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THE CONTEXT, PROPERTIES, AND CONSTITUTIONALITY OF NONCONSENSUAL ARBITRATION: A STUDY OF FOUR SYSTEMS

John R. Allison*

I. INTRODUCTION

Conflict knows little of the boundaries of culture, class, geography, or subject matter. Disputation is, and always has been, a worldwide phenomenon. In the United States, especially in modern times, we have shown a notable inclination to employ formal adjudication systems to resolve our disputes rather than techniques such as conciliation, community opprobrium, or informal adjudication that have been more prevalent in some other cultures and in our own culture at earlier times.¹ Our dependence on formal litigation models for conflict resolution can be attributed plausibly to a variety of complex factors.² Although it is true that many observers today characterize modern litigation and administrative adjudication as encumbered by inordinate cost, delay, and user frustration, one can find widely divergent opinions as to whether societal dependence on formal adjudication has been the chief culprit.³ These perceived problems may be traceable to

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1. See, e.g., J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (tracing the use of informal conflict resolution models in this country from colonial beginnings); McThenia & Shaffer, *For Reconciliation*, 94 *YALE L.J.* 1660 (1985) (discussing various dispute resolution models, many of which are founded on religious values, having the primary objective of reconciling relationships); Nader, *Disputing Without the Force of Law*, 88 *YALE L.J.* 998, 1000 (1979) (observing that traditional nonadjudicative methods for redressing grievances, such as holding up the wrongdoer to community opprobrium, have come to be little used as means of social control as society has become more complex and diffuse); Sander, *Varieties of Dispute Processing*, 70 *F.R.D.* 111, 122 (1976) (discussing Japan's longstanding and successful system of family conciliation tribunals).

2. Some cite the competitiveness derived from capitalism and from the recentness of our frontier heritage as driving forces behind the extensive use of formal adjudication. See, e.g., F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS, AND ACHIEVEMENTS* 6-7 (1948). Others refer to the fact that much of the cost of formal adjudication is external, i.e., not borne by the parties but rather by the public support of the judicial system as possibly leading to a degree of use that is excessive when viewed from a social policy perspective. See Calvani, Langenfeld & Shuford, *Attorney Advertising and Competition at the Bar*, 41 *VAND. L. REV.* 761, 778 & n.97 (1988).

3. Compare Barton, *Behind the Legal Explosion*, 27 *STAN. L. REV.* 567, 567 & n.2 (1975) (documenting spiraling litigation activity and projecting, at then-current rates, a million cases per year in courts of appeals by the early 21st century); Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdiction Principles for Process Choice*, 1984 *WIS. L. REV.* 893, 895-97 (tracing development of the view that there is an institutional crisis in the American civil justice system); Levin

the very foundation of our traditional dispute resolution models, the adversary system itself.⁴ On the other hand, the adversary system may provide more social benefits than costs, and the problems of delay, expense, and frustration that are often ascribed to the process today may simply highlight the need for refinements in a fundamentally sound institution.⁵

There also is sharp disagreement about whether our heavy use of formal adjudication and the commitment of very substantial resources to it represent a serious social problem.⁶ Although it is true that the volume of formal adjudication in both courts and administrative agencies has grown markedly in the past two or three decades, one can argue plausibly that the American system of adjusting conflicting interests has more of a qualitative problem than a quantitative one.⁷ Given the size, heterogeneity, and complexity of our society, as well as the value we place on protecting rights, it is not unreasonable to view high-volume use of

& Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 222-23 (1985) (demonstrating that legal expenses are consuming an increasing portion of the nation's GNP); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977) (observing with alarm the dramatic increases in court filings, backlogs, and processing times) with Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-20 (1986) (arguing that the chorus of complaints about a litigation explosion is not really about the volume of litigation but about the expanding reach and complexity of the substantive law); Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 16-17 (1985) (arguing that most of the filing increase in federal courts had come from only a few categories of cases, including huge increases in government- instituted litigation); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61 (1983) (general perception of a litigation explosion has been skewed by input from elitist groups).

4. See, e.g., Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984) (examining adversarial excesses, including those relating to discovery); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34-35, 43-48 (1982) (contrasting the inevitably divisive characteristics of the adversarial approach to dispute resolution with other approaches aimed at healing relationships and finding creative solutions to problems); Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 (1986) (same).

5. See, e.g., Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 335 (1985) (urging that court reform efforts and ADR experiments be more narrowly tailored to fit particular problems in a fundamentally sound system). There are also those who argue that some form of adversarial system is an inevitable product of the effort to ameliorate the natural human tendency to judge too swiftly. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Comment, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 390 (1972). Still others view the adversary model of adjudication as fundamentally sound, but nevertheless point to the practice of using juries in civil cases, especially commercial or otherwise complex ones, as a major contributor to unconscionable cost and delay. See, e.g., de Seife, *A Plea for the Creation of Commercial Courts*, 17 NEW ENG. L. REV. 437, 438 (1982); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980).

6. See, e.g., authorities cited at *supra* note 3.

7. For example, the number of filings per capita in federal district courts tripled in a little more than two decades, from 1960 to the early 1980's. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 63-64 (1985).

formal litigation systems as a natural and unalarming development.⁸ Regardless of whether one views the empirical evidence of usage volume with such quiescence, it is at least as pertinent to ask questions that are essentially qualitative. Are we receiving appropriate value from our formal dispute resolution systems? The costs to users of formal adjudication are many, including not only attorney fees and other direct litigation expenses but also the opportunity costs of protracted resolution processes and the virtually incalculable economic consequences of diverting creative energy from productive endeavors and of severing profitable commercial relationships.⁹ Some cost items, such as attorney fees, are essentially just wealth transfers and thus amount only to private costs, albeit very substantial and important ones. On the other hand, such cost components as creative energy diversion and relationship damage represent not only private but also social costs because they include substantial external components.¹⁰ Other costs, such as those associated with operating the court system, are predominantly external and even more clearly exemplify social costs. From the perspective of the disputant, do formal adjudication models generally provide an appropriate level of private goal satisfaction in exchange for the private costs of dispute resolution?¹¹ From the societal perspective, do these models appropriately further relevant social policy goals in exchange for the social costs?¹²

8. See, e.g., Galanter, *The Day After the Litigation Explosion*, *supra* note 3, at 18-28 (sources of increased court filings vary over time with changes in society); Marvell, *Civil Caseloads: The Impact of the Economy and Trial Judgeship Increases*, 69 JUDICATURE 153, 153-56 (1985) (judicial activity increases with expansions in economic activity).

9. Such indirect costs could be characterized as part economic and part psychological, or perhaps as psychological costs that ultimately translate into economic costs. In any event, these costs obviously cannot be quantified with any claim of precision. On the importance of psychological costs, see Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 80 (1974) (identifying psychological costs of litigation); Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 73, 121-22 (1983) (after having studied the monetary costs of litigation, explicitly recognizing that psychological costs of litigation may be great).

10. Internal, or private, costs are those borne by the parties to a transaction, in this case the parties to a dispute. External, or social, costs are those borne by others outside the transaction. For general discussions of these concepts, see B. FLEISHER, E. RAY, & T. KNIESNER, PRINCIPLES OF ECONOMICS 341-43 (1987); R. POSNER, ECONOMIC ANALYSIS OF LAW 7 & n.9 (2d ed. 1977); Gould, *The Economics of Legal Conflicts*, 2 J. LEG. STUD. 279 (1973); Landes & Posner, *Adjudication as a Public Good*, 8 J. LEG. STUD. 235 (1979); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973).

11. The goals of private parties in dispute resolution may include obtaining just compensation for a wrong, protecting tangible and intangible property interests to insure future return on the investment in those property interests, opportunism, vindication, and retribution.

12. Social policy goals in the design and operation of dispute resolution systems may include the provision of nonviolent outlets for individual vindication and retribution needs, bringing repose to disputes so that disputants can turn their efforts back to creative endeavors, maintenance of an orderly system for protecting and transferring property rights so that investment is encouraged, establishment of social norms, maintenance of social norms by deterring nonconforming behavior, and wealth distribution. See Bush, *supra* note 3, at 905-20, for a discussion of some of the public goals of dispute resolution.

We still seem to be rather far from definitive answers to questions of this nature. The one thing that can be said with certainty is that for the past several years such questions have been posed with increasing frequency and intensity. Scholars, practitioners, and policymakers recently have been paying much more attention both to ways in which traditional dispute resolution methods might be refined¹³ and to the use of entirely different means for settling our differences.¹⁴

By far the greater portion of this inventive vigor has been focused on the design and implementation of systems for settling conventional private controversies, the customary stuff of civil litigation. The modern alternative dispute resolution (ADR) movement, which began in earnest in the mid-1970s, has produced the mini-trial,¹⁵ summary jury trial,¹⁶ medical malpractice claims prescreening,¹⁷ early neutral evaluation¹⁸ and "rent-a-judge" programs,¹⁹ among

13. For example, the federal courts have been making increasing use of the summary judgment in recent years. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986). In addition, greater attention is being paid today to case management techniques. In the federal realm, Rule 16 of the Federal Rules of Civil Procedure was amended in 1983 to encourage more efficient management of federal civil dockets. As is always true of change, not everyone accepts every innovation with enthusiasm, nor should they. Compare Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 255-60 (examining the utility of case management and noting its inevitability because of pretrial discovery) with Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (observing the dangers of granting such indeterminate extrajudicial powers to courts).

14. One very recent experiment in New Jersey creates an arbitration system that is at a procedurally intermediate stage between traditional arbitration and litigation. See Note, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U. PA. L. REV. 1723 (1988).

15. The minitrial, which is designed primarily for intercorporate disputes, involves capsulized presentations of evidence and legal arguments by opposing counsel to a panel consisting of a neutral advisor (who usually will be a subject-matter expert or attorney) and executives from each company. The company representatives, who should have settlement authority, retire for direct settlement negotiations immediately after the presentations. They may seek the opinion of the neutral advisor before commencing settlement talks or only after negotiations have stalled. See, e.g., Ensen, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M.L. REV. 1, 10-12 (1988) (presenting a more detailed description and analysis of the minitrial).

16. The summary jury trial involves capsulized presentations of evidence and legal arguments by opposing counsel to an advisory jury selected in the same manner as are regular juries. The verdict of the jury, which is nonbinding unless the jury agrees otherwise, is then used as a foundation for settlement negotiations. Like the minitrial, its functions are to force the parties and their attorneys to think about settlement in a rational, structured way much earlier in the dispute resolution process than they might otherwise and to introduce a greater degree of realism into the parties' expectations. See, e.g., Ensen, *id.* at 13-15 (presenting a more detailed description and analysis of the summary jury trial).

17. Medical malpractice claims prescreening programs typically have required the claimant, as a prerequisite to litigation, to submit the claim to a panel consisting of an attorney, a health care professional, and a third person (who is required by some programs to be from neither the health care

other procedures. In addition to engendering novel mechanisms, dissatisfaction with perceived deficiencies in the adversarial litigation model also have accelerated the use of much older procedures such as mediation²⁰ and arbitration.²¹

The ADR movement also has emerged in the administrative realm as a component of various regulatory programs. Regulatory negotiation ("reg-neg") as an experimental alternative to traditional administrative agency rulemaking has enjoyed some success.²² Alternatives to conventional agency adjudication are

nor legal professions, although in New York the third panel member is a trial court judge). After evaluation of the claim by the panel, the claimant retains the right to litigate the claim fully, but a unanimous "liability" or "no liability" panel determination is admissible evidence in the case. Although all forms of ADR have some detractors, there seems to be a consensus that medical malpractice prescreening has not been very successful. See Corodemus & Ver Strate, *Dark Victory: The Doom of Medical Malpractice Panels*, 5 SETON HALL L.J. 31 (1980) (presenting a generally negative analysis of medical malpractice claims prescreening, including discussion of some state court decisions holding such panels to violate state constitutional provisions); Karzon, *Medical Malpractice Statutes: A Retrospective Analysis*, 1984 ANN. SURV. AM. L. 693 (same); Note, *The 1985 Medical Malpractice Reform Act: The New York Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOKLYN L. REV. 135 (1986) (hailing the New York reform effort, but decrying the fact that prescreening panels were retained from earlier legislation).

18. One prominent example of this procedure was initiated by the United States District court for the Northern District of California in 1985, referred to as "early neutral evaluation," provides for an evaluation of litigation by a court-appointed neutral within 160 days after an action is filed. The neutral suggests ways that the dispute could be litigated most efficiently and may propose options for settlement. One readily can see that early neutral evaluation is a court-annexed variation of mediation. See Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U.L. REV. 591, 598-99 (1988). The District of Columbia Superior Court's Multi-Door Courthouse program utilizes a similar form of early neutral evaluation. *Id.* See also Levine, *Early Neutral Evaluation: A Follow-Up Report*, 70 JUDICATURE 236 (1987) (evaluation of initial phase of program in the Northern District of California).

19. The rent-a-judge concept involves referral of a case to a retired judge who is paid by the parties to conduct a private trial. The most well known rent-a-judge program is that found in California. See Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981). Several other states, including New York, Oregon, Rhode Island, South Carolina, and Washington, have adopted similar measures. See *Special Project, Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 1015 & n.1125 (1984).

20. Mediation involves the use of a neutral party without decision-making authority who attempts to facilitate settlement between the parties to a dispute. The precise role of a mediator, which may range from performance of relatively passive tasks such as scheduling and overseeing direct negotiations to performance of relatively proactive functions such as claims evaluation and suggestion of settlement alternatives, depending on the wishes and agreement of the parties. See, e.g., Riskin, *The Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 26 (1985) (discussing range of mediator activities).

21. See *infra* text accompanying notes 33-58 for a discussion of the nature and legal framework of traditional consensual arbitration.

22. Regulatory negotiation, or negotiated rulemaking, is yet another variation on the mediation theme applied to the process of promulgating regulations. Regulations are often subject to challenge through litigation. Both federal and state governments have sought to avoid such litigation through a process in which the proposing agency and interested groups meet together to negotiate the content of regulations prior to their adoption. If a proposed regulation can be agreed upon through such negotiation, subsequent litigation normally can be avoided. Regulatory negotiations have been

being developed, the most notable instances of which involve some form of arbitration.²³ Interestingly, today's search for more expeditious and less costly forms of adjudication in the administrative context represents the second part of a biphasal phenomenon, because administrative adjudication was viewed originally as a less formal alternative to judicial adjudication.²⁴

Most ADR mechanisms have been and continue to be completely voluntary. Alongside the evolution of volitional alternatives, however, we recently have witnessed the accelerating use of *nonconsensual* ADR mechanisms in both the private-claims and administrative contexts. Although several forms of non-consensual ADR have been attempted for the resolution of private disputes,²⁵ the most ambitious and well-known is the "court-annexed arbitration" now found in a substantial number of states and federal districts.²⁶

Several important instances of nonconsensual ADR have been adopted within the administrative-regulatory realm, as well. When a nontraditional form of conflict resolution is imposed without the full consent of the parties in the administrative arena, arbitration appears so far to be the procedure of choice. Examples include mandatory arbitration of disputes over a withdrawing employer's liability to a multiemployer pension plan,²⁷ commodity futures customer-broker disputes,²⁸ and data compensation disputes under the federal pesticide law.²⁹ Uses of nonconsensual ADR will probably become much more common in this setting than in the resolution of purely private claims, because in the former case (a) a substantial degree of government coercion is already established and expected and (b) the constitutional barriers to nonconsensual ADR will be easier to surmount.³⁰ Perhaps the most unusual form of nonconsensual administrative ADR to date is the data compensation arbitration program of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).³¹ Pesticides must be

successful at the federal level in environmental and airline matters and at the state level in regulated industry pricing matters. The negotiations frequently involve intervention of a third party neutral acting as a mediator. See Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261; Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471 (1983); Perriit, *Negotiated Rule-Making Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986).

23. See *infra* text accompanying notes 27-32.

24. See, e.g., Perriit, *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 PEPPERDINE L. REV. 863, 865 (1987) ("Administrative procedure was the original alternative dispute resolution technique.").

25. Medical malpractice prescreening and early neutral evaluation are two examples. See *supra* notes 17-18 and accompanying text.

26. See *infra* text accompanying notes 68-110.

27. See *infra* text accompanying notes 115-219.

28. See *infra* text accompanying notes 220-58.

29. See *infra* text accompanying notes 259-558.

30. See *infra* text at Part VIII.

31. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

registered with the Environmental Protection Agency (EPA) prior to marketing, and registration requires submission of voluminous safety and health data developed from extensive laboratory and field testing. Under present law, a later registrant of the same or a similar pesticide may obtain registration without submitting its own data if it cites the previously submitted data in the EPA's files and offers to compensate the original registrant for use of the data. If the parties are unable to agree on an amount of compensation, the only means available for resolving the question is legally binding arbitration. There are no decisional standards for the arbitrators and, for all practical purposes, there is no judicial review.

The multifaceted constitutional incertitude that plagued the FIFRA data arbitration program from its inception has now been resolved in favor of its validity.³² The decisions approving data compensation arbitration, as well as several other decisions involving other nonconsensual arbitration programs, have much to tell us about the constitutionally permissible boundaries of such dispute resolution experiments. These boundaries, which formerly may have been thought substantially circumscriptive, now have been revealed as something considerably less. As a result, we almost certainly will be seeing other variations on the same theme.

The purpose of this article is to analyze the context, properties, and constitutionality of these instances of nonconsensual arbitration. Although FIFRA data arbitration and the constitutional challenges to which it has been subjected will receive the most extensive study, the other examples also will be explored in some detail. It is first necessary, however, to lay some groundwork. Each of the nonconsensual arbitration systems to be studied, including FIFRA data arbitration, draws the inspiration for its design and operation from contract-based commercial arbitration. To aid in the understanding of the former, Part II discusses the fundamental nature and legal framework of the latter. Part III examines the emergence of a clearly growing trend toward nonconsensual arbitration, and Part IV analyzes the use of court-annexed arbitration for private-claims resolution. Parts V and VI explore multiemployer pension plan withdrawal liability arbitration and commodity futures broker-customer arbitration, respectively, as two important expressions of the trend in the regulatory context. In Parts IV, V, and VI, the context, properties, and constitutionality of the three systems are examined in some depth. Part VII analyzes FIFRA data compensation arbitration in detail. In order to present the context and properties of this arbitration system properly, Part VII thoroughly explores the complex regulatory scheme of which it is an integral part. This part then studies the constitutional concerns generated by the program and its operation. Part VIII concludes the article by briefly reflecting upon the four systems and inquiring whether there remain any meaningful constitutional limitations on experiments with nonconsensual dispute resolution, particularly in the regulatory domain. After considering some of these experiments that at first

32. See *infra* text accompanying notes 391-558.

blush seemed to test the constitutional margin, we must ask whether this margin was ever where we may have supposed it to be and, if so, whether it has moved.

II. CONSENSUAL ARBITRATION

A. *The Nature of Arbitration*

Like most dispute resolution alternatives, commercial arbitration traditionally has been and usually still is used only when all disputants agree to do so.³³ At the onset of the modern ADR movement, consensual arbitration was not merely a well-established procedure but was one the origins of which were traceable to antiquity.³⁴ Along with the recent surge of interest in various resolution alternatives, this ancient device has experienced rapidly growing usage during the past few years. In the United States, the increasing popularity of commercial arbitration probably is attributable not only to its perceived advantages over litigation but also to the success of the American Arbitration Association (AAA) as a facilitator of the process. The AAA, a private nonprofit entity formed in New York in 1926 and now the preeminent arbitration organization in the country, is primarily an administrator of arbitration cases. It also performs other important functions, including promulgation and updating of procedural arbitration rules, arbitrator training, research and publication, and general arbitration-related education.³⁵

33. Although the present discussion is limited to commercial arbitration, it bears mentioning that private-sector labor arbitration also is almost exclusively the product of agreement. Most labor-management collective bargaining agreements include a provision calling for binding arbitration as the capstone of an internal procedure for handling employee grievances and other labor disputes. Although commercial arbitration and labor arbitration possess many common characteristics, the two have traditionally been viewed as distinct. The federal law governing commercial arbitration, the Federal Arbitration Act, expressly excludes labor disputes from its coverage. 9 U.S.C. § 1 (1982). The enforceability of arbitration agreements in the labor-management relations context is governed by § 301 of the Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 185(b) (1982).

34. Arbitration is found in Old Testament scripture, 1 Kings 3:16-28, and in Greek mythology. Kellor, *supra* note 2, at 3. Arbitration enjoyed some popularity in the settlement of political disputes in the first millennium B.C. Controversies between Athens and Megara over possession of the island of Salamis in about 600 B.C., between Corinth and Corcyra over possession of Leucas in 480 B.C., and between Genoa and the Viturians over a common boundary in 117 B.C. were all settled by arbitration. *Id.* at 4. Evidence also exists that various employment disputes in ancient times were frequently arbitrated. *Id.* The arbitration of commercial disputes was demonstrably commonplace throughout the centuries in many different civilizations. It was in use, for example, among traders from the Phoenicians and Greeks to the desert caravans of Marco Polo's time. *Id.* at 3.

35. The number of commercial arbitration cases filed with the AAA increased 250% from 1972-85. AMERICAN ARB. ASS'N, CASELOAD FIGURES (1985), cited in Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 & n.7 (1985). A comparison of the more recent 1983-87 period shows a 49% increase. AMERICAN ARB. ASS'N, 1987 STATISTICAL REP. (June 1, 1988). Taking into account all categories of arbitrations handled by the AAA, including commercial, construction, labor, and accident cases, filings with the organization during 1987 totalled almost 53,000. AMERICAN ARB. ASS'N, 1987-88 ANN. REP. 3. There are no

Arbitration involves the use of a disinterested third party decision maker or panel of decision makers that behaves in a quasi-judicial manner. Unlike most other alternative procedures, arbitration usually produces a legally binding decision based upon examination of evidence and consideration of both factual and legal arguments. Although arbitration possesses several of the adversarial attributes of litigation, available evidence indicates that it is usually faster and less expensive than litigation.³⁶ Arbitration is also less formal, completely private, susceptible to the selection of expert decision makers, and arguably more conducive than litigation to the continuance of a commercial relationship between the parties.³⁷ Commercial arbitration arising from international transactions is not necessarily faster or less expensive than litigation, but it is generally perceived as sharing the other positive attributes with domestic commercial arbitration.³⁸

Arbitration possesses attributes that some users might view as negative, as well. There usually is no opportunity in arbitration to conduct pretrial discovery, a characteristic which contributes much to speed and economy but which is criticized by some (especially attorneys) as permitting inadequate factual development for sound decision making.³⁹ Arbitrators draw their authority from the parties' contract, and are not obligated to follow relevant rules of law or evidence unless the contract so provides.⁴⁰ As a practical matter, arbitrators do

statistics on commercial arbitration not sponsored by the AAA. See Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CALIF. L. REV. 317, 317 & n.2 (1979) (reporting exhaustive but fruitless efforts to find statistics for arbitration outside the AAA).

36. See Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219, 221-22 & n.15 (1986); Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 438-40, 472-77 (1988).

37. See Allison, *supra* note 36, at 221-22 & n.15; Stipanowich, *supra* note 36, at 433-38.

38. See Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361, 378-79 (1986).

39. Neither the Federal Arbitration Act, Uniform Arbitration Act, nor the AAA's Commercial Arbitration Rules provides for prehearing discovery, and it is generally recognized that discovery normally is permitted only if state law or the parties' agreement so provides, or if exceptional circumstances are present. See Allison, *supra* note 36, at 250 & nn.240-44. Discovery is not favored because parties that agree to arbitrate are deemed to have substituted the relatively low cost and speed of the arbitration process for the more complete fact-finding and procedural safeguards that increase costs and processing times in litigation. See *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, 302, *cert. denied*, 444 U.S. 911 (1979).

40. See Bernstein, *The Impact of the Uniform Commercial Code Upon Arbitration: Revolutionary Overthrow or Peaceful Coexistence?*, 22 ARB. J., Aug. 1967, at 65, 84 (arbitrators do not feel constrained by rules of law but can be expected to seek guidance from such rules); Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 54 (1987) (arguing that emphasis on process values in arbitration and other forms of ADR may occur at the expense of substantive law); Mentschikoff, *The Significance of Arbitration: A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 701-03 (1952) (arbitrators are free to use a variety of criteria as the basis for their decisions, and if considering pertinent rules of law may retest them for "inherent soundness"); Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U.L. REV. 953, 978-82 (1986) (arbitrators not bound by legal rules). See also AMERICAN ARB. ASS'N, COMMERCIAL ARB. RULES §

tend to pay attention to legal rules even if they do not adhere to them strictly.⁴¹ Intuitively, one would expect attorney arbitrators, in contrast with those from business or some technical area such as engineering, to have more regard for pertinent rules of evidence and substantive law. In any event, the fact that arbitrators are not required to follow legal rules quite possibly lessens the predictability of outcome.⁴² Moreover, arbitrators are not required to prepare a written opinion setting forth their factual findings or reasons for decision.⁴³ Indeed, in American domestic commercial arbitration they are discouraged from doing so.⁴⁴ Perhaps the most important arbitral characteristic that some observers may view negatively is the virtual absence of review. In general, the merits of an arbitration decision (or "award") are not reviewable by a court.⁴⁵ It should be evident even to the casual observer that the characteristics some would view as negative contribute largely to the speed, economy, and privacy most often mentioned as positive attributes. Depending on their attitudes and particular situations, various disputants may have different views of arbitration's mix of positive and negative traits. There are trade-offs. The really important principle is that prospective users should understand the trade-offs and make informed choices when selecting a dispute resolution mechanism like arbitration. This is the nature of bargained-for exchange relationships.

31 (Sept. 1, 1988) [hereinafter AAA COMMERCIAL RULES] ("The Arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.").

41. Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961).

42. See Bayer & Abrahams, *The Trouble With Arbitration*, 11 LITIGATION 30, 30 (1985) (consistency and predictability are not characteristics of arbitration); Bonn, *The Predictability of Nonlegalistic Adjudication*, 6 LAW & SOC'Y REV. 563, 571-77 (1972) (arbitration fails to meet the requirements of a formally rational legal system that would support any significant predictability of case outcomes; although the author found a limited degree of case-outcome predictability in textile industry arbitration, he attributed it to self-selection biases in case filings).

43. See Bush, *supra* note 3, at 964-65 & n.136 (arbitration is not necessarily rule-applying or rule-articulating); Landes & Posner, *supra* note 10, at 248-49 (arbitration rarely involves publication or communication of decisions or rules); Stipanowich, *supra* note 36, at 439-40 & n.86 (arbitrators' decisions seldom contain any supporting rationale).

44. The AAA offers the following advice to its commercial arbitrators:

Commercial arbitrators are not required to explain the reasons for their decisions. As a general rule, the award consists of a brief direction to the parties on a single sheet of paper. One reason for brevity is that written opinions might open avenues for attack on the award by the losing party.

Courts will not review arbitrators' decisions on the merits of the case, even where the conclusions are different from those a court might reach. But a carelessly expressed thought in a written opinion may afford an opportunity to delay enforcement of the award. The obligations to the parties are better fulfilled when the award leaves no room for attack. In situations where the arbitrator feels it necessary to write such an opinion, it should be contained in a separate document.

American Arb. Ass'n, A Guide for Commercial Arbitrators 16 (undated).

45. See *infra* notes 54-56 and accompanying text.

B. The Legal Framework

An agreement to arbitrate can be made after a dispute has arisen and settlement efforts have reached an impasse. Most commonly, however, arbitration agreements take the form of provisions in commercial contracts by which the parties obligate themselves to submit to arbitration all future disputes arising from the underlying transaction. Courts in nations employing the continental code system generally showed little or no antipathy toward the court-foreclosing effect of arbitration and normally enforced arbitration agreements by ordering the recalcitrant to submit to the process and adhere to the result.⁴⁶ On the other hand, courts in nations employing the English common law system, including the United States, demonstrated an early and sustained hostility toward arbitration.⁴⁷ Although these courts usually would enforce post-dispute arbitration agreements, they usually would not compel compliance with a predispute arbitration clause.⁴⁸

Attitudes eventually did change in America and in other nations operating under English-based systems.⁴⁹ Beginning in the early 1920s, states began to legislate the legal enforceability of predispute arbitration agreements.⁵⁰ In 1925, Congress passed the Federal Arbitration Act (FAA), which required enforcement of all written arbitration agreements (pre- or post-dispute) arising either from maritime transactions or from transactions affecting interstate or foreign

46. Roman law recognized the validity of arbitration agreements and provided rules for their enforcement. 5 R. POUND, JURISPRUDENCE 355-60 (1959). This receptive attitude carried over to the civil law and to continental procedural codes. *Id.* The official attitude toward arbitration in France, however, could be characterized as relatively hostile until 1806. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 53 (1984).

47. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 596-605 (1927); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 138-46 (1934).

48. 6A A. CORBIN, CORBIN ON CONTRACTS § 1433, at 392 (1962).

49. L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 432-33 (3d ed. 1972); Carbonneau, *supra* note 46, at 39-44.

50. Although most of the American states passed arbitration legislation during the nineteenth century, these statutes did little more than codify the common-law attitude and outline procedures for review. Fuller & Eisenberg, *supra* note 49, at 433. In 1920 New York became the first state to enact a modern arbitration statute, providing for the enforcement of agreements to arbitrate future disputes and for very limited judicial review of arbitrators' awards. Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (current version codified at N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1983)). In 1923, New Jersey passed a law similar to the New York statute, Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291 § 1 (current version codified at N.J. REV. STAT. §§ 2A:24-1 to -11 (1988)), and Massachusetts and Oregon followed with relatively progressive arbitration legislation in 1925. Act of Apr. 29, 1925, ch. 294, 1925 Mass. Acts 337 (current version codified at MASS GEN. LAWS ANN. ch. 251, §§ 1-22 (West 1959 & Supp. 1988)); Act of Feb. 24, 1925, ch. 186, 1925 Or. Laws 279 (current version codified at OR. REV. STAT. §§ 33.210-.340 (1988)).

commerce.⁵¹ The expansive notion of interstate commerce that began to develop in the 1930s caused the FAA to apply to arbitration agreements in most commercial transactions of substantial magnitude.⁵² Under the FAA, federal or state courts not only must stay litigation in favor of arbitration, but also must order specific enforcement of the arbitration clause upon petition of one of the parties.⁵³ Confirmation of the resulting arbitration award and conversion into a judgment is largely pro forma.⁵⁴ As alluded to earlier, the law permits only the most minimal judicial review, restricting it to nonsubstantive grounds such as serious arbitrator misconduct.⁵⁵ Even in the rare case in which an arbitral award

51. Federal Arbitration Act of 1925, Pub. L. No. 401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1982)). Section 2 of the FAA specifies the Act's jurisdictional reach. 9 U.S.C. § 2 (1982).

52. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (consulting agreement to obtain assistance in moving business from New Jersey to Maryland and continuing operations of an interstate manufacturing and wholesaling business obviously has a sufficient connection with interstate commerce).

53. Section 3 of the FAA, 9 U.S.C. § 3 (1982), requires federal district courts to stay litigation in a case in which the dispute is within the scope of a written arbitration agreement. Section 4 of the FAA, 9 U.S.C. § 4 (1982), requires federal courts to compel arbitration in such a case upon petition by one party and a showing that the other party has failed or refused to comply with the arbitration agreement. State courts are also required to enforce the provisions of the FAA. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp.*, 460 U.S. 1 (1983).

54. 9 U.S.C. § 9 (1982). Again, although the language of the FAA refers to enforcement of arbitration agreements and awards by federal courts, the Supreme Court has ruled that the FAA must also be enforced by state courts when the Act's interstate commerce or maritime jurisdictional prerequisites are satisfied. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp.*, 460 U.S. 1 (1983).

55. Section 10 of The Federal Arbitration Act, 9 U.S.C. § 10 (1982), provides that an arbitration award may be set aside by a court only on specific grounds unrelated to the substantive merits:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or 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, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Although there are a few minor language variations, the UAA's stated grounds for judicial nonenforcement of an arbitral award are identical in all important respects to those of the FAA. UNIF. ARB. ACT § 12, 7 U.L.A. § 140 (1985).

The Supreme Court has indicated, as well, that an arbitration award under the FAA may be set aside for "manifest disregard of the law." *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The concept has remained undefined and all but unused. *Stipanowich*, *supra* note 40, at 982-86. A party seeking review on such grounds bears a very heavy burden. See *Drayer v. Krasner*, 572 F.2d 348 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2d Cir. 1968); *Saxis S.S. Co. v. Multifacs Int'l Traders*, 375 F.2d 577 (2d Cir. 1967); *Sidarma Societa Italiana Di Armamento Spa, Venice v. Holt Marine Indus.*, 515 F. Supp. 1302 (S.D.N.Y. 1981); *Dundas Shipping & Trading Co. v. Stravelakis Bros.*, 508 F. Supp. 1000 (S.D.N.Y. 1981); *In re Puerto Rico Maritime Shipping Auth.*, 496 F. Supp. 14 (S.D.N.Y. 1979).

can be set aside, the FAA does not authorize judicial involvement in the merits of the dispute; in fact, it strongly implies an intent to foreclose such involvement by expressly authorizing courts to remand for a new arbitration hearing.⁵⁶

Almost all American states have enacted modern arbitration statutes that closely resemble the FAA. Many of these states either adopted or borrowed very heavily from the Uniform Arbitration Act (UAA), which in all important respects is practically identical to the FAA.⁵⁷

Arbitration agreements relating to international commercial transactions have been accorded similar treatment by many bilateral treaties and several multilateral conventions, the most notable of which is the 1958 United Nations Convention on the Enforcement of Foreign Arbitral Awards.⁵⁸

III. THE EMERGENCE OF NONCONSENSUAL ARBITRATION

Although arbitration historically has been almost exclusively consensual, we have begun to see this characteristic change. The change remains minor when compared with all uses of arbitration, but it shows signs of further development into an important phenomenon. As part of the more general movement toward greater use of arbitration and other ADR mechanisms, instances of legally compelled arbitration have appeared in a number of contexts in recent years. The examples of nonconsensual arbitration chosen for discussion--court-annexed, multiemployer pension plan withdrawal, commodity futures, and FIFRA data arbitration--invoke the procedure in more or less traditional form, with several variations that will be explained further into the discussion.⁵⁹

Before outlining several of the experiments with nonconsensual arbitration, it is necessary to identify some problems of semantics that may impede understanding of the basic concept. When discussing consent or its absence, one must contend with the fact that there are many degrees of choice and compulsion. Except for those possessing a radically deterministic view of the world, practically all actions can be viewed as involving choice; the difference normally lies only in

56. 9 U.S.C. § 10(e) (1982).

