject matter. Instructions should be more detailed for relatively policy-laden subjects (such as interest arbitration in labor relations) than for more fact-intensive ones.338

In general, the FAA criteria are suited to review of arbitration either in the agency or in district court.339 Agency review under FAA standards would not be as stringent as review of much administrative adjudication, because of the latter’s structure to reflect a greater policy content.340 When arbitral schemes have relatively large effects on agency

---


336. Additionally, if an arbitrator exceeds delegated authority in a pending case, an agency may seek redress by invoking the familiar jurisdiction of the courts to determine an arbitrator's jurisdiction. See supra notes 44-47 and accompanying text.

337. Professor Fallon has argued that Thomas was wrongly decided, because it delegated authority to arbitrators to decide issues of “law.” See Fallon, supra note 143, at 991. The vague standard at issue in Thomas certainly needed elaboration. See supra notes 268-70 and accompanying text. If an agency appropriately confines arbitral discretion by specifying the content of the governing norm, there should be no need to invalidate the entire scheme.

338. See Craver, supra note 19, at 566-67, for examples of varying criteria used for interest arbitration. Recent state cases considering the validity of private delegations have often concerned public employee interest arbitration. Mos: courts have upheld these schemes against delegation attacks. See, e.g., City of Richfield v. International Firefighters Ass'n, 276 N.W.2d 42, 45-46 (Minn. 1979) (holding that delegation to arbitrators is constitutional if founded on a definite policy); State v. City of Laramie, 437 P.2d 295, 300-01 (Wyo. 1968) (stating that functions are delegable if the delegate executes previously determined law). Other cases have invalidated such schemes. See, e.g., Greeley Police Union v. Greeley City Council, 191 Colo. 419, 422, 553 P.2d 790, 792 (1976) (holding delegation unconstitutional in the absence of public accountability); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 789-90 (Utah 1977) (same).


340. Agencies may overturn ALJ decisions readily, as long as substantial evidence supports the final decision. E.g., FCC v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955) (clarifying that
policy—for example, in interest arbitration with federal employees—agency review for facial legality of the award must encompass a judgment that the policy effects are acceptable. In this way, agencies can accommodate Buckley's implication that executive officers must always be accountable for public policy. Even in non-"policy" contexts, examination of particular awards should aid the search for recurring problems.

In arbitration, the executive loses ordinary fact review but gains the speedier resolution of disputes. More intensive fact review would vitiate the distinctive advantages of arbitration by forcing arbitrators to provide the procedural formalities necessary to build a suitable record. Nevertheless, a limited review under FAA criteria should help agencies to discharge their responsibilities to supervise arbitration. An agency can perceive problems far more easily than district judges scattered around the country, each of whom sees an occasional case presenting part of the spectrum. Moreover, an agency's ordinary rulemaking powers offer much more flexibility than federal courts possess to shape an arbitral program in response to developments. If agencies perform this "retail" review, there would be no need for judicial duplication, although courts could still examine issues concerning the "wholesale" validity of the scheme.

E. Arbitration and Enforcement Functions

The functions that Buckley denied to congressional appointees all involved the governmental coercion of primary conduct. Perhaps that role involves responsibilities that the executive may never delegate. The differences between coercive and noncoercive governmental action, however, are easy to exaggerate. As economists are quick to note, both the carrot and the stick influence behavior. Nevertheless, legal controls on government monitor coercive activities most closely. Functional analysis gives some weight to the degree of coercion present in an activity, without resting exclusively on that factor. The diverse subject matter of

the strict "clearly erroneous" rule does not apply to an examiner's findings and that an agency may overrule an examiner so long as it does so based on substantial evidence). Indeed, final adjudicative authority frequently vests in the political executives at the head of the agency. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (holding that the choice to adjudicate lies in the first instance within the NLRB's discretion).

341. This kind of review would accord with statutory or administrative criteria such as those empowering the Federal Labor Relations Authority to invalidate civil service awards that are "contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a)(1) (1982).

342. Restricted by FAA standards, this function would not introduce impermissible levels of bias.

343. See Heckler v. Chaney, 470 U.S. 821, 832 (1985) (noting that coercive applications of government power are more amenable to judicial review).
federal programs suggests that a single characteristic should not predominate.

