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Harold H. Bruff
University of Colorado Law School

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

Harold H. Bruff**

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** 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.

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].

3. *See generally* ADMINISTRATIVE CONFERENCE OF THE U.S., SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 701-860 (1987) [hereinafter ACUS SOURCEBOOK] (describing the growing use of ADR methods in administrative agencies); Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 141 (1987) (same).

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-

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).

7. Negotiated rulemaking is agency-sponsored negotiation between groups interested in a contemplated regulation. The process generates a proposal that the agency issues as a notice of proposed rulemaking, initiating the usual procedure for informal rulemaking. *See, e.g.*, 1 C.F.R. §§ 305.82-4, .85-5 (1988) (containing recommendations setting out procedures for negotiated rulemaking). *See generally* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 42-112 (1982) (providing a detailed overview of negotiated rulemaking).

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.

10. *See* 1 C.F.R. § 305.86-3 (1988).

11. *See generally* Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984) (discussing common-law arbitration in the seventeenth century).

12. In 1984, nearly 40,000 labor, commercial, construction, and accident cases were filed with the American Arbitration Association. Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78, 79.

13. *See generally* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 189-243 (1985) (discussing arbitration's advantages in providing expert decision makers, privacy, and informality); J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 383-607 (1988) (providing a comprehensive review of legal and policy issues surrounding arbitration).

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,[14] 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.[15] 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.[16]

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.[17] The second encompasses disputes between the government and its employees, including both the resolution of grievances under an existing law or contract[18] and the determination of future contractual relations.[19] The third is disputes between private parties related to program administration. Examples include claims against the "Superfund" for cleanup of toxic wastes,[20] the ascertainment of employers' liability for withdrawal from pension plans overseen by the Pension Benefit Guaranty Corporation,[21] and the determination of compensation that a pesticide manufacturer

14. *See* Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 447 (1988).

15. *See, e.g.*, COMMERCIAL ARBITRATION RULES (Am. Arbitration Ass'n 1985), *reprinted in* R. COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 33-40 (3d ed. 1986); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Joint Comm. of the Am. Arbitration Ass'n & the Am. Bar Ass'n 1977), *reprinted in* R. COULSON, *supra*, at 141-49.

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.

17. *See* 42 U.S.C. § 1395u(b)(3)(C) (1982); 42 C.F.R. §§ 405.801-.872 (1987).

18. *See generally* Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1978*, 17 SAN DIEGO L. REV. 857, 864-67 (1980) (discussing the scope of negotiated grievance arbitration procedures for federal employees).

19. *See* 5 U.S.C § 7119 (1982); 39 U.S.C. § 1207 (1982). *See generally* Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C.L. REV. 557, 558 (1980) (noting that 27 states authorize such arbitral schemes).

20. *See* 42 U.S.C. § 9612(b)(4) (1982 & Supp. IV 1986); 40 C.F.R. §§ 305.10-.52 (1987), *revoked*, 52 Fed. Reg. 33812 (1987).

21. *See* 29 U.S.C. § 1381 (1982 & Supp. II 1984); 29 C.F.R. §§ 2641.1-.13 (1987).

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 addressing 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, delegation 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 century, common-law courts refused to enforce agreements to arbitrate.[24] The courts distrusted the informality of arbitration and perceived it as a

22. *See* 7 U.S.C. § 136a(c)(1)(D)(ii) (1982); 29 C.F.R. § 1440.1 (1988).

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 assure consistency with statutory authority, because principles of fairness and accountability to executive authority are pertinent to both inquiries. The discussion that follows assumes the presence of adequate statutory authority for any particular referral to arbitration.

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 Arbitration*, 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.[25] 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.[26]

Statutes eventually endorsed arbitration and defined its relation to the courts. The Federal Arbitration Act of 1925 (FAA)[27] attempted to "revers[e] centuries of judicial hostility to arbitration agreements . . . and to place [them] 'upon the same footing as other contracts.' "[28] 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."[29] The Act authorizes federal courts to compel arbitration[30] 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."[31]

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. Wolaver, *supra* note 24, at 141-42.

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

27. 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1982)). The FAA has analogues in most states, based on the Uniform Arbitration Act, 7 U.L.A. 5 (1985), formulated in 1955. *See* Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1140 n.32 (1986) (identifying 45 state statutes that enforce arbitration agreements).

28. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924)); *see also* Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 274-78 (1926) (discussing the need for federal and state arbitration statutes).

29. 9 U.S.C. §§ 1-2 (1982).

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 . . . .

9 U.S.C. § 10 (1982).

cases generally embrace arbitration.[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.[33] The search for case load solutions may skew legal doctrine,[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.[35] Nevertheless, the courts retain a major supervisory role through routine judicial review of agency adjudications.[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.[37] Therefore, the availability of arbitration in federal programs should appeal to a harried judiciary.

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

32. *See infra* subpart II(B).

33. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 94-129 (1985) (reviewing the debilitating consequences of the "caseload explosion" in the federal courts); Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1410-14 (1987) (proposing a new court to relieve the Supreme Court's work load); Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1426-28 (1987) (arguing that elevation of the law-clarifying functions of the Office of Law Revision Counsel would render a new court unnecessary).

34. For example, the Supreme Court's administrative law doctrine may reflect an attempt to reduce judicial case loads. *See* Strauss, *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).

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, *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).

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.

37. *See infra* notes 241-44 and accompanying text.

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*,[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."[39] Therefore, " 'federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.' "[40]

Federalism also yields to the contractual values embodied in the FAA. In *Perry v. Thomas*,[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.' "[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.[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

38. 470 U.S. 213, 218-21 (1985).

39. *Id.* at 220.

40. *Id.* at 221 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)).

41. 107 S. Ct. 2520, 2526-27 (1987).

42. *Id.* at 2525 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

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.[44] Instead, courts construe the underlying contracts, resolving doubts in favor of arbitrability.[45] 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.' "[46] The presumption favoring arbitrability also reflects the "greater institutional competence"[47] 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*,[48] the Court adopted the traditional view by holding that a customer's misrepresentation claims against brokers under the Securities Act of 1933[49] were not subject to compulsory arbitration,

44. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967), the Court held that an arbitrator could decide a claim that a contract containing an agreement to arbitrate was induced by fraud, but not a claim that the agreement to arbitrate was tainted.

45. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). But this presumption of arbitrability, which arose in labor arbitration, does not extend to all contexts. *See* Schneider Moving & Storage v. Robbins, 466 U.S. 364, 371-72 (1984) (holding that presumption, designed to minimize strikes and promote labor peace, was not applicable to contract with trustee of benefit funds).

46. AT&T Technologies v. Communications Workers, 475 U.S. 643, 651 (1986) (quoting Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1509 (1959)). Although the FAA does not apply to labor arbitration, the Court looks to it for "guidance," in light of the similarity of the two schemes. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 372 n.9 (1987).

47. *AT&T Technologies*, 475 U.S. at 650; *see also* Pearce v. E.F. Hutton Group, 828 F.2d 826, 829 (D.C. Cir. 1987). In *Pearce*, the court observed that the rationale for the policy of resolving jurisdictional doubts in favor of arbitration "is at its strongest where the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry." *Id.*

48. 346 U.S. 427 (1953).

49. The claims were brought under § 12(2), 15 U.S.C. § 77l(2) (1982).

notwithstanding an agreement to arbitrate.[50] 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 customer's statutory rights.[51]

In *Shearson/American Express v. McMahon*,[52] the Court sharply limited *Wilko*.[53] The McMahons had signed customer agreement forms providing for arbitration of any controversy arising out of their accounts with Shearson.[54] They sued in district court, alleging fraudulent conduct and breach of fiduciary duties under the Securities Exchange Act of 1934[55] and the Racketeer Influenced and Corrupt Organizations Act (RICO).[56] The court of appeals held the claims nonarbitrable under both federal statutes.[57]

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 customers. In a broadly phrased opinion for the majority, Justice O'Connor emphasized that the duty to enforce arbitration agreements "is not diminished"[58] for claims founded on statutory rights, absent a showing that arbitration "is inadequate to protect the substantive rights at issue."[59] Addressing the Securities Exchange Act issues, the *McMahon* Court characterized *Wilko* as an embodiment of traditional judicial suspicion of arbitration.[60] 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).

51. *Wilko*, 346 U.S. at 436-37.

52. 107 S. Ct. 2332, 2338-39 (1987).

53. In Noble v. Drexel, Burnham, Lambert, Inc., 823 F.2d 849, 851 (5th Cir. 1987), the court held that *McMahon* had retroactive application.

54. *McMahon*, 107 S. Ct. at 2335.

55. The claims were brought under § 10(b), 15 U.S.C. § 78j(b) (1982).

56. 18 U.S.C. § 1961 (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.

58. *McMahon*, 107 S. Ct. at 2337.

59. *Id.* at 2339.

60. *See id.* at 2341.

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.[61] 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.[62] The Court confined *Wilko* to its holding under the 1933 Act.[63]

Proceeding to the RICO claims, the Court rejected the McMahons' 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"[64] 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*,[65] 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.

64. *McMahon*, 107 S. Ct. at 2344 (quoting *Mitsubishi*, 473 U.S. at 633).