57. See Special Project, *supra* note 19, at 935 ("every state except Vermont has adopted some arbitration legislation"). Vermont recently became the last state to adopt a modern arbitration statute. See VT. STAT. ANN. tit. 12, §§ 5651-5681 (1973 & Supp. 1988). More than three-fifths of the states have adopted the Uniform Arbitration Act. See UNIF. ARB. ACT, 7 U.L.A. 1 (1985 & Supp. 1989) (listing 32 states and the District of Columbia as having adopted the UAA).

58. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. Some writers refer to the U.N. Convention as the New York Convention. See Allison, *supra* note 38, at 381-92 (discussing the legal and institutional framework of international commercial arbitration).

59. See *infra* text accompanying notes 68-558.

the consequences of making one selection over another.⁶⁰ Terms like "mandatory" or "compulsory" arbitration sometimes are used to describe situations quite dissimilar to those discussed in this paper.⁶¹ For example, one occasionally encounters such terms being used to identify the product of a contractual predispute arbitration clause. This usage results from the fact that, under modern arbitration statutes, the parties to such an agreement are legally prohibited from opting out of arbitration after a dispute arises. They must honor both the procedure and the award that flows from it or face judicial compulsion. In truth, of course, arbitration in this kind of situation is mandatory only in the sense that the parties to any legally enforceable contract are bound either to honor it or ultimately incur the loss of government protection for certain rights in property (through enforcement of a money damage judgment) or liberty (through a decree of specific performance and the consequent penalties for noncompliance). This species of arbitration, which accounts for most of its modern applications and which has been the primary subject of twentieth-century arbitration legislation in this country, is just as consensual as the underlying contract.⁶²

60. According to Hobbes, even fear or necessity does not prevent actions from being exercises of free will. T. HOBBS, *LEVIATHAN* pt. 1, ch. 13, pt. 2, ch. 21. Aquinas viewed human actions as necessarily being voluntary exercises of free will unless produced by overweening external physical force or complete ignorance of facts relating to available choices and consequences. Fear of consequences does not make acts involuntary. T. AQUINAS, *THE SUMMA THEOLOGICA* pt. 1 of 2d pt., ques. 6. Speaking more practically, however, it is obvious that in assigning legal responsibility for actions and in determining the effects of actions on legal status and relations, a workable legal system must differentiate among the circumstances in which persons exercise their free will. See generally 4 R. POUND, *JURISPRUDENCE* ch. 26 (discussing the general theory of acts, and examining the law's categorization of acts for the purpose of assigning legal responsibility and determining effects on legal status and relations). Aristotle viewed the task of assigning legal responsibility as consisting essentially of dividing actions into the voluntary and the involuntary, and saw actions resulting from compulsion and ignorance as being the two primary instances in which exercises of the will should be treated as involuntary. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. 3, ch. 1.

61. This is the main reason I have chosen the term "nonconsensual" rather than "mandatory" or "consensual."

62. Arbitration clauses found in contracts of adhesion, or in those procured by fraud, duress, or the like, surely contain elements of involuntariness, and the law recognizes the need to protect against such events. See Federal Arbitration Act, 9 U.S.C. § 2 (1982) (written arbitration agreement valid and irrevocable "save upon such grounds as exist at law or in equity for the revocation of any contract"). This section of the FAA incorporates the agreement-formation rules and the defenses of state contract law. Both state and federal courts refer to state common law to determine when an agreement to arbitrate is "revocable" (unenforceable). State law, whether judicial or legislative in origin, may not create special contract rules for determining the validity and enforceability of arbitration agreements, however, because of conflict with the congressional policy underlying the FAA. See *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987).

Despite the fact that the FAA incorporates state contract rules of contract formation and defense, the assertion of *general* contract defenses cannot prevent a dispute from being arbitrated. The Supreme Court has held that defensive issues such as fraud, duress, mistake, and the like are to be resolved by *the arbitrator* if they relate to the contract as a whole. A court will entertain such questions preparatory to deciding whether to compel arbitration only when they relate specifically to the arbitration clause. For example, a claim of fraud will defeat a motion to compel arbitration only if the

In this article, arbitration is spoken of as nonconsensual when its selection as a dispute resolution mechanism is driven primarily by governmental power rather than by the volition of contracting parties. Saying this, we still do not purge the discussion of all definitional problems. Within the domain of cases in which the use of arbitration is attributable primarily to governmental coercion, there are variations in the mix of compulsion and choice. Court-annexed arbitration, for instance, is completely nonconsensual but, subject to certain monetary disincentives, either party may seek trial *de novo*.⁶³ Multiemployer pension plan arbitration also is completely involuntary, but the scope of review is much narrower than in court-annexed arbitration.⁶⁴ Commodity futures arbitration is voluntary for the customer, but is not voluntary in any meaningful sense for the futures broker. The only real choice for the broker is to go into a different line of work, because the practical economic necessity of membership in a commodity futures exchange carries with it the statutory obligation to submit disputes to binding arbitration if the customer so desires. There is also no significant review of commodity futures arbitration.⁶⁵ FIFRA data arbitration is compulsory for the original pesticide developer unless the choice is made not to register a given pesticide with the EPA, and a pesticide cannot be marketed without registration. It is compulsory for a later registrant of the same or a similar pesticide unless that party spends several years and millions of dollars doing its own testing and developing its own data, or simply forgoes market entry. Here, too, there is no review of any consequence.⁶⁶

To reiterate, the conceptual thread that runs through this discussion is the predominance of sovereign compulsion in the selection of arbitration as a dispute resolution method.⁶⁷

claimant demonstrates that the arbitration clause itself was fraudulently induced. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

63. *See infra* text accompanying notes 76-79.

64. *See infra* text accompanying notes 136-45.

65. *See infra* text accompanying notes 236-50.

66. *See infra* text accompanying notes 380-82.

67. Arbitration of disputes between securities brokers and their customers is not used in this discussion as an example of nonconsensual arbitration because it is the product of a clause in the commission agreement. It must be admitted, however, that in this use of arbitration the degree of free choice for one party, the customer, has not been especially meaningful in the past. The inclusion of arbitration clauses in these contracts is an industry-wide practice and generally has not been a matter for individual negotiation. The fact that the underlying transaction is a contract of adhesion does not affect the arbitrability of the dispute, and the effect, if any, of the adhesion characteristic on the rights of the parties is a question for the arbitrator. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Securities industry arbitration has come under increasing criticism in recent years, in large part because of the absence of any real choice on the part of customers in the selection of the arbitral forum. *See, e.g., Wurczinger, SEC Faces Mandatory Arbitration Issue*, NAT'L L.J., Nov. 14, 1988, at 21, col. 1. In response to this criticism, the Securities Exchange Commission recently approved changes in the arbitration rules of the securities industry's three primary self-regulatory organizations (SRO's)--the New York Stock Exchange, American Stock Exchange, and National Association of

IV. COURT-ANNEXED ARBITRATION

A. Context and Properties

The most generalized variety of nonconsensual arbitration actually originated quite some time ago in the Pennsylvania state court system. Legislation in that state in 1952 created a procedure later to be known as "court-annexed arbitration," which required trial judges to refer certain cases to arbitration after pleadings were filed.⁶⁸ The next court-annexed system was not adopted, however, until 1970 when New York and Ohio implemented procedures patterned generally after the Pennsylvania model.⁶⁹ Today, twenty-two states employ court-annexed arbitration under either statutory authorization or court rule.⁷⁰ Some of these systems apply statewide, but many apply only to designated urban counties.⁷¹

Securities Dealers—that increase at least the appearance, and perhaps the reality, of customer awareness and free choice in the use of arbitration as a substitute for litigation against the broker-dealer. Exchange Act Release No. 26,805 [1989 Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,414, May 10. The new rules require, *inter alia*, that broker-dealers place immediately before predispute arbitration clauses language that informs customers that they are waiving their right to seek remedies in court, that arbitration is final, that discovery is generally more limited than in court proceedings, that the award is not required to contain factual findings and legal reasoning, and that the arbitration panel typically will include a minority of arbitrators associated with the securities industry. *Id.*, [1989 Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,414, at 80,111-3, May 10.

A perception of industry bias in the securities arbitration system also has been a source of criticism. See, e.g., *Can Disgruntled Investors Turn the Tables on Their Brokers?*, BUS. WK., Aug. 8, 1988, at 60-61. Recent empirical evidence strongly suggests, however, that this perception is illusory. In a study commissioned by the New York Stock Exchange, data gathered from six major brokerage firms on recent customer-broker disputes showed that customer-claimants fared substantially better in industry-sponsored arbitration than in litigation, as measured by average recovery, average legal costs, average recovery as a percentage of amount of claim, and average legal costs as a percentage of amount of recovery. NEW YORK STOCK EXCHANGE, RESPONSE TO THE SECURITIES AND EXCHANGE COMMISSION REQUEST FOR REVIEW OF PREDISPUTE ARBITRATION AGREEMENTS (Oct. 14, 1988). Regardless of the reality, the recently approved changes in the arbitration rules of the SRO's attempt to deal with the perception of pro-industry bias by articulating more precisely the requirement for an arbitrator to be classified as "public" (i.e., nonindustry), as well as requiring greater disclosure by arbitrators of personal and professional background information. Exchange Act Release No. 26,805 [1989 Current Binder] Fed. Sec. L. Rep. ¶ 84,414, at 80,101-80,104, May 10.

68. Act of Jan. 14, 1952, Pub. L. 2087, No. 566 (current version at 42 PA. CONS. STAT. ANN. §§ 7361-7362 (Purdon 1982)). See Doty, *Philadelphia's Compulsory Arbitration Program*, 29 VILL. L. REV. 1449, 1449-53 (1984) (describes history of court-annexed arbitration in Pennsylvania); Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537, 539-40 (1983) (same); Walker, *Court-Ordered Arbitration Comes to North Carolina and the Nation*, 21 WAKE FOREST L. REV. 901, 914-17 (1986) (same).

69. See P. EBENER & D. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE 5-6 (1985).

70. See Keilitz, Gallas & Hanson, *State Adoption of Alternative Dispute Resolution*, 12 STATE CT. J. 4, 6-8 (1988). In addition, legislation in Alaska authorizes the state supreme court to adopt rules providing for court-annexed arbitration of claims below \$3,000, but no such rules have been adopted yet. See ALASKA STAT. §§ 09.43.190, .200, .210, .220 (1983).

71. See Keilitz, Gallas & Hanson, *supra* note 70, at 6-8.

In 1978, three federal district courts adopted local court rules authorizing court-annexed arbitration systems resembling preexisting state procedures.⁷² Those in the Eastern District of Pennsylvania and the Northern District of California continue in operation, but the program in the Connecticut federal district was abandoned not long after implementation.⁷³ Beginning in 1984, nine other federal district courts have commenced programs of a similar nature.⁷⁴ In general, state and federal systems of court-annexed arbitration operate in money damage suits in which the amount in controversy is below a prescribed maximum.⁷⁵

All of the federal court-annexed arbitration programs and most of the state programs permit a party dissatisfied with the arbitral outcome to obtain a trial *de novo*.⁷⁶ To further the goals of expediting dispute resolution and minimizing its costs, however, all of the federal and most of the state programs incorporate disincentives for seeking *de novo* review.⁷⁷ These disincentives range from

72. The United States Department of Justice had drafted a bill that would have authorized from five to eight federal courts to experiment with court-annexed arbitration in certain types of civil cases, and submitted it to Congress in 1977. See *The Court-Annexed Arbitration Act of 1978: Hearings on S. 2253 Before the Subcomm. on Improvements in Judicial Machinery*, 95th Cong., 2d Sess. (1978). Congress did not enact this legislation; indeed, it was not necessary because the power to adopt local court rules granted by existing legislation, 28 U.S.C. § 2071 (1982), and by the Federal Rules of Civil Procedure, FED. R. CIV. P. 83, is sufficiently broad to permit federal district courts to implement court-annexed arbitration on their own initiative. See *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 714 (E.D. Pa. 1983) (power to adopt local rules sufficient to include creation of court-annexed arbitration program); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 572-73 (E.D. Pa. 1979) (same). Although Congress did not pass the bill proposed by the Justice Department, it did provide funding for the three federal district courts that had instituted court-annexed arbitration programs in early 1978 by local court rule. D. CONN. R. 28; N.D. CAL. R. 500; E.D. PA. R. 49 (current version E.D. PA. R. 8).

73. See Levin, *supra* note 68, at 540 & n.19; Nejejski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 799 & n.77 (1983).

74. Eight of the nine programs have been adopted with congressional funding. M.D. FLA. R. 8.01-06; W.D. MICH. R. 43; W.D. MO. R. 30; D.N.J.R. 47; E.D.N.Y. ARB. R. §§ 1-7; M.D.N.C.R. 601-11; W.D. OKLA. R. 43; W.D. TEX. R. CIV. P. 300-9. In addition, court-annexed arbitration has been adopted by individual court initiative, without congressional funding, in the Southern District of Ohio. S.D. OHIO R. 4.4.1; S.D. OHIO ARB. R. 1.0-11.3. See Walker, *supra* note 68, at 902 n.3. In 1988, Congress finally provided direct authorization for court-annexed arbitration in ten out of eleven districts currently using it (all except the Southern District of Ohio). The legislation explicitly recognizes the power of other district courts (including the Southern District of Ohio) to adopt court-annexed arbitration on their own initiative by local court rule. JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT OF 1988, Pub L. No. 100-72, 102 Stat. 4659-62 (to be codified at 28 U.S.C. §§ 651-658).

75. Jurisdictional maxima in state court programs range from \$6,000 in New York to \$150,000 in Hawaii, with no limit in Florida, Michigan, and New Hampshire. See Keilitz, Gallas & Hanson, *supra* note 70, at 6-7. Maxima in federal court programs range from \$50,000 in the Eastern District of New York to \$150,000 in the Middle District of North Carolina, with no limit in the Southern District of Ohio. See Walker, *supra* note 68 at 919.

76. See P. EBENER & D. BETANCOURT, *supra* note 69, at 9-11.

77. See Walker, *supra* note 68, at 922-34.

payment of a flat fee or all arbitration fees to payment of all arbitration fees, court costs, and attorney fees.⁷⁸ In many of these systems responsibility for various fee and cost components is contingent on the *de novo* petitioner's failure to obtain a more favorable result in trial than in arbitration.⁷⁹

B. The Right to Trial by Jury

1. Federal Court-Annexed Arbitration Programs

There have been surprisingly few constitutional challenges to court-annexed arbitration. The most salient have been based on the right to trial by jury. Soon after the first federal programs were in place, such a challenge was rejected in *Kimbrough v. Holiday Inn*.⁸⁰ There the defendants in a diversity action in the Eastern District of Pennsylvania demanded a jury trial under Federal Rule of Civil Procedure 38(b) and moved to prohibit arbitration and vacate the order of referral. They claimed that the arbitration program violated the right to jury trial guaranteed by the seventh amendment to the United States Constitution.

In upholding the program's validity, the court drew upon the Supreme Court's longstanding acceptance of the proposition that the seventh amendment did not concretize jury trials as they existed in 1791 when the amendment was adopt-

78. *Id.* at 933-34. In the ten currently authorized federal programs, the only permissible disincentive is payment of all arbitration fees. See Pub. L. No. 100-72, 102 Stat. 4661 (to be codified at 28 U.S.C. § 655).

79. See Walker, *supra* note 68, at 933-34.

80. 478 F. Supp. 566 (E.D. Pa. 1979). The defendants also raised a challenge on equal protection grounds. *Id.* at 574-77. Because the equal protection clause of the fourteenth amendment technically applies only to the states, such a challenge to federal government action is based on the due process clause of the fifth amendment. *Id.* at 574 n.19. The equal protection claim was based on three characteristics of the district court's court-annexed arbitration program: first, litigants in this district were treated differently than in the many other districts that did not have court-annexed arbitration; second, the disincentives for seeking trial *de novo* after arbitration were different for plaintiffs and defendants (in this district, one not improving his position through trial *de novo* was required to pay all arbitration fees and, if a defendant, interest on the arbitration award from the date of its filing); and third, distinctions were drawn between parties based on the amount of the plaintiff's claim, in that the program in this district did not apply to claims larger than \$50,000 (\$75,000 under the current local rule, E.D. PA. R. 8.3). The court concluded that the program did not affect fundamental rights other than the right to jury trial under the seventh amendment. That issue, of course, was resolved within the framework of seventh amendment jurisprudence. Therefore, the classifications complained of were not appropriate for review under a strict scrutiny standard but instead were to be examined under the rational basis test. *Kimbrough*, 478 F. Supp. at 575 n.20. The court found little difficulty in concluding that the court-annexed arbitration program survived a review for minimal rationality. Legitimate governmental interests obviously were present in the need to conserve scarce judicial resources in the face of ever-increasing case loads, and the government is permitted to experiment in good faith with novel means for protecting such interests. The means chosen, according to the court, were not unduly burdensome and were rationally related to the government interests in question. *Id.* at 575-77.

ed.⁸¹ Although the common-law understanding of the right to jury trial at that time is to serve as a historical benchmark for assessing seventh amendment claims, innovations in form and procedure are permissible so long as the substance of the right is preserved.⁸² This substance is preserved so long as an innovative dispute resolution measure neither finally determines the rights of persons or property nor imposes onerous conditions on access to jury trial. For example, the court in *Kimbrough* relied on decisions by the Supreme Court finding no seventh amendment violations in the practice of giving a jury's answers to special interrogatories controlling effect when those answers conflict with the general verdict,⁸³ the employment of a pretrial "auditor" to examine documents and hear testimony for the purpose of narrowing and clarifying issues for trial,⁸⁴ the use of six-member juries instead of the twelve-member tribunals that were traditional at common law,⁸⁵ and the granting of summary judgments⁸⁶ and directed verdicts.⁸⁷

In the view of the *Kimbrough* court, court-annexed arbitration alters the substance of the jury trial right to no greater extent than these earlier innovations. Because of the availability of post-arbitration trial *de novo*, the rights of persons or property are not finally determined by the arbitration tribunal.⁸⁸ Moreover, the court concluded, the combination of a short delay occasioned by the holding of an arbitration hearing,⁸⁹ the short time period after the arbitration award

81. *Id.* at 567-69.

82. *See, e.g.,* Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593 (1897).

83. *Id.* at 595-98.

84. *Ex parte* Peterson, 253 U.S. 300, 307 (1920).

85. Ballew v. Georgia, 435 U.S. 223, 229-30 (1978); Colgrove v. Battin, 413 U.S. 149, 156-60 (1973); Williams v. Florida, 399 U.S. 78, 86-104 (1970).

86. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320-21 (1902).

87. Galloway v. United States, 319 U.S. 372, 396 (1943).

88. *Kimbrough v. Holiday Inn*, 478 F. Supp. at 569-70.

89. Referral to arbitration is immediate. The court in *Kimbrough* said that the arbitration hearing is usually held about thirty days after referral. *Id.* at 567. The current local rules in the Eastern District of Pennsylvania provide that the hearing will be held in "about five months," but permit the parties to agree to an earlier date. E.D. PA. R. 8.4(a). The parties have 120 days for discovery prior to arbitration. *Id.* In the event of a demand for trial *de novo*, additional but presumably not duplicative discovery may be necessary. The time prior to arbitration consumed by discovery and other preparatory efforts should not be expected to lengthen total preparation time and expense for trial *de novo* if the process is properly managed. Total time, and perhaps expense, certainly could be increased, however, if the reference to arbitration is not made very soon after the complaint is filed with the court, continuances are not tightly controlled, or the procedure otherwise is not well managed. *See* Note, *Oregon Court-Annexed Arbitration: Just What the Doctor Ordered?*, 21 WILLAMETTE L. REV. 593, 604-05 (1985). Therefore, in a well-designed and efficiently managed system, the time and cost of the hearing and award should be the primary addition to total time and cost when trial *de novo* is demanded. Such hearings customarily last less than one day. *See* Nejeleski & Zeldin, *supra* note 73, at 803. Under the current local rule in the Eastern District of Pennsylvania, the arbitration panel must render its award "promptly" after the hearing. E.D. PA. R. 8.6. Other federal districts impose specific time limits for rendition of the award, ten days being common. *See, e.g.,* W.D. OKLA. R. 43(O)(1).

during which trial *de novo* can be demanded,⁹⁰ and the minor disincentives for seeking trial *de novo* under that federal district's local court rules⁹¹ did not impose onerous conditions on the availability of jury trial,⁹² especially when balanced against the overall benefits likely to be derived from court-annexed arbitration.⁹³

Kimbrough's seventh amendment analysis was later cited with approval in a decision striking the demand for trial *de novo* of a party who had refused to participate in court-annexed arbitration.⁹⁴ More recently, in *Rhea v. Massey-Ferguson, Inc.*, the United States Court of Appeals for the Sixth Circuit relied primarily on *Kimbrough* to reject a seventh amendment challenge to a mandatory mediation program adopted by local federal district court rule.⁹⁵

2. State Court-Annexed Arbitration Programs

Although the seventh amendment does not apply to limitations on the right to trial by jury at the state level,⁹⁶ state constitutional provisions throughout the country normally parallel the seventh amendment rather closely in substance and

90. Under then-applicable local rule 49, the time period was twenty days. Under the current rule in that district, the time period is thirty days. E.D. PA. R. 8.7(a). Thirty days is now the uniform standard for the ten currently authorized federal programs. Pub. L. No. 100-72, 102 Stat. 4661 (to be codified at 28 U.S.C. § 655).

91. Under then-applicable local rule 49, a party demanding trial *de novo* who did not receive a judgment more favorable than the arbitration award had to pay all arbitration fees and, in the case of the defendant, interest from the date of the award. Under the current rule, the penalty is limited to an arbitration fee of \$75 per arbitrator on the panel. E.D. PA. R. 8.7(d). There are three arbitrators on the panel unless the parties agree to use a single arbitrator. *Id.*

92. *Kimbrough v. Holiday Inn*, 478 F. Supp. at 571.

93. The identifiable burdens imposed on one's exercise of the right to jury trial must be balanced against benefits both to the public and to the individual disputant. With respect to the public benefit, the court emphasized the burden to society of backlogs and delay in the court system and the growing perception that alternative mechanisms like arbitration can contribute to the amelioration of problems in the civil justice system. *Id.* Regarding the benefits to individual disputants, the court stated:

Furthermore, arbitration provides a valuable service by promoting speedy and inexpensive dispute resolution. Litigants have the opportunity to test the validity of their claims very shortly after they are filed. Certainly, this limits the time and expense of discovery prior to arbitration. In the normal course of trial without arbitration, voluminous resources can be expended in discovery which is of marginal advantage at trial. The pendency of arbitration forces counsel to focus their attention on the basic elements of the case. Aside from the ultimate award, if arbitration reveals that no claim exists, settlement will become a viable possibility. At the very least, arbitration helps counsel streamline their case and direct their additional discovery in profitable areas.

Id.

94. *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712 (E.D. Pa. 1983).

95. 767 F.2d 266 (6th Cir. 1985).

96. *Minneapolis & St. Louis R. R. v. Bombolis*, 241 U.S. 211 (1916).

scope.⁹⁷ Indeed, because of the absence of any previous federal court rulings on the seventh amendment's applicability to court-annexed arbitration, the court in *Kimbrough* relied on two Pennsylvania Supreme Court decisions in addition to the more general seventh amendment jurisprudence of the United States Supreme Court. Shortly after implementation of Pennsylvania's state court-annexed arbitration experiment, the program survived a right to jury trial challenge under the Pennsylvania state constitution in *In re Smith*.⁹⁸ In that case, the court had relied in large measure on the United Supreme Court's seventh amendment precedents, and found that the availability of trial *de novo* effectively answered any claims that the right to jury trial had been infringed.⁹⁹

Using essentially the same reasoning, the Pennsylvania high court's later decision in *Parker v. Children's Hospital* upheld the state's nonconsensual arbitration program for medical malpractice cases.¹⁰⁰ Like the general court-annexed arbitration system, the state's malpractice arbitration statute provided for trial *de novo* subject to minor limitations and disincentives.¹⁰¹ The court concluded that, on their face, these statutory prerequisites to malpractice litigation did not impose a burden on the right of trial by jury sufficient to violate the Pennsylvania Constitution. The court also rejected a claim that the required presence of two health care professionals on the arbitration panel, along with two attorneys and three lay persons, violated the procedural due process guarantee of an impartial tribunal. The balance on the panel, coupled with the availability of *de novo* review, minimized the potential effect of any conflict of interest claim.¹⁰²

It is interesting to note, however, that various nonconsensual ADR mechanisms created at the state level for medical malpractice claims have not always fared as well in the face of constitutional challenges as have the more generally focused state and federal court-annexed arbitration programs. These programs vary greatly, both in fundamental design and in detail.¹⁰³ Some programs, like

97. See, e.g., M. GREEN, BASIC CIVIL PROCEDURE 175 (2d ed. 1979).

98. 381 Pa. 223, 112 A.2d 625 (1955), *app. dism'd sub nom. Smith v. Wissler*, 350 U.S. 858 (1958).

99. *In re Smith*, 381 Pa. at 231, 112 A.2d at 629.

100. 483 Pa. 106, 394 A.2d 932 (1978).

101. The losing party at trial had to pay all costs of both arbitration and trial if the court found that *de novo* appeal had been taken arbitrarily or capriciously. *Id.* at 122, 394 A.2d at 939.

102. *Id.* at 131, 394 A.2d at 944.

103. See generally Harlan, *Virginia's New Medical Malpractice Review Panel and Some Questions It Raises*, 11 U. RICH. L. REV. 51 (1976) (examining wisdom and potential constitutional infirmities of Virginia statute requiring prescreening and evaluation of malpractice claims by a panel of attorneys and health care professionals); Moore, *Constitutional Standards of Review for Medical Malpractice Mediation Panels*, 1 OHIO ST. U.J. DISP. RES. 183 (1985) (surveying state court decisions regarding constitutionality of mandatory prelitigation mediation in malpractice cases); Terry, *The Technical and Conceptual Flaws of Medical Malpractice Arbitration*, 30 ST. LOUIS U.L.J. 571 (1986) (discussing many practical and constitutional problems encountered by states in using arbitration to deal with perceived malpractice crisis); Comment, *The Constitutionality of Medical Malpractice Mediation*

that of Pennsylvania, have employed nonconsensual arbitration of malpractice claims,¹⁰⁴ while others have required forms of mediation and claim evaluation¹⁰⁵ prior to litigation. Still other states have adopted special forms of voluntary, legally binding arbitration.¹⁰⁶ State court decisions reviewing these programs have varied as much as the programs themselves.

The experiences of Pennsylvania and Florida illustrate rather well the ambivalence with which some courts have viewed nonconsensual medical malpractice ADR. As mentioned above, in *Parker v. Children's Hospital*, the Pennsylvania Supreme Court drew heavily from its earlier decision upholding the validity of Pennsylvania's court-annexed arbitration program to conclude that the state's nonconsensual malpractice arbitration program did not contravene the right to jury trial. Only two years after rejecting this facial challenge, however, the same court ruled that substantial experience with the law's operation compelled the conclusion that the right to jury trial had been unreasonably burdened. In *Mattos v. Thompson*, the court held that the program had in fact caused unconscionable delays that "burden[ed] the right to jury trial with 'onerous conditions, restrictions or regulations which . . . made the right practically unavailable.'"¹⁰⁷

Panels: A Maryland Perspective, 9 U. BALT. L. REV. 75 (1979) (same, but with focus on Maryland legislation); Note, *The Michigan Medical Malpractice Act: Post-Morris v. Metriyakool*, 4 COOLEY L. REV. 173 (1986) (discussing Michigan legislation providing for voluntary, legally binding arbitration of medical malpractice claims by specially structured panels, and decisions upholding statute's validity); Comment, *Mandatory State Malpractice Arbitration Boards and the Erie Problem: Edelson v. Soricelli*, 93 HARV. L. REV. 1562 (1980) (discussing the application of state malpractice arbitration laws in federal court diversity of citizenship cases under the Erie doctrine); Recent Cases, Note, *Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts*, 45 MO. L. REV. 316 (1980) (discussing decision by Missouri Supreme Court invalidating mandatory malpractice mediation statute under open courts provision of state constitution); Note, *Civil Procedure--Constitutional Law--Access to the Courts and the Medical Malpractice Act: Jiron v. Mahlab*, 14 N.M.L. REV. 503 (1984) (discussing decision by New Mexico Supreme Court invalidating statute requiring prescreening and evaluation of malpractice claims by state Medical Review Commission on ground that hindering access to courts violates due process); Note, *Medical Malpractice Arbitration: Time for a Model Act*, 33 RUTGERS L. REV. 454 (1981) (surveying state malpractice arbitration programs and suggesting uniform statute); Note, *The Massachusetts Medical Malpractice Statute: A Constitutional Perspective*, 11 SUFFOLK U.L. REV. 1289 (1977) (discussing potential due process and equal protection problems with Massachusetts statute requiring prescreening and evaluation of malpractice claims); Note, *The Michigan Malpractice Act's Requirement of a Physician on the Panel Violates the Due Process Right to a Fair and Impartial Tribunal*, 28 WAYNE L. REV. 1843 (1982) (arguing that Michigan law requiring malpractice arbitration panel to include a physician violates due process guarantee of impartial tribunal, an argument that was later rejected by the Michigan Supreme Court).

104. See P.R. LAWS ANN. tit. 26, §§ 4101-4106 (Supp. 1987).

105. See MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1984 & Supp. 1989).

106. See MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (West Supp. 1989).

107. 491 Pa. 385, 395, 421 A.2d 190, 195 (1980) (quoting *In re Smith*, 381 Pa. 223 at 231, 112 A.2d 625 at 629 (Pa. 1955)). Apparently the Michigan experience was different. An empirical study of the actual operation of Michigan's malpractice arbitration program revealed that the program provided a cheaper and quicker forum for resolution than litigation. See Terry, *supra* note 103, at 573-74 n.11. The Michigan program does differ in some important respects from that of Pennsylvania,

In Florida, the state supreme court first upheld a mandatory prelitigation mediation program against facial due process and right-to-jury-trial challenges.¹⁰⁸ Four years later the same court struck down the program on these grounds because actual experience had shown it to be "unworkable and inequitable in practical operation."¹⁰⁹ In other states, various constitutional challenges to malpractice ADR programs have been accepted and rejected with roughly equal frequency.¹¹⁰

Although the programs and the state court decisions scrutinizing them are sufficiently disparate to resist generalization, one feature common to most malpractice ADR programs may account for many of the constitutional difficulties they have encountered. Unlike state and federal court-annexed arbitration schemes, which tend to be simple and lean, most malpractice ADR statutes have involved considerable complexity. Complexity invites delay and inefficiency, which greatly increases the chances that restrictions on the right to jury trial and on general access to the courts will be viewed as too great to withstand constitutional challenge.

In contrast with pure common-law tort and contract disputes that are usually the subject of court-annexed arbitration, other examples of nonconsensual arbitration typically arise in an administrative setting. The disputes resolved by these processes usually are integral parts of a broadly conceived regulatory

however. The most important difference is that in Michigan malpractice arbitration is voluntary, although the composition of the panel and other particulars are regulated. Note, *The Michigan Medical Malpractice Act*, *supra* note 103, at 175. It seems likely that consent might diminish the use of delaying tactics by attorneys.

108. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976).

109. *Aldana v. Holub*, 381 So. 2d 231, 237 (Fla. 1980).

110. *Compare Eastern v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (holding that requirement of mediation before malpractice litigation did not violate state constitution's due process clause, but that required payment of \$2,000 bond prior to litigation did violate due process); *Wright v. Central Dupage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (holding that required mediation prior to filing malpractice lawsuit violated separation of powers and jury trial provisions of state constitution); *Missouri ex rel. Cardinal Glennon Mem. Hosp. v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (finding mandatory malpractice mediation/claim evaluation statute violative of state constitution's open courts provision); *Jiron v. Mahlab*, 99 N.M. 425, 659 P.2d 311 (1983) (same, using due process rationale) *with Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146 (5th Cir. 1981) (finding that provision of Louisiana statute requiring review and evaluation by screening panel prior to litigation did not violate due process or equal protection); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977) (finding that required mediation and posting of \$2,000 bond prior to filing medical malpractice suit did not violate either right to jury trial or open courts provisions of state constitution); *Morris v. Metriyakool*, 418 Mich. 423, 344 N.W.2d 736 (1984) (holding that statute requiring a health care professional to be a member of the panel in a voluntary malpractice arbitration program did not violate due process, in the absence of proof of actual bias); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981) (holding that required prelitigation arbitration in malpractice cases did not violate equal protection clause or right to jury trial).

scheme. The claims themselves may be either pure creations of statute,¹¹¹ statutorily modified replacements for common-law claims,¹¹² or occasionally even traditional common-law tort and contract claims embedded in the fabric of a regulatory program.¹¹³ The multiemployer pension plan, commodity futures, and FIFRA data arbitration systems selected for study are not the only instances of nonconsensual regulatory arbitration to be found, but they are among the most notable.¹¹⁴ Moreover, they illustrate a spectrum of the many possible variations on the same general theme.

V. MULTIEmployer PENSION PLAN ARBITRATION

A. Context and Properties

In 1974 Congress enacted the Employee Retirement Income Security Act (ERISA) to comprehensively regulate private pension plans.¹¹⁵ The primary goals of Congress were to encourage adequate funding of vested pension benefits, prudent management of pension fund assets, and fulfillment of reasonable

111. Although at first blush one might view the claim for a share of pesticide data costs as a statutorily modified replacement for a common-law trade secret claim, closer examination reveals the claim to be purely a creation of federal statute. See *infra* text accompanying notes 364-67.