Proposals are circulating that suggest employing arbitration in some enforcement contexts, such as the revocation of permits for hazardous waste facilities.\textsuperscript{344} Such a scheme must contain certain limits. The executive traditionally enjoys wide prosecutorial discretion, because the component activities of gathering information, setting priorities, and allocating resources affect many of an agency's responsibilities and are difficult to monitor effectively from the outside.\textsuperscript{345} Hence, permitting an arbitrator to choose whom to prosecute or to decide other issues that implicate general enforcement policy would divest the executive of core functions.

Private neutrals could, however, play a number of other roles. First, they could influence enforcement in ways that do not formally displace executive discretion. A portion of the ACUS recommendation, for example, suggests employing various ADR techniques, including negotiation, mediation, and "minitrials," in the settlement of litigation.\textsuperscript{346} These techniques vest actual settlement authority in the hands of government officers. The recommendation, however, would expose settlements raising major public policy issues or third-party effects to notice and comment, thereby reaping the benefits of exposing deciders to outside influences.\textsuperscript{347} Thus, the process would not rely solely on interested parties and the ADR neutral, whose perspective may be limited, in settling cases having implications beyond their facts.

Second, private neutrals could arbitrate fact questions underlying an enforcement dispute. Efficiency gains from informal process would accrue without sacrificing the executive's needs to set overall enforcement priorities and policy. This kind of arbitration should be voluntary, to alleviate concerns for both executive prerogative and fairness to affected parties.

Finally, though the issue is more difficult, agencies could employ private neutrals to arbitrate the application of settled criteria for sanctions such as permit revocation to a particular respondent. The executive


\textsuperscript{345} See Heckler, 470 U.S. at 831 (discussing wide-ranging agency prosecutorial discretion); FTC v. Universal-Rundle Corp., 387 U.S. 244, 249-50 (1967) (upholding FTC's discretion to determine whether to prosecute).

\textsuperscript{346} See 1 C.F.R. § 305.86-3 (1988). Minitrials are abbreviated summaries of trial evidence, presented before principal officers of the litigants who are authorized to settle the case.

\textsuperscript{347} At present, consent agreements are sometimes subjected to notice and comment procedures. See G. ROBINSON, E. GELLHORN & E. BRUFF, supra note 283, at 549.
thereby retains control of overall policy by formulating the standards for sanctions. But an important aspect of prosecutorial discretion concerns law-applying—the decision whether to compromise a charge or to take it to trial. Administrative law accommodates the combination of prosecutorial and adjudicative functions in a single agency, with appropriate safeguards. Nevertheless, reducing the potential for bias that attends the selection of sanctions by the investigating office promotes due process. Voluntary arbitration thus alleviates concerns for both executive and individual interests. As in other federal arbitration schemes, the use of private deciders can promote public values.

VIII. Conclusion

To satisfy the due process and separation of powers concerns emanating from articles II and III of the Constitution, arbitral schemes must have certain relationships with federal courts and agencies. Agencies are responsible for the composition of the arbitral pool, the method of selecting arbitrators in particular cases, and the articulation of the governing norm. When arbitration does not have the full consent of private parties, agencies have a special responsibility to assure its fairness by supervising the conduct of arbitration in ways consistent with its neutrality. Agencies must review awards in the limited ways that are familiar in private arbitration, and also for their consistency with the agency's law and policies. Federal courts can then defer to agencies for review of individual awards, while retaining their traditional function of deciding statutory and constitutional challenges to the scheme as a whole.

Thus, the basic role of arbitration in federal programs is to apply relatively well-defined public-law norms to factual disputes. Arbitration can thereby promote goals of neutrality, expertise, informality, and expedition in resolving these disputes. The policy effects of arbitration, although inescapable, must be minimized through articulation of the governing standard and review for the consistency of awards with the agency's law and policy. Under appropriate constraints, private deciders can play a role in the administration of public programs.


349. See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 492-93 (1976) (holding that school board could both negotiate with teachers and discharge them for illegally striking after negotiations failed). In Hortonville, provision of a neutral decider would have eliminated the need for the Court to inquire whether the facts raised a sufficient danger of bias to deny due process.