65. 466 U.S. 284, 286 (1984).

of speech and association.[66] The Supreme Court refused to accord the arbitration any preclusive effect in the subsequent trial.[67] Drawing on earlier cases,[68] the Court held that arbitration "cannot provide an adequate substitute" for a trial in protecting federal statutory and constitutional rights under section 1983.[69]

The *McDonald* Court gave four reasons for denying arbitration preclusive effect.[70] 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.' "[71] 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.[72] 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.[73] The absence of a bright line between lawmaking and law-applying will mean, of course, that new or broadly phrased statutes create norms that must be elaborated and applied at the same time.[74] These are not appropriate instances for judicial restraint, however, because under the Edwards formula, courts should defer only to arbitration that

66. *Id.*

67. *Id.* at 287-92. The Court earlier had held that the federal statute requiring full faith and credit for "judicial proceedings" in state courts, *see* 28 U.S.C. § 1738 (1982), does not apply to arbitration. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 477 (1982).

68. *See* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 734 (1981) (holding that arbitration does not preclude suit to enforce minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 254 (1982)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (holding that arbitration does not preclude suit under title VII); *see also* Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 77-84 (1986) (discussing New York case law giving arbitral issue determinations preclusive effect in state courts).

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).

72. *See* Devine v. White, 697 F.2d 421, 438-39 (D.C. Cir. 1983) (Edwards, J.).

73. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 680 (1986).

74. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (noting the "broad language" of title VII as a reason for denying arbitration preclusive effect).

is confined to applying known statutory criteria.[75]

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.[76] As *McMahon* illustrates, however, an arbitrator's charge can specifically require enforcement of public-law obligations.[77] 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."[78] 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.[79] Although shared interests make the union a reliable proxy for most economic issues, member interests are likely to diverge on issues of individual liberty.[80] 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

75. 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.

76. 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)).

77. *See* Shearson/American Express v. McMahon, 107 S. Ct. 2332, 2343, 2345-56 (1987).

78. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 373 (1987) (citing W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983)); *cf.* Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1427 (8th Cir. 1987) (holding that award reinstating nuclear plant employee who committed serious violations of safety regulations violates public policy). *See generally* Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486 (1981) (arguing that public policy should prevent enforcement of arbitration agreements only in very limited circumstances determined by statute or other legal rules).

79. *McDonald*, 466 U.S. at 291.

80. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); *see also* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 742 (1981) (concluding that unions are not reliable representatives for some statutory guarantees of individual economic entitlement). The Court has adhered to the view that certain statutory rights for employees are not subject to compulsory arbitration. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, 108 S. Ct. 1877, 1883 (1988) (holding that state-law claims can be resolved independently of a collective bargaining agreement, provided that claim does not require interpretation of the agreement); Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 564-67 (1987) (holding that a worker's Federal Employer's Liability Act claim for personal injuries could not be subject to compulsory arbitration under the Railway Labor Act, 45 U.S.C. §§ 151-159 (1982)); *cf.* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078-82 (1984) (expressing concerns about the adequacy of union representation in settlements).

agency supervision of arbitral schemes.[81]

Finally, the *McDonald* Court observed that arbitral fact-finding is not the equivalent of judicial fact-finding, because of the informality of arbitral processes.[82] The "reasons" for this conclusion merely describe the ways in which arbitration usually deviates from trial processes.[83] The Court's unarticulated concern may have been that the arbitration of civil rights or constitutional issues threatens core judicial responsibilities.[84] The *McMahon* decision did not address this issue, but in constitutional litigation generally, the Court exercises relatively independent review of the facts found below.[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.[86] Yet prisoners prove astute at converting their grievances into constitutional claims,[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.

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.[88] Second, arbitrators can apply clearly defined public policy norms. Finally, review by a government entity, such as a

81. *See McMahon*, 107 S. Ct. at 2356.

82. *McDonald*, 466 U.S. at 291.

83. *See Gardner-Denver*, 415 U.S. at 57-58.

84. The *Gardner-Denver* Court emphasized that "the resolution of statutory or constitutional issues is a primary responsibility of courts." *Id.* at 57.

85. *See* Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 254-63 (1985) (analyzing the scope of judicial review of fact issues underlying constitutional claims).

86. *See* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 314-16 (1970); Keating, *Arbitration of Inmate Grievances*, 30 ARB. J. 177, 190 (1975).

87. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (holding that negligent loss of a hobby kit was a constitutional deprivation of property), *overruled*, Daniels v. Williams, 474 U.S. 327, 330 (1986).

88. *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).

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.[89] This standard reflects its originating context in contractual, private law.[90] 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.[91]

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.[92] 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.*,[93] 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 roam[100] 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.
97. 295 U.S. 495 (1935).
98. *Id.* at 537.
99. *Id.*
100. *Id.* at 538-39, 541-42.
101. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 61-62 (1965).

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.[102] 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.[103] For example, the issuance of federal milk marketing orders, which regulate prices, depends on the consent of dairy farmers and milk handlers.[104] The Court's efforts to distinguish the issues and resolve inconsistencies in the cases have been very weak.[105] 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).