112. The claim by a multiemployer pension plan against a withdrawing employer can be viewed primarily as a creation of federal statute, but also can be characterized as a modified substitute for a contractual claim. See *infra* note 363 and accompanying text. In addition, some of the claims asserted by a customer against a commodity futures broker, such as those asserting violations of the Commodity Exchange Act's anti-fraud provisions, 7 U.S.C. § 6b (1982), represent statutorily modified replacements for common-law claims. See *infra* text accompanying notes 360-62.

113. Several mechanisms are available for the resolution of disputes between customers and commodity futures professionals, including arbitration, litigation, and an administrative reparations proceeding. The reparations proceeding is limited to alleged violations of the Commodity Exchange Act or the regulations of the Commodity Futures Trading Commission. In litigation or arbitration, however, a customer may assert common-law tort and contract claims in addition to or instead of statutory claims. Indeed, as is the case with arbitration generally, a customer does not have to frame distinct legal theories at all when arbitrating a dispute with a broker or other commodity futures professional because the arbitrator is not strictly bound to follow substantive legal rules. See Moylan & Ukman, *Dispute Resolution Systems in the Commodity Futures Industry*, 6 J. FUTURES MKTS. 659 (1986); Raisler & Geldermann, *The CFTC's New Reparation Rules: In Search of a Fair, Responsive, and Practical Forum for Resolving Commodity-Related Disputes*, 40 BUS. LAW. 537, 577-79 (1985); White & Stein, *Broker-Customer Arbitration: An Attractive Alternative to Litigation*, 7 J. FUTURES MKTS. 459 (1987).

114. Arbitration and arbitration-like decision models are found in a number of other regulatory settings. For example, even though not denominated as arbitration, the use of carrier-appointed private hearing officers to resolve Medicare claims disputes is essentially a form of legally binding arbitration that closely resembles the traditional variety. See *infra* note 194.

115. Employee Income Retirement Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended 29 U.S.C. §§ 1001-1461 (1982)).

employee pension expectations.¹¹⁶ One of several problems identified by Congress was that terminations of pension plans had deprived employees of anticipated retirement benefits.¹¹⁷ Consequently, Congress created in title IV of ERISA an insurance program to guarantee payment of benefits to employees and retirees whose pension plans terminate without sufficient assets to pay vested benefits.¹¹⁸ To provide insurance coverage, Congress established an independent government corporation, the Pension Benefit Guaranty Corporation (PBGC), to collect premiums from insured plans and "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries" of terminated plans.¹¹⁹

There are several types of private pension plans, including single-employer and multiemployer plans. As the term implies, a single-employer plan is established and maintained by one employer for its employees. ERISA defines a multiemployer plan as one to which more than one employer contributes and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.¹²⁰

116. See 29 U.S.C. § 1001(a) (1982) (congressional statement of findings and purpose); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980) (discussing history of ERISA).

117. 29 U.S.C. § 1001(a) (1982).

118. *Id.* 29 U.S.C. §§ 1301-1381 (1982).

119. *Id.* 29 U.S.C. §§ 1302 (1982).

120. *Id.* 29 U.S.C. §§ 1301(a)(3) (1982). Even more fundamentally, pension plans may be classified as either "defined contribution" plans or "defined benefit" plans. See 29 U.S.C. §§ 1002(34)-(35) (1982). In a defined contribution plan, an employer determines, on an annual basis, the amount of contribution to be made to the plan from profits. The amount can depend on the employer's exercise of discretion or on one of a variety of formulas. Generally, employer contributions are allocated to an individual employee's account and such contributions are based on the proportion of his compensation to that of all the participating employees in the plan. An employee's benefits depend on both the amount of employer contributions and the return on the pension trust's investments. A defined benefit plan, on the other hand, aims to provide a fixed benefit to an employee over a period of years, usually for life, after retirement. The benefit to be received is determined by a formula specified in the plan and normally is calculated based on compensation and years of service. Employees know the exact amount of the monthly pension they will receive at retirement. The employer must make contributions to a defined benefit plan that are sufficient to fund this benefit, the amount of such contributions being calculated actuarially. An employee covered by a defined benefit plan is not directly affected by the return on the pension trust's investments, and contributions are not made to individual accounts but are instead placed in a common fund from which individual benefits are paid out. Obviously, the problem of liability for unfunded vested benefits arises in the case of a defined benefit rather than a defined contribution plan. Defined benefit plans are the predominant form. See Fischel & Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1112-13 (1988); *The Second Circuit Review -- 1983-84 Term: Labor Law: The Second Circuit Looks over the Rainbow of Discretion at ERISA Trustees' Accelerated Distribution Decisions*, 51 BROOKLYN L. REV. 997, 1003 n.39 (1985) (citing M. CANAN, *QUALIFIED RETIREMENT PLANS* §§ 3.11-.12, .51 (1977)).

Multiemployer plans can be viewed as possessing hybrid defined-benefit and defined-contribution attributes. Such a plan is a defined benefit one in that it sets benefit levels that are not tied to individual accounts. A multiemployer plan does possess some defined contribution characteristics from

Multiemployer plans have proved attractive because of their potential for lessening industrial strife by fostering cooperation among employers, employees, and unions.¹²¹

Under ERISA's insurance scheme PBGC originally insured single-employer plans unconditionally, but had substantial discretion over the insurance of multiemployer plans.¹²² If PBGC chose to underwrite the benefits of a terminated multiemployer plan, it could recover its expenditures only from employers who had contributed to the plan within the five years preceding termination.¹²³ Consequently, when an employer withdrew from a multiemployer plan its liability to the plan was merely a contingency. If the plan terminated within five years from the date of the employer's withdrawal, and PBGC covered the unfunded benefits upon termination, the withdrawing employer was liable to PBGC for a proportionate share of PBGC's expenditures. An employer who withdrew more than five years before the plan's termination avoided liability, and the other employers who either remained in the plan until termination or withdrew within five years before termination were left with a disproportionate share of liability to PBGC. Although this total liability to PBGC was limited to thirty percent of the employer's net worth, it nevertheless could reach staggering proportions for those still in the plan at termination.¹²⁴

The law created a perverse incentive for each employer to withdraw from a multiemployer plan before the other contributing employers did so. This incentive was all the more powerful in a declining industry where the likelihood of withdrawal by other employers was high as they closed plants or otherwise contracted operations. As the number of participating employers diminished,

the employer's perspective, however, because the underlying collective bargaining agreement fixes the amount the employer must contribute, typically an amount per month per covered employee. It is the function and responsibility of the plan's trustees to align the benefit levels that the plan promises with the expected contribution levels. See Fischel & Langbein, *id.* at 1113. By imposing a set of subsidiary liabilities on employers for shortfalls in certain circumstances, the 1980 amendments to ERISA, *infra* text accompanying notes 126-35, cause multiemployer plans to look even more like pure defined benefit plans. *Id.* at 1113 n.41.

121. See Note, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 *FORDHAM URB. L.J.* 211, 219 (1986).

122. PBGC's coverage of multiemployer plans was originally discretionary because Congress had "substantial uncertainty as to the need for . . . insurance in the case of multiemployer plans and the effects of insuring such plans." See H.R. REP. NO. 869, Part II, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2993, 3001.

123. See H.R. REP. NO. 869, Part I, 96th Cong., 2d Sess. 54, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2918, 2922 [hereinafter H.R. REP. NO. 869(I)]. Employers participating in a multiemployer plan had to pay insurance premiums to PBGC regardless of PBGC's subsequent decision whether to underwrite an underfunded plan. *Id.* at 55, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2923.

124. See 29 U.S.C. § 1362(b)(2) (1982) (limiting liability to PBGC to 30 percent of net worth). See also H.R. REP. NO. 869(I), *supra* note 123, at 54, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2922.

remaining employers would feel growing pressure to withdraw as their share of potential liability increased.¹²⁵

Corrective action was taken by Congress in 1980 in the form of the Multiemployer Pension Plan Amendments Act (MPPAA),¹²⁶ which amended title IV of ERISA to impose mandatory withdrawal liability on employers and an accompanying set of assessment and collection procedures.¹²⁷ An employer leaving a multiemployer pension plan must pay to the plan a proportionate share of its "unfunded vested benefit liability" irrespective of when withdrawal occurs or whether the entire plan terminates.¹²⁸ The plan itself, acting through its board of trustees, determines the fact and date of withdrawal, as well as the amount of a withdrawing employer's liability.¹²⁹ The board, the membership of which is designated in the document establishing the plan trust, must have equal representation from employees and contributing employers.¹³⁰ Trustees owe a strict fiduciary duty to act exclusively in the interests of the plan's participants (covered employees) and their beneficiaries.¹³¹ The plan not only has substantial discretionary authority to determine the fact and date of withdrawal, but it also has exceptionally wide latitude in calculating the amount of withdrawal liability.¹³² The plan may select from among four methods for calculating the amount of a withdrawing employer's liability, or may adopt its own method with PBGC approval.¹³³ Regardless of the method chosen, the amount of any given assessment depends heavily on the use of actuarial assumptions about employees' life expectancies, retirement ages, and future rates of return on the plan's

125. See H.R. REP. NO. 869(I), *supra* note 123, at 61, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2929.

126. Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified in scattered sections of 5, 26 and 29 U.S.C.).

127. 29 U.S.C. §§ 1381-1401 (1982).

128. 29 U.S.C. § 1381(a) (1982) (establishing mandatory liability); 29 U.S.C. § 1393(c) (1982) (defining "unfunded vested benefits" as "an amount equal to--the value of nonforfeitable benefits under the plan, less the value of the assets in the plan").

129. 29 U.S.C. § 1382 (1982).

130. See Labor Management Relations Act, § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B) (1982) (authorizing employer-financed trust funds for the benefit of employees with the proviso that employers and employees be represented equally in trust administration).

131. 29 U.S.C. § 1102(a)(2) (1982) (providing that the plan's trustees owe a fiduciary duty); 29 U.S.C. § 1104(a)(1) (1982) (defining the scope of that fiduciary duty).

132. 29 U.S.C. §§ 1383, 1385 (1982) (describing events of complete and partial withdrawal). See Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980*, 71 GEO. L.J. 161, 166-69 (1982) (discussing discretion of pension plan trustees); Note, *Administrative Law--Decisionmaker Bias and the Procedural Due Process Rights of Withdrawing Employers Under the MPPAA*, 9 W. NEW ENG. L. REV. 227, 230-31 & n.26 (same).

133. 29 U.S.C. § 1391 (1982). Once a calculation method is adopted by a plan, however, it must be applied uniformly with respect to each employer who subsequently withdraws, and new rules or amendments adopted by the plan may not be applied retroactively. 29 U.S.C. § 1394 (1982).

investments.¹³⁴ Acting within the expanse of this discretion, a plan may even impose liability in an amount exceeding a withdrawing employer's net worth.¹³⁵

Disagreements between the plan and an employer concerning withdrawal liability must be resolved in binding arbitration.¹³⁶ Although either the plan, the employer, or both jointly may request arbitration, the incentive to seek review clearly lies with the withdrawing employer.¹³⁷ If arbitration is not sought within the statutorily prescribed time, the liability amount set by the plan automatically becomes final and may be collected by the plan through an enforcement proceeding in either state or federal court.¹³⁸ Arbitration of a dispute concerning the existence or amount of withdrawal liability does not take place on a clean slate. Instead, the arbitration panel must presume that the plan's determination is correct, and can overturn that determination only if the employer "shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous."¹³⁹

Either party may seek review of the arbitral decision in federal district court. Three different standards of review are employed for alleged errors in the arbitrator's fact findings, statutory interpretations, and conduct of the proceedings. On the whole, the review is quite circumscribed. When the arbitrator's factual findings are challenged, the court must operate from a strong presumption that the findings are correct and may overturn them only on the basis of "a clear preponderance" of contrary evidence.¹⁴⁰ This review standard is quite similar to that required by the Federal Rules of Civil Procedure for appellate review of

134. 29 U.S.C. § 1393(a)(1) (1982) (requiring only that the plan use actuarial assumptions and methods that "in the aggregate, are reasonable," and that "in combination, offer the actuary's best estimate of anticipated experience under the plan"). See generally Note, *Trading Fairness for Efficiency*, *supra* note 132, at 167-68 (discussing substantial element of discretion in making actuarial assumptions).

In *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc.*, 762 F.2d 1137, 1150 (1st Cir. 1985) (Aldrich, dissenting), the dissenting judge challenged the majority's statement that the duties of plan trustees were largely ministerial by asking "But, how 'ministerial' is it for the trustees to select, as here, a discount rate of 7 1/2% for determining future values, an interest rate unheard of in my memory in a decade, while the Fund's actuary admitted the rate could reasonably have been set at 14 1/2%?"

135. See *Shelter Framing Corp. v. Carpenters Pension Trust*, 543 F. Supp. 1234 (C.D. Cal. 1982) (plan assessed employer's withdrawal liability at twice its net assets), *aff'd in part and rev'd in part on other grounds*, 705 F.2d 1502 (9th Cir. 1983), *rev'd sub nom.* *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

136. 29 U.S.C. § 1401 (1982).

137. 29 U.S.C. § 1401(a)(1) (1982) (prescribing time limits for initiation of arbitration by either party or jointly).

138. 29 U.S.C. § 1401(b)(1) (1982).

139. 29 U.S.C. § 1401(a)(3)(A) (1982).

140. 29 U.S.C. § 1401(c) (1982).

a trial court's fact findings in a nonjury trial.¹⁴¹ Despite its very limited scope, judicial review of the arbitrator's fact findings under MPPAA is still greater than in the case of consensual arbitration under the Federal Arbitration Act, where it is nonexistent.¹⁴² The second type of review occurs when an arbitrator's interpretation of the statute itself is challenged. Although the MPPAA is silent on the standards for judicial review of such questions, the courts have held that the review is *de novo*.¹⁴³ This stands in sharp contrast to the complete absence of merit review in consensual arbitration, but most of the arbitrator's important liability-related determinations under MPPAA are factual in nature and thus subject only to a clearly erroneous review standard.¹⁴⁴ The third form of review, which applies to nonsubstantive issues such as alleged procedural unfairness or arbitrator misconduct, follows the standards provided in the Federal Arbitration Act for review of consensual arbitration. This review is extremely limited.¹⁴⁵

141. See FED. R. CIV. P. 52(a) (trial judge's findings of fact to be set aside only if clearly erroneous). A finding is clearly erroneous under Rule 52(a) only if the appellate court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). See also C. WRIGHT, LAW OF THE FEDERAL COURTS 647-51 (4th ed. 1983).

142. See *supra* text accompanying notes 45, 55.

143. Although MPPAA itself says nothing about statutory interpretation by the arbitrator or judicial review of such interpretation, the federal courts have held that this review is *de novo*. See *Union Asphalts & Roadoils, Inc. v. MO-KAN Teamsters Pension Fund, Inc.*, 857 F.2d 1230, 1233 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1748 (1989); *Trustees of the Amalgam. Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 928-29 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986); *Board of Trustees of the W. Conf. of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *IAM Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984); *Republic Indus., Inc. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

144. The fundamental questions of whether there has been a withdrawal, when the withdrawal occurred, which calculation method to use, and what actuarial assumptions to make are factual in nature. The United States Court of Appeals for the Seventh Circuit recently made it even clearer than before that the minimal scrutiny provided for by the clearly erroneous standard will almost always apply. The court held that the clearly erroneous standard of review also applies to "mixed questions of law and fact"--questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the rule of law as applied to the facts is or is not violated. *Chicago Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir. 1989).

145. 29 U.S.C. § 1401(b)(3) (1982) (incorporating provisions of Federal Arbitration Act, except as modified). See Federal Arbitration Act, § 10, 9 U.S.C. § 10 (1982) (grounds for setting aside arbitration award in consensual arbitration). See also *supra* note 55.

B. A Constitutional Potpourri: Taking, Due Process, Jury Trial, and Encroachment on Article III Judicial Power

The withdrawal liability provisions of MPPAA engendered a substantial amount of constitutional litigation, only some of which related to the dispute resolution mechanism. In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,¹⁴⁶ decided in 1984, the Supreme Court ruled that the action of Congress in making the withdrawal liability provisions retroactively effective to a date five months prior to the Act's passage was sufficiently rational to withstand a substantive due process challenge. Two years later the Court rejected a general and relatively insubstantial takings clause challenge in *Connolly v. Pension Benefit Guaranty Corp.*¹⁴⁷

From 1983 to 1985 six courts of appeals upheld MPPAA in the face of multifaceted constitutional attacks.¹⁴⁸ Several of these courts rejected substantive due process challenges of the type rejected by the Supreme Court in *R.A. Gray*.¹⁴⁹ Employers also claimed that being required to begin payment of the withdrawal liability assessed by the plan before arbitral or judicial review of that assessment violated the hearing requirement of procedural due process. Applying the balancing model of *Mathews v. Eldridge*,¹⁵⁰ the courts faced with this

146. 467 U.S. 717 (1984). After *Gray*, however, Congress mooted the point by removing the retroactivity feature. Deficit Reduction Act, Pub. L. No. 98-369, § 558(a)(1), 98 Stat. 494, 899 (1984).

147. 475 U.S. 211 (1986).

148. *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137 (1st Cir. 1985), *rev'g en banc*, 762 F.2d 1124 (1st Cir. 1984); *Board of Trustees of the W. Conf. of Teamsters Pension Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

149. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). See *Thompson Bldg. Materials*, 749 F.2d at 1401-03; *Washington Star*, 729 F.2d at 1507-11; *Standard Dye*, 725 F.2d at 849-54; *Pleick*, 724 F.2d at 1262-74; *Republic Industries*, 718 F.2d at 635-39.

150. 424 U.S. 319 (1976). The court in *Republic Industries* relied, at least nominally, on *Mathews* to conclude that MPPAA's dispute resolution scheme does not violate the withdrawing employer's procedural due process rights by requiring payment before providing any opportunity for a full evidentiary hearing. 718 F.2d at 639-40. In *Mathews*, an individual who had been receiving Social Security disability payments for several years challenged the later termination of those benefits. 424 U.S. at 324-25. After a periodic review of medical reports and a questionnaire that had been completed by the recipient, the state monitoring agency determined that he was no longer disabled. *Id.* at 323-24. The Social Security Administration accepted the state agency's findings and terminated the benefits. *Id.* at 324. The recipient challenged the action, claiming a procedural due process right to a pretermination evidentiary hearing. *Id.* at 324-25. The Supreme Court balanced (1) the recipient's private property interest in uninterrupted benefits pending final administrative resolution; (2) the risk of erroneous deprivation of that interest in a process that relied on medical evaluations by the recipient's own physician, a comprehensive questionnaire filled out by the recipient (with assistance available upon request from the local social security office), and complete access by the recipient to

contention concluded that the existing procedures were sufficient and that a full evidentiary hearing prior to the commencement of payments was not required by procedural due process.¹⁵¹ It was also urged that placing decision-making authority in the hands of the plan's trustees, subject only to limited review by an arbitration panel and even more limited review by a court, amounted to a denial of the right to jury trial. This claim was easily rejected because of two well-established seventh amendment principles. First, the right to jury trial exists only for a claim that either was known and jury-triable under the common law of England around 1791 when the amendment was ratified, or is a statutory creation closely analogous in nature and remedy to such a common-law claim. Second, there is no right to a jury trial when determination of a claim has been placed in the hands of an administrative tribunal, apparently irrespective of the nature of the claim.¹⁵²

A claim that the dispute resolution system amounts to a delegation of judicial power to a nonjudicial tribunal in violation of Article III of the Constitution was rejected on the grounds that (1) withdrawal liability was borne solely of a congressional regulatory effort, so that Congress could have determined it unilaterally, and (2) judicial review was sufficient to view the plan and arbitrator as analogous to the fact-finding adjuncts that had been approved by the Supreme Court in other contexts.¹⁵³ Necessary to this conclusion, of course, was the preliminary determination that the judicial review provided for in MPPAA was meaningful; only if such review was meaningful could the fact-finding functions of the plan and arbitrator be characterized as judicial "adjuncts."¹⁵⁴

all information relied on by the state agency; (3) the public interest manifested in the administrative burden and other social costs that would accompany a constitutional right to a full pretermination evidentiary hearing; and (4) the likelihood that additional procedural safeguards would diminish substantially the risk of erroneous deprivation of the private interest. *Id.* at 335-49. This analysis led the Court to conclude that the existing process was sufficient to meet procedural due process requirements. *Id.* at 349.

151. *Keith Fulton*, 762 F.2d at 1140; *Thompson Bldg. Materials*, 749 F.2d at 1404; *Standard Dye*, 725 F.2d at 854; *Republic Industries*, 718 F.2d at 639-40.

152. *Thompson Bldg. Materials*, 749 F.2d at 1404; *Washington Star*, 729 F.2d at 1511; *Standard Dye*, 725 F.2d at 854-55; *Peick*, 724 F.2d at 1277. These courts relied primarily on *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), in which the Court concluded that, in the case of rights created by federal 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," *id.* at 450, even if the seventh amendment would require a jury trial had Congress assigned the adjudication of those rights "to a federal court of law instead of an administrative agency." *Id.* at 455.

153. *Thompson Bldg. Materials*, 749 F.2d at 1404-06.

154. *Id.* at 1406; *Washington Star*, 729 F.2d at 1511; *Standard Dye*, 725 F.2d at 855; *Peick*, 724 F.2d at 1277; *Republic Industries*, 718 F.2d at 641. The issue of encroachment on the structural integrity of the Article III federal judiciary is explored thoroughly in the discussion of FIFRA data arbitration, *supra* text accompanying notes 443-531.

C. Structural Bias and Procedural Due Process

1. A Question of Loyalties

Although forming only part of the constitutional broadside leveled at MPPAA, the most serious challenge to the statute focused on the fundamental fairness of the procedures and presumptions contained in the statute's dispute resolution system. The essential basis for these challenges was the weight given to an initial determination by a body (the plan's trustees) that is not likely to be impartial. This theory was considered by five of the six circuits that upheld the validity of the statute.¹⁵⁵

As observed earlier, employers and employees are equally represented on a plan's board of trustees. One can argue cogently that, from the perspective of a withdrawing employer, a decision-making entity so constituted is not an impartial tribunal as required by procedural due process.¹⁵⁶ All of the trustees owe a statutorily prescribed fiduciary duty to act exclusively in the interests of the plan's participants (employees) and their beneficiaries.¹⁵⁷ Adding to the probable predisposition created by fiduciary obligation, those trustees representing *employees* are likely to have powerful incentives to make any assumptions and exercise any discretionary judgment in such a way as to maximize the withdrawing employer's liability. Moreover, even the *employer* representatives as a group would seem to have strong incentives to insure that a presently withdrawing employer pay as much as possible toward unfunded vested benefits, so as to reduce the future liability exposure of other employers.¹⁵⁸

The statute does provide a check on this tendency of employer-affiliated trustees when they select a formula for calculating liability, in that the plan must use the same formula to determine the liability of other withdrawing employers in the future.¹⁵⁹ Employer representatives on the board of trustees thus know that their choice today may affect their own company tomorrow. One cannot know for sure whether an employer representative's apprehension of similar

155. The decision-maker bias question was not considered in *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983).

156. The essential guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property.

While different situations may entail different types of procedures, there is always the general requirement that the government process be fair and impartial. Therefore, there must be some type of neutral and detached decision-maker, be it a judge, hearing officer or agency. The Court has continually held that "a fair trial in a fair tribunal is a basic requirement of due process." This requirement applies to agencies and government hearing officers as well as judges.

J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 487 (3d ed. 1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1965)).

157. 29 U.S.C. § 1104(a)(1) (1982).

158. See Note, *Trading Fairness for Efficiency*, *supra* note 132, at 168.

159. 29 U.S.C. § 1394(b) (1982).

treatment for his company in the event of future withdrawal will offset his incentive to reduce unfunded vested benefits immediately. In general, it is to be expected that a present certainty will influence behavior more than a future uncertainty. Consequently, the uniformity requirement probably checks the liability-maximization motive only in the case of a trustee who knows that his own employer is very likely also to withdraw in the reasonably near term while substantial vested benefits are still unfunded.

Even if the uniformity requirement does provide a meaningful constraint on the formula-selection decision by an employer representative on the board, the statute does not provide the same kind of checks on trustees when they make highly discretionary actuarial assumptions. The actuarial assumptions for a specific withdrawing employer merely must be reasonable in the aggregate,¹⁶⁰ and as factual determinations they carry very strong presumptions of reasonableness to the arbitral and judicial fora.¹⁶¹ Therefore, regardless of whether there is personal bias on the part of any given trustee, the decision model for withdrawal liability determinations incorporates structural bias of sufficient magnitude to raise serious procedural due process concerns.¹⁶² The heavy presumptions in favor of the correctness of the plan's, and later the arbitrator's, factual determinations may compound the problem, because a decision maker's behavior is no doubt affected by foreknowledge of the kind of review to which its decisions are to be subjected. At the very least, these presumptions do nothing to assuage uneasiness about the system's unfairness.

2. Judicial Analysis of MPPAA's Structural Bias

The United States Court of Appeals for the Fourth Circuit first considered a procedural due process challenge based on alleged structural bias in *Republic Industries, Inc. v. Teamsters Joint Council No. 83*.¹⁶³ The court rejected the challenge for several reasons and upheld MPPAA's dispute resolution system. First, the Fourth Circuit stated that the trustees' fiduciary duties do not create a facially unfair bias. Describing the allegation of trustee bias as "little more than 'generalized assumptions of possible interest' unsupported by any evidence other than a description of the institutional role of the trustees," the court indicated that particularized substantiation of the allegation would be necessary.¹⁶⁴ The court emphasized that membership on a plan's board must consist of equal representation from employers and employees, and that they "are fiduciaries and must act as such."¹⁶⁵ And to prohibit tribunals composed of individuals drawn from

160. 29 U.S.C. § 1393(a)(1) (1982).

161. 29 U.S.C. § 1401(a)(3) (1982).

162. See *infra* text accompanying notes 177-219.

163. 718 F.2d 628 (4th Cir. 1983).

164. *Id.* at 640 n.13 (quoting *Schweiker v. McClure*, 456 U.S. 188, 196 (1982)).

165. *Id.* at 640.

organizations interested in the matter being regulated would, the court felt, "deny the tribunal valuable, and perhaps otherwise unavailable, expertise."¹⁶⁶ Second, the court emphasized that the trustees' decision-making function is not totally discretionary, but is subject to some constraints under the statute because (1) they must select one of four calculation formulas or obtain PBGC approval for any other, and (2) their actuarial assumptions must be reasonable in the aggregate.¹⁶⁷ Third, the court observed that the presumptions of correctness merely "shifted the burden of proof to the challenger," and concluded that the review of the plan's liability assessment is not "meaningless."¹⁶⁸

Chronologically, courts in the Second,¹⁶⁹ District of Columbia,¹⁷⁰ Ninth,¹⁷¹ and First¹⁷² Circuits followed *Republic Industries'* rejection of the decision-maker bias claim, tracking the Fourth Circuit's analysis in all important respects. On the question of whether structural bias exists at all, three courts added the observation that the trustees' fiduciary duties to the plan did not impose upon them an absolute duty to choose calculation rules and assumptions producing the highest possible liability for a withdrawing employer.¹⁷³ According to these three courts, the fiduciary status of trustees instead requires them to act neutrally and reasonably.¹⁷⁴ Indeed, in *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, the First Circuit continued this reasoning to the point of arguing that trustees possibly could even be found in violation of their fiduciary duties by imposing liability so unconscionably high as to discourage prospective plan entrants from joining in the future.¹⁷⁵ Ultimately, four of the five circuit courts denied that there was any structural bias at all in the withdrawal liability determination. In *Keith Fulton,*

166. *Id.*

167. *Id.* at 640-41.

168. *Id.* at 641.

169. *Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 725 F.2d 843 (2d Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984).

170. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984).

171. *Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

172. *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137 (1st Cir. 1985), *rev'g en banc*, 762 F.2d 1124 (1st Cir. 1984).

173. *Keith Fulton*, 762 F.2d at 1142; *Thompson Bldg. Materials*, 749 F.2d at 1404; *Washington Star*, 729 F.2d at 1511.

174. *Keith Fulton*, 762 F.2d at 1142; *Thompson Bldg. Materials*, 749 F.2d at 1403; *Washington Star*, 729 F.2d at 1511.

175. *Keith Fulton*, 762 F.2d at 1142-43. The First Circuit based this argument on the statement in MPPAA's legislative history that the choice by trustees of a calculation rule that eliminates or reduces a withdrawing employer's liability would not be a per se violation of their fiduciary duty to the plan. See H.R. REP. NO. 869(I), *supra* note 123, at 67, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 2935.

however, the First Circuit did admit the presence of such bias but concluded that it is not of sufficient magnitude to violate due process.¹⁷⁶

The reasoning of *Republic Industries* and its progeny is troubling in some ways. As Justice Scalia, paraphrasing Churchill, recently said in a different context, the courts' supporting statements "contain much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true."¹⁷⁷

The Fourth Circuit's first point, that the trustees' fiduciary status creates no meaningful bias, is questionable as a factual proposition. What this group of courts apparently would require to support a claimed lack of decision-maker impartiality is either direct proof of subjective personal bias, or at least strong evidence of a personal stake in particular outcomes so as to compel an inference of subjective personal bias. There is no question that this kind of evidence usually would lead to a conclusion that procedural due process standards have been infringed, but *structural bias* should also count. Indeed, subjective personal bias probably produces skewed results over time to a lesser extent than the kind of structural or institutional bias apparently present in MPPAA trustee decision making. Moreover, determining whether subjective personal bias exists involves a fact-finding process that is far less reliable than the process of identifying structural bias, because the former is less susceptible of substantiation and more easily disguised than the latter.

The First Circuit's additional rationale for finding no bias in *Keith Fulton* may be a true statement, but its relevance is tenuous. The court stated that the trustees' fiduciary obligations do not require them to impose the highest possible liability, and that they might actually violate their duties if they imposed such great liability on a withdrawing employer as to dissuade other employers as prospective plan entrants.¹⁷⁸ Although perhaps true in the abstract, it is difficult to envision such an occurrence because proving a causal connection between trustee action and later nonentry would be practically impossible. Even if true, however, the argument proves little. It requires a quantum leap to get from (a) a bias-produced surcharge on withdrawal liability that is large enough to harm a withdrawing employer to (b) a similarly actuated liability increment that is so unconscionably high as to harm the plan in the long term by discouraging future entry. Moreover, future entry might even be stimulated by the prospect of a plan less encumbered by underfunded vested benefits.

In the Fourth Circuit's second point, which emphasized that the trustees do not act with completely unbridled discretion, the court could be interpreted as saying that a tribunal can be viewed as impermissibly biased only when its discretion is limitless. This, of course, is just not true, and it is doubtful that the

176. *Keith Fulton*, 762 F.2d at 1143.

177. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1399 (1989) (Scalia, J., dissenting).

178. *Keith Fulton*, 762 F.2d at 1142-43.

court really meant such a thing.¹⁷⁹ The nature and extent of limits placed on a decision maker's discretion are no doubt relevant to the question of whether structural bias so tends toward unfair results as to violate due process. But a slight limitation on the discretion of a decision maker will not suffice to cure structural bias that otherwise is manifestly unfair. What the court surely must have meant is that the constraints imposed by MPPAA on the discretion of plan trustees were *substantial enough* to overcome any possible structural bias, a bias which the Fourth Circuit and the other courts in this group thought nonexistent or trivial in any event. The contrary position is, however, quite tenable. The limits MPPAA does impose on the discretion of plan trustees leave room for a great deal of judgmental latitude, so much so that whatever structural bias exists in the system is insufficiently arrested.

The third reason for rejecting the employer's claim of a predisposed tribunal, that the statute's presumptions of correctness merely shift the burden of proof to the employer, is an indisputably true statement. Because of the virtual *ex parte* nature of the initial determination by the plan,¹⁸⁰ the subsequent arbitration proceeding possibly should not be characterized as a *review* at all. Thus, one can view the presumptions in favor of the plan's liability calculation as creating a reverse burden of proof in the first instance rather than a burden of demonstrating error to a reviewing body.¹⁸¹ Even if this is an accurate characterization of the

179. Constitutionally impermissible decision-maker bias has been found despite the existence of checks on the decision maker's discretion. One example is *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), discussed *infra* at text accompanying notes 188-89, in which a due process violation was found in the system by which a mayor levied fines as a judge in traffic cases and also exercised substantial authority over a city budget that depended heavily on revenue from such fines, the mayor's discretion as a judge was constrained both by the standards inherent in applicable traffic laws and by appellate review.

Although it would seem that the court in *Republic Industries* could not really have meant that only "unbridled" discretion in the hands of a structurally biased decision maker would violate due process, this same language was used by another court in upholding MPPAA's decision process. See *Keith Fulton*, 762 F.2d at 1141. Although the other courts upholding MPPAA would not admit of any bias at all on the part of trustees, it is interesting to note that the court in *Keith Fulton* accepted the argument that some bias was present. This court, then, seems to have been of the view that some degree of structural bias is permissible even in the presence of very great discretion.

180. The plan's board of trustees calculates withdrawal liability, notifies the employer, and demands payment on an installment schedule. 29 U.S.C. § 1399(b)(1) (1982). Within ninety days after being notified of the liability amount, the employer may ask the plan to review its assessment. 29 U.S.C. § 1399(b)(2)(A) (1982). After a "reasonable review," the plan notifies the employer of its final determination. 29 U.S.C. § 1399(b)(2)(B) (1982).

181. Rather than treating MPPAA's presumptions as a purely procedural burden-of-proof reversal, one court reviewed the presumptions under the rational basis standard of substantive due process. See *Keith Fulton*, 762 F.2d at 1143-44. Not surprisingly, because of the ease with which rationality may be demonstrated in almost any modern regulatory measure affecting only property rights, the presumptions were upheld as a logical means of expediting dispute resolution within a federal program. *Id.* The court in *Keith Fulton* probably characterized the presumptions incorrectly and applied the wrong standard. See *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 137, 141 (3d Cir. 1986), *aff'd by an*

presumptions, however, it proves little. There are many possible degrees of presumption and contrary proof in legal decision processes, and a degree that is appropriate in the case of an initial decision maker without any hint of bias is not necessarily appropriate for one with demonstrable incentives to favor one of two participants in a zero-sum game.

MPPAA's procedures and presumptions finally did encounter a measure of judicial resistance. A panel of the First Circuit in *Keith Fulton* followed some aspects of the foregoing critical analysis to find the structural bias and presumptions of MPPAA to be violative of procedural due process.¹⁸² After a rehearing *en banc*, however, the full court followed the other four circuits and rejected the employer's due process challenge.¹⁸³ In 1986, however, the United States Court of Appeals for the Third Circuit, in *United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, concluded that the structural bias and presumptions attending the withdrawal liability determination create a decision system fundamentally flawed by unfairness.¹⁸⁴ The court also found, however, that this bias does not taint the process beyond repair. With adequate review, the court concluded, the existing system would be valid. Further finding the system of presumptions and review to be severable from the remainder of the statute, the court removed them and produced a scheme in which plans make determinations as before but are now subject to *de novo* review in arbitration.¹⁸⁵ The decision was then affirmed by an equally divided Supreme Court, which of course creates no high court precedent and leaves the system partially void only in the Third Circuit.¹⁸⁶

3. An Elaboration on the Constitutional Status of Structural Bias

It is not entirely clear how important the occurrence of a purely structural bias will be in procedural due process examinations of nonconsensual regulatory dispute resolution. Until recently, the Supreme Court's decisions seemed to view such bias with great suspicion. In *Tumey v. Ohio*, a unanimous 1927 decision written by Chief Justice Taft, the Court found constitutionally deficient a procedure by which a town's mayor received, as compensation for services as a judge in prohibition law cases, the court costs assessed against convicted

equally divided Court sub nom. Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987).

182. 762 F.2d 1124 (1st Cir. 1984), *rev'd en banc*, 762 F.2d 1137 (1st Cir. 1985).

183. 762 F.2d 1137 (1st Cir. 1985), *rev'g en banc*, 762 F.2d 1124 (1st Cir. 1984).

184. 787 F.2d 128 (3d Cir. 1986), *aff'd by an equally divided Court sub nom.* Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987).

185. 787 F.2d at 142-44.

186. *United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd by an equally divided Court sub nom.* Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987).

defendants.¹⁸⁷ *Tumey*, of course, involved a decision maker with such a striking personal stake in the outcome of its decisions that the case is not especially helpful in guiding the resolution of really close due process questions. Almost fifty years later, in *Ward v. Village of Monroeville*, the Court again found a due process violation in the operation of Ohio's mayor's court system, this time on the basis of an exclusively structural bias.¹⁸⁸ The mayor served not only as the municipality's executive officer with budget execution authority, but also as judge of the municipal court that heard cases involving certain traffic offenses and city ordinance violations. Fines collected by this court accounted for about forty percent of the town's total revenue. Although there was no evidence of subjective personal bias or individual stake in particular outcomes, the Court found that the structural bias indigenous to such a system contravened the right to an impartial tribunal. The stake of the mayor in *Ward* appears to be neither greater nor more direct than that of the plan trustees under MPPAA. Because the cases heard by the mayor's court were criminal in nature, however, *Ward* admittedly involved stronger private interests than are found in the decision-making processes of MPPAA and most other regulatory programs.¹⁸⁹

The next year after *Ward* the Court extended its concern about structural bias to the regulatory realm in *Gibson v. Berryhill*.¹⁹⁰ There the Court held that procedural due process was violated by the decision of a State Board of Optometry revoking the licenses of "all optometrists in the State who were employed by business corporations." The action was invalidated because the Board of Optometry consisted solely of self-employed optometrists in private practice, those whose licenses were revoked accounted for almost one-half of all practicing optometrists in the state, and the Board's action could result in personal gain to Board members because of reduced competition.¹⁹¹ In one sense, the personal stake of plan trustees in withdrawal liability decisions is not as direct as the stake of the Optometry Board members. The stake of *employer* representatives on a plan's board of trustees is vicarious because the possible benefits of their decisions redound to their employers, whereas the stake of Optometry Board members was not merely vicarious because they were self-employed practitioners and would personally receive the benefits of lessened competition. On the other hand, the position of *employee* representatives on a plan's board of trustees more closely approximates that of Optometry Board members because they and the group they

187. 273 U.S. 510 (1927).

188. 409 U.S. 57 (1972).

189. In this regard, however, the comments of Judge Aldrich, who dissented in *Keith Fulton*, are interesting: "The court does not seek to distinguish *Ward* as being a criminal case, but if one did, I would ask what would one prefer to have decided by a biased decision-maker, a traffic fine or a \$468,000 assessment? This is financial life." *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137, 1150 (1st Cir. 1985), (Aldrich, J., dissenting), *rev'g en banc*, 762 F.2d 1124 (1st Cir. 1984).

190. 411 U.S. 564 (1973).

191. *Id.* at 578-79.

represent directly benefit from the actualization of their bias. One may look at the comparison between plan trustees and Optometry Board members from an entirely different perspective, however: current payments on account of a withdrawal liability assessment *immediately* reduce unfunded vested benefits and the corresponding risk to both the employers and employees represented by plan trustees, whereas the benefit to Optometry Board members must work its way through the market and is subject to the vicissitudes of competition. Viewed in this way, the stake of plan trustees is at least as direct as that of Optometry Board members.

Because of the *ex parte* nature of the trustees' liability determination, coupled with the somewhat questionable view of their role as entailing little or no discretionary judgment, several courts have characterized the withdrawal liability decision of pension plan trustees as more closely akin to a prosecutorial exercise rather than an adjudicatory one.¹⁹² The subsequent decision of the arbitrator obviously is adjudicatory, but that is not where the alleged bias exists. If we do in fact identify the plan's decisions as quasi-prosecutorial, the presence of purely structural bias may be less likely to offend current Supreme Court thinking on the extent to which such bias can be tolerated. In the past decade, the Court seems to have evidenced less concern about structural bias, especially in situations where the questioned decisions are not obviously of a traditional adjudicatory character.¹⁹³

192. See *Republic Industries*, 718 F.2d at 640 n.13, where the court noted that plan trustees perform a function that is not purely adjudicatory, but instead "play a mixed role since much, but admittedly not all, of their task is ministerial in nature." This observation was based, however, on the court's unconvincing position that trustees exercise little discretionary judgment. See also *Thompson Bldg. Materials*, 749 F.2d at 1404 (following the conclusion and supporting rationale of *Republic Industries* on this point).

See also *Keith Fulton*, 762 F.2d at 1140, where the court stated that it did "not perceive the trustees to be performing an adjudicatory role when they calculate the withdrawal liability." In so characterizing the trustees' function, however, the court in *Keith Fulton* seemed to view the performance of an "adjudicatory" role as being exclusively the province of judges. This, of course, is not the case at all. Many nonjudicial decision makers perform obviously adjudicatory functions.

193. It must be noted that not everyone shares in the perception of the trustees' function as nonadjudicatory. In *United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 141 n.18 (3d Cir. 1986), *aff'd by an equally divided Court sub nom.* *Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc.*, 107 S. Ct. 2171 (1987), the court felt compelled to "reject the suggestion, advanced tangentially by the majority in *Keith Fulton*, that the trustees' role is not adjudicative in nature. The trustees perform the judicial task of making case-by-case determinations significantly affecting the property of employers." The court contrasted the facts in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), discussed *infra* at text accompanying notes 194-202. The court observed that in *Jerrico* the Supreme Court's identification of the decision maker's function as prosecutorial rather than judicial was based on the finding that he "rules on no disputed factual or legal questions." *Jerrico*, 446 U.S. at 247. In *Yahn & McDonnell*, on the other hand, the court said that plan trustees "must frequently make complex legal and factual determinations." 787 F.2d at 141 n.18.

In *Marshall v. Jerrico, Inc.*,¹⁹⁴ the due process issue focused on the procedure for collecting fines under the Fair Labor Standards Act.¹⁹⁵ The unit of the Labor Department responsible for assessing such fines, the Employment Standards Administration (ESA), retains the fines to cover the costs of determining violations and fixing penalties. These funds are then distributed to the ESA's regional offices, the point in the organization where an assistant regional administrator makes the actual fine assessment. The Court rejected the contention that this system created an impermissible risk of bias by encouraging assistant regional administrators "to make unduly numerous and large assessments of civil penalties."¹⁹⁶ The Court concluded that the assistant regional administrator's duties "resemble those of a prosecutor more closely than those of a judge,"¹⁹⁷ because of the fact that his authority extended only to the assessment of fines and his determination of the appropriate amount was appealable to an administrative law judge.¹⁹⁸ Because of the quasi-prosecutorial nature of the assistant regional administrator's duties, the Court felt that the strict standards of *Tumey* and *Ward* were inapplicable.¹⁹⁹ The Court then emphasized two characteristics of the challenged decision model that provided further support for its conclusion that no impermissible decision-maker bias existed. First, the assistant regional administrator's salary was fixed by law, so that he personally could not benefit economically from his decisions.²⁰⁰ Second, the amounts received as fines represented substantially less than one percent of ESA's budget, and were allocated to regional offices on the basis of expenses incurred rather than fines collected.²⁰¹ Thus, the Court found no meaningful probability that the decision maker's judgment would be distorted by the prospect of institutional gain.²⁰²

The structural bias inherent in the MPPAA withdrawal liability assessment procedure is more direct and of greater magnitude than that present in the system examined in *Jerrico*. This distinction, plus the fact that the Court elsewhere has shown that it is at least possible for structural bias in the design of an assessment or quasi-prosecutorial decision system to be serious enough to offend due process,²⁰³ still leaves some room for doubt about the validity of an MPPAA-

194. 446 U.S. 238 (1980).

195. Fair Labor Standards Act, § 16(e), 29 U.S.C. § 216(e) (1982).

196. 446 U.S. at 241.

197. *Id.* at 243.

198. 29 C.F.R. §§ 579, 580 (1988).

199. 446 U.S. at 243.

200. *See* 5 U.S.C. § 5332 (1982).

201. 446 U.S. at 245.

202. *Id.* at 250.

203. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), three defendants were enjoined by a federal district court from infringing a trademark. After subsequently discovering that the defendants continued to infringe the trademark in violation of the injunction, two attorneys for the trademark owner requested that the district court appoint them as special counsel to prosecute a criminal contempt action against defendants. The court did so and the defendants ultimately were

type model. *Jerrico* does make it clear, however, that evidence of a purely structural bias must rise to a much higher level to support a claimed due process violation in this kind of decision system than in a system with more traditional adjudicatory characteristics.

In the past decade, evidence of diminished concern over structural bias can even be found in two of the Court's decisions scrutinizing regulatory decision systems that possess more adjudicatory properties than exist in the MPPAA trustee determination. In *Schweiker v. McClure*,²⁰⁴ the Court analyzed the Medicare scheme for federal reimbursement of insurance carriers. The Secretary of Health and Human Services, who is responsible for administering the payment of Medicare claims, pays insurance carriers to perform the claims review function.²⁰⁵ An oral hearing may be held when a claim over \$100 is denied by the carrier and a written appeal is unsuccessful.²⁰⁶ The hearing in such a case is conducted by a hearing officer appointed by and completely answerable to the carrier. At the time of the decision in *Schweiker*, there was no right of appeal from the hearing officer's determination.²⁰⁷ Even though a person who actually participated in the case prior to the hearing was not permitted to serve as a hearing officer, as of the time of trial five out of the seven past and present hearing officers for the carrier involved in this case were its former or current employees.²⁰⁸ The district court agreed with a procedural due process challenge based on alleged decision-maker bias and found the system unconstitutional.²⁰⁹ The lower court's primary theme was structural bias. The court viewed hearing officers as having a pecuniary interest in pleasing the carriers they serve because, even though they are paid with government funds, their incomes as hearing officers depend entirely on whether and how often the carrier requests their services.²¹⁰ In every case brought before a hearing officer, the court emphasized, the carrier has already denied the claim twice, thus strengthening an already-forged link between carrier and hearing officer that creates an intolerable risk of

convicted and sentenced to jail terms. The Supreme Court reversed the convictions on the basis of its view that the district court's appointment of an interested prosecutor violated procedural due process. The private interest in this case clearly was a fundamental one deserving greater procedural protection than the property interest of withdrawing employers under MPPAA, but the case does at least stand for the proposition that prosecutor bias is something that matters, even where there is no evidence of subjective personal bias. *Id.*

204. 456 U.S. 188 (1982).

205. 42 U.S.C. § 1395(u)(a) (1982).

206. *Id.* at § 1395(u)(b).

207. Subsequently, Congress amended the statute to permit an appeal from the hearing officer to an administrative law judge in the case of claims exceeding \$500, with judicial review available for claims exceeding \$1,000. 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)).

208. 456 U.S. at 193.

209. *McClure v. Harris*, 503 F. Supp. 409, 414-15 (N.D. Cal. 1980), *rev'd sub nom. Schweiker v. McClure*, 456 U.S. 188 (1982).

210. 503 F. Supp. at 415.

decision-maker bias.²¹¹ The Supreme Court, however, found no due process violation.²¹² Noting that the plaintiffs made no claim of actual personal bias and did not seek to disqualify their individual hearing officers, the Court detected insufficient structural bias to warrant blanket disqualification.²¹³ Because it was the federal government that paid the claims, rather than the carriers, the Court saw no carrier pecuniary interest in particular outcomes and without a *primary* source of bias thought it illogical to argue that hearing officers possess a *derivative* bias.²¹⁴ In addition, the Court found no primary source of structural bias in the Secretary's efforts to help carriers identify possible overbillers and to warn them to control overutilization of medical services.²¹⁵ The Court thus rejected a line of reasoning to the effect that the Secretary himself was biased in favor of inadequate awards, his warnings to carriers about controlling overutilization created unfair incentives for carriers to minimize awards, and the carriers' incentives improperly influenced hearing officers.²¹⁶ In *Friedman v. Rogers*,²¹⁷ the Court upheld against equal protection and free speech challenges a state statute prohibiting optometrists from practicing under a trade name. The statute had been the culmination of a long-standing economic and political struggle between "professional" and "commercial" optometrists, the latter group consisting of salaried optometrists usually employed by firms not only providing optometric services but also manufacturing lenses and selling and fitting frames. The plaintiff, a commercial optometrist, also challenged a portion of the statute requiring that a majority of the members of the Texas Optometry Board be members of the Texas Optometric Association. The Board has broad authority to regulate the practice of optometry in the state, including enforcement of the professional responsibility code. The code included the trade-name prohibition, which was aimed at commercial optometrists. The Association is an organization of "professional," or self-employed, optometrists. As part of his challenge to the statute, the commercial optometrist claimed that, with a majority of its members representing professional optometrists, the Board would be inherently biased when conducting disciplinary proceedings against commercial optometrists. Observing

211. *Id.* at 414-15.

212. 456 U.S. at 195-97.

213. *Id.* at 195.

214. *Id.* at 196-97.

215. *Id.* at 196 n.9.

216. *Id.* As a secondary theme, the district court had examined the need for additional procedural protection under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and concluded that the private interest of claimants weighed heavily enough in the equation to require a hearing before an administrative law judge either before or after a hearing officer's determination. *McClure v. Harris*, 503 F. Supp. 409, 415 (N.D. Cal. 1980), *rev'd sub nom.* *Schweiker v. McClure*, 456 U.S. 188 (1982). The Supreme Court also disagreed with the position that additional safeguards were needed to reduce the risk of erroneous deprivation, specifically repudiating the lower court's finding that hearing officers were unqualified to conduct hearings. *Id.* at 198-99.

217. 440 U.S. 1 (1979).

that the plaintiff himself was not the subject of a disciplinary proceeding, the Court refused to consider the claim of decision-maker bias because there was no opportunity to examine in a particular context the possibility that members of the Board might have personal interests that precluded a fair hearing.²¹⁸ Although couched in terms of standing, the Court's refusal to hear a facial challenge to the structure of the Board clearly minimizes the importance of a purely structural bias.

Designers of nonconsensual arbitration or other ADR mechanisms in the regulatory setting must recognize that, if an MPPAA-type system were found to offend procedural due process because of structural bias, all available solutions necessarily would involve trade-offs. Moreover, even if structural bias in any such system survives constitutional challenge, the system is not likely to enjoy full user acceptance. Whether constitutionally required or not, sound dispute resolution system design demands a perception of fairness, especially when the procedure is neither bargained-for nor selected from a menu of alternatives. If interested parties, such as plan trustees, must be used as initial decision makers in order to bring necessary expertise to bear, the potential constitutional infirmity can be remedied by granting the reviewing entity greater latitude to examine factual determinations. This modification may or may not make an MPPAA-type procedure completely fair, but it would make it fairer than the present MPPAA system, and surely would make it constitutional. To thoroughly purge the procedure of partiality would require removal of interested parties from the initial decision level. A true adversary proceeding in the first instance before an arbitrator, to whom actuaries and other experts would be directly answerable, is one possible alternative. Either of these modifications no doubt would reduce the efficiency of the decision process, but fairness rarely fails to come at the expense of expediency.²¹⁹

VI. COMMODITY FUTURES BROKER-CUSTOMER ARBITRATION

A. Dispute Resolution Alternatives Under the Commodity Exchange Act

In 1974 Congress passed the Commodity Futures Trading Commission Act, which substantially altered the Commodity Exchange Act's (CEA) design for regulation of trading in commodity futures, options, and leverage contracts.²²⁰ The 1974 Act created the Commodity Futures Trading Commission (CFTC) as an independent administrative agency with extensive regulatory jurisdiction over trading practices, contract markets (i.e., commodity exchanges), and commodity

218. *Id.* at 17-20.

219. See *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) ("[P]rocedural due process is not intended to promote efficiency . . ."). See also *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (procedural safeguard must be provided "if that may be done without *prohibitive* cost") (emphasis added).

220. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended at 7 U.S.C. §§ 1-24 (1982)).

futures professionals.²²¹ Further amendments in 1978²²² and 1982²²³ accomplished several changes in the CFTC's jurisdiction and regulatory authority.

One very significant aspect of these changes in commodity regulation has been the creation of innovative resolution procedures for disputes between commodity futures professionals and their customers. Commodity futures professionals include futures commission merchants (the commodity futures counterpart of the securities broker-dealer), associated persons, floor brokers, introducing brokers, commodity trading advisors, and commodity pool operators.²²⁴ In this discussion, the popular term "broker" is sometimes used generically to describe all commodity futures trading professionals. Today a customer has several fora available for resolution of disputes with professionals. As alternatives to federal court actions for alleged violations of the anti-fraud provisions of the CEA,²²⁵ or suits in state court for common-law claims or alleged violations of state statutes,²²⁶ the customer now has the option of using an administrative reparations proceeding within the CFTC or binding arbitration.

An administrative reparations proceeding is limited to customer claims based on alleged violations of the CEA or CFTC regulations, and cannot entertain a customer's state-law claims.²²⁷ The CFTC's decision-making authority in a

221. 7 U.S.C. § 4(a) (1982).

222. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (1978) (codified as amended at 7 U.S.C. §§ 1-24 (1982)).

223. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1982) (codified as amended at 7 U.S.C. §§ 1-24 (1982)).

224. See Raisler & Geldermann, *The CFTC's New Reparation Rules: In Search of a Fair, Responsive, and Practical Forum for Resolving Commodity-Related Disputes*, 40 BUS. LAW 537, 538 n.5 (1985); Horwitz & Gilberg, *Introducing Brokers Under the Commodity Exchange Act: A New Category of Commodity Professionals*, 40 WASH. & LEE L. REV. 907 (1983); Rosen, *Regulation of Commodity Pool Operators Under the Commodity Exchange Act*, 40 WASH. & LEE L. REV. 937 (1983).

225. 7 U.S.C. § 6 (1988). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), the Supreme Court recognized an implied private right of action for violations of the CEA. The private right of action has since been codified at 7 U.S.C. § 25 (1988).

In such a case, a federal district court may also decide state common-law and statutory claims pursuant to its pendent jurisdiction, if the federal and state claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

226. See, e.g., *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67, 510 N.E.2d 840 (1987) (claims of fraud and breach of fiduciary duty under both common law and state deceptive practices statute); *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174 (Iowa 1987) (claim of unauthorized trading); *McCracken v. Conticommodity Servs., Inc.*, 755 P.2d 454 (Colo. Ct. App. 1988) (claim of negligence in trading); *Dean Witter Reynolds, Inc. v. Hammock*, 489 So.2d 761 (Fla. Dist. Ct. App. 1986) (claim of breach of contract for provision of brokerage services).

227. See 7 U.S.C. § 18(a) (1988), which reads:

Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation.

reparations proceeding does, however, encompass common-law counterclaims asserted by a commodity futures broker, as occurs when the latter seeks to recover a negative customer account balance. A constitutional challenge to the CFTC's practice of deciding the broker's common-law counterclaims was made in *Commodity Futures Trading Commission v. Schor*.²²⁸ The basis for the challenge was that administrative resolution of pure common-law counterclaims violates article III of the Constitution by permitting nonjudicial resolution of issues that are properly determined only in a judicial forum.²²⁹ The Supreme Court rejected the article III challenge and upheld the practice.²³⁰ Extensive treatment of the article III issue is reserved for the subsequent discussion of FIFRA data arbitration, because of the centrality of the issue to that arbitration program.²³¹

It bears noting at this point, however, that the Supreme Court found the guarantee of article III to include two components: personal and structural. The personal component consists of a non-absolute right to "an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States."²³² The Court found that Schor, the customer, had waived this personal right by insisting upon use of the reparations proceeding and fully participating in it, raising the article III objection only after the proceeding had reached a conclusion with which he was dissatisfied.²³³ The structural component, having its roots in the separation of powers doctrine, consists of a flexible and somewhat limited protection of the integrity of the judiciary against undue encroachment by the legislative or executive branches.²³⁴ The Court also found that the reparations procedure did not run afoul of this article III component, because the procedure forms a small but integral part of a comprehensive federal regulatory scheme that is clearly within the power of Congress and because the claimant retains the choice of federal or state court adjudication as alternatives to the administrative reparations forum.²³⁵

228. 478 U.S. 833 (1986).

229. Article III of the Constitution provides that "(t)he judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish ..." and provides that these federal courts shall be staffed by judges who hold their offices during good behavior and whose compensation shall not be diminished during their tenure in office. U.S. CONST. art. III, § 1.

230. 478 U.S. at 859.

231. See *infra* text accompanying notes 443-531.

232. 478 U.S. at 848.

233. *Id.* at 849.

234. *Id.* at 850-51.

235. *Id.* at 855.

B. Context and Properties of the Arbitration Program

Section 5a(11) of the 1974 Act, as amended in 1982, also requires all commodity exchanges to "[p]rovide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof."²³⁶ This section further specifies that the use of any such dispute resolution mechanism must be voluntary on the part of the customer.²³⁷ Congress explicitly made the customer's use of any ADR procedure voluntary, but said nothing about the consensual or nonconsensual nature of the commodity professional's participation. Looking solely to the statutory language, one legitimately could ask whether a commodity exchange or registered association would comply with the statute by designing an ADR system the use of which is voluntary by both the professional and the customer. In its regulations, the CFTC has interpreted section 5a(11) as requiring creation of an ADR procedure in which the professional must participate if initiated by the customer.²³⁸ Congress has concurred in this interpretation.²³⁹ Consequently, disputes between commodity professionals and their customers are subject to ADR procedures that are nonconsensual from the professional's perspective.

Although section 5a(11) and the CFTC's implementing regulations speak broadly of *any* "fair and equitable" dispute resolution procedure, citing arbitration only as an example,²⁴⁰ the regulations clearly envision arbitration as the preferred method.²⁴¹ All of the commodity exchanges have, in fact, responded to the CFTC's mandate by implementing arbitration programs.²⁴² In addition to exchange-sponsored arbitration, the exchanges can comply with the statute and regulations by permitting customer-initiated access to an arbitration program sponsored by the National Futures Association (NFA), the industry's only

236. 7 U.S.C. § 7a(11) (1988).

237. *Id.*

238. 46 Fed. Reg. 57,457 (1981).

239. Congress expressly stated that its 1982 amendments to the CEA "[do] not affect the existing requirement that the use of arbitration by the customer is voluntary or the *Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue.*" H.R. REP. NO. 565, 97th Cong., 2d Sess. 56 (1982) (emphasis added). *See also* Geldermann, Inc. v. Commodity Futures Trading Comm'n., 836 F.2d 310, 314 (7th Cir. 1987) (Congress intended to require exchange members to submit to customer-initiated arbitration), *cert. denied*, 109 S. Ct. 54 (1988).

240. 7 U.S.C. § 7a(11) (1988).

241. *See* 17 C.F.R. § 180.2 (1988) (describing a procedure having the earmarks of arbitration); *Id.* at § 180.3 (specifically referring to arbitration in provisions regulating content of professional-customer agreement so as to insure voluntariness on customer's part).

242. *See Note, Dispute Resolution in Commodities Futures*, 12 FORDHAM URB. L.J. 175, 181 n.73 (1984).

registered futures association.²⁴³ The latter may actually possess several advantages for the customer over exchange-sponsored arbitration. For instance, a customer can compel a commodity futures professional to submit to exchange-sponsored arbitration only when the professional is a member of that particular exchange and the complaint relates to a transaction within the exchange's jurisdiction.²⁴⁴ Therefore, exchange-sponsored arbitration is not a viable choice for a customer complaining about conduct of the professional that relates to transactions in two or more different commodities not all of which are traded on that exchange.²⁴⁵ Arbitration sponsored by the NFA, on the other hand, can be compelled with respect to any professional who is a member of that national association.²⁴⁶ All commodity futures commission merchants are required by statute to belong to NFA,²⁴⁷ and other categories of commodity futures professionals usually must be NFA members as a practical matter because commission merchants cannot deal with them otherwise.²⁴⁸ Therefore, a customer normally can compel any professional to participate in NFA-sponsored arbitration.

Review of commodity futures broker-customer arbitration apparently is limited to the same nonsubstantive grounds available for review of consensual arbitration. In the case of both exchange-sponsored and NFA arbitration, CFTC regulations provide that the award "shall be final."²⁴⁹ "The only right of appeal" is then identified as being that "provided under applicable law."²⁵⁰ The CFTC's evident intent is to incorporate the review provisions of either the Federal Arbitration Act or the pertinent state arbitration statute, which, as discussed earlier, generally permit judicial review only for serious arbitrator misconduct or gross procedural error.

243. See 7 U.S.C. § 7a(11) (1988); 17 C.F.R. § 170.8 (1988). See also Note, *supra* note 242, at 188 & n.148.

244. CFTC regulations relating to nonconsensual arbitration provide:

The term "claim or grievance" as used in this part shall mean any dispute which arises out of any transaction on or subject to the rules of a contract market, executed by or effected through a member of that contract market or employee thereof which dispute does not require for adjudication the presence of essential witnesses or third parties over whom the contract market does not have jurisdiction and who are not otherwise available. . . .

17 C.F.R. § 180.1(a) (1988).

245. See Note, *Dispute Resolution in Commodities Futures*, *supra* note 242, at 185.

246. *National Futures Ass'n, Arbitration: A Way to Resolve Commodity-Related Disputes* 3 (1989).

247. 7 U.S.C. § 21m (1988).

248. *National Futures Ass'n, Bylaw* 1101 (1989).

249. 17 C.F.R. § 180.2(f) (1988) (exchange-sponsored arbitration); 17 C.F.R. § 170.8 (1988) (incorporating same conditions and limitations for NFA arbitration as for exchange-sponsored arbitration). In the case of exchange-sponsored arbitration, the regulations also specifically prohibit any review within the exchange itself. 17 C.F.R. § 180.2(f) (1988).

250. 17 C.F.R. § 180.2(f) (1988). See also 17 C.F.R. § 170.8 (1988).

C. Encroachment on Article III Judicial Power

The only significant constitutional challenge to the nonconsensual arbitration of the CEA and its implementing regulations was made in *Geldermann, Inc. v. Commodity Futures Trading Commission*.²⁵¹ The basis for the challenge was the same as that leveled at the CFTC administrative reparations procedure in *Schor*, namely, that compelling a party to submit to a nonjudicial tribunal for resolution of private damage claims violates article III of the Constitution. Again, detailed analysis of the article III issue is reserved for Part VII's discussion of FIFRA data arbitration.²⁵² Briefly, however, the United States Court of Appeals for the Seventh Circuit in *Geldermann* tracked very closely the Supreme Court's reasoning in *Schor*. Unlike *Schor*, where a customer challenged the constitutionality of the reparations procedure, in *Geldermann* the commodity futures professional raised the article III challenge to arbitration. The court of appeals found two reasons for concluding that *Geldermann* had waived its personal right to an adjudication by an article III court. First, as a member of the commodity exchange sponsoring the arbitration (the Chicago Board of Trade), *Geldermann* was party to a membership agreement that incorporated various regulations, including those mandating arbitration.²⁵³ The court viewed such agreement as sufficient for waiver of the article III right despite the fact that the exchange rules included the arbitration program because of a government mandate and that membership in such an exchange was a practical economic necessity.²⁵⁴ Second, the court found an independent basis for waiver in *Geldermann's* participation in the arbitration program and belated assertion of the article III challenge only after losing in arbitration.²⁵⁵ With respect to the structural component of article III, the court of appeals also found no unconstitutional infringement of the judicial power.²⁵⁶ In reaching this conclusion, the court followed the reasoning of both *Schor* and *Thomas v. Union Carbide Agricultural Products Co.*²⁵⁷ *Thomas* involved an Article III challenge to the FIFRA data arbitration program, and is analyzed in detail in Part VII. C.²⁵⁸

251. 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 54 (1988).

252. *See infra* text accompanying notes 443-531.

253. 836 F.2d at 316-18.

254. *Id.* at 318.

255. *Id.* at 321.

256. *Id.* at 322-23.

257. 473 U.S. 568 (1985).

258. *See infra* text accompanying notes 443-99. In *Geldermann*, the Seventh Circuit also dismissed a challenge based on the right to jury trial. The court held that the right of trial by jury is subsidiary to the right to an adjudication by an Article III court. Thus, if there is no right to an Article III tribunal, there can be no right to trial by jury. 836 F.2d at 323-24.

VII. FIFRA DATA COMPENSATION ARBITRATION

A. Context and Properties

1. The Role of Safety and Health Data in Pesticide Regulation

The production, sale, and use of pesticides creates a classic economic-environmental dilemma. According to conventional wisdom, pesticides are critical to agricultural productivity.²⁵⁹ These same chemicals, on the other hand, can present profound risks to the environment.²⁶⁰ As a consequence, the regulation of pesticides has assumed an important place on the agendas of state and federal policy makers. Significant federal pesticide regulation began in 1947 with congressional passage of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).²⁶¹ Dealing as it does with issues combining huge economic stakes with emotionally charged concerns about human health and possible harm to an increasingly vulnerable ecosystem, FIFRA's history predictably has been characterized by debate, dissatisfaction, and no small amount of acrimony.

One of the chief points of contention among participants in the ongoing interchange has been the treatment of safety and health data. Historically, a major commitment to research and development (R&D) has been essential to successful development and marketing of pesticides.²⁶² Estimates indicate that 10,000-

259. See S. REP. NO. 838, 92d Cong., 2d Sess. 3 ("Pesticides are essential to man's food supply both as to quality and quantity."), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993, 3995 [hereinafter S. REP. NO. 838]; Brief of the American Chemical Soc'y, et al., as Amici Curiae in Support of Appellee, at 5, 9-10, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (stressing importance of pesticides to productivity). See also MacIntyre, *Why Pesticides Received Extensive Use in America: A Political Economy of Agricultural Pest Management to 1970*, 27 NAT. RESOURCES J. 533, 535-36 (1987) (direct, short-term productivity gains from use of pesticides are substantial, thus leading to rapid expansion in use of pesticides). But see *id.* at 537, 549-54 (productivity gains may be illusory because of hidden, long-term costs).

260. See S. REP. NO. 970, 92d Cong., 2d Sess. 9 (reporting increased evidence of and public concern about the health and environmental hazards of pesticides), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4093-94 [hereinafter S. REP. NO. 970]; Brief of AFL-CIO, et al., as Amici Curiae in Support of Appellant, at 2, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (giving examples of serious health risks from pesticides).

261. Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, 61 Stat. 163 [hereinafter 1947 FIFRA] (codified as amended at 7 U.S.C. §§ 135-135k, later superseded by 7 U.S.C. §§ 136-136y (1988)).

262. See *Monsanto Co. v. EPA*, 564 F. Supp. 552, 555 (E.D. Mo. 1983) (discussing large investment in research and development by pesticide manufacturers), vacated *sub nom.* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); McGarity & Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837, 849 (1980) (acknowledging critical role of research and development in drug and pesticide industry, in context of discussing impact of government disclosure on research and development).