103. *See, e.g.*, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 108-09 (1978) (upholding statute requiring an automobile manufacturer to obtain state approval before operating a dealership if an existing franchisee objected); H.P. Hood & Sons v. United States, 307 U.S. 588, 595 (1939) (upholding equalization provisions of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c (1982 & Supp. IV 1986), which fixed minimum producer prices on milk after agreement by at least two-thirds of the milk producers); United States v. Rock Royal Co-op., 307 U.S. 533, 577-78 (1939) (upholding provision of the Agricultural Marketing Agreement Act allowing vote of two-thirds of producers to be sufficient for issuing certain government orders); Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding Tobacco Inspection Act, 7 U.S.C. § 511 (1982 & Supp. IV 1986), which withheld regulation of a market unless two-thirds of the voting growers favored it). For a critique of the *Fox* case, see Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 854-57, 870-75 (1980).

104. In Block v. Community Nutrition Inst., 467 U.S. 340, 345-48, 352 (1984), the Court held that this statutory scheme impliedly precluded judicial review at the behest of consumers. The Court assumed the validity of the statute, which had been upheld in *Rock Royal* and *H.P. Hood*, and, indeed, confirmed the power of the producers and handlers through its preclusion holding. *See* Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 49-50 (1984).

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").

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]

106. *See* Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426-27 (1982) (discussing twentieth-century debates on the public/private distinction).

107. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543-47 (1985) (stressing the unworkability of any attempt to identify "traditional government functions" for tenth amendment purposes).

108. *See generally The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (surveying divergent points of view on the role of government). For a cogent summary of normative theories and their limits, see Steiner, *Public Expenditure Budgeting*, in THE ECONOMICS OF PUBLIC FINANCE 241, 248-57 (Brookings Inst. 1974).

109. *See, e.g.*, S. BUTLER, PRIVATIZING FEDERAL SPENDING: A STRATEGY TO ELIMINATE THE DEFICIT 32-33 (1985) (stating that federal spending should be privatized because constituency pressures force legislators to support higher federal spending); E. SAVAS, PRIVATIZING THE PUBLIC SECTOR 89-93 (1982) (stating that many government sources can be "contracted out," which would heighten efficiency); Kolderie, *The Two Different Concepts of Privatization*, 46 PUB. ADMIN. REV. 285, 288 (1986) (arguing that competition should reduce the "unit costs" of many government functions). For further commentary on the issue of privatization, see *Privatization: The Assumptions and the Implications*, 71 MARQ. L. REV. 445 (1988), and *Overview: Perspectives on Privatization and the Public Interest*, 6 YALE L. & POL'Y REV. 1 (1988).

110. *See* Tierney, *Government Corporations and Managing the Public's Business*, 99 POL. SCI. Q. 73, 75 (1984).

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.[112] 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."[113] 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.[114] 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 ensnaring 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.[115] Traditional views of government as the neutral and expert elabo-

112. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985) (describing the difficult task of finding a principled distinction between private and governmental functions); Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1075-78 (1980) (describing this "distinction" as a cluster of rules whose purposes courts have not articulated carefully).

113. OMB CIRCULAR NO. A-76 (REVISED) § 6e (Aug. 4, 1983); *see also* Note, *Privatization and the Reagan Administration: Ideology and Application*, 6 YALE L. & POL'Y REV. 229, 232-50 (1988).

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.[116] Current theories of legislation emphasize its capacity to provide not only "public goods" for all but also "private goods" for special interests.[117] Controversy surrounds the extent to which courts should try to offset this tendency.[118]

Similarly, administrative law recently experienced the ascendancy of an interest representation theory of policy making.[119] 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.[120] To promote public-regarding policy, modern administrative law relies on fostering and controlling the oversight activities of all three branches of government.[121] 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).

119. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1760-1802 (1975) (describing the political modes of interest representation in administrative law).

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").

121. *See generally* Bruff, *Legislative Formality, Administrative Rationality*, 63 TEXAS L. REV. 207, 229-44 (1984) (reviewing external sources of influence on agency decision making).

sentative who may bind them all.[122] Another is the formation of special taxing districts by petition of some residents in a territory, against the wishes of the others.[123]

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.[124] 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.[125] 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.[126]

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.[127] 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.[128] 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.[129] 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.[130] Federal judges also enforce consent agreements in public-law litigation, as negotiated by private parties.[131] 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).

128. Jaffe, *supra* note 105, at 249-51.

129. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-23 (1935).

130. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEXAS L. REV. 1329, 1450-51 (1978); *see also* Allied Tube & Conduct Corp. v. Indian Head, Inc., 108 S. Ct. 1931, 1937-38 (1988) (noting that private standards-setting organizations are not "governmental" for purposes of antitrust immunity, even though governments often adopt their standards). *See generally* R. DIXON, STANDARDS DEVELOPMENT IN THE PRIVATE SECTOR: THOUGHTS ON INTEREST REPRESENTATION AND PROCEDURAL FAIRNESS (1978).

131. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302 (1976).

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,[132] the optimal specificity of constitutional rules that regulate the organization of government is low.[133] 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[134] or constitutionality.[135] The acceptability of a procedure is a function of the particular issues to be decided,[136] 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.[137] 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.[138] 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.[139] The Court consequently

132. *See supra* section III(B)(1).

133. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 493-94 (1987).

134. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-25 (1978).

135. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

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

137. *See supra* section III(B)(2).

138. *See* Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 517-26 (1987).

139. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721-27 (1986) (forbidding an officer removable by

draws relatively bright lines between the functions of the branches. In the interference cases, the Court uses a functional approach that evaluates 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*, formalism offers the advantages of preserving clear lines of political accountability and of minimizing evasions of constitutional strictures.[141] For the organization of the "fourth branch" of the bureaucracy, however, formalism's simplicities would not permit the complexity that administrative 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 arbitrators? 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) (invalidating 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); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-46 (1977) (rejecting an "airtight" separation 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 judgment 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 overview of the issues discussed in this Part, see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

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. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928).

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-

145. *See* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 19-20 (1981) (finding "no more than a glimmer of consensus" on such limits).

146. 5 U.S.C. §§ 554-557 (1982).

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).

149. The Supreme Court mandated such review in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

150. *See* Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 17-18 (1982).

151. Bowsher v. Synar, 478 U.S. 714, 733 (1986).

tion also describes a principal activity of the federal courts.[152] Plainly, a simple formalist distinction will not suffice for separation of powers purposes.[153]

The Court has struggled to identify adjudicative functions that *must* remain in federal courts, those that *may* be placed in the executive, and those that *must* be placed in the executive.[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.

Crowell v. Benson[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.[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.[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.[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,[159] such as whether an accident had occurred on navigable waters.

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

152. *See* INS v. Chadha, 462 U.S. 919, 963-67 (1983) (Powell, J., concurring) (characterizing congressional review of agency adjudication as unconstitutional intervention in a judicial function).

153. *See Bowsher*, 478 U.S. at 748-53 (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").

154. This subpart discusses the first two categories and Part VI addresses the third in connection with article II doctrine.

155. 285 U.S. 22, 31 (1932).

156. An examiner was to conduct evidentiary hearings on a record. *Id.* at 47-48.

157. *Id.* at 46, 49.

158. *See id.* at 49.

159. *Id.* at 63-64.

relied to justify shifting article III business to agencies have eroded. Courts now defer to agency determinations of law as well as fact,[160] and the doctrines of constitutional and jurisdictional fact have fallen into disuse.[161] 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.[162] For similar reasons, administrative law judges enjoy statutory guarantees of their independence[163] 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[164] because of the protections flowing from the separation of functions and procedural guarantees.[165] 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.[166] Notwithstanding the Court's general approval, however, the characteristics of a particular scheme can present unacceptable dangers of bias or interest.[167]

160. *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 859-66 (1984); *see also* Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 292-99 (1986) (noting the Court's inconsistent application of this doctrine).

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.

162. *See generally* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761-79 (1981) (reviewing statutory and constitutional law of separation of functions and surveying agency practice).

163. *See* 5 U.S.C. §§ 3105, 5372, 7521 (1982); *see also* Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111-12 (1981) (describing APA provisions that attempt to ensure the independence of ALJs).

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).

165. *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 245-50 (1980) (finding that an administrator acting as prosecutor could make a preliminary assessment of civil penalties when the ALJ and not the administrator adjudicated the penalties).

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 status[171] but had powers closely resembling those of federal judges. A plurality of four justices[172] 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).

168. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1279 (1975).

169. 458 U.S. 50 (1982).

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.

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,[174] 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.[175] Nevertheless, the Justices emphasized that *Crowell* had endorsed nonjudicial decision only for issues of fact.[176] Yet the plurality conceded the erosion of the doctrines of constitutional and jurisdictional fact on which *Crowell* relied to preserve close supervision of agencies.[177] 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.[178] The dissenters pointed out the inconsistency of the plurality's formulation with the ordinary pattern of administrative adjudication.[179] 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.[180] 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.[181]

The use of the public rights doctrine, which the Court has never explained coherently, sowed much confusion in *Northern Pipeline*.[182] The doctrine originated in a conclusory passage in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[183] 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.
182. *See, e.g.*, Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 204-14 (questioning the reasoning behind the public/private rights dichotomy). For an able historical treatment of the public rights doctrine, see Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFFALO L. REV. 765 (1986).
183. 59 U.S. (18 How.) 272, 284 (1856). *Murray's Lessee* appears to overturn an earlier ease,

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.

185. 430 U.S. 442 (1977).

186. *Id.* at 450.

187. *Id.* at 455.

instead of an administrative agency."[188] 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.[189]

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.[190] The Court's reliance on sovereign immunity, itself a nineteenth century judicial construct,[191] 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.[192] 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.[193] 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.