From 1981-1987, aggregate annual expenditures on research and development relating to pesticide screening and registration, for those companies reporting to the National Agricultural Chemicals Ass'n, were as follows: 1981 = \$451.9 million; 1982 = \$509.8 million; 1983 = \$524.4 million; 1984 =

20,000 compounds typically must be screened to find a commercially useful pesticide.²⁶³ Commercialization of a pesticide is not only R&D-intensive, but also requires compliance with regulatory procedures that can be exceptionally expensive. Registration of a pesticide with the Environmental Protection Agency (EPA), which normally demands several years of testing and the filing of a large volume of resulting safety and health data, costs several million dollars per active ingredient.²⁶⁴ In addition to the direct costs of R&D and registration, opportunity costs also are quite high because a period of several years is necessary after discovery of a pesticide compound to meet registration requirements and reach commercialization.²⁶⁵

\$730.6 million; 1985 = \$683.4 million; 1986 = \$685.4 million; 1987 = \$681.9 million. See NATIONAL AGRICULTURAL CHEMICALS ASS'N, 1982 INDUSTRY PROFILE SURVEY 13a (1983) (reporting updated figure for 1981); NATIONAL AGRICULTURAL CHEMICALS ASS'N, 1983 INDUSTRY PROFILE SURVEY 7 (1984) (reporting updated figure for 1982); NATIONAL AGRICULTURAL CHEMICALS ASS'N, 1984 INDUSTRY PROFILE SURVEY 7 (1985) (reporting updated figure for 1983); NATIONAL AGRICULTURAL CHEMICALS ASS'N, 1985 INDUSTRY PROFILE SURVEY 7 (1986) (reporting updated figure for 1984); NATIONAL AGRICULTURAL CHEMICALS ASS'N, 1986 INDUSTRY PROFILE SURVEY 7 (1987) (reporting updated figure for 1985); NATIONAL AGRICULTURAL CHEMICALS ASS'N, 1987 INDUSTRY PROFILE SURVEY 8 (1988) (reporting updated figure for 1986 and preliminary figure for 1987) [the 1982-87 annual surveys are hereinafter referred to collectively as NACA SURVEYS]. Beginning with the 1988 INDUSTRY PROFILE SURVEY, published in 1989, research and development expenditures are no longer reported because of reporting difficulties and consequent doubts about the precision of the figures.

263. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 998 (1984).

264. *Id.* Efficacy data were formerly required in addition to safety and health data. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, § 3(c)(1), 86 Stat. 973, 979 (1972) (codified as amended at 7 U.S.C. § 136a(c)(1) (1988)). EPA urged Congress to permit waiver of efficacy data. H.R. REP. NO. 663, at 59-60, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 2032-33 [hereinafter H.R. REP. NO. 663]. See Schulberg, *The Proposed FIFRA Amendments of 1977: Untangling the Knot of Pesticide Registration*, 2 HARV. ENVTL. L. REV. 342, 355 (1977) [hereinafter Schulberg, *The Proposed FIFRA Amendments*]. Congress did so in § 3(c)(5) of 1978 FIFRA, 7 U.S.C. § 136a(c)(5) (1988). Under its data waiver regulation, EPA subsequently has waived much of the efficacy data that previously were required. 40 C.F.R. § 152.91 (1988).

265. Estimates of the time required to get pesticides to market vary from one source to another. See *Monsanto Co. v. EPA*, 564 F. Supp. 552, 555 (E.D. Mo. 1983) (district court finding that it takes 4-8 years of screening to identify a compound with commercial potential, and an additional 6 years (including 2 years to obtain registration) before bringing the product to market), *vacated sub nom. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Federal Insecticide, Fungicide, and Rodenticide Act: Hearings Before the House Comm. on Agriculture*, 95th Cong., 1st Sess. 321-22 (1977) (statement of John E. Donalds, Dow Chemical U.S.A.) (estimated effective period for a pesticide patent is 7-10 years out of the nominal 17 year period, implying that regulatory delay could be as much as 7-10 years); S. REP. NO. 334, 95th Cong., 1st Sess. 36 (1977) (because of delay caused by registration requirements, effective patent term is only 12 years out of the nominal term of 17 years) [hereinafter S. REP. NO. 334]; NACA SURVEYS, *supra* note 262 (during 1981-87, average time elapsed from discovery of a compound to first full commercial registration was 108 months, or 9 years, a substantial part of which was devoted solely to fulfilling registration requirements). *But see* S. REP. NO. 334, *id.* at 90 (statement of Patricia Wald, Assistant Attorney General) (disagreeing that compliance with registration requirements produces an effective patent period of only 12 years because patent pending period can be substantial).

When the patent on a pesticide expires, or when a similar pesticide can be produced without infringing the patent on the original, competition is to be expected.²⁶⁶ Prior to marketing the pesticide, however, the later producer also must register its product with the EPA. Whether the regulating agency should be permitted to use the previously submitted data in support of the subsequent registration application is one of pesticide regulation's longstanding perplexities. Without such use, a subsequent, or "follow-on," registrant must duplicate the expenditure of several years and several million dollars to develop its own safety and health data. If use of previously submitted data is to be permitted, should the follow-on registrant be required to compensate the original submitter for a portion of the data development costs? And if compensation is to be required, how are disputes over the appropriate amount to be resolved?

Congress has amended FIFRA several times since 1947, the most recent substantial revision occurring in 1978.²⁶⁷ In its latest rendering, the statute adopts the policy of permitting EPA to consider previously submitted data in support of a subsequent registration application for the same or a similar pesticide.²⁶⁸ As a prerequisite to EPA's use of the safety and health data in this way, however, the follow-on registrant must offer to compensate the original data submitter.²⁶⁹ The registration process then proceeds, regardless of whether the parties agree on the amount of compensation.²⁷⁰

The 1978 FIFRA amendments adopted a nonconsensual arbitration system for resolving data-cost compensation disputes. If the parties are unable to agree on

266. It is theoretically possible, of course, to enter the pesticide business by obtaining a license from the patent owner prior to patent expiration. This seems to be an unlikely event, in view of the fact that during the term of a pesticide patent the owner usually will not even sell the active ingredient to a follow-on registrant who wishes to formulate an end product, thus causing the latter to turn to somewhat risky foreign sources. See Rathvon, Cates & Liss, *The Linuron Decision: Impact on Pesticide Registrants, Implications for Data Compensation Disputes Under FIFRA--Generic Pesticide Producers*, 12 CHEMICAL REG. REP. (BNA) No. 46, pt. II, at 1681 (Feb. 17, 1989) [hereinafter Rathvon].

The competition from follow-on registrants can be very meaningful. When a pesticide patent expires, and follow-on registrants are able to manufacture the active ingredient, prices of the end product often decrease substantially. See Brief of Pesticide Producers Ass'n, et al., as Amici Curiae, at 12-14, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (detailing examples of dramatic price decreases in such circumstances).

267. FIFRA was rewritten substantially in 1972. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. §§ 136-136y (1982)) [hereinafter 1972 FIFRA]. Relevant, but relatively minor, amendments were made in 1975. Insecticide, Fungicide, and Rodenticide Act of 1975, Pub. L. No. 94-140, 89 Stat. 751 (codified as amended at 7 U.S.C. §§ 136-136y (1982)) [hereinafter 1975 Amendments]. FIFRA was again rewritten substantially in 1978. Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified as amended at 7 U.S.C. §§ 136-136y (1982)). Other relevant, but again relatively minor, amendments were enacted in 1988. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655. [hereinafter 1988 Amendments].

268. 7 U.S.C. § 136a(c)(1)(D) (1982).

269. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

270. *Id.*

an amount of compensation, their dispute must be submitted to arbitration without any meaningful judicial review. The dispute resolution mechanism of FIFRA, as well as its other data-related provisions, were entangled in litigation focusing mainly on constitutional issues until recently. Indeed, some constitutional questions still linger, although they are not of the same seriousness as those resolved. Before turning to the details of the data-cost arbitration program and its constitutionality, it is instructive to examine more closely the historical background and present state of pesticide regulation, with particular emphasis on the treatment of data submitted for registration purposes.

2. Pesticide Regulation Prior to 1972

Federal regulation of pesticides began with enactment of the Insecticide Act of 1910, which made it unlawful to manufacture and sell adulterated or misbranded insecticides.²⁷¹ This legislation was replaced in 1947 by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which was primarily a licensing and labeling statute.²⁷² It required that all pesticides be registered with the Department of Agriculture (DOA) prior to sale in interstate or foreign commerce.²⁷³ The statute also contained general standards setting forth the types of information necessary for proper labeling of a registered pesticide, including directions for use; warnings to prevent harm to people, wildlife, and plants; and claims made about the efficacy of the product.²⁷⁴ In 1970, the DOA's responsibilities under FIFRA were transferred to the newly created Environmental Protection Agency (EPA).²⁷⁵

3. Pesticide Regulation and the Treatment of Safety and Health Data: 1972-78

Because of increasing public concern about the safety of pesticides and their effect on the environment, and because of a growing perception that existing regulation was inadequate to safeguard the public interest, Congress substantially rewrote FIFRA in 1972.²⁷⁶ The 1972 amendments essentially changed FIFRA

271. Federal Insecticide Act of 1910, ch. 191, 36 Stat. 331.

272. 1947 FIFRA, ch. 125, 61 Stat. 163 (codified as amended at 7 U.S.C. §§ 135-135k, later superseded by 7 U.S.C. §§ 136-136y (1982)). See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984) (characterizing FIFRA as first enacted in 1947 as primarily a licensing and labeling statute).

273. 1947 FIFRA, ch. 125, §§ 3(a), 4(a), 61 Stat. 163, 166-67.

274. 1947 FIFRA, ch. 125, §§ 2(u)(2), 3(a)(3), 61 Stat. 163, 165-66.

275. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970).

276. 1972 FIFRA, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. §§ 136-136y (1982)). See S. REP. NO. 970, *supra* note 260, at 9, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4093-94 (reporting increased evidence of and public concern about the health and environmental hazards of pesticides).

from a labeling law to a comprehensive regulatory statute.²⁷⁷ As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides.²⁷⁸ Moreover, it regulated pesticides produced and sold in both intrastate and interstate commerce,²⁷⁹ provided for review, cancellation, and suspension of registration,²⁸⁰ and gave EPA much greater enforcement authority.²⁸¹ The 1972 revision also added a new criterion for registration: that EPA determine that the pesticide will not cause "unreasonable adverse effects on the environment."²⁸²

For purposes of this analysis, the most important provisions of the 1972 amendments dealt with the pesticide registration procedure and the use of data acquired through that procedure. As we have seen, the safety, health, and efficacy data that must accompany a registration application are the result of a very costly and time-consuming regimen of testing. It is not only valuable to its developer but also to would-be competitors, environmental protection organizations, employee groups, physicians treating patients with abnormal chemical sensitivities, product liability attorneys, and others.²⁸³ It may well be, as large pesticide manufacturers have often argued, that legal recognition of the proprietary nature of such test data is necessary to stimulate adequate levels of investment in R&D.²⁸⁴ In contrast, one cannot easily dismiss the claim of a strong public interest in disclosing test data sufficiently so that EPA's regulatory effort can be

277. See H.R. REP. NO. 511, 92d Cong., 2d Sess. 1 (1972) (so characterizing the 1972 revision).

278. See S. REP. NO. 838 pt. II, *supra* note 259, at 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3993.

279. *Id.*

280. *Id.* at 2, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3994.

281. *Id.*

282. 1972 FIFRA, § 3(c)(5)(C), 86 Stat. at 980.

283. See, e.g., *Monsanto v. EPA*, 564 F. Supp. 552, 562 (E.D. Mo. 1983), *vacated sub nom. Ruckelshaus v. Monsanto Co.* 467 U.S. 986 (1984) (examples of parties interested in obtaining registration data); H.R. REP. NO. 566, 97th Cong., 2d Sess. 42-43 (1982) (discussing value of the data to a registrant's competitors); Brief of AFL-CIO, et al., as Amici Curiae in Support of Appellant, at 3-5, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (detailing reasons why unions and environmental groups want to see data); Jurisdictional Statement of Appellant, at 8 n.9, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (examples of parties interested in obtaining registration data); Joint Appendix to Briefs of Appellant and Appellee, at 247-59, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (excerpt from trial testimony of EPA official in charge of responding to disclosure requests indicating wide variety of requestors) [hereinafter *Joint Appendix*].

284. See Brief of the American Chemical Soc'y, et al., as Amici Curiae in Support of Appellee, at 5-12, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (arguing that disclosure of test data will diminish incentives for R&D); Brief of Abbott Laboratories, et al., as Amici Curiae in Support of Affirmance, at 8-9, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (same). *But see* McGarity & Shapiro, *supra* note 262, at 851-56 (critically examining argument that disclosure of test data will diminish incentives for R&D).

overseen by interested members of the public,²⁸⁵ consumers can make their own choices about individualized risks from pesticide exposure,²⁸⁶ and registrants' testing methodologies can be subjected to the independent peer review of the scientific community.²⁸⁷ Moreover, factoring the interests of economic efficiency and conservation of scarce research resources into the regulatory calculus suggests that previously submitted data perhaps should be used to support later registrations of the same or similar pesticides.²⁸⁸ Prior to 1972, DOA and EPA had treated data submitted in support of a registration application as confidential, and both in policy and practice did not disclose it publicly.²⁸⁹ When a producer sought registration of a pesticide identical or similar to one that had been previously registered, there apparently was an official policy at both agencies to the effect that previously submitted data would not be used in support

285. See S. REP. NO. 334, *supra* note 265, at 41-44 (need for oversight and augmentation of EPA regulatory effort by interested members of the public); McGarity & Shapiro, *supra* note 262, at 840-44 (same). See generally Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WISC. L. REV. 207, 221-229 (general discussion of reasons for government disclosure to public of privately submitted data, with emphasis on Freedom of Information Act, 5 U.S.C. § 552 (1982)).

286. See McGarity & Shapiro, *supra* note 262, at 840-44.

287. See *id.* at 841-42 (discussing importance of peer review and its furtherance through disclosure); Brief of the American Ass'n for the Advancement of Science, et al., as Amici Curiae in Support of Appellant, at 4-18, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (same).

288. See S. REP. NO. 334, *supra* note 265, at 31 (citing congressional objective of avoiding duplicative testing); McGarity & Shapiro, *supra* note 262, at 845-47 (discussing various negative aspects of duplicative drug and pesticide testing, including greater exposure of human subjects and diversion of scarce research facilities and personnel from productive uses).

It can be argued, however, that there is no such thing as "duplicative" scientific testing, because additional testing is an important means of advancing scientific understanding through verification of earlier results, especially since no two manufacturers use identical processes or produce identical chemicals. Brief of SDS Biotech Corp., et al., as Amici Curiae in Support of Appellee, at 22-23, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The more data of a given type that EPA has for comparison and verification, the more confident it can be that its regulatory decision is sound. See 44 Fed. Reg. 27,945, 27,946 (1979). *But see* McGarity & Shapiro, *id.* at 847 (in the case of pharmaceuticals, and analogously in the case of pesticides, duplicative testing does not serve the valid scientific goal of verification through replication, because it is done only for the purpose of obtaining a license and not for the purpose of scientific verification). Moreover, additional testing may help prevent problems that historically have been common to pesticide regulation: failure of manufacturers to discover or disclose adverse effects, difficulty in interpreting controversial data, and fraudulent test results. Brief of SDS Biotech, *id.* at 23. See also Brief of AFL-CIO, et al., as Amici Curiae in Support of Appellant, at 6 n.6, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Along the same lines, it has been argued that the claim that "duplicative" testing ties up scarce scientific resources is illusory, because "there is no reason to suppose that testing services would not grow to meet increased demand." Brief of SDS Biotech, *id.* at 23 n.40.

289. See S. REP. NO. 334, *supra* note 265, at 38 (USDA and EPA did not disclose test data); Joint Appendix, *supra* note 283, at 60-65, 83-86, 95-97 (policy of USDA and EPA was to keep data confidential, and there was no evidence that confidentiality was breached).

of the subsequent registration.²⁹⁰ Despite this official policy, and despite the absence of legislative authorization to make such use of the data, DOA and EPA personnel reviewing registration applications consistently did consider previously submitted data to support these follow-on registrations.²⁹¹ The 1972 amendments included sections attempting to resolve questions pertaining to both disclosure of data and use of previously submitted data for later registrations.

With regard to disclosure, a party submitting data in connection with a registration application was permitted by the 1972 law to designate any portions of the submitted material it believed to be "trade secrets or commercial or financial information."²⁹² The law provided no standards to guide the trade secret determination, and EPA was permitted to exercise its own judgment as to whether particular data should be so characterized.²⁹³ The agency was prohibited, however, from publicly disclosing any such data that it did classify as trade secrets.²⁹⁴ With regard to any data not deemed by EPA to be trade secrets, the agency was *required* to make public disclosure within thirty days after registration.²⁹⁵ Disputes between registrants and EPA over the trade secret classification of particular data were to be resolved by declaratory judgment action in federal district court at the instance of the submitter.²⁹⁶ Not surprisingly, most data submitters marked everything as trade secrets.²⁹⁷ Moreover, EPA adopted the policy of refusing to treat *any* safety and health test data as trade secrets, and of granting trade secret status only to narrowly defined formulaic and manufacturing information.²⁹⁸ A federal district court ruled, in *Chevron Chemical Co. v. Costle*,²⁹⁹ that EPA had exceeded its statutory authority in taking such an intransigent position, and another court held, in *Mobay Chemical Corp. v.*

290. S. REP. NO. 334, *supra* note 265, at 38 (policy of USDA and EPA was also not to use data in its files to support subsequent registrations); Joint Appendix, *supra* note 283, at 60-65, 83-86, 95-97 (same).

291. *See* S. REP. NO. 334, *supra* note 265, at 38, 90 (USDA and EPA did actually use data in files to support subsequent registrations); Joint Appendix, *supra* note 283, at 67-69, 70-74, 77, 219-247 (same).

292. 1972 FIFRA, § 10(a), 86 Stat. at 989.

293. *Id.* at § 10(b), 86 Stat. at 989.

294. *Id.*

295. *Id.* at § 3(c), 86 Stat. at 979.

296. *Id.* at § 10(c), 86 Stat. at 989.

297. *See* S. REP. NO. 334, *supra* note 265, at 7 (statement of Douglas Costle, Administrator, Environmental Protection Agency, that major pesticide firms had obtained de facto exclusive use by very broad trade secret claims); H.R. REP. NO. 663, *supra* note 264, at 58, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1988, 2031 (same).

298. *See* *Mobay Chemical Corp. v. Costle*, 447 F. Supp. 811, 824 (W.D. Mo. 1978), *appeal dismissed*, 439 U.S. 320, 321 (1979); *Chevron Chemical Co. v. Costle*, 443 F. Supp. 1024, 1030-31 (N.D. Cal. 1978).

299. 443 F. Supp. 1024, 1031-32 (N.D. Cal. 1978).

Costle,³⁰⁰ that EPA must adhere to the *Restatement of Torts* definition of trade secrets when making its determination.³⁰¹ The attitudes of both sides caused most registration applications to result in litigation before these two court decisions, and the same entanglement usually resulted after those rulings because data submitters continued to make all-encompassing trade secret claims.³⁰²

In response to the question whether EPA could consider previously submitted data to support a follow-on registration, the 1972 amendments adopted a mandatory licensing scheme. EPA was permitted to use previously submitted data for subsequent registrations upon satisfaction of two conditions: (1) data classified as trade secrets could not be so used;³⁰³ and (2) non-trade secret data could be used only if the follow-on registrant first "offered to pay reasonable compensation for producing the test data to be relied upon."³⁰⁴ Thus, the seemingly insoluble trade secret problem also infected the data-use provisions, and the *Chevron* and *Mobay* decisions put a practical hold on EPA's consideration of previously submitted data to support follow-ons.³⁰⁵ The law viewed the offer of compensation as a prelude to negotiation between the original submitter and the follow-on registrant. If the two were unable to agree on compensation, the ultimate determination of reasonable compensation was EPA's responsibility, with review by a federal district court.³⁰⁶ Although EPA felt that it had neither the resources nor expertise to adjudicate compensation cases,³⁰⁷ it did render decisions in two such cases, the facts of which arose before data-use was effectively shut down by *Chevron* and *Mobay*.³⁰⁸

The 1972 version of FIFRA failed to specify an effective date for the data disclosure and use-compensation provisions.³⁰⁹ Further amendments in 1975 prescribed that any data submitted before 1970 would not be subject to the disclosure provisions and would not be compensable if used in connection with a follow-on registration.³¹⁰ The 1975 amendments also changed the curious judicial review provision of the 1972 use-compensation scheme. EPA's compensation determination was appealable to a federal district court only by the

300. 447 F. Supp. 811, 824-27 (W.D. Mo. 1978), *appeal dismissed*, 439 U.S. 320, 321 (1979).

301. RESTATEMENT OF TORTS § 757 & comment b (1939).

302. *See Note, The Proposed FIFRA Amendments, supra* note 264, at 347-48.

303. 1972 FIFRA, § 3(c)(1)(D), 86 Stat. at 979-80.

304. *Id.*

305. *See Note, The Proposed FIFRA Amendments, supra* note 264, at 347.

306. 1972 FIFRA, § 3(c)(1)(D), 86 Stat. at 979-80.

307. *See H.R. REP. NO. 663, supra* note 264, at 59, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 2032.

308. *Union Carbide Agric. Chem. Co. v. Thompson-Hayward Chem. Co.*, FIFRA COMP. Dkt. No. 27 (July 13, 1982); *Ciba-Geigy Corp. v. Farmland Indus., Inc.*, FIFRA COMP. Dkt. Nos. 33, 34, & 41 (Aug. 19, 1980).

309. *See Chevron Chemical Co. v. Costle*, 641 F.2d 104, 109-10 (3d Cir. 1981).

310. 1975 Amendments, § 3(c)(1)(D), 89 Stat. at 755.

original data submitter and the court was permitted only to raise and not to lower the amount of compensation.³¹¹ Although this provision had not been challenged, and indeed had not even been used,³¹² serious concerns about fairness led Congress in 1975 to permit review at the instance of either party and to grant the reviewing court latitude to raise or lower EPA's compensation award.³¹³

A variety of problems with the regulatory regime as it existed under the 1972 and 1975 amendments, including the previously discussed contentiousness over trade secret classification and EPA's professed inability to adjudicate compensation disputes adequately, caused the pesticide registration process to grind virtually to a halt.³¹⁴ This logjam, coupled with a number of other deficiencies in EPA's regulation of pesticides, moved Congress to autopsy the system yet again.³¹⁵

4. Pesticide Regulation and the Treatment of Safety and Health Data: Post-1978

Congressional re-evaluation of the 1972 law and its 1975 amendments produced a 1978 version of FIFRA with substantially revised disclosure and use-compensation rules.³¹⁶ As with earlier versions, the prescribed contours of both data disclosure and use-compensation formed part of a multifaceted compromise among large R&D-oriented pesticide producers, small producers needing access to previously submitted test data, formulators of end-use products from the concentrated chemicals, environmental organizations, users, the scientific community, and other interested parties.³¹⁷ Because the nonconsensual arbitration program was but a part of the larger compromise that produced new disclosure and use-compensation rules, understanding the latter is a prerequisite to comprehending the former.

311. 1972 FIFRA, § 3(c)(1), 86 Stat. at 979.

312. The only two administrative compensation cases decided by EPA under the 1972 provisions were not appealed. *Union Carbide Agric. Chem. Co. v. Thompson-Hayward Chem. Co.*, FIFRA COMP. Dkt. No. 27 (July 13, 1982); *Ciba-Geigy Corp. v. Farmland Indus., Inc.*, FIFRA COMP. Dkt. Nos. 33, 34, & 41 (Aug. 19, 1980).

313. 1975 Amendments, *supra* note 267, at § 3(c)(1)(D), 89 Stat. at 755. See S. REP. NO. 452, 94th Cong., 1st Sess. 11, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1359, 1368-69 (purpose of change was to "effectuate fairness and evenhandedness by allowing both parties to the compensation determination the right of appeal, and by removing the limitation on the district court's authority to reduce the Administrator's determination").

314. See S. REP. NO. 334, *supra* note 265, at 3.

315. See Note, *The Proposed FIFRA Amendments*, *supra* note 264, at 345-51 (discussing various shortcomings of both the legislation and its implementation by EPA).

316. Federal Insecticide, Fungicide, and Rodenticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified as amended at 7 U.S.C. §§ 136-136y (1982)).

317. See S. REP. NO. 334, *supra* note 265, at 5-16 (providing examples of the various sources of input leading to 1978 amendments).

a. The Trade Secret/Disclosure Compromise

The 1978 revision effectively removes general trade secret protection from safety and health test data. A registrant is still permitted to mark identified portions of its submitted data as "trade secrets or commercial or financial information" that are not to be publicly disclosed,³¹⁸ but trade secret status is available only for narrowly defined categories of non-test data,³¹⁹ and the registration process is not interrupted by disputes over such status.³²⁰ After considerable parsing of the statutory language, one can discern three categories of data:

(1) The first consists of safety and health test data, which EPA is required to disclose, upon request, within thirty days after registration.³²¹ The only exception to the agency's duty of disclosure for test data is found in a provision prohibiting it from disclosing any data to a foreign or multinational pesticide producer.³²² Any party requesting test data from EPA is required to sign an affirmation that it neither is nor represents a foreign or multinational producer and will not disclose the data to such an entity.³²³ All of the large American pesticide companies that engage in significant R&D are multinationals, so theoretically they should not be able to obtain each other's test data from EPA.³²⁴ Intuition, however, as well as some available evidence, suggests that these large competitors may be able to acquire at least some of this data indirectly as a result of public disclosure.³²⁵

(2) The second category consists of information revealing (a) manufacturing and quality control processes,³²⁶ or (b) formulas and methodologies pertaining to deliberately added inert ingredients,³²⁷ which can be publicly disclosed by EPA only if the agency determines that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.³²⁸ In addition,

318. 7 U.S.C. § 136h(a) (1982).

319. 7 U.S.C. § 136h(d) (1982).

320. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

321. 7 U.S.C. § 136a(c)(2)(A) (1982).

322. 7 U.S.C. § 136h(g) (1982).

323. *Id.*

324. *See* Joint Appendix, *supra* note 283, at 208-09.

325. *See id.* at 253-54. (One legitimate way for this to happen is for a small competitor operating solely within this country to acquire test data and later be taken over by a large multinational.). *See also* Monsanto Co. v. EPA, 564 F. Supp. 552, 562 (E.D. Mo. 1983), *vacated sub nom.* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (expressing doubt about the efficacy of attempting to prevent disclosed data from finding its way to multinational or foreign competitors); Motion to Affirm, at 4, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (arguing that publicly disclosed test data inevitably will find its way into the hands of registrant's competitors).

326. 7 U.S.C. § 136h(d)(1)(A) (1982).

327. 7 U.S.C. § 136h(d)(1)(B)(C) (1982).

328. 7 U.S.C. § 136h(d)(1) (1982).

when necessary to the implementation of FIFRA, formulas may be disclosed to any other federal agency consulted by EPA,³²⁹ and may be revealed by EPA in a public hearing or in its fact findings.³³⁰

(3) The third category consists of incidental information concerning production, distribution, sale, or inventories of a pesticide, which is eligible to be characterized by EPA as trade secret data.³³¹ Even if the agency, or a reviewing court, concludes that particular information of this nature is deserving of trade secret status, EPA nevertheless may disclose it as part of a public proceeding on the question of adverse environmental effects if deemed to be necessary to the public interest.³³²

b. Exclusive Use and Compensation: The Quid Pro Quo

In return for the data submitter's loss of much of its right to claim trade secret status for test data, the compromise struck in Congress provides an exclusive-use period during which data cannot be used to support subsequent registrations, followed by another period during which the follow-on registrant is required to compensate the original submitter.³³³ In an interesting political occurrence, the bill finally reported out of conference committee and ultimately enacted by Congress provided significantly more protection for large R&D-oriented pesticide manufacturers than these manufacturers had urged through their trade association or had been provided in either the final House or Senate bills that went to

329. 7 U.S.C. § 136h(b) (1982).

330. *Id.*

331. 7 U.S.C. § 136h(b), (d)(2) (1982).

332. 7 U.S.C. § 136h(d)(2) (1982).

333. 7 U.S.C. § 136a(c)(1)(D)(i-ii) (1982). See H.R. CONF. REP. NO. 1560, 95th Cong., 2d Sess. 29-30, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2043, 2045-46.

conference committee.³³⁴ As adopted, the 1978 amendments created a use-compensation structure that charitably may be characterized as convoluted.

For test data submitted in connection with registrations granted after the statute's 1978 effective date on either new pesticides or new uses of previously registered pesticides, the law provides an exclusive-use period of ten years.³³⁵ Rather than looking only forward as does the exclusive use provision, the *compensation* scheme reaches back to 1970. With respect to data submitted by a registrant in 1970 or thereafter, that registrant is entitled to compensation for any follow-on use of the data during the fifteen-year period after initial submission.³³⁶

Thus, under the 1978 amendments, a follow-on registrant can get EPA to use data that were submitted to support a new product or new use registration that was granted between 1970 and 1978, but must compensate the original submitter for such use during a period of up to fifteen years from the original submission.³³⁷ The follow-on registrant cannot, however, get EPA to use data in its files that were submitted by the original registrant in support of a registration that was granted after the effective date of the new law in 1978, unless the data is at least ten years old.³³⁸ Without the ability to rely on previously submitted data, a prospective follow-on registrant must do its own testing and develop its own data. The initial data protected by the 1978 exclusive-use provision have just recently

334. The National Agricultural Chemical Association (NACA), the membership of which consists primarily of large pesticide manufacturers, had urged Congress to provide a ten-year period of exclusive use, but no additional period during which compensation would be paid to the original registrant by a follow-on. NACA was of the view that any compensation system would be impractical and unworkable. See S. REP. NO. 334, *supra* note 265, at 94-98.

The final Senate bill, much of which reflected EPA's views, provided for no period of exclusive use and a period of 7 years during which the original registrant would be entitled to compensation from a follow-on registrant. S. 1678, 95th Cong., 2d Sess. § 2(a)(1) (1978). See S. REP. NO. 334, *supra* note 265, at 17 (section-by-section analysis of S. 1678); H.R. REP. NO. 663, *supra* note 264, at 53-54 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 2026-27 (EPA's views).

The House bill, and later, amendments proposed by the House to S. 1678, called for a 5-year period of exclusive use plus a 5-year period during which the original registrant would be entitled to compensation from a follow-on registrant. H.R. 8681, 95th Cong., 2d Sess. § 2(a)(1) (1978). See H.R. REP. NO. 663, *supra* note 264, at 23-24 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 1996-97 (section-by-section analysis of H.R. 8681); H.R. CONF. REP. NO. 1560, 95th Cong., 2d Sess. 29-30, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2043, 2045-46 (proposed House amendments to S. 1678 borrowing from H.R. 8681).

The version reported out of conference committee and enacted by Congress provided for a 10-year period of exclusive use for new data, with a total period of compensability of 15 years, thus effectively creating 10 years of exclusive use followed by 5 years of compensation. See H.R. CONF. REP. NO. 1560, 95th Cong., 2d Sess. 30-31, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2043, 2046-47 (version reported out of conference committee); 7 U.S.C. § 136a(c)(1)(D)(i-ii) (1982) (enacted version).

335. 7 U.S.C. § 136a(c)(1)(D)(i) (1982).

336. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

337. *Id.*

338. 7 U.S.C. § 136a(c)(1)(D)(i) (1982).

(1988) begun to be available to support follow-on registrations. With regard to post-1978 data for which the ten-year exclusive-use period has expired, the follow-on registrant can obtain its use and must compensate the original submitter for whatever is left of a fifteen-year period since submission. This period of compensation for post-1978 data obviously must be for five years or less (fifteen minus the exclusive-use period). Thus, for data supporting a post-1978 registration, the original submitter can receive ten years of exclusive use and up to five years' compensation.³³⁹ The following scenarios illustrate how the 1978 use-compensation system operates. In each, O is the original data submitter and registrant, and F is the prospective follow-on registrant.

Scenario 1: In 1989, F wishes to register a pesticide identical or similar to one for which the test data were submitted prior to 1970. F may cite this data in EPA's files without delay or obligation to compensate. It should be noted in passing that whenever a follow-on registrant is permitted to rely on previously submitted data, either with or without a compensation obligation, the follow-on merely cites to an index prepared by EPA and does not see the raw test data.³⁴⁰

Scenario 2: In 1989, F wishes to register a pesticide identical or similar to one for which the test data were submitted between 1970 and 1978. F may rely on the data, but is obligated to compensate O for F's use of the data during the remaining portion of a fifteen-year period from original submission. If, for example, F obtains a registration in 1989 based upon data originally submitted by O in 1977, F is obligated to pay O for a three-year use of the data ($1977 + 15 = 1992 - 1989 = 3$).

Scenario 3: In 1989, F wishes to register a pesticide identical or similar to one for which a new product or new use registration was obtained after 1978. F can cite the previously submitted data only if the prior registration is at least ten years old. As mentioned above, this means that such data is only recently becoming available for F's use. The fifteen-year compensation period applies to such data, but the exclusive-use period during which the data could not be used at all to support follow-ons has consumed ten of the fifteen years. A maximum term of five compensable years remains. In effect, then, for data submitted in connection with a post-1978 registration, O receives ten years of exclusive use followed by five years of compensation entitlement. It also bears noting that any patents on post-1978 new pesticides or new uses may still be in effect under the seventeen-year period of patent protection, although regulatory delays will have consumed at least some of that period.³⁴¹ Current law permits F to obtain registration, however, even before patent expiration on the original.³⁴² Thus, F can either develop its own data or cite the previously submitted data, obtain

339. See *Petrolite Corp. v. EPA*, 519 F. Supp. 966, 968-69 (D.D.C. 1981) (confirming this interpretation of the interplay between the exclusive use and compensation provisions).