191. *See generally* P. SHANE & H. BRUFF, THE LAW OF PRESIDENTIAL POWER 43 (1988) (discussing the origins of the sovereign immunity doctrine).

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.[194] The Court's doctrine of deference to an agency's judgments of law and policy extends to the adjudicative context.[195] 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,[196] for example, with the narrow factual focus of a Social Security Administration determination of an individual's disability.[197]

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.[198] 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.[199] 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.[200] The justification for formalism in preventing aggrandizement is likely to be absent.[201] Functional analysis focuses the Court's attention on the

194. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 89-90 (1943).

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).

196. *See generally* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978).

197. *See generally* J. MASHAW, *supra* note 35, at 23-24, 126-27.

198. For a helpful summary of administrative law distiuctions between issues of fact and law, see NLRB v. Marcus Trucking Co., 286 F.2d 583, 590-91 (2d Cir. 1961) (Friendly, J.).

199. *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-26 (1985) (observing that courts should give legislatures substantial discretion in formulating procedural processes).

200. *See* Strauss, *supra* note 4, at 629-33.

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 arrangements that the structure of our government demands. Fortunately, later cases have employed functionalism to curtail the implications of *Northern Pipeline*.

In *Thomas v. Union Carbide Agricultural Products Co.*,[202] the Court upheld the mandatory arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[203] Under the Act, manufacturers 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 registration and later filings for similar products submitted by other manufacturers. 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."[205]

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 congressional 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 ordinary appellate review.[209] She rejected an argument that FIFRA had cre-

202. 473 U.S. 568, 594 (1985).

203. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). *See generally* Note, *FIFRA Data-Cost Arbitration and 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 FIFRA arbitrations. *See* 29 C.F.R. § 1440 app. (1988).

205. 7 U.S.C. § 136a(c)(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.*

206. *Thomas*, 473 U.S. at 587.

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 applicants. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (holding that in certain circumstances this public use effected a compensable taking).

208. *Thomas*, 473 U.S. at 589.

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.

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*,[219] 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.[220] 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.[221] Indeed, the Court compared this option to arbitration and concluded that the voluntary choice of informal procedures minimized separation of powers concerns.[222] The Court then asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in Article III courts"[223] and whether the latter retained the " 'essential attributes of judicial power.' "[224] Only the jurisdiction over counterclaims differed from the usual agency model.[225] The Court saw no reason to deny agencies all pendent jurisdiction and found federalism concerns minimal, because federal courts could have entertained the claims.[226] 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

219. 478 U.S. 833, 841 (1986).

220. *See* 7 U.S.C. § 12a(5) (1982); *see* 17 C.F.R. § 12.19 (1988).

221. *Schor*, 478 U.S. at 850.

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,[227] especially when the process affected important individual liberties. Indeed, at times participants could not waive judicial process.[228] *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.[229] 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."[230] 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.' "[231] 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.

230. *Thomas*, 473 U.S. at 590.

231. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 836 (1986) (quoting H.R. REP. NO. 975, 93d Cong., 2d Sess., pt. 1, at 44 (1974)).

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.[232] These inquiries require only a brief statement of the basis for an award.[233] 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.[234] Thus, courts routinely permit constitutional inquiry of statutes that appear to preclude all review.[235] 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.[236] In a companion case, *United States v. Erika, Inc.*,[237] 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.[238] 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.

235. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 367 (1974) (holding limitation on judicial review in Veterans Benefit Act does not apply to questions arising under the Constitution); Bartlett v. Bowen, 816 F.2d 695, 702 (D.C. Cir. 1987) (holding limitation on judicial review in Medicare Act does not apply to constitutional challenges).

236. *See* Schweiker v. McClure, 456 U.S. 188, 195 (1982); *see infra* subpart VI(A).

237. 456 U.S. 201, 206 (1982).

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.[239] So limited, the review scheme prevents " 'the overloading of the courts with trivial matters.' "[240]

By deferring to agency review of arbitrator's decisions, courts can further reduce the burden on their dockets. 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.[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.[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.[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.[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.

239. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675 (1986). Congress later precluded this form of judicial review in the Omuibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(4), 100 Stat. 1874, 2038 (codified at 42 U.S.C. § 1395ff(b)(4) (Supp. IV 1986)).

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

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.

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").

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

244. *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 377-95 (1968).

A. Schweiker v. McClure *and General Due Process*

In *Schweiker v. McClure*,[245] 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.[246]

Congress authorizes the Department of Health and Human Services (HHS) to contract with private insurers, such as Blue Cross, to administer these claims payments.[247] 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.[248] At the time *McClure* was decided, the claimant received no further appeal.[249]

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.[250] 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*,[251] the Court assumed that the weight of the private

245. 456 U.S. 188, 195 (1982).

246. *See id.* at 190.