340. See *Chevron Chemical Co. v. Costle*, 499 F. Supp. 732, 737 (D. Del. 1980), *aff'd*, 641 F.2d 104 (3d Cir. 1981).

341. See *supra* note 265.

342. 7 U.S.C. § 136(a) (1982) (registration system operates independently of patent system).

registration, and then either wait for patent expiration or negotiate a patent license from or through O if the latter is willing. As a practical matter, O probably will have to wait for the patent to expire. Experience indicates that O not only is unlikely to grant such a license to a potential competitor during the patent term, but also is unlikely even to sell the active ingredients (the "technical product") to the follow-on registrant after patent expiration. Thus, even after a follow-on obtains registration, unless it is prepared to gear up for manufacture of the technical product rather than just formulate end-use products from the purchased technical product, it often must find a foreign source for the technical product.³⁴³

Similar use-compensation issues can arise in a slightly different context. If EPA determines that additional data are needed to maintain an existing registration (i.e., there are "data-gaps" to be filled), the agency may issue a "call-in" for such data to all registrants.³⁴⁴ Compliance with the call-in is necessary to maintain registration.³⁴⁵ If there is only one registrant, the additional data is subject to the same use-compensation scheme already discussed in the event that a follow-on subsequently obtains a registration. If one or more follow-ons have already registered the pesticide at the time of the data call-in, however, the original and all follow-on registrants are responsible for complying with the call-in as a condition to maintenance of their respective registrations. FIFRA permits these registrants to enter a joint data development agreement under which they share in the testing or other burdens attendant to compliance with the call-in.³⁴⁶ In the alternative, they may enter an agreement merely to share the costs of developing the additional data.³⁴⁷ According to a recent interpretation of the statute by an arbitration panel in a data compensation case, compliance with this portion of the statute requires at least a good-faith effort to negotiate a joint development or cost sharing agreement.³⁴⁸ Consequently, a registrant (usually the original) that develops its own data in compliance with EPA's call-in is entitled to compensation from other registrants relying on that data to maintain their registrations only if the former at least has attempted in good faith to negotiate either type of agreement with the latter. Conversely, a registrant (usually a follow-on) not generating its own data in response to a call-in is entitled to keep its registration by using the additional data developed by another registrant only if the former has at least attempted in good faith to negotiate either type of agreement with the latter. If an agreement has been attempted but not consummated, or if an agreement has been made but has not resolved the amount of compensation to be paid for use by one

343. See Rathvon, *supra* note 266, at 1681.

344. 7 U.S.C. § 136a(c)(2)(B)(i) (1982).

345. 7 U.S.C. § 136a(c)(2)(B)(iv) (1982).

346. 7 U.S.C. § 136a(c)(2)(B)(ii) (1982).

347. See *id.* See also Rathvon, *supra* note 266, at 1681.

348. E.I. du Pont de Nemours & Co. and Griffin Corp., American Arb. Ass'n Docket No. 16-171-0080-86M, at 18-21 (Dec. 22, 1988) (Birch, Juten & Foy, Arbs.).

registrant of new data developed by another, the amount becomes an issue to be resolved pursuant to FIFRA's arbitration system.

Data compensation disputes of this second kind, either occurring alone or in conjunction with the type first described, are likely to proliferate in the future because amendments to FIFRA in 1988 call for a greatly accelerated schedule for EPA's "reregistration" program.³⁴⁹ Under this program, Congress has mandated that EPA review and reregister pesticides that originally had been registered prior to November 1, 1984, in an effort to insure that older registrations conform to more recent, stricter registration standards.³⁵⁰ Reregistration often results in data call-ins by EPA.³⁵¹

5. Comparison of FIFRA Arbitration With Other Nonconsensual Systems

Like the 1972 version of FIFRA, the 1978 amendments permit a follow-on registrant to rely on compensable previously submitted data only if an offer of compensation is made to the original data submitter.³⁵² If the parties are unable to agree on the amount of compensation, the current system provides for a dispute resolution method very different from the earlier form. Instead of assigning the adjudicatory responsibility to EPA, subject to judicial review, the 1978 law provides for mandatory arbitration at the instance of either party with no meaningful judicial review.³⁵³ Data compensation disputes among two or more registrants subject to a data call-in are resolved in the same manner.³⁵⁴ The law commits the task of conducting the arbitration program to the Federal Mediation and Conciliation Service (FMCS), an executive branch agency that serves mediation and arbitration roles in labor disputes.³⁵⁵ The agency, recognizing its lack of expertise relevant to the responsibility it had been given, adopted regulations delegating administrative authority over the program to the American Arbitration Association (AAA), the nation's preeminent private

349. In 1978 Congress had directed EPA to reregister old pesticides "in the most expeditious manner practicable." 7 U.S.C. § 136a(g) (1982). The new reregistration scheme calls for a series of very ambitious deadlines for EPA to accomplish the task. 1988 Amendments, § 4, 102 Stat. 2655. See Conner, Ebner, Landfair, O'Connor and Weinstein, *Effects on Industry*, in J. GREENE, REGULATING PESTICIDES: FIFRA AMENDMENTS OF 1988--A BNA SPECIAL REPORT 35, 36-37 (1989) (accelerated reregistration likely to produce more arbitration cases) [hereinafter Conner, *Effects on Industry*].

350. 7 U.S.C. § 136a(g) (1982). See J. GREENE, REGULATING PESTICIDES: FIFRA AMENDMENTS OF 1988--A BNA SPECIAL REPORT 7 (1989) (rationale for reregistration).

351. See Conner, *Effects on Industry*, *supra* note 349.

352. 1972 FIFRA, § 3(c)(1)(D), 86 Stat. at 979 (current version at 7 U.S.C. § 136(c)(1)(D)(ii) (1982)).

353. 7 U.S.C. § 136(c)(1)(D)(ii) (1982).

354. 7 U.S.C. § 136a(c)(2)(B)(v) (1982).

355. 7 U.S.C. § 3(c)(1)(D)(ii) (1982). See 45 Fed. Reg. 55,394, 55,394-55,395 (1980) (discussing nature of FMCS).

arbitration organization.³⁵⁶ The regulations incorporate a slightly modified version of AAA's commercial arbitration rules, and specify that arbitrators are to be selected from AAA's roster of commercial arbitrators.³⁵⁷ Arbitrators in the FIFRA data compensation program are, however, given special training by EPA.³⁵⁸

The dispute resolution mechanism created by Congress in FIFRA was, and continues to be, unusual in several ways. The fact that parties are forced to employ what traditionally has been a consensual procedure is itself unusual, although we already have seen that nonconsensual arbitration has become somewhat less novel in recent times. Several of the most important features of data-compensation arbitration are discussed below. To aid in illuminating these features, pertinent comparisons will be made with counterpart characteristics of the other nonconsensual systems discussed in this article: court-annexed, pension-plan, and commodity-futures arbitration.

a. The Nature of the Underlying Rights

Data-compensation arbitration under FIFRA adjusts rights and obligations between private parties, as do court-annexed, pension plan, and commodity-futures arbitration. Although adjudications in the four systems all involve private disputants, rights adjudicated therein are distinguishable along a continuum from those of a purely common-law nature to those arising solely from federal regulatory legislation.

Traditional common law tort and contract rights are at issue in court-annexed arbitration.³⁵⁹ Because arbitrators in commodity futures arbitration have the same broad, unreviewable latitude over the merits of a dispute that characterizes traditional arbitration, these arbitration proceedings can involve a mixture of common-law and statutory rights.³⁶⁰ Customer complaints asserted against a commodity futures professional may allege violation of the Commodity Exchange Act or CFTC regulations, such as an allegation of noncompetitive execution or bucketing.³⁶¹ Such complaints may, on the other hand, allege common-law

356. 29 C.F.R. § 1440.1 (1988). See 45 Fed. Reg. 55,394, 55,394-55,395 (1980) (discussing the fact that FIFRA arbitrations are outside the expertise and customary role of FMCS as reason for delegation to AAA).

357. 29 C.F.R. § 1440.1 app. (1988).

358. See Brief of Appellees, at 6-7, *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985); Reply Memorandum for the Appellant, at 34-39, *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985).

359. See *Walker*, *supra* note 68, at 917-21 (discussing types of claims subject to court-annexed arbitration).

360. See *supra* note 113.

361. Noncompetitive execution of customer orders is often accomplished by a cross-trade. A cross-trade is the "offsetting or noncompetitive matching of the buying order of one customer against the selling order of another, a practice that is permissible only when executed as required by the

contract or tort claims, or both statutory and common-law claims together. In many instances, even the statutory claims merely represent modified substitutes for claims that would have been cognizable as contract or fraud claims at common law.³⁶²

The claim of a multiemployer pension plan against a withdrawing employer for the latter's share of unfunded vested benefits represents the enforcement of a federal statutory right. Such a right may be viewed, however, as a partial substitute for contractual rights that otherwise would exist absent pension regulation. Such contract rights would exist among contributing employers, as well as between these employers, on the one hand, and the trust and its beneficiaries, on the other.³⁶³

Under FIFRA, an original data submitter's claim against a follow-on registrant for a share of data development costs is essentially a federal statutory claim. The data was developed and submitted for the purpose of fulfilling a federal statutory requirement. It probably is true that at least some of the safety and health data would have been developed even without the registration requirement, because the pesticide developer has a significant self-interest in producing pesticides that perform their advertised function adequately and safely. It also is probably true that the data can have value to the submitter apart from fulfilling the FIFRA registration requirement, such as providing evidence for defense against future product liability suits, a record of new testing procedures and techniques discovered during the testing process, information necessary for meeting foreign registration requirements, and kernels of serendipitous information useful as

Commodity Exchange Act, CFTC regulations and rules of the contract market." *COMMODITY FUTURES TRADING COMM'N, GLOSSARY OF SOME TERMS USED IN THE FUTURES TRADING INDUSTRY* 8 (1978). Generally, a cross-trade is permissible only if made at the market price after each order has been offered in open outcry and neither has been accepted. See *Cohl v. Floor Broker Asscs.*, [1977-80 Decisions Transfer Binder] *Commodity Futures L. Rep. (CCH)* ¶ 20,790 (CFTC Mar. 12, 1979).

Bucketing consists of directly or indirectly putting "the opposite side of a customer's order into the handling broker's own account or into an account in which he has an interest, without execution on an exchange." *COMMODITY FUTURES TRADING COMM'N, GLOSSARY OF SOME TERMS USED IN THE FUTURES TRADING INDUSTRY* 3 (1978). See *Siegel Trading Co.*, [1977-80 Decisions Transfer Binder] *Commodity Futures L. Rep. (CCH)* ¶ 20,452 (CFTC July 26, 1977).

362. One example is unauthorized trading of the customer's account. It can be a violation of the CEA and CFTC regulations, *Blanding v. First Commodity Corp.*, 2 *Comm. Futures L. Rep. (CCH)* ¶ 21,648 (CFTC Nov. 29, 1982), or a violation of common-law fiduciary duties, *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174 (Iowa 1987).

363. These contract rights and obligations would normally be created by a multiemployer collective bargaining agreement with a union. See R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 86-92 (1976). Thus, even without specific pension plan regulation, the rights and obligations of federal labor law would add to, or in the case of conflict supersede, those existing at common law. *Id.* at 540-41, 543-51. Breach of a contractual obligation among employers would almost certainly breach an obligation to the union, as well, and it would normally be the union that would undertake to enforce the rights in question. When the union is a party to an action to enforce obligations created by a collective bargaining agreement, enforcement may be sought in either state or federal court under § 301 of the Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 185(b) (1982).

building blocks for later research.³⁶⁴ Some meaningful portion of this value may well be lost when EPA discloses the test data to requesting parties, especially if there are indirect leaks to major competitors, but lost value due to disclosure is not what is supposed to be compensable through arbitration. The follow-on registrant does not see the data when it is used to support that party's registration.³⁶⁵ What is primarily compensable through arbitration is a share of the cost, however computed, of developing the data necessary to obtain registration.³⁶⁶ A secondary element of the compensation right may consist of a share

364. See *Monsanto Co. v. EPA*, 564 F. Supp. 552, 561-62 (E.D. Mo. 1983), *vacated sub nom. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (discussing various other uses of safety and health data); Comment, *The Taking of Trade Secrets: What Constitutes Just Compensation?*, 48 U. PITT. L. REV. 247, 260-61 (1986) (same); Note, *FIFRA and the "Taking" of Trade Secrets*, 8 B.C. ENVTL. AFF. L. REV. 593, 623 (1980) (same); Brief of Abbott Laboratories, et al., as Amici Curiae in Support of Appellee, at 5-7, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (same). See also S. REP. NO. 334, *supra* note 265, at 72 (statement of Douglas Costle, Administrator, Environmental Protection Agency) ("data developed in support of registration has [sic] a continuing commercial value beyond its [sic] value in achieving the immediate registration for which it [sic] was developed").

365. See *Chevron Chemical Co. v. Costle*, 499 F. Supp. 732, 737 (D. Del. 1980), *aff'd*, 641 F.2d 104 (3d Cir. 1981).

366. There has been, and continues to be, vigorous debate about how these costs should be computed. For example, questions have arisen as to whether the registrant's compensable costs should include only those attributable to compelled data in contrast with data voluntarily submitted in connection with an EPA special review. It cannot be determined from the opinion in the first FIFRA arbitration case whether such data were treated as compensable. *Stauffer Chemical Co. and PPG Indus., Inc.*, FMCS Docket No. 16-199-077-82 (June 28, 1983) (Birch, Smolka, & Vassil, Arbs.), *reprinted in* Reply Brief for the Appellant, at 42, *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985). In the second case, such data were held not to be compensable. See *E.I. du Pont de Nemours & Co. and Griffin Corp.*, American Arbitration Ass'n Docket No. 16-171-0080-86M, at 17 (Dec. 22, 1988) (Birch, Juten & Foy, Arbs.). There have been similar disagreements about the compensability of the cost of efficacy studies conducted after EPA began waiving such studies, but the arbitrators in both *Stauffer*, *id.* at 47, and *du Pont*, *id.* at 17, held such data to be noncompensable. See also Rathvon, *supra* note 266, at 1683.

In addition, once costs have been determined, ample room for disagreement still exists about the method for allocating them between original and follow-on registrants. Costs can be divided per capita. See Note, *Compensating Manufacturers Submitting Health and Safety Data to Support Product Registrations After Ruckelshaus v. Monsanto*, 61 IND. L.J. 189, 213-15 (1986) (urging per capita allocation). On the other hand, costs can be allocated presently on the basis of current or projected market shares, or allocated in future periodic installments based on actual future market shares. One of the EPA administrative decisions rendered under the pre-1978 law used current market shares. *Ciba-Geigy Corp. v. Farmland Indus., Inc.*, FIFRA COMP. Dkt. Nos. 33, 34, & 41, slip op. at 43-44 (Aug. 19, 1980). The other used a per capita allocation method. *Union Carbide Agric. Chem. Co. v. Thompson-Hayward Chem. Co.*, FIFRA COMP. Dkt. No. 27, slip op. at 60-64 (July 13, 1982). The compensation provisions of the 1972 version of FIFRA provided for payment of "reasonable compensation," 1972 FIFRA, § 3(c)(1)(D), 86 Stat. at 979, whereas the counterpart provisions of the 1978 version simply provided for "compensation," 7 U.S.C. § 3(c)(1)(D)(ii) (1982). In the first FIFRA arbitration decision under the 1978 regime, a per capita method was used to compute a lump-sum payment for actual data production costs, and a projected market share method was used to estimate future royalty payments to compensate for avoided opportunity costs. *Stauffer*, *id.* at 52-53. In the second FIFRA arbitration decision, actual data production costs were allocated on the basis of both historic and actual future market shares, with payments to be a combination of lump sum and future

of the opportunity costs incurred by the original registrant and avoided by the follow-on, because of the regulatory delay incurred by the former but not the latter before being able to market the pesticide.³⁶⁷ The right to such compensation, though existing between private parties, is a pure federal statutory right. This fact distinguishes the rights and obligations adjusted in FIFRA arbitration from those adjudicated in court-annexed, pension-plan, or commodity-futures arbitration. Such a characteristic is clearly relevant to any attempted defense of FIFRA's unusual dispute resolution mechanism, from either the perspective of sound regulatory policy formulation or compliance with constitutional directives. Whether this characteristic, by itself, should be sufficient to fully justify a non-consensual, standardless, virtually unreviewable procedure is less clear.

installments. *du Pont, id.* at 36-39.

367. The debate over whether the compensation payable from the follow-on to the original registrant should include only a share of the actual costs of testing and producing data necessary for registration, or whether it should also include a "value received" component reflecting the follow-on registrant's avoided opportunity costs, has been even longer and more vigorous than the debate over which direct costs to include. *Compare* Brief for PPG Indus., Inc. as Amicus Curiae, at 10-22, *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985) (urging a narrow cost-sharing approach); Brief for PPG Indus., Inc. as Amicus Curiae, at 6-18, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (same); Brief for Sathon, Inc. as Amicus Curiae, at 19-23, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (same) *with* Brief for Stauffer Chemical Co. as Amicus Curiae in Support of Affirmance, at 13-18, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (urging a broader compensation standard including both original registrant's actual data production costs and follow-on's avoided opportunity costs).

The two EPA administrative cases decided under the 1972 version of FIFRA included only the original registrant's actual data production costs. *Union Carbide Agric. Chem. Co. v. Thompson-Hayward Chem. Co.*, FIFRA COMP. Dkt. No. 27, slip op. at 67-69 (July 13, 1982); *Ciba-Geigy Corp. v. Farmland Indus., Inc.*, FIFRA COMP. Dkt. Nos. 33, 34, & 41, slip op. at 32-34, 43-44 (Aug. 19, 1980). In the first FIFRA arbitration decision under the 1978 version of FIFRA, the arbitrators adopted a broad approach for calculating compensation, including both actual data production costs (allocated per capita, paid in a lump-sum) and the follow-on's avoided opportunity costs (compensated by royalties on follow-on's future sales). *Stauffer, id.* at 48-54. In the second arbitration case, the arbitrators acknowledged that avoided opportunity costs can be a legitimate component of total compensation in appropriate circumstances, *du Pont, id.* at 17-18, 22-23, but ultimately limited their award to actual data costs, *id.* at 32-39. It has been suggested by attorneys for the original registrant that the arbitrators did not award an amount attributable to avoided opportunity costs because there was a substantial delay between the time the follow-ons obtained their registrations and the time they began marketing their products. *See* Conner, Ebner, Landfair, O'Connor & Weinstein, *The Linuron Decision: Impact on Pesticide Registrants, Implications for Data Compensation Disputes Under FIFRA--The Original Registrant*, 12 *Chemical Reg. Rep.* (BNA) No. 46, pt. II, at 1681, 1685, 1686 (Feb. 17, 1989) [hereinafter Conner, *The Linuron Decision*]. In *du Pont*, the arbitrators' acknowledgement of the general propriety of including avoided opportunity costs applied only to data compensation under 7 U.S.C. § 3(c)(1)(D)(ii) (1982), and not to joint development or cost sharing under 7 U.S.C. § 136a(c)(2)(B)(ii), (iii) (1982). This conclusion was based on the arbitrators' interpretation of the former provision as embodying a broader concept of compensation than the latter. *du Pont, id.* at 11-14, 17-18.

*b. The Availability of Decision Standards or
Choice-Based Substitutes*

In the absence of either a freely bargained-for dispute resolution procedure or some other meaningful choice in the selection of a procedure, the existence of identifiable standards obligatory on the decision maker is the sine qua non of fair and reasonably consistent conflict adjustment. In the 1978 version of FIFRA, Congress neither established standards to guide the arbitrators in determining compensation nor authorized EPA to do so. At least two courts, as well as one arbitration panel and the FMCS, have concluded that Congress specifically intended to impose no constraining standards on the arbitral determination of data compensation.³⁶⁸ The absence of standards is something that participants in traditional consensual arbitration are accustomed to, because arbitrators in their normal role are not bound to follow substantive rules of law or evidence unless the disputants contractually have so provided.³⁶⁹ Participants in consensual arbitration bargain for the procedure, however, and presumably trade those attributes they view negatively for those they view more positively. And, again, they can even bargain for the applicability of legal rules. FIFRA data-cost disputants obviously have not bargained for the uncertainty wrought by standardless dispute resolution, and are not permitted to bargain for more certainty.

One occasionally encounters the notion that a party submitting to a pesticide registration or other regulatory process "consents" to all of its conditions as the *quid pro quo* for the "benefits" of regulation.³⁷⁰ The only choice such a party normally has, of course, is to submit or not do business. This "regulatory bargain" rationale is far more fiction than fact, and certainly does not constitute the kind of bargaining that lends fairness to a standardless dispute resolution mechanism. The decision to regulate in a given manner may be good public policy, but justifying a dispute resolution procedure within the regulatory scheme by

368. See *PPG Indus., Inc. v. Stauffer Chemical Co.*, 637 F. Supp. 85, 88 (D.D.C. 1986); *Sathon, Inc. v. American Arbitration Ass'n*, 20 Env't Rep. Cas. (BNA) 2241, 2245 (N.D. Ill. 1984); *E.I. du Pont de Nemours & Co. and Griffin Corp., American Arbitration Ass'n Docket No. 16-171-0080-86M*, at 14 (Dec. 22, 1988) (Birch, Juten & Foy, Arbs.); 44 Fed. Reg. 43,292, 43,293 (1979).

369. See *supra* note 40 and accompanying text.

370. See, e.g., *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 592 (1985) (suggesting that follow-on registrants consented to FIFRA arbitration by choosing to register pesticides); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984) (using a form of consent rationale as partial justification for conclusion that Monsanto had no "reasonable investment-backed expectation" that data would be kept confidential); *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 318-21 (7th Cir. 1987) (holding that commodity futures broker consented to arbitration merely by membership in exchange, despite economic necessity of membership and government requirement that exchanges have such arbitration), *cert. denied*, 109 S. Ct. 54 (1988). See also Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 991-92 & n.414 (1988) (although doctrine of "unconstitutional conditions" has eroded substantially, at some point conditioning government benefits on waiver of constitutional right such as access to Article III forum rises to level of coercion and should be void).

characterizing submission to the process as a manifestation of consent is jurisprudential nonsense.

Somewhat like bargaining for a dispute resolution procedure, the availability of alternative procedures from which the disputants are free to choose can introduce discipline to the decision-making process that substitutes, though probably imperfectly, for required standards. FIFRA disputants, however, have no choice among alternatives for determining compensation.

Court-annexed arbitration similarly involves adjudication by arbitrators not legally obligated to abide by any set of legal principles. The fact that court-annexed arbitration programs normally require the arbitrators to be attorneys may increase the likelihood that they will adhere to pertinent legal rules, but this fact in itself really adds little to the predictability of result.³⁷¹ Lawyers can have their own personal versions of any given principle. The absence of decision standards in court-annexed arbitration is largely offset, however, by the availability of *de novo* review, which is discussed in the next section.³⁷²

The legislation and agency regulations that impel commodity futures arbitration also do not require the arbitrators to follow any identifiable standards for decision.³⁷³ Assuming that arbitrators are knowledgeable of commodity futures trading, an assumption likely to be fulfilled in such a specialized field, the fact that the transactions prefatory to arbitrated disputes arise in a highly differentiated commercial community with well-established conventions may increase the likelihood that those conventions will usually serve as surrogates for obligatory legal principles. Here, again, likelihood does not protect disputants in any given case against decision makers with highly idiosyncratic interpretations of the conventions. In contrast with court-annexed or FIFRA arbitration, commodity futures arbitration gives one party, the customer, a choice of dispute resolution mechanisms. The customer can select arbitration, administrative reparations proceedings within the CFTC, or litigation in federal or state court.³⁷⁴ Although this range of alternatives may provide the customer with a reasonable substitute for either overarching decisional standards or a bargained-for dispute resolution method, the commodity futures professional has no such choice.³⁷⁵

371. See Walker, *supra* note 68, at 915, 925.

372. See *infra* text accompanying notes 389-90.

373. The closest thing to a decision standard in commodity futures arbitration is the statutory requirement that the procedure itself be "fair and equitable," which of course is no substantive standard at all. See 7 U.S.C. § 7a(11) (1982).

374. See *supra* text accompanying notes 224-48.

375. See *supra* text accompanying notes 237-39. As discussed *supra* at text accompanying notes 251-54, in *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 316-18 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 54 (1988), an alternative rationale for concluding that the commodity futures professional had waived its right to adjudication by an Article III court was that the professional had consented to the arbitration procedure by becoming a member of the exchange. Once again, such "consent" is largely a legal fiction that cannot substitute for decision-making standards in the way that true bargaining can. See *supra* text accompanying note 370.

In the case of multiemployer pension plan withdrawal arbitration, there is neither bilateral bargaining nor unilateral choice from among alternatives to substitute for decisional standards.³⁷⁶ Decisional standards in this system, however, are more concrete than in the others, despite the wide latitude given pension plan trustees to make liability assessments against a withdrawing employer, a latitude imputed subsequently to the arbitrator by a strong presumption of trustee correctness.³⁷⁷ Pension trustees are constrained at least to the extent that they must either select their liability calculation formula from among four alternatives or receive approval from PBGC for any other method, apply the same formula to other withdrawing employers in the future, and use actuarial assumptions that are reasonable in the aggregate.³⁷⁸ Previous discussion demonstrated how much discretion rests with the trustees, and subsequently with the arbitrator, but even the minimal standards found in pension plan arbitration lend some degree of guidance and predictability that does not exist in the other systems.³⁷⁹

c. Judicial Review

The knowledge of the parties, their attorneys, and the initial decision maker that subsequent oversight may be conducted by an independent reviewing body can provide another source of discipline to restrain potential arbitrariness, bias, or other individualized oppression in the decisional process. The discipline created by the knowledge that review is available is similar in kind, if not degree, to that provided by concrete initial decisional standards or a bargained-for decisional process. It is present to some degree even if the reviewing body itself is unconstrained by knowable and reasonably certain decisional standards, but is far more obvious when the review is so constrained.

FIFRA specifies that the arbitrator's data-compensation award is unreviewable by any court "except for fraud, misrepresentation, or other misconduct" by the arbitrator or one of the parties.³⁸⁰ Although FIFRA's legislative history sheds no light on the intended scope of review for fraud, misrepresentation, or misconduct, the statute clearly contemplates no review on the merits. The language is similar in tenor to the review provisions of the Federal Arbitration Act (FAA), which governs consensual arbitration. Grounds for setting aside an arbitration award under the FAA are limited to situations involving demonstrable fraud or material conflict of interest on the part of the arbitrator, a party's

376. See *supra* text accompanying notes 136-39.

377. See *supra* text accompanying notes 132-35, 139.

378. See *supra* note 134.

379. The critical problem with pension plan liability assessments and arbitration, it will be recalled, is the confluence of these rather loose standards, a biased initial decision maker, and the absence of adequate factual review. See *supra* text accompanying notes 155-162.

380. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

procurement of an award by fraud or other undue means, gross procedural failures such as the arbitrator's refusal to receive evidence pertinent and material to the dispute, and the rendering of an award clearly in excess of the arbitrator's contractual authority.³⁸¹ The grounds for review under the FAA have been construed quite narrowly by the courts, as should be the case, because a broad construction would undermine the basic cost and expediency goals of arbitration.³⁸²

It seems likely that a similarly narrow construction will be accorded the FIFRA arbitration review provision. Indeed, because FIFRA's review provision makes no explicit reference to gross procedural error or unauthorized action by the arbitrator, as does the FAA, one can argue that the former envisions an even narrower scope of review than the latter. There is also the chance, however, that courts will interpret the term "misconduct" in FIFRA as encompassing such concepts.³⁸³ Preclusion of review involves a trade-off between speed, economy, and flexibility on the one hand, and protection against arbitrary, biased, or otherwise oppressive decisions on the other. The trade-off, which is much the same as that made when no standards for decision are imposed on arbitrators, is an appropriate one when parties freely bargain for it, but is much less defensible when there is no opportunity to choose.

The legislation and CFTC regulations requiring that commodity futures exchanges and the NFA establish nonconsensual arbitration systems specify that the arbitration will be "final," with the only right of appeal being that "provided under applicable law."³⁸⁴ In other words, commodity futures arbitration adopts the review provisions designed for consensual arbitration under either the pertinent state arbitration statute or the Federal Arbitration Act, as the case may be.³⁸⁵ Most state arbitration laws limit judicial review in a fashion similar to the federal act, so the review provisions borrowed by commodity futures arbitration permit

381. See *supra* notes 55-56 and accompanying text.

382. See Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 637-38 (limited nature of judicial review); Stipanowich, *supra* note 36, at 439-40 (same); Note, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way?"*, *supra* note 14 at 1731-32 (same).

383. One court has recently held, however, that FIFRA arbitrators cannot be found guilty of "misconduct" by employing no particular standards for determining compensation, because no standards exist. *PPG Indus., Inc. v. Stauffer Chemical Co.*, 637 F. Supp. 85, 89 (D.D.C. 1986).

384. See *supra* text accompanying notes 249-50.

385. In *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 54 (1988), the commodity futures broker was a member of the Chicago Board of Trade, which had adopted arbitration rules to comply with the CEA and with CFTC regulations. The exchange rules provided that arbitrations were to be governed by the Uniform Arbitration Act of Illinois. 836 F.2d at 323. Because of their similarity in almost all relevant particulars, it usually makes little difference whether the Federal Arbitration Act or a state's codification of the Uniform Arbitration Act applies. See *generally* note 55.

scrutiny only for fraud, gross procedural error, or action in excess of authority.³⁸⁶

Pension plan arbitration is subject to more extensive review than either FIFRA or commodity futures arbitration. Nonsubstantive complaints about the conduct of the proceeding are reviewable on the same narrow grounds as in these two systems.³⁸⁷ In contrast with the other two systems, however, judicial review of the trustees' and arbitrator's liability assessment does go to the merits. Review of factual determinations is, by statutory mandate, conducted under a "clearly erroneous" type of standard; review of statutory interpretation is *de novo*.³⁸⁸

With respect to review, what distinguishes court-annexed arbitration from those systems found in regulatory contexts is the availability of trial *de novo* in a court that does have an obligation to apply relevant legal principles and whose decision is further reviewable by an appellate court.³⁸⁹ Even though trial *de novo* is not usually sought, its mere availability serves as a more than adequate safeguard against oppressive first-level decision making. At some theoretical point, the statutory disincentives against trial *de novo* could be sufficient to destroy its function as a check on arbitrators, but this point does not seem to have been approached by existing disincentives in most court-annexed arbitration systems. These disincentives, which were discussed earlier, range from trivial to significant.³⁹⁰ Even at their most substantial, however, the disincentives do not seem great enough to make trial *de novo* an empty promise.

B. The Data Disclosure, Use, and Arbitral Compensation System as a Fifth Amendment Taking

Litigation over the constitutionality of FIFRA's arbitration scheme clouded its implementation until the Supreme Court recently upheld the key disclosure and use-compensation provisions in *Ruckelshaus v. Monsanto Co.*³⁹¹ and *Thomas v. Union Carbide Agricultural Products Co.*³⁹² The taking and article III issues resolved by the Court in *Monsanto* and *Union Carbide*, as well a statutory

386. See *supra* note 55 (grounds for setting aside arbitration award under the Uniform Arbitration Act essentially the same as under the FAA).

387. See *supra* text accompanying note 145.

388. See *supra* text accompanying note 140-143.

389. It is not clear that full trial *de novo* would always be necessary to satisfy various state and federal constitutional objections to court-annexed arbitration. For example, although most states with court-annexed arbitration programs provide for trial *de novo*, a small number do not. See Walker, *supra* note 68, at 922. Even if trial *de novo* is not a state or federal constitutional prerequisite, it may be necessary for public acceptance in many locales, and some form of relatively thorough review is obviously necessary for both constitutionality and general community acceptance when pure common-law claims are at issue and the disputes being resolved are not an integral part of a regulatory program.

390. See *supra* text accompanying notes 76-79.

391. 467 U.S. 986 (1984).

392. 473 U.S. 568 (1985).

vagueness/standardless delegation issue left unresolved, are outlined here to illustrate the constitutional concerns that a somewhat unorthodox nonconsensual dispute resolution procedure can generate.

1. The Construct of the Taking Issue

One of the earliest and most strenuously voiced complaints concerning FIFRA's validity asserted that the disclosure and use of test data amounted to a "taking" of the registrant's property in violation of the fifth amendment.³⁹³ Under the taking clause, which acts as a limitation on the sovereign power of eminent domain, a governmental appropriation of private property is lawful only if carried out for a public purpose and only if just compensation is paid to the property owner.³⁹⁴ The basis for the taking contention was that an original pesticide registrant has a property interest in the test data protectible under state trade secret law.³⁹⁵ The primary value of proprietary information inheres in the competitive advantage gained from its confidentiality and the right to exclude others from its use.³⁹⁶ Data submitters asserted that the disclosure and follow-on use provisions of FIFRA substantially deprived them of these attributes of ownership.³⁹⁷

Although several lower federal courts had upheld the validity of the 1978 FIFRA data provisions in the face of fifth amendment taking claims,³⁹⁸ in 1983 a district court accepted the taking arguments of Monsanto Co. and invalidated the entire scheme for handling test data.³⁹⁹ The court based its decision on four points:

(1) Despite the absence of any federal law creating a property right in test data submitted to EPA, state trade secret law in Missouri, the pertinent jurisdic-

393. The taking issue was raised not long after enactment of the 1978 version of FIFRA. See *Petrolite Corp. v. EPA*, 519 F. Supp. 966 (D.D.C. 1981); *Mobay Chemical Co. v. Costle*, 517 F. Supp. 254 (W.D. Pa. 1981), *aff'd sub nom. Mobay Chemical Co. v. Gorsuch*, 682 F.2d 419 (3d Cir. 1982), *cert. denied*, 459 U.S. 988 (1982); *Chevron Chemical Co. v. Costle*, 499 F. Supp. 732 (D. Del. 1980), *aff'd*, 641 F.2d 104 (3d Cir. 1981), *cert. denied*, 452 U.S. 961 (1981).

394. U.S. CONST. amend. V.

395. *Ruckelshaus v. Monsanto*, 467 U.S. at 1000-14; *Mobay Chemical Co. v. Gorsuch*, 682 F.2d at 422; *Chevron Chemical Co. v. Costle*, 641 F.2d at 114-16; *Petrolite Corp. v. EPA*, 519 F. Supp. at 970.

396. *Ruckelshaus v. Monsanto*, 467 U.S. at 1011-12 n.15; RESTATEMENT OF TORTS § 757 comment b, at 5 (1939); McGarity & Shapiro, *supra* note 262, at 862-63; Comment, *The Taking of Trade Secrets: What Constitutes Just Compensation?*, *supra* note 364, at 259-61; Note, *FIFRA and the "Taking" of Trade Secrets*, *supra* note 364, at 632-33. See also *supra* text accompanying notes 365-68.

397. *Ruckelshaus v. Monsanto*, 467 U.S. at 1000-14; *Mobay Chemical Co. v. Gorsuch*, 682 F.2d at 422; *Chevron Chemical Co. v. Costle*, 641 F.2d at 114; *Petrolite Corp. v. EPA*, 519 F. Supp. at 969.

398. *Mobay Chemical Co. v. Gorsuch*, 682 F.2d at 423-24; *Chevron Chemical Co. v. Costle*, 641 F.2d at 116-17; *Petrolite Corp. v. EPA*, 519 F. Supp. at 972-73.

399. *Monsanto v. EPA*, 564 F. Supp. 552, 568-69 (E.D. Mo. 1983), *vacated sub nom. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

tion, did create such an interest.⁴⁰⁰ This state-created interest encompassed the right to prevent disclosure except when essential to serve the public interest and to exclude others from use of the data.⁴⁰¹

(2) Permitting use of Monsanto's test data by follow-on registrants deprived it of the right to exclude, and this aspect of the property right was appropriated for a nonpublic purpose.⁴⁰² The only beneficiaries, according to the court, were the individual follow-on registrants.⁴⁰³ One of Congress's main, and explicitly stated, purposes for permitting follow-on use was to lower barriers to entry and thereby increase competition in the pesticide industry, an admittedly public purpose.⁴⁰⁴ Second-guessing Congress to an unusual extent, the court held that the evidence demonstrated competition in the industry to be vigorous and in no need of enhancement.⁴⁰⁵

(3) The public interest in assuring that safe and effective pesticides are marketed was served by EPA's analysis and scrutiny of submitted data, including its reliance on an independent scientific advisory panel.⁴⁰⁶ The public interest in receiving information of sufficient quantity and quality to make informed decisions about pesticides was adequately served by FIFRA's labeling requirements.⁴⁰⁷ Increasing the perceived low level of public confidence in the effectiveness of government pesticide regulation, one of the reasons asserted by Congress for its decision mandating public disclosure of safety and health data, may have been sufficiently public in character for fifth amendment purposes.⁴⁰⁸ But, the court held, permitting the public to share in regulation of the pesticide industry through disclosure to requesting parties works a destruction of private property that must be compensated.⁴⁰⁹

(4) FIFRA's arbitration system provided *no* compensation for disclosure, and failed to provide *just* compensation for follow-on use because the absence of either standards for determining compensation or judicial review made the system inherently arbitrary.⁴¹⁰

400. *Monsanto v. EPA*, 564 F. Supp at 565-66.

401. *Id.* at 565-66.

402. *Id.* at 566.

403. *Id.*

404. *See* S. REP. 334, *supra* note 265, at 30-31.

405. *Monsanto v. EPA*, 564 F. Supp. at 566.

406. *Id.* at 566-67.

407. *Id.* at 567.

408. *Id.*

409. *Id.*

410. *Id.*

2. Safety and Health Data as Property

Acting on direct appeal in *Ruckelshaus v. Monsanto Co.*, the Supreme Court vacated, concluding that the disclosure and use-compensation programs passed fifth amendment muster.⁴¹¹ The district court's opinion showed a lack of deference to the legislative branch that was striking for any court after the 1930s.⁴¹² Thus, the Supreme Court's reversal was unsurprising even though the nonconsensual arbitration system put in place by FIFRA's 1978 amendments did raise some provocative questions.

In one of the most significant portions of its opinion, the Court held, for the first time, that proprietary data filed with a regulatory agency can constitute property for purposes of the fifth amendment taking clause.⁴¹³ Borrowing from some of its procedural due process cases such as *Board of Regents v. Roth*,⁴¹⁴ the Court acknowledged "the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"⁴¹⁵ The one point on which the Court agreed with the district judge was that the state trade secret law of Missouri could provide such an independent source of property rights.⁴¹⁶

3. Investment-Backed Expectation

The Court next explored whether the disclosure and use provisions amounted to a taking of Monsanto's intangible property. Monsanto did not challenge the power of Congress to regulate the pesticide industry, and any such challenge no doubt would have been fruitless. The Court observed that regulatory restrictions on commerce have long been recognized as part of the reciprocal exchange for "the advantage of living and doing business in a civilized community."⁴¹⁷ Validity of such regulation under the commerce and due process clauses simply depends on some minimally rational relationship to a matter of legitimate

411. 467 U.S. 986, 1020 (1984).

412. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 352-59 (3d ed. 1986) (discussing judicial willingness to second-guess wisdom of economic regulatory measures until about 1937, and increasing unwillingness since that time) [hereinafter J. NOWAK].

413. 467 U.S. at 1003-04.

414. 408 U.S. 564, 577 (1972) (holding that because state law provided no form of entitlement to continuation, an untenured assistant professor had no property right in employment and state university did not violate procedural due process by failing to grant hearing prior to termination).

415. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1001 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 464, 577 (1972))).

416. 467 U.S. at 1003-04.

417. *Id.* at 1007 (quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting))).

congressional concern.⁴¹⁸ These principles are not only strong but approach inviolability when the subject of regulation is a product such as pesticides, the very nature of which creates public and legislative concern.⁴¹⁹

Even legitimate regulation can become a taking for which compensation is owing.⁴²⁰ The Court reiterated the aphorism of takings jurisprudence that it had found it impossible to develop a "set formula" for deciding when "justice and fairness" dictate that economic harm caused by government regulation be treated as a compensable taking.⁴²¹ The inquiry into whether there has been a taking is one of an "ad hoc, factual" nature.⁴²² While no precise decisional model has proved feasible, the Court has identified several factors relevant to the question whether government action has crossed the line between mere regulation and compensable taking. These factors include "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."⁴²³ In the case of FIFRA's data provisions, however, the Court found the weight of the third factor to be so overwhelming as to dispose of the taking question without reference to the first two factors.

The third factor, a "reasonable investment-backed expectation," must be more than a "unilateral expectation or an abstract need," according to the Court.⁴²⁴ With regard to FIFRA test data in the hands of EPA, the nature of the submitter's expectation depends on the known conditions under which the data are submitted. In its analysis, the Court divided the known conditions of data submission into three segments, the period prior to the 1972 amendments, during 1972-78, and after the effective date of the 1978 amendments.

Finding no pre-1972 guarantee of confidentiality or exclusive use in FIFRA or other federal law, the Court concluded that prior to 1972 Monsanto could not have had a reasonable investment-backed expectation that EPA would maintain test data in strict confidence and would use them exclusively for the purpose of considering the application for which they had been submitted.⁴²⁵ Therefore, there could be no compensable taking of data submitted prior to the effective date of FIFRA's 1972 revision. Although the Court rested its conclusion in this regard on the absence of any express guarantee in federal law, it also noted two other buttressing factors. First, in an industry that long had been the subject of much public concern and government regulation, the possibility was great that the

418. 467 U.S. at 1007 (observing that Monsanto was not challenging the power of Congress to regulate the marketing and use of pesticides, nor would such a challenge have been of any avail).

419. *Id.*

420. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

421. 467 U.S. at 1005 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

422. *Id.* (quoting *Kaiser Aetna* at 175).

423. *Id.* (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)).

424. *Id.* (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

425. *Id.* at 1008-09.

federal government, which had taken no position prior to 1972 on disclosure of pesticide test data, would find disclosure to be in the public interest if it focused on the issue.⁴²⁶ Second, there was substantial evidence that prior to 1972 personnel of EPA and USDA did customarily consider previously submitted data in support of a follow-on application, and that this agency practice was well known within the pesticide industry.⁴²⁷

The known conditions surrounding data submission were markedly different, however, during the operative period of the 1972 amendments. During this time, a data submitter had the opportunity to designate its data as trade secrets upon submission. When Monsanto filed data with EPA during the 1972-78 time frame, it did so with the understanding that FIFRA prohibited the agency from disclosing or making a follow-on use of those data agreed or ultimately determined to be trade secrets. The 1972-78 understanding based on statutorily prescribed conditions of submittal was sufficient to create a reasonable investment-backed expectation of confidentiality and nonuse.⁴²⁸ Thus, actions by EPA pursuant to the current, challenged version of FIFRA disclosing or using data that had been submitted during the 1972-78 period with such expectations constitute takings under the fifth amendment.⁴²⁹ The nonconsensual arbitration program instituted in 1978 has no applicability to any claimed losses resulting from disclosure, and judicial determinations of just compensation will be required for any disclosure-related taking.⁴³⁰ It is possible, the Court acknowledged, that data-cost arbitration may actually provide just compensation for a particular use-related taking, but the Court declined to reach the question in this case because there had been no arbitration.⁴³¹

With respect to any safety and health test data submitted by Monsanto after the effective date of the 1978 amendments, the Court reached essentially the same conclusion on the taking question as it had for pre-1972 data. Monsanto could not have had a reasonable investment-backed expectation that EPA would keep the data confidential and refrain from follow-on use beyond the limits prescribed in the amended statute itself. Monsanto was on notice, the Court held, of the manner in which EPA was authorized to disclose and use any safety and health data turned over to it by an applicant for registration.⁴³² Subsequent to the 1978 revision, Monsanto and other submitters of new data know that, for a period of ten years from submission, EPA will not consider such data in evaluating a follow-on registrant's application without the submitter's permission. The post-1978 expectations of submitters also are formed by knowledge that, once the ten-year

426. *Id.*

427. *Id.* at 1009-10. *See also supra* note 289-91.

428. *Id.* at 1010-11.

429. *Id.* at 1012.

430. *Id.* at 1013.

431. *Id.* & n.15.

432. *Id.* at 1006.

period of exclusive use expires, their permission is no longer required for follow-on use but that they are entitled to compensation for the use until the end of the fifteenth year from submission. Similarly, these submitters are aware that EPA is required publicly to disclose safety and health data subject to limited exceptions.

When distilled to its quintessence, the Court's fifth-amendment analysis of post-1978 test data simply stands for the fundamental proposition that Congress may, so long as it otherwise acts within its constitutional power, *prospectively* redefine state-created property rights without effecting a compensable taking.

4. Public Purpose

Finally, the Court found that the taking that occurred with respect to data submitted during the 1972-78 period was for a public purpose.⁴³³ Criticizing the lower court's lack of deference to Congress, the Court stated that the scope of the public use requirement of the taking clause is "coterminous with the scope of a sovereign's police powers," and "the role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow."⁴³⁴ So long as the taking has a conceivably public character, the Court continued, "the means by which it will be attained is . . . for Congress to determine."⁴³⁵

The public purposes behind the 1978 disclosure provisions included providing an effective check on the decision-making processes of EPA,⁴³⁶ enhancing public confidence in those processes,⁴³⁷ and allowing members of the public to determine the likelihood of individualized risks peculiar to their use of the product.⁴³⁸ In a similar vein, the public purposes underlying the 1978 data-use provisions included eliminating costly duplication of research and data development,⁴³⁹ streamlining the registration process,⁴⁴⁰ making new end-use prod-

433. *Id.* at 1016.

434. *Id.* at 1014.

435. *Id.* (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

436. See S. REP. NO. 334, *supra* note 265, at 41 (EPA acknowledging problems with its regulation of pesticides, and urging public disclosure of data "to encourage public understanding and criticism of Agency decision-making."); STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY AND THE REGULATION OF PESTICIDES 49 (Comm. Print 1976) (staff report criticizing EPA's record and strongly recommending public disclosure of pesticide registration data as a check on the agency, subsequently relied on heavily by Congress in fashioning 1978 FIFRA amendments).

437. See H.R. REP. NO. 663, *supra* note 264, at 52, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 2025 (view of EPA that disclosure should improve public confidence in regulatory process).

438. See S. REP. NO. 334, *supra* note 265, at 41, 44 (view of EPA that public disclosure increases individual knowledge of risks and benefits, thus furthering the exercise of independent consumer judgment); McGarity & Shapiro, *supra* note 262, at 844 (same).

439. See *supra* note 288 and accompanying text.

ucts available to consumers more quickly,⁴⁴¹ and stimulating competition by lowering entry barriers to the pesticide business.⁴⁴²

*C. Arbitration as an Encroachment
on Article III Judicial Power*

1. The Construct of the Article III Issue

Article III, § 1 of the Constitution provides that "The judicial Power of the United States, shall be vested" in courts whose judges enjoy lifetime tenure "during good Behavior" and compensation that "shall not be diminished during their Continuance in Office."⁴⁴³ Independence of the judicial branch, which was clearly the objective of this provision, serves not only as a check on legislative and executive power but also increases the likelihood of impartial adjudications.⁴⁴⁴ Although most of the early litigation over FIFRA's data provisions had centered on taking and other issues related to trade secrets,⁴⁴⁵ the nonconsensual arbitration program was also susceptible to a nontrivial claim that it violated article III of the Constitution by delegating federal judicial power to a tribunal without the core protections of article III. The lower court in *Monsanto* had, in a one-sentence afterthought, used article III as an alternate ground for striking down FIFRA.⁴⁴⁶ The Supreme Court in *Monsanto* did not reach the issue, however, because the Court found it unripe for adjudication.⁴⁴⁷ As the *Monsanto* case was in process, Union Carbide and several other pesticide producers were separately pursuing litigation founded primarily on the article III claim.

440. See S. REP. NO. 334, *supra* note 265, at 2-5 (discussing critical need to streamline registration process while making it more effective); H.R. REP. NO. 663, *supra* note 264, at 18, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 1991 (same).

441. See S. REP. NO. 334, *supra* note 265, at 3 ("overriding concern . . . that pesticides should be available to meet pest control needs"); H.R. REP. NO. 663, *supra* note 264, at 18, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 1991 (concern about pesticide availability).

442. See S. REP. NO. 334, *supra* note 265, at 30-31, 90-93 (discussing effect of legislation on pesticide competition); H.R. REP. NO. 663, *supra* note 264, at 18, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1988, 1991 (expressing purpose of enhancing competition).

443. U.S. CONST. art. III, § 1.

444. See THE FEDERALIST NO. 78 (A. Hamilton), *reprinted in* 43 GREAT BOOKS OF THE WESTERN WORLD 229, 230-31 (R. Hutchins ed. 1952) (judiciary serves as a check on legislature, not because it is superior, but because it is an intermediary for the people); *id.* at 232 (independence of the judiciary also permits it to judge fairly without regard to temporary "ill humors" of society's majority).

445. See *supra* text accompanying notes 393-442.

446. 564 F. Supp. at 567.

447. 467 U.S. at 1020.

After precious little analysis, the district court in *Union Carbide* found the mandatory data-cost arbitration scheme unconstitutional under article III.⁴⁴⁸ Relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁴⁴⁹ then the Supreme Court's most recent pronouncement on the contours of article III, the court held that the functions of a non-article III forum such as FIFRA arbitration must be limited in such a way that "the essential attributes of judicial power" are retained in an article III court.⁴⁵⁰ Because of the nonconsensual nature of the arbitration and the practical unavailability of judicial review, the court stated that "[t]he use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters."⁴⁵¹

2. Public Rights, Formalism, and the *Northern Pipeline* Antecedent

Again acting on direct appeal, the Supreme Court, in *Thomas v. Union Carbide Agricultural Products Co.*, reversed.⁴⁵² Although not overruling its *Northern Pipeline* decision of three years earlier, the Court did repudiate the approach and significant portions of the language of that case.

Northern Pipeline had involved a challenge to the constitutionality of the system of bankruptcy courts created by the Bankruptcy Reform Act of 1978.⁴⁵³ Prior to this wholesale revision of the federal bankruptcy law, bankruptcy cases were heard by referees acting as adjuncts to and under the direct supervision of federal district courts.⁴⁵⁴ These referees did not enjoy the article III protections

448. *Union Carbide Agricultural Prods. Co., Inc. v. Ruckelshaus*, 571 F. Supp. 117, 124 (S.D.N.Y. 1983), *rev'd sub nom. Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985).

449. 458 U.S. 50 (1982).

450. 571 F. Supp. at 124 (quoting *Northern Pipeline* at 81).

451. 571 F. Supp. at 124.

452. 473 U.S. 568, 594 (1985).

453. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1982) and in scattered sections of 18, 28, 46 & 48 U.S.C.).

454. The law in force prior to the 1978 Bankruptcy Reform Act was the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (current version at 11 U.S.C. §§ 101-1330 (1982)). The 1898 Act was amended by the Chandler Act of 1938, ch. 575, 52 Stat. 840 (current version at 11 U.S.C. §§ 101-1330 (1982)).

Before 1978, federal district courts served as bankruptcy courts. Bankruptcy Act of 1898, ch. 541, § 2, 30 Stat. 544 (repealed 1978). District courts were empowered to appoint referees, who were authorized to administer and settle disputes and otherwise exercise judicial powers necessary to bankruptcy dispositions. *Id.* at §§ 38, 39. The referees' jurisdiction was limited to property that was in their actual or constructive possession. *Id.* at § 38. Causes of action owned by the debtor could be brought by the bankruptcy trustee in the bankruptcy court only if the court would otherwise have had jurisdiction over the matter. *Id.* at § 23. If the bankruptcy court lacked jurisdiction, the action had to be brought in a state court or other federal court that did have jurisdiction. *Id.* All decisions of the

of federal judges.⁴⁵⁵ The 1978 Bankruptcy Act, in an attempt to upgrade the status of those charged with adjudicating bankruptcy cases, created a new system of courts staffed by bankruptcy judges.⁴⁵⁶ The judicial power of these courts extended not only to core bankruptcy proceedings but also to related actions governed by state law, such as those by or against the bankrupt debtor involving contract and tort claims.⁴⁵⁷ Bankruptcy judges exercised independent authority over questions of both law and fact, subject only to normal appellate review.⁴⁵⁸ These judges were to be appointed by the president for only fourteen-year terms, however, so bankruptcy tribunals were not article III courts.⁴⁵⁹ In *Northern Pipeline*, a majority of the Supreme Court found a violation of article III in the Bankruptcy Act's creation and empowering of bankruptcy judges, but there was no majority rationale.⁴⁶⁰ The four-member plurality adopted a "formalistic,"

referee were reviewable by the district court. *Id.* at § 38.

The Chandler Act's amendments in 1938 decreased the administrative duties of the referees and increased their judicial duties. See SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY COURTS 2-4, 95th Cong., 2d Sess. (Comm. Print 1978) (discussing the authority of referees under prior law). Later, referees came to be known as "bankruptcy judges." Bankr. R. 901 (7), 411 U.S. 1092 (1973). Although decisions of bankruptcy judges continued to be reviewable by district courts, they attained de facto finality due to burgeoning district court caseloads. See SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY COURTS 3-5, 95th Cong., 2d Sess. (Comm. Print 1978).

455. District judges were empowered to appoint referees for two-year terms, Bankruptcy Act of 1898, § 33, and to remove them at will, *id.* at § 34.

456. See Eisen & Smrtnik, *The Bankruptcy Reform Act of 1978—An Elevated Judiciary*, 28 DE PAUL L. REV. 1007, 1009-14 (1979) (discussing elevated status of bankruptcy judges under 1978 Act over bankruptcy referees and judges under prior law).

457. 28 U.S.C. § 1471(c) (Supp. IV 1978). As a result of the decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), invalidating the broad jurisdictional grant to bankruptcy courts, current law now places bankruptcy judges under the direct supervision of federal district courts, much as under pre-1978 law, when they hear "non-core" proceedings without the parties' consent. 28 U.S.C. § 157(c)(1), (2). In addition, district courts may withdraw any case or proceeding from a bankruptcy judge, either on their own motion or that of a party, "for cause shown." *Id.* at § 157(d). The district court must withdraw a case from the bankruptcy judge, upon motion by a party, if the court determines that resolution requires consideration of both bankruptcy law issues and other federal laws "regulating organizations or activities affecting interstate commerce." *Id.* "Core" bankruptcy proceedings involve matters pertaining to the administration of bankruptcy estates, allowance or disallowance of claims against estates, decisions about creditor preferences, discharging debts, the sale of property, and the liquidation of assets. *Id.* at § 157(b)(2). Although current law does not specifically define "non-core" proceedings, it does indicate that liquidation of "personal injury tort" and "wrongful death" claims are non-core. *Id.* at § 157(b)(2)(B), (O).

458. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 & n.5 (1982).

459. 28 U.S.C. §§ 152, 153(a). Under current law, bankruptcy judges are still appointed for 14-year terms, but the appointment is now made by the relevant United States Court of Appeals. 28 U.S.C. § 152(a).

460. Justice Brennan authored the plurality opinion, which was joined by Justices Marshall, Blackmun and Stevens. 458 U.S. at 52-90. Justices Rehnquist and O'Connor concurred in the judgment, but felt it unnecessary to announce broad principles governing the assignment by Congress

or literal, approach to article III analysis by reading the Court's precedents as requiring exercise of the federal adjudicatory power by article III courts except in three situations: (1) Because of Congress's plenary power over the District of Columbia and United States territories, in such areas it constitutionally can exercise its Article I legislative power by creating tribunals not having the protections of article III.⁴⁶¹ (2) Under similar reasoning, the extraordinary degree of power over the military granted by the Constitution to the legislative and executive branches justifies the creation of non-article III military courts.⁴⁶² (3) Congress also can institute non-article III decision-making bodies for the adjudication of "public rights."⁴⁶³

The "public rights" category was the only one at issue in *Northern Pipeline*. The plurality correctly characterized public rights as those arising as an inextricable part of constitutionally authorized exercises of power by the legislative and executive branches.⁴⁶⁴ Then, however, in an unfortunate choice of words, the plurality said that "a matter of public rights must at a minimum arise 'between the government and others.'"⁴⁶⁵ In an obvious contradiction of this ill-conceived statement, the plurality then acknowledged that a discharge in bankruptcy might very well be a public right similar to such congressionally created benefits as pilot licenses or common carrier operating licenses.⁴⁶⁶ Regardless of whether the restructuring of debtor-creditor relations is of a public character, however, the

of adjudicatory powers to non-Article III tribunals. *Id.* at 89-92. Chief Justice Burger and Justices White and Powell dissented. *Id.* at 92-118.

461. *Id.* at 64-65. See *Palmore v. United States*, 411 U.S. 389 (1973) (reaffirming rule that Congress has independent authority under the Constitution to establish legislative (non-Article III) courts for the District of Columbia, originally announced in *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838)); *Wallace v. Adams*, 204 U.S. 415 (1907) (recognizing similar congressional authority regarding adjudication of questions of tribal membership relevant to property claims within Indian territory); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (same with regard to territorial courts). See also FALLON, *supra* note 370, at 971-73 (discussing use of non-Article III territorial courts, in connection with proposal that appellate review by an Article III court be a constitutional minimum).

462. *Northern Pipeline*, 458 U.S. at 66-67. See, e.g., *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857) (recognizing authority of Congress to establish non-Article III courts-martial). See also Note, *A Literal Interpretation of Article III Ignores 150 Years of Article I Court History: Northern Pipeline Construction Co. v. Marathon Oil Pipeline Co.*, 19 NEW ENG. L. REV. 207, 213-14 (1983) (discussing cases involving military-tribunal exception to requirement of adjudication by Article III court).

463. 458 U.S. at 67-70. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (upholding congressional vesting of responsibility for deciding cases under the Longshoremen's and Harbor Workers' Compensation Act in an administrative agency); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (approving congressional creation of Court of Customs Appeals as a non-Article III court); *Murray's Lessee v. Hoboken Land Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (approving congressional grant of authority to Solicitor of the Treasury and United States Marshall to summarily determine liability and sell assets of a delinquent customs officer). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 51-58 (2d ed. 1988) (discussing "public rights" cases).

464. 458 U.S. at 67-68.

465. *Id.* at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

466. *Id.* at 71.

justices found that the state-law contract and tort claims also placed within bankruptcy courts' power most assuredly did not involve public rights.⁴⁶⁷ A bankruptcy court's exercise of jurisdiction over these private state-law rights might be valid if it acted only as an adjunct to an article III court, with the latter retaining the "essential attributes of judicial power."⁴⁶⁸ But such was not the case here, where the bankruptcy court's authority was plenary and subject only to appellate review under the normal "clearly erroneous" standard.⁴⁶⁹

A two-member concurrence in *Northern Pipeline* agreed that this exercise of complete adjudicatory power over state-law claims by a non-article III tribunal violated the Constitution, but could not join in the plurality's sweeping attempt to categorize the scope of Article III.⁴⁷⁰ A three-member dissent could not accept the plurality's literalist approach to article III and instead argued for a "functional," or flexible, approach that would in each case balance the strength of the legislative interest against the extent to which basic article III values are undermined.⁴⁷¹ The dissent would have found this balance to favor the legislative interest.⁴⁷²

3. Functionalism and the Evisceration of *Northern Pipeline*

In *Union Carbide*, the Court first rejected the pesticide producers' contention that data compensation rights are state-law rights of the same nature as those at issue in *Northern Pipeline*.⁴⁷³ To the contrary, the Court held, these rights are purely creations of federal law.⁴⁷⁴ As this article's earlier analysis of FIFRA compensation rights demonstrates, the Court's conclusion in this regard was correct.⁴⁷⁵

The Court then turned to the producers' contention that, even if sired solely by federal statute, FIFRA compensation rights are "private rights" requiring either adjudication by an article III court or review by such a court sufficient to retain the essential attributes of judicial power.⁴⁷⁶ In the course of responding to this contention, *Union Carbide's* six-member majority effectively renounced the *Northern Pipeline* plurality's approach to article III analysis, an approach many

467. *Id.* at 71-72.

468. *Id.* at 76-87.

469. *Id.* at 84-85.

470. *Id.* at 89-92 (Rehnquist & O'Connor, JJ., concurring in the judgment).

471. *Id.* at 92-118 (Burger, C.J., White & Powell, JJ., dissenting).

472. *Id.* at 116-18.

473. *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 584-85 (1985).

474. *Id.*

475. *See supra* text accompanying notes 363-67.

476. 473 U.S. at 585.

observers had viewed as rigidly formalistic.⁴⁷⁷ A literal prohibition of non-article III adjudications subject to three tightly circumscribed exceptions is not the appropriate way to apply article III, according to the Court.⁴⁷⁸ In place of such a methodology, the Court opted for a more elastic, functional technique similar to the balancing process promoted by the dissenters in *Northern Pipeline*.⁴⁷⁹ The thrust of the inquiry should be whether, considering all relevant circumstances, a particular congressional choice to create a non-article III adjudicatory body seriously threatens an aggrandizement of the political branches at the expense of the judicial branch.⁴⁸⁰

The *Northern Pipeline* plurality had stated that a case involves public rights only if those rights arise "between the government and others." To the extent that this statement was intended to mean that only those disputes including the United States as a party are to be treated as involving public rights, in fact it ever meant that, the *Union Carbide* Court expressly rejected it.⁴⁸¹ The Court did not abandon the distinction between public and private rights, but viewed the term "public rights" merely as a malleable description of situations in which the adjudication of rights by a non-article III tribunal is not likely to undermine basic article III values.⁴⁸² Stated somewhat differently, the Court viewed the public rights concept as reflecting a practical understanding of the fact that when Congress chooses a nonjudicial forum for resolving matters the executive or legislative branches could have determined conclusively, the danger of encroaching on judicial independence is diminished.⁴⁸³

477. *Id.* at 585-89. See, e.g., Fallon, *supra* note 370, at 918-19 (stating that "literalism" of Court in *Northern Pipeline* is understandable because of its allure, but ultimately impossible to sustain as Article III doctrine); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 204-14 (characterizing *Northern Pipeline's* public rights/private rights dichotomy as not only unduly formalistic but also irrelevant); Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 611-17 (1985) (viewing *Northern Pipeline* as one example of "myth" of judges as "gladiators" for the people, standing up against the "King" when necessary); Note, *A Literal Interpretation*, *supra* note 462, at 233-35 (characterizing *Northern Pipeline* as a deviation from longstanding precedent); Note, *Formalism and Functionalism: From Northern Pipeline to Thomas v. Union Carbide Agricultural Products Co.*, 37 SYRACUSE L. REV. 1003, 1013-17 (1986) (criticizing inadequacy of *Northern Pipeline's* formalistic approach).

478. 473 U.S. at 585-86.

479. *Id.* at 586-93. See *Northern Pipeline*, 458 U.S. at 92-118 (Burger, C.J., White & Powell, JJ., dissenting).

480. 473 U.S. at 589-91.

481. *Id.* at 586.

482. *Id.* at 586-89.

483. *Id.* at 589.

4. Aggrandizement of the Political Branches and the Structural Integrity of the Judiciary

In the case of FIFRA data-compensation rights, the *Union Carbide Court* identified several factors contributing to a conclusion that the mandatory arbitration system does not impinge on the structural integrity of the judicial branch sufficiently to contravene article III.

(1) To begin with, the compensation right possesses many of the characteristics of a public right. Using a registrant's data to support a follow-on registration serves a public purpose as an integral element of a comprehensive federal regulatory scheme designed to protect the public health. Because the right to compensation is both a creation of federal statute and a component of a larger administrative arrangement, Congress had considerable latitude "to allocate costs and benefits among voluntary participants in the program without providing an article III adjudication."⁴⁸⁴

(2) Congress could have fashioned other means of adjusting the burdens of pesticide regulation without even implicating article III. It could have authorized EPA, for instance, to charge follow-on registrants fees to cover the cost of test data and from those fees subsidized submitters for a portion of their data development costs. In the Court's view, Congress instead just collapsed these two steps into one.⁴⁸⁵

(3) The "near disaster" of the 1972 amendments and "the danger to public health of further delay in pesticide registration" demonstrates an especially strong legislative interest in developing an expedient method for apportioning data costs and resolving compensation disputes.⁴⁸⁶ The obvious strength of the legislative interest and necessity of congressional action, in themselves, substantially diminish the likelihood of a structural magnification of legislative or executive power at the judiciary's expense.⁴⁸⁷

(4) The Court noted that "the FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement."⁴⁸⁸ Under this system of internal sanctions, if a follow-on registrant fails to comply with the arbitration provisions, EPA is required to cancel the follow-on registration; in the event of such a failure by the original registrant the agency considers the data without compensation.⁴⁸⁹ These observations were made because, according to the Court, the danger of legislative or executive encroachment on judicial power is minimal when no

484. *Id.*

485. *Id.* at 590.

486. *Id.*

487. *Id.*

488. *Id.* at 591.

489. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

unwilling defendant is subjected to judicial enforcement power as a result of the non-article III adjudication.⁴⁹⁰

(5) Although the Court had made its point, it closed with two observations regarding review, the first of dubious validity and the second of little practical importance. In the first observation about review, the Court stated that FIFRA "limits but does not preclude" review of the arbitral decision by an article III court, and that, in the particular circumstances in which expedient dispute resolution was a practical necessity, the review provided was an "an appropriate exercise of the judicial function."⁴⁹¹ As noted earlier in this article, FIFRA permits judicial review of an arbitration award to an extent almost identical to, and certainly no greater than, that of consensual arbitration.⁴⁹² Such review does not touch the merits of the dispute, but relates only to palpable debasement of the decision-making process. Indeed, any review could not involve the merits because there are no standards for decision. The Court stated that "[t]his provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under governing law."⁴⁹³ The first part of this statement may carry some meaning because abusing or exceeding authority arguably could be brought within the term "misconduct" in FIFRA's judicial review provision.⁴⁹⁴ The latter portion of the statement is completely without substance because, as already fully explored, there are no decision standards and thus no "mandate under governing law" for an arbitrator to "misconstrue."⁴⁹⁵

(6) In its second observation concerning review, the Court noted somewhat cryptically that "review of constitutional error is preserved."⁴⁹⁶ Congress said nothing in FIFRA about judicial review of constitutional challenges. The Court meant either that Congress did not prohibit such review and that it is presumed to exist in the absence of a clear legislative expression to the contrary, or that article III and due process preclude Congress from doing so. So far, the Court has not found it necessary to decide whether Congress has the power to foreclose federal courts from entertaining constitutional claims, but such an attempted exercise of

490. 473 U.S. at 591. This argument may strike some as being precisely backwards. Judicial enforcement could, in fact, provide an opportunity for some form of oversight by the Article III judiciary.

491. *Id.* at 592.

492. *See supra* text accompanying notes 380-82.

493. 473 U.S. at 592.

494. *See supra* text accompanying notes 369-70.

495. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). Although the FIFRA arbitration provision contains no explicit standards of decision, the general congressional objectives underlying the 1978 FIFRA amendments can be discerned from legislative history. Standards borrowed from the legislative history probably are sufficient to withstand the minimal, perhaps ethereal, constitutional scrutiny called for under the statutory vagueness or standardless delegation doctrines, *infra* text accompanying notes 532-58, but not to support meaningful judicial review or, for that matter, fair dispute resolution in the first instance, *supra* text accompanying notes 368-70.

496. 473 U.S. at 592.

power by Congress surely would raise very serious constitutional questions.⁴⁹⁷ Whenever a particular federal statute has forbidden judicial review, the Court has interpreted the preclusive provision narrowly so as not to raise the constitutional issue.⁴⁹⁸ In *Union Carbide*, the Court's observation concerning the existence of an independent basis for review of constitutional claims probably is not all that important because, once the constitutionality of FIFRA itself is established, constitutional claims should seldom arise from the continuing operation of the arbitration program. Any *procedural* malfeasance by the arbitrators that might generate due process claims presumably would already lie within the express scope of permissible judicial review and the review therefore would not take on a constitutional dimension.⁴⁹⁹ Fifth amendment taking claims could still arise from individual arbitrations, such claims being based on assertions by an original registrant that a particular arbitration award provided no compensation at all for diminution in value by public disclosure (which, of course, the award is not supposed to provide), and that the award fell substantially short of providing constitutionally required "just compensation" for use of the data to support a follow-on registration. Assuming that FIFRA's data disclosure and use provisions remain essentially unchanged in future years, the potential for taking claims will

497. In *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring), a case involving the statutory limitation of judicial review in Selective Service cases, it was observed that an interpretation of the limitation as precluding judicial consideration of constitutional claims would raise serious constitutional problems.

498. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 n.3 (1985) (in case challenging constitutionality of federal statute placing \$10 limit on attorney fees in disability benefits cases before Veteran's Administration, interpreting statutory prohibition of judicial review as not encompassing review of constitutional claims); *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (interpreting statutory prohibition of judicial review of Veteran's Administration educational benefits decisions as not encompassing review of constitutional challenges).