247. *See* 42 U.S.C. § 1395u(a) (1982).

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)(1)(C), 100 Stat. 1874, 2038 (codified at 42 U.S.C. § 1395ff(b)(2) (Supp. IV 1986)).

250. *McClure*, 456 U.S. at 196-97.

251. 424 U.S. 319, 335 (1976).

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

Id.

interest was "considerable."[252] 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."[253] 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.[254] Because of these requirements, the Court perceived no constitutional deficiencies in the adjudicative procedures nor any need that the deciders be attorneys.[255]

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.[256] 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.[257] 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

252. *McClure*, 456 U.S. at 198.

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.

257. *See generally* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1327-33 (1984) (discussing the historical origins and development of the unconstitutional conditions doctrine).

competence of the decider. Recall Judge Friendly's point that assurances of neutrality reduce the need for other procedural safeguards.[258] *McClure* shows that the Court does not regard agency deciders as necessarily fairer or more reliable than private ones.[259]

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.[260] 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.[261] 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 gnarantees of decider competency.[262] 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."[263]

Under any particular program, the appropriateness of arbitral process depends on the nature of the participants and the issues. In *Gray Panthers v. Schweiker*,[264] 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.[265] Second, oral hearings were necessary for claims raising issues of credibility.[266] 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. *See 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).
263. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985).
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]

267. Gray Panthers v. Schweiker, 716 F.2d 23, 36 (D.C. Cir. 1983) (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

268. The Court did not reach a delegation doctrine challenge to the adequacy of this standard. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593 (1985).

269. *See* PPG Indus. v. Stauffer Chem. Co., 637 F. Supp. 85, 87 (D.D.C. 1986) (upholding the standard and stating that the arbitrator has discretion to choose the compensation formula).

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.

271. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

VII. Executive Branch Supervision

Execution of the laws typically entails a complex mix of law-interpreting, policy making, and fact-finding.[272] 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.[273] 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."[274]

A. Adjudicative Activities and Executive Responsibility

The President's constitutional powers "are not fixed but fluctuate,"[275] 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.[276] 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[277] and maximize the need for supervision.[278] By contrast, the ap-

272. *See* Bowsher v. Synar, 478 U.S. 714, 732-33 (1986).

273. U.S. CONST. art. II, § 1, cl. 1.

274. *Id.* § 3.

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

276. *See generally* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 488-508 (1979) (employing a functional analysis to evaluate the authority for presidential initiatives).

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.[279]

Administrators frequently make policy through adjudication;[280] the President, therefore, has a substantial claim to overall supervision, not including intervention in a particular pending case.[281] Of course, the policy-making content of adjudication varies substantially.[282] 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.[283] To minimize executive oversight, Congress allocates adjudicative functions to federal courts, legislative courts, or independent agencies.[284] 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.[285] The current debate over the constitutional status of these agencies centers on presidential authority to supervise their policy-making functions.[286] Meanwhile, the Supreme Court continues to treat the independent agencies as a viable part of government.[287]

279. Due process imposes little constraint on general policy making. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542 & n.16 (1978) (stating that the Constitution does not require additional procedural devices in rulemaking proceedings).

280. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-93 (1974) (recognizing that administrators must exercise powers on a case-by-case basis to resolve specialized problems); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (allowing administrators to announce new principles in resolving issues not expressly covered by an existing administrative rule).

281. *See* ROADS TO REFORM, *supra* note 2, at 79, 82.

282. *See supra* notes 196-97 and accompanying text.

283. *See generally* M. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION 16-18 (1976) (noting the fluctuations in Congress's exercise of power over agencies in the 1960s and 1970s); G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 117-31 (3d ed. 1986) (discussing executive supervision of policy making by administrative agencies).

284. Of course, executive power over these entities varies, but the President retains his appointment power for all of them.

285. *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).

286. *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).

287. *See, e.g.*, Morrison v. Olson, 108 S. Ct. 2597, 2609-11 (1988) (holding that Congress may restrict President's power to remove officers, absent conflict with President's performance of his constitutional duties); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 836 (1986) (praising independence of CFTC as a bulwark to fairness of adjudication); Bowsher v. Synar, 478 U.S. 714, 733 (1986) (discussing the independence of agencies and the inability of Congress to remove members except for impeachable offenses).

3. Procedure.—Congress also affects presidential power by specifying agency procedure. Formal adjudication enjoys constitutional[288] and statutory[289] protections from outside interference by anyone, including the President. Rulemaking, on the other hand, is subject to increasingly ambitious executive management.[290] Informal adjudication occupies a gray area in which Congress often fails to specify procedures, leaving the courts to define the permissibility of outside contacts.[291]

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.[292] 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.[293] 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."[294] 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.[295]

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).

289. *See* 5 U.S.C. § 557(d) (1982).