Although the Supreme Court has not decided whether the Constitution requires access to judicial review for constitutional claims, it has determined that the Constitution does not mandate the availability of general appellate review of legal or factual issues, in either criminal or civil cases. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (criminal); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (civil). See also Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 628-29 (1984) (criticizing Court's refusal to recognize constitutional right of appeal).

499. Moreover, there are indications that procedural due process claims focusing on EPA's operation of the data use/compensation system or FMCS's supervision of the arbitration program may be difficult to maintain. One district court has held that an original registrant cannot challenge, on procedural due process grounds, EPA's failure to notify it of the agency's use of post-1978 data to support a follow-on registration, because under *Monsanto* there is no property right in such data. The court held, again relying on *Monsanto*, that a procedural due process claim can only be asserted with regard to data submitted during 1972-78. *Eli Lilly & Co. v. EPA*, 615 F. Supp. 811, 819-20 (S.D. Ind. 1985). The court may have misread *Monsanto*, because the Supreme Court held that there is indeed a property right in data submitted to EPA to obtain registration, but that there is a compensable "taking" of only such data as were submitted during 1972-78 with a reasonable, investment-backed expectation of continued confidentiality. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 1006-13. Prior to *Monsanto*, at least one district court had held that no procedural due process claims could be asserted by submitters of data after 1978 because there was no property right in such data. See *Petrolite Corp. v. EPA*, 519 F. Supp. 966, 974 (D.D.C. 1981).

dwindle with time because of the Supreme Court's decision in *Monsanto* that only data submitted during the 1972-78 period has been "taken" for fifth amendment purposes.

5. Developments in Article III Doctrine Since *Union Carbide*

a. Schor and the Bifurcation of Article III

One cannot properly leave a discussion of *Union Carbide* without further comment about its effect on article III jurisprudence. The *Northern Pipeline* plurality's decision model, consisting of an almost unyielding buffer around the federal judicial function, penetrable only by three exceptions, had been roundly criticized as not only representing unwarranted and unrealistic formalism,⁵⁰⁰ but also as a radical departure from 150 years of more ductile theory.⁵⁰¹

Given the difficulty the Court has experienced historically in attempting to articulate coherent article III doctrine,⁵⁰² and the fact that the formalistic approach of *Northern Pipeline* commanded only a plurality, the substantial theoretical shift in *Union Carbide* was not altogether surprising. Although there may have been some doubt immediately after *Union Carbide* as to whether the case signalled a permanent reversion to a less formalistic approach toward article III, any such doubt had little time to manifest itself before the Court again visited the question in *Commodity Futures Trading Commission v. Schor*.⁵⁰³ As discussed earlier, *Schor* did not involve nonconsensual arbitration but instead examined an article III challenge to the somewhat analogous administrative reparations scheme of the Commodity Exchange Act.⁵⁰⁴ *Schor's* importance to the present discussion lies in its bifurcation of article III interests and its strong confirmation of the shift in *Union Carbide* to a less formalistic view of article III,

500. See, e.g., Fallon, *supra* note 370, at 918-19 (arguing that "literalism" of *Northern Pipeline* plurality ultimately impossible to sustain as Article III doctrine); Redish, *supra* note 477, at 204-14 (characterizing plurality's public rights/private rights dichotomy as not only unduly formalistic but also irrelevant); Resnik, *supra* note 477, at 611-17 (viewing *Northern Pipeline* as one example of "mythic" perception of federal courts as bulwarks against executive tyranny); Note, *Formalism and Functionalism*, *supra* note 477, at 1013-17 (1986) (criticizing *Northern Pipeline's* formalistic approach as inadequate and unworkable).

501. See Redish, *supra* note 477, at 204-10 (arguing that Court's elevation of public/private rights distinction is aberration in historical development of Article III doctrine); Note, *A Literal Interpretation*, *supra* note 462, at 233-235 (characterizing *Northern Pipeline* as a deviation from longstanding precedent).

502. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist & O'Connor, JJ., concurring in the judgment) (characterizing historic development of Article III doctrine as marked by "frequently arcane distinctions and confusing precedents").

503. 478 U.S. 833 (1986).

504. See *supra* text accompanying notes 227-35.

a shift of potentially great significance to the constitutionality of yet-unborn nonconsensual arbitration systems.

In *Schor*, a customer asserted violations of CEA's anti-fraud provisions in a CFTC reparations proceeding against a commodity futures broker. Before receiving notice of the reparations proceeding, the broker had filed a diversity action in federal district court to recover the debit balance in the customer's trading account with the broker.⁵⁰⁵ The customer counterclaimed for the alleged CEA violations in the district court, and also moved on two separate occasions to dismiss or stay the district court action on the grounds that continuation of the federal suit would be a waste of judicial resources and a burden on the litigants because the CFTC reparations proceeding would fully adjudicate the rights of the parties.⁵⁰⁶ Although the customer's motions to dismiss or stay the broker's federal court action were not granted, the broker ultimately was induced to dismiss that action voluntarily and assert its claim for the debit balance as a counterclaim in the reparations proceeding. In that proceeding, the administrative law judge ruled in the broker's favor on both the customer's claim and the broker's counterclaim.⁵⁰⁷ Then, for the first time, the customer challenged the CFTC's statutory authority to determine a state common-law counterclaim. The administrative law judge rejected the challenge, the CFTC declined to review the decision, and the customer sought review before the federal court of appeals.⁵⁰⁸

On its own initiative, the court of appeals raised the question of whether the CFTC could constitutionally adjudicate the broker's counterclaims without impermissibly encroaching on the federal judicial power under article III. Although the court of appeals ultimately did not reach the article III question, the Supreme Court did find it necessary to confront the issue.⁵⁰⁹

505. *Conti Commodity Servs., Inc. v. Mortgage Servs. of Am., Inc.*, No. 80-C-1089 (N.D. Ill., filed Mar. 4, 1980).

506. 478 U.S. at 838.

507. *Id.*

508. *Id.*

509. The court of appeals, *sua sponte*, had raised the issue of whether the CFTC could constitutionally adjudicate common-law counterclaims in light of the Supreme Court's then-current decision in *Northern Pipeline*. *Schor v. Commodity Futures Trading Comm'n*, 740 F.2d 1262 (D.D.C. 1984), *vacated sub nom. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). After considering the question, the court of appeals opted for an interpretation of the CEA that denied the CFTC authority to adjudicate common-law counterclaims, thus avoiding the Article III constitutional issue. 740 F.2d at 1266-69. The Supreme Court then decided *Union Carbide* and, after granting the CFTC's petition for writ of certiorari in *Schor*, vacated the court of appeals decision and remanded it for reconsideration in light of *Union Carbide*. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 883 (1986). After reconsideration, the court of appeals reinstated its earlier decision that the CFTC had no statutory authority to entertain the broker's common-law counterclaims. *Schor v. Commodity Futures Trading Comm'n*, 770 F.2d 211 (D.D.C. 1985), *rev'd sub nom. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). The Supreme Court again granted certiorari. 474 U.S. 1018 (1985). The Court first concluded that the court of appeals had erred in finding no statutory authority for the CFTC's determination of common-law counterclaims. 478 U.S. at 841-47.

The Court identified two interests served by article III, one personal and the other structural. The personal interest protected by article III consists of the right of litigants "to have claims decided before judges who are free from potential domination by other branches of government."⁵¹⁰ The structural interest, on the other hand, is found in the need "to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government.'"⁵¹¹

b. Waiver of Article III's "Personal" Component

Perhaps the most important distinction between the two interests, according to the Court, is that the personal interest is waivable whereas the structural one is not.⁵¹² In *Schor*, the Court concluded that the customer had waived his personal right to an adjudication by an article III tribunal in two ways. First, the customer had expressly waived the right by demanding that the broker pursue its counterclaim in the reparations proceeding rather than in the federal court action. The customer was content to have the entire dispute, including the broker's common-law contract claim, resolved by the CFTC until the administrative law judge ruled against him.⁵¹³ Second, even if the customer had not expressly insisted on having the broker's counterclaim resolved administratively, he had implicitly waived his personal article III right by foregoing state or federal litigation and electing administrative reparations when CFTC regulations made it

It is true that a cardinal rule of federal statutory construction requires courts, when faced with two or more reasonable alternatives, to choose an interpretation that avoids serious doubt about the statute's constitutionality. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979). In *Schor*, however, the Supreme Court concluded that the only reasonable interpretation of the CEA was that Congress had indeed authorized the CFTC to dispose of common-law counterclaims. 478 U.S. at 841-47. The Article III challenge thus had to be resolved. *Id.*

510. 478 U.S. at 848.

511. *Id.*

512. *Id.* at 848-49. It is difficult to foresee the future consequences of the Court's bifurcation of Article III into personal and structural interests. Several questions, which are beyond the scope of this article, remain to be answered. For instance, if in a particular case the structural interest is found not to be offended, and if the personal interest is found not to have been waived, are there circumstances in which the personal interest by itself will provide a basis for invalidating congressional action? Also, if the personal interest is found not to have been waived, what factors will guide the analysis of that interest? To what extent, if any, will those factors be similar to the factors identified by the Supreme Court as relevant to the structural component of Article III?

As applied to Article III doctrine generally, the two interests identified by the Court in *Schor* may turn out to be inseparable in practice, if not in theory. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 866-67 (Brennan & Marshall, JJ., dissenting) (arguing that the two interests are inseparable). If so, the distinction ultimately will be of little practical importance. The one situation where the dichotomy may have a practical effect is in a special case like *Schor* where the challenger was afforded several choices and now complains about the Article III implications of the choice he made. It may be that only the commodity futures professional, and not the customer, can claim that Article III values have been subverted.

513. 478 U.S. at 849.

clear that the agency would exercise jurisdiction over counterclaims arising from the same transaction.⁵¹⁴

Given the particular facts of *Schor*, the Court's waiver rulings seem quite reasonable, if we accept the proposition that article III separation of powers claims should be waivable at all. The customer's conduct clearly was sufficient to support a finding of express waiver. The implicit waiver found in the customer's knowing election of an alternative procedure over litigation also makes sense, whether the procedure in question is reparations or arbitration. It simply is not a nonconsensual procedure from the customer's perspective. The commodity futures customer has more freedom to select among dispute resolution procedures than if there had been no superintending regulatory scheme.

The factually based finding of waiver in *Schor* is far more defensible than the fictional waiver that subsequently served as an alternative ground for decision in *Geldermann, Inc. v. Commodity Futures Trading Commission*.⁵¹⁵ In the case, which involved the CEA's arbitration system rather than its administrative reparations procedure, the United States Court of Appeals for the Seventh Circuit concluded that a commodity futures broker had waived the right to raise an article III challenge for two reasons. First, the broker waived the right by belatedly raising an article III challenge only after the arbitration proceeding had concluded to his dissatisfaction.⁵¹⁶ Although these facts do not point quite so strongly to waiver as did the facts in *Schor*, this part of the holding in *Geldermann* is at least sensible. The second basis for finding waiver, however, raises the "regulatory bargain" concept discussed earlier. The court found that the broker also had waived its right to assert an article III challenge merely by becoming a member of the particular commodities exchange, the rules of which provided for compulsory arbitration if demanded by a customer.⁵¹⁷ The exchange rules were adopted, of course, under compulsion by the CFTC. Moreover, the broker's "choice" was the largely illusory one of operating at a substantial competitive disadvantage by foregoing exchange membership.⁵¹⁸

514. *Id.* at 849-50.

515. 836 F.2d 310, 317-20 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 54 (1988).

516. *Id.* at 321.

517. *Id.* at 317-20.

518. In *Geldermann*, the court of appeals supported its fictional waiver holding by taking, totally out of context, an isolated statement from *Union Carbide*. 836 F.2d at 317-18. In *Union Carbide*, the Supreme Court pointed to the fact that FIFRA's data provisions were uncoupled with any judicial sanctions, but instead were enforceable only by a set of internal administrative sanctions, as one of several factors supporting a conclusion that the danger of encroachment on federal judicial power was minimal. 473 U.S. at 591-92. The Court observed, in dictum, that if there were any judicial sanctions the only object of them would be a follow-on registrant who had consented to the arbitration procedure. 473 U.S. at 592. Although this statement in *Union Carbide* hints at acceptance of the notion of fictional consent to a nonconsensual dispute resolution procedure, its use as authority for a finding of waiver in *Geldermann* was obviously improper.

*c. Article III's "Structural" Component and the
Confirmation of Functionalism*

After finding that the customer had waived its personal right to raise an article III challenge, the Supreme Court in *Schor* analyzed the nonwaivable structural interest safeguarded by article III. Here, the Court reiterated its rejection of a formalistic approach to article III analysis in favor of a functional approach that focuses on whether adjudication in a non-article III tribunal unduly threatens the institutional integrity of the judicial branch.⁵¹⁹ Following much of *Union Carbide's* reasoning and language, the Court identified several factors which when taken together lead to the conclusion that CFTC determination of common-law counterclaims creates little real danger of legislative or executive aggrandizement at the expense of the judiciary.

The first factor to be examined is the extent to which the "essential attributes of judicial power" are reserved to article III courts rather than being transferred to a non-article III tribunal.⁵²⁰ The only departure from the "traditional agency model," according to the Court, is the CFTC's authority to decide common-law counterclaims in an administrative reparations proceeding.⁵²¹ Although a "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties," the judicial power

519. 478 U.S. at 851. Although current scholarship widely recognizes *Union Carbide* and *Schor* as representing a return to Article III functionalism, it generally sees cases such as *Bowsher v. Synar*, 478 U.S. 714 (1986), decided on the same day as *Schor*, and *INS v. Chadha*, 462 U.S. 919 (1983), as representing the continuing use of formalism when separation of powers questions involve legislative-executive conflicts rather than legislative-judicial ones. See Brown, *Article III as a Fundamental Value--The Demise of Northern Pipeline and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 77-80 (1988); Strauss, *Formal and Functional Approaches to Separation of Powers Questions--A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 515-16 (1987); Note, *Formalism and Functionalism*, *supra* note 476, at 1033-34. See also *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 865 (Brennan & Marshall, JJ., dissenting) ("impossible to reconcile the radically different approaches" of *Bowsher* and *Schor*).

Despite the Court's dramatic departure from the much-criticized *Northern Pipeline* plurality's approach, *Schor* also has not fared extremely well in the scholarly literature. See, e.g., Brown, *supra*; Saphire & Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U.L. REV. 85 (1988) (proposing that, because neither the risk to administrative agencies created by formalism of *Northern Pipeline* nor the risk to judicial independence created by functionalism of *Union Carbide* and *Schor* is acceptable, Article III doctrine should focus on availability and scope of judicial review); Strauss, *supra*; Note, *Eroding the Separation of Powers: Congressional Encroachment on Federal Judicial Power*, 53 BROOKLYN L. REV. 669, 686-97 (1987) (sharply criticizing *Schor* as providing little guidance and as sacrificing constitutional value of judicial independence to nonconstitutional value of efficiency); Note, *Commodity Futures Trading Commission v. Schor: Article III Finds a Home on the Slippery Slope*, 21 LOY. L.A.L. REV. 707, 748-49 (1988) (although viewing *Northern Pipeline* as too formalistic, thus risking destruction of critical institutions (administrative agencies), seeing *Schor* as too functional, thus risking gradual erosion of judiciary's independence); Note, *Formalism and Functionalism*, *supra*.

520. 478 U.S. at 851-53.

521. *Id.* at 852.

allocated to the CFTC is quite narrow.⁵²² The agency's overall adjudicatory power is limited to a highly circumscribed area of law and its even narrower jurisdiction over non-federal counterclaims arising from the same facts is "limited to that which makes the reparations procedure workable."⁵²³ Moreover, CFTC reparations decisions are fully reviewable by an article III court, under a "weight of the evidence" standard for factual determinations and *de novo* for legal ones.⁵²⁴ The second factor viewed by the Court as important to article III structural analysis is the "origins and importance of the right to be adjudicated."⁵²⁵ While admitting that the risk of undue encroachment on the federal judiciary is at its greatest when an obviously "private," common-law right is implicated, the Court found such risk to be *de minimis* in the present case because of the range of available dispute resolution alternatives.⁵²⁶ Although the commodity futures professional has far less choice than the customer, even the broker in the present case had an option to pursue its debit-balance claim in federal or state court.⁵²⁷ The customer has even more choices.⁵²⁸ The existence of these alternatives is relevant to the structural component of article III because they make it clear that Congress was trying to promote expedient dispute resolution in pursuit of broader regulatory objectives rather than attempting to intrude upon judicial prerogatives.⁵²⁹

The Court identified the third factor as "the concerns that drove Congress to depart from the requirements of article III."⁵³⁰ At this point, however, this factor had become redundant. The relevant concerns of Congress, which related to enhancing the efficiency of commodity futures regulation by providing expedient dispute resolution procedures, had already been identified by the Court and found substantial in its examination of the second factor.

The decisions in *Union Carbide* and *Schor* could not be clearer in their implications for article III scrutiny of nonconsensual dispute resolution mechanisms in federal regulatory programs. When arbitration or some other resolution procedure is adopted pursuant to a demonstrably legitimate federal interest, is both related and subsidiary to that interest, and calls for only a relatively circumscribed exercise of judicial power by a non-article III tribunal, anyone raising an article III challenge faces long odds. Moreover, the Court apparently will not be reluctant, under the right facts, to find that such a claim has been waived, although it remains to be seen whether the dichotomy between a waivable personal interest

522. *Id.*

523. *Id.* at 856.

524. *Id.* at 853.

525. *Id.* at 851.

526. *Id.* at 853-55.

527. *See supra* text accompanying notes 505-06.

528. 478 U.S. at 855. *See supra* text accompanying notes 225-26.

529. 478 U.S. at 854-55.

530. *Id.* at 851, 855-56.

and a nonwaivable structural interest will have any practical significance, aside from special cases like *Schor* where the challenger had selected from an array of dispute resolution options.⁵³¹

D. Statutory Vagueness/Standardless Delegation

Not surprisingly, those challenging the constitutionality of FIFRA's data provisions also have pointed to the fact that the statute grants arbitrators the authority to make legally binding determinations without any accompanying standards. The issue may be posed in more than one way. In *Monsanto* the district court held, without any real discussion and apparently as an alternative ground for striking down the statute, that the compensation provisions were "arbitrary and vague."⁵³² Although the district court announced this conclusion in the midst of stating its rationale for finding that the FIFRA compensation system did not provide just compensation for the taking of Monsanto's property, it seems to have been applying a substantive due process standard.⁵³³ The Supreme Court did not reach the issue, however, because the Court viewed it, like the article III issue, as unripe for determination.⁵³⁴ When the statute in question is regulatory, nonpenal, and affects only property rights rather than a fundamental right such as freedom of expression, a challenge based on alleged statutory vagueness is very unlikely to succeed.⁵³⁵ The courts' virtual rejection of due process as a basis for challenging the *substance* of a statute, rather than its procedural implementation, is too well known to warrant comment.⁵³⁶ Although neither standards for determining compensation nor the general policy goals of Congress were given expression in the statute itself, the legislative history

531. Again, the facts in *Schor* supported a finding of waiver by a customer who had many choices. It is hoped that the Supreme Court will not extend its willingness to find waiver to cases where there is no factual basis for doing so, as was improperly done by the court of appeals in *Geldermann*. See *supra* note 518. The isolated statements about consent to registration in *Monsanto*, 467 U.S. at 1007-08, and about consent to arbitration in *Union Carbide*, 473 U.S. at 592, were not made by the Court in connection with a waiver issue, and should not be seized upon to support a finding of waiver. Fictional consent should not even be used in place of sound policy analysis to justify a regulatory decision, much less to fabricate a waiver of important rights. See *supra* text accompanying note 370.

532. *Monsanto Co. v. EPA*, 564 F. Supp. 552, 567 (E.D. Mo. 1983), *vacated sub nom. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

533. In the next paragraph, the court stated that "the arbitration scheme does not afford Monsanto just compensation and constitutes a denial of due process in violation of the Fifth Amendment." 564 F. Supp. at 567. See J. NOWAK, *supra* note 412, at 321-29 (discussing the nature of the distinction between procedural and substantive review under the due process clause).

534. 467 U.S. at 1020.

535. See J. NOWAK, *supra* note 412, at 323 & n.2, 846-47 (discussion of statutory vagueness/overbreadth as a viable constitutional doctrine in cases involving penal statutes or affecting fundamental rights).

536. See L. TRIBE, *supra* note 463, at 565-86 (tracing rise and fall of substantive review under the due process clause).

of FIFRA's 1978 data provisions is far from silent. This history, which has been elaborated upon already,⁵³⁷ provides ample evidence of what Congress was attempting to accomplish generally through the data provisions, and courts considering a statutory vagueness charge will almost certainly find that the legislative record constitutes sufficient guidance to withstand a due process challenge.⁵³⁸

In *Union Carbide*, the issue was propounded in terms of whether FIFRA's data provisions had accomplished a standardless delegation of Congress' legislative power in violation of article I of the Constitution. The district court stated that "plaintiffs appear correct in their contention that this is a standardless delegation of [legislative] powers,"⁵³⁹ but rendered no holding on the standardless delegation issue, instead resting its decision solely on article III.⁵⁴⁰ The Supreme Court also did not reach the article I delegation issue in *Union Carbide*, because of the Court's view that the issue had been neither fully litigated in the lower court nor adequately briefed or argued before the high court.⁵⁴¹

Because FIFRA arbitration adjusts rights and obligations between identified parties on the basis of an established set of historical facts, the procedure is fundamentally an adjudicatory rather than a rule-making one.⁵⁴² On the surface, viewing the arbitrator's role in this way makes for a somewhat uneasy theoretical fit when one claims that Congress has delegated legislative rule-making power without adequate standards. In the administrative realm, however, the lines between adjudicatory and rulemaking actions are often blurred, with policy making not uncommonly taking place in an adjudicatory or quasi-adjudicatory procedure.⁵⁴³

537. See *supra* notes 259-358 and accompanying text.

538. See *infra* text accompanying note 547.

539. 571 F. Supp. at 124.

540. *Id.*

541. 473 U.S. at 593.

542. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (discussing and applying adjudicative/legislative distinction in context of determining whether procedural due process guarantee applies); *Londoner v. Denver*, 210 U.S. 373 (1908) (same); J. NOWAK, *supra* note 412, at 484-85 (discussing nature of adjudicatory actions in due process context); R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW & PROCESS* 248-55 (1985) (same) [hereinafter R. PIERCE].

543. Agencies are not required to select among the various adjudicatory and rulemaking procedures according to traditional definitions of adjudicative and legislative action, and some agencies have preferred to use adjudicatory proceedings to accomplish rulemaking. See R. PIERCE, *supra* note 542, at 282-85. Congress can, if it wishes, require agencies to employ hybrid adjudicatory/rulemaking procedures in which adjudication and policy making are entwined. See, e.g., Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1974, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193-98 (codified as amended at 15 U.S.C. § 57a (1982)). Courts, however, cannot require agencies to employ adjudicatory-type procedures in its rulemaking that are more demanding than those required by statute or the Constitution. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). A court can require an agency to conduct an adjudicatory-type hearing in rulemaking, for example, only when the action that is denominated "rulemaking" bears all the obvious earmarks of adjudication--the action affects a relatively small number of persons, those

In the case of FIFRA, the lack of express legislative guidance provided for arbitrators necessarily casts them in a limited policy-making role, especially in the early stages of the arbitration program's implementation.⁵⁴⁴ Thus, despite the adjudicatory nature of their task, an article I standardless delegation issue may indeed arise if FIFRA arbitrators are viewed as policy-making surrogates for Congress. Even if such an issue exists, however, a standardless delegation challenge faces odds as long as those facing a statutory vagueness claim. For decades the courts have strained mightily to uphold delegations of rule-making power to administrative agencies, and have approved delegations accompanied by the broadest possible standards.⁵⁴⁵ Because FIFRA arbitrators are subdelegates of the Federal Mediation and Conciliation Service,⁵⁴⁶ any rule-type policy making by the arbitrators will presumably be judged according to the same relaxed constitutional standards as those applied to such actions when practiced directly by an administrative agency. In a vein similar to that likely to be followed in

persons are exceptionally concerned, and their concern is based in each case on individualized grounds—so that procedural due process applies and mandates a hearing. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973).

544. Neither FIFRA nor the regulations of EPA or FMCS make provisions for any precedential value to be accorded to arbitration decisions. To do so would certainly not comport with traditional conceptions of the arbitral process. However, because of the narrowness of the issues dealt with in FIFRA arbitration and the relatively small and highly differentiated community of interested parties and arbitrators, it would not be surprising to observe the development of at least an informal manifestation of *stare decisis* as more data compensation cases are decided. Subsequent arbitration panels would then play less of a policy-making role.

In the second full-fledged FIFRA arbitration to be decided, the arbitrators made an explicit effort to prepare the opinion in a way that would increase its future value as precedent and even pled with future participants in the process to reduce the substantial transaction costs of FIFRA arbitrations by giving precedential effect to their determinations. See *E.I. du Pont de Nemours & Co. and Griffin Corp.*, American Arb. Ass'n Docket No. 16-171-0080-86M, at 5-6 & app. A at 37-40 (Dec. 22, 1988) (Birch, Juten & Foy, Arbs.). *But see* Conner, *The Linuron Decision*, *supra* note 367, at 1685-88 (attorneys for original registrant in *du Pont* arbitration arguing that no FIFRA arbitration decision, including that one, should be treated as having precedential value).

In contrast with commercial arbitration, precedent does play a role in labor arbitration, where arbitrators prepare written opinions and sometimes do rely on prior arbitrations. See, e.g., *Star Mfg. Co.*, 68 Lab. Arb. 148 (1977) (Hall, Arb.) (arbitrator treating prior arbitration award as having precedential value); *Pepsi Cola Gen. Bottlers, Inc. and Brewery & Soft Drink Workers*, Local 20, 55 Lab. Arb. (BNA) 663 (1970) (Volz, Arb.) (same).

545. See R. PIERCE, *supra* note 542, at 56-59 (tracing decline of nondelegation doctrine since New Deal). There has been recent interest in attempting to revitalize the nondelegation doctrine, including expressions of such interest by Chief Justice (then Justice) Rehnquist. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring). See also R. PIERCE, *supra* note 542, at 60 & n.58 (discussing recent scholarly opinion urging revitalization). Although such revitalization has not yet occurred, Professors Shapiro & Glicksman recently argued that Congress has shown signs of filling the void during the 1980s by exercising greater control over administrative discretion, something that few thought Congress would do without pressure from the courts. See Shapiro & Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 823-24.

546. See *supra* text accompanying notes 355-57.

response to a due process challenge, courts are almost certain to view the major objectives of the data use and compensation scheme that can be gleaned from the legislative history--eliminating costly duplication of research and data development, streamlining the registration process, making new end-use products available to consumers more quickly, and stimulating competition by lowering entry barriers to the pesticide business--as constituting sufficient congressional guidance to satisfy article I concerns.⁵⁴⁷

Today, delegating policy-making authority without standards will not raise significant article I concerns unless the policies left to the delegate are truly central to the congressional function.⁵⁴⁸ Although Congress probably could have set regulatory policy more effectively by explicitly identifying the specific objectives of data compensation for arbitrators to pursue, what has been left to the arbitrators--calculating compensation in furtherance of purposes generally discernible from legislative history--is policy making at a sufficiently subordinate level to survive the minimal constitutional scrutiny these kinds of regulatory delegations normally receive. It is true, however, that unless Congress broadens the scope of judicial review or the courts do so by an expansive (and strained) interpretation of the statutory term "misconduct,"⁵⁴⁹ a court probably will be disabled from determining in any given case whether the arbitrators have acted in furtherance of congressional goals. Given the extreme difficulty of successfully maintaining a standardless delegation or due process challenge against federal regulatory legislation, such disabling may represent bad law but does not offend modern constitutional norms.

In the aftermath of *Monsanto* and *Union Carbide*, one district court, in *PPG Industries, Inc. v. Stauffer Chemical Co.*,⁵⁵⁰ has confronted the standardless delegation issue directly. In *PPG* the court followed the reasoning of *Fahey v. Mallonee* to conclude that the absence of compensation standards does not transgress article I.⁵⁵¹ The *PPG* court read *Fahey* as distinguishing statutes that are penal in nature, create novel rules of law where there is no settled law or custom, and delegate authority to private groups, from statutes that are regulatory in nature, create remedies known to existing law, and delegate authority to public bodies.⁵⁵² The *PPG* court found that the first two criteria of *Fahey* clearly supported the constitutionality of the FIFRA delegation. The arbitration provision is regulatory, not penal, and serves only "to replace the decision-making body

547. See *supra* text accompanying notes 439-42.

548. See L. TRIBE, *supra* note 463, at 363 ("agency exercising delegated authority is not free . . . to exercise its authority to pursue any and all ends within the affirmative reach of federal authority").

549. 7 U.S.C. § 136a(c)(1)(D)(ii) (1988).

550. 637 F. Supp. 85, 89 (D.D.C. 1986).

551. *Fahey v. Malonee*, 332 U.S. 245 (1947).

552. *PPG*, 637 F. Supp. at 89 (citing *Fahey*, 332 U.S. at 249).

administering a remedy that already existed."⁵⁵³ Here the court was referring to the fact that the data use and compensation provisions had existed under the 1972 version, with EPA serving as compensation adjudicator.⁵⁵⁴ With respect to the third criteria, the court admitted that the arbitrators under FIFRA are not a public body. The court reasoned, however, that the concern with delegation to private parties had to do with the private party's interest in the industry being regulated,⁵⁵⁵ as in *Schechter Poultry Corp. v. United States*.⁵⁵⁶ The private parties involved in the FIFRA delegation are not members of the pesticide industry, the court emphasized, but instead are disinterested arbitrators appointed by FMCS from the roster of the American Arbitration Association.⁵⁵⁷ In analyzing this third factor, the PPG court would have been on firmer theoretical ground had it focused on the arbitrators' position as subdelegates of FMCS rather than their position as nonmembers of the industry, but the conclusion that the standardless delegation to FIFRA arbitrators does not violate article I of the Constitution is probably the correct one.⁵⁵⁸

553. PPG, 637 F. Supp. at 89.

554. See *supra* text accompanying notes 306-08.

555. PPG, 637 F. Supp. at 89.

556. 295 U.S. 495, 539 (1935).

557. See *supra* text accompanying notes 355-57. See also Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 455-462 (1989) (discussing difficulty of distinguishing between "public" and "private" decision makers to whom regulatory decisions have been delegated, and importance of ensuring alignment between public interests and interests of the private deciders).

558. There is a possibility that a follow-on registrant may be able to assert a due process or Article I challenge to the data use and compensation provisions of FIFRA only in a case in which that party had declined to cite previously filed data because of the nonconsensual arbitration program, and instead had obtained registration by developing its own data. Under the "statutory estoppel" doctrine, a party cannot claim entitlement to a benefit under a statute, receive such benefit, and then take a position inconsistent with its earlier claim of entitlement. *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 502 (1955). Statutory estoppel arguably could occur if a follow-on registrant asserts an entitlement to the benefit of receiving registration upon citing previously filed data, accepts registration, and then challenges the constitutionality of the provision for determining its liability to the original submitter. One district court has so held. *Sathon v. American Arbitration Ass'n*, 20 Env'tl Rep. Cas. (BNA) 2241, 2244 (N.D. Ill. 1984). In that case the follow-on registrant relied on data in EPA's files to obtain registration, then refused to arbitrate and filed a declaratory judgment action claiming that the arbitration scheme was unconstitutional. Another court, in *PPG Indus., Inc. v. Stauffer Chemical Co.*, 637 F. Supp. 85 (D.D.C. 1986), did entertain the Article I challenge of a follow-on registrant that had obtained registration by citing previously filed data, but that party had not exercised a free choice in relying on data in EPA's files. Although PPG was decided later than *Sathon*, the facts of PPG had arisen earlier, at a time when EPA effectively prevented follow-on registrants from developing their own data as an alternative to citing that which had already been filed. In 1979 EPA had adopted its "cite-all" regulations, under which the agency interpreted FIFRA to require that a follow-on registrant cite all pertinent previously filed data and pay for them. 40 C.F.R. §§ 162.9-4, 9-5 (1979). PPG Industries had acquired its follow-on registration while these regulations were in effect. In 1983, in *National Agricultural Chemicals Ass'n v. EPA*, 554 F. Supp. 1209 (D.D.C. 1983), the court held that EPA had exceeded its statutory authority by adopting

VIII. CONCLUSION

The modern movement toward greater use of alternative dispute resolution procedures has many complex roots and takes a variety of forms. The pressure generated by the delay, expense, and acrimony that many participants associate with formal litigation models, whether judicial or administrative, has been vented partly through development of novel mechanisms and partly through greater usage of older devices such as arbitration and mediation. The ADR movement has taken hold not only in the realm of private disputes, but also in the resolution of conflicts arising within the context of regulatory programs. Indeed, in the regulatory context the ADR movement is actually the second part of a biphasal phenomenon, because adjudication by administrative agencies was originally viewed as a less formal alternative to judicial resolution.

Although most manifestations of ADR have been and continue to be the product of consent among the disputants, recent times have witnessed increasing experimentation with nonconsensual mechanisms. Many of these experiments with nonconsensual ADR have involved arbitration, either in traditional or modified form. Nonconsensual arbitration occurs when a statute, administrative agency regulation, or court rule compels either or both of the parties to participate in the process.

The four nonconsensual arbitration systems chosen for study--court-annexed, multiemployer pension plan, commodity futures, and FIFRA data compensation arbitration--possess both similar and dissimilar origins and characteristics. Court-annexed arbitration developed solely from dissatisfaction with the many private and social costs associated with litigation. The other three systems sprang from a desire to promote expedited dispute resolution ancillary to the achievement of broader regulatory policy goals. Although one finds substantial variation among the general policy goals of the legislation regulating withdrawal from multi-employer pension plans, relations between commodity futures professionals and their customers, and treatment of data associated with pesticide registration, the dispute resolution provisions of each statute clearly