290. *See generally Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195, 1195-97 (1981) (discussing presidential requirements that agencies support rules with cost-benefit analyses).

291. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 409-10 (D.C. Cir. 1981) (upholding the legality of unrecorded contacts with rule makers by both executive and congressional officers); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) (holding congressional influence that produces agency decision based on factors not made relevant by statute is grounds for remand), *cert. denied*, 405 U.S. 1030 (1972).

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.

294. Bowsher v. Synar, 478 U.S. 714, 733 (1986).

295. 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986); *see, e.g.*, United States v. Wise, 370 U.S. 405, 416 (1962) (holding that despite the vagueness of the Sherman Act, a corporate officer is subject to

Recall the Court's struggle to define adjudicative functions that *may* be placed in the executive branch.[296] The policy component of "public rights" meant that Congress could, but need not, allocate them to the executive.[297] 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.[298] 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[299] 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.[300] Consent is also relevant to the acceptability of arbitration in federal programs.[301] 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.[302] 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,[303] 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).

303. *See* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-55 (1975).

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

304. *See* OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 95-99 (1983) (discussing the involvement of outside groups in the rulemaking process).

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.[312] 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.[313]

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.[314] Granted, but *Buckley* had no occasion to consider less than a complete displacement of power to select deciders.[315] 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?[316]

312. *See* Morrison v. Olson, 108 S. Ct. 2597, 2620-21 (1988); *see also* Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510, 520 (D.D.C. 1986) (distinguishing both *Buckley* and *Bowsher* as involving "attempts to enlarge the legislative authority at the expense of that of the Executive Branch"), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988).

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.[317] 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.[318] 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).

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).

321. *See, e.g.*, J. MURRAY, A. RAU & E. SHERMAN, *supra* note 13, at 523 (noting that the SEC, in response to criticism contained in the dissenting opinion in Shearson/American Express v. McMahon, 107 S. Ct. 2332, 2346-59 (1987) (Blackmun, J., concurring in part, dissenting in part), was considering changes to assure arbitral impartiality in the securities industry).

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).

323. Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1883 & n.66 (1981).

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.[325] This approach reflects the policy orientation of "interest" arbitration, which resolves distributional issues between the parties on a prospective basis.[326] 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.[327] Such 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.[328] 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.[329]

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

See 1 C.F.R. § 305.86-8 (1988). *See generally* G. RUTTINGER, ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE DISPUTES RESOLUTION AND NEGOTIATED RULEMAKING: REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1986) (suggesting potential criteria for establishing qualifications for ADR neutrals).

325. *See* 5 U.S.C. § 7119 (1982).

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).

327. *See* Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510, 523 (D.D.C. 1986) (stating that *Buckley* concerns are alleviated by the presence of a government majority on the FOMC), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988).

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).

329. *See* 20 U.S.C. § 1234(c) (1982). *See generally* B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 54.05(2)(a) (1987) (discussing the structure and staffing of the Education Appeal Board).

to mutual preference.[330] Federal agencies borrow these practices, sometimes by direct referral to the AAA.[331]

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.[332]

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.[333] 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.[334] 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 authorizing courts to vacate fraudulent awards "show a desire of Congress to provide not merely for *any* arbitration but for an impartial one").

331. *See, e.g.*, 29 C.F.R. § 1440 app. (1988) (pesticide registrations); 40 C.F.R. § 305.31 (1987) (Superfund), *revoked*, 52 Fed. Reg. 33812 (1987).

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 a 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, then, "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

335. Several commentators have suggested a similar type of limited review of ALJ performance. *See* Lubbers, *supra* note 163, at 125-26 (acknowledging the necessity of an independent corps of ALJs, but calling for objective performance evaluations based on statistical data drawn from cases decided over a significant time period); Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 594 (1986) (noting the delicate balance that ALJs must tread in adjudicating agency policies and in remaining independent of agencies); *cf.* Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1140-41 (D.D.C. 1984) (stating that generalized executive review of ALJ performance is legitimate as long as it does not skew the outcome of particular adjudications).

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. Most 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).

339. *See* 9 U.S.C. § 10 (1982). The ACUS recommendation facilitates this limited review by calling for a brief, informal discussion of the factual and legal basis for an award. *See* 1 C.F.R. § 305.86-3 (1988).

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.[341] 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.[342] 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.[343] 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.[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.[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.[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.[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

344. *See generally* Holznagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 24 B.C. ENVTL. AFF. L. REV. 329 (1986) (discussing the success of various state-law arbitration approaches in resolving waste facility disputes).

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).

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.

347. At present, consent agreements are sometimes subjected to notice and comment procedures. *See* G. ROBINSON, E. GELLHORN & H. 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.[348] Nevertheless, reducing the potential for bias that attends the selection of sanctions by the investigating office promotes due process.[349] 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.

348. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 252 (1980) (holding that administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency, with ALJ adjudicating the penalties).

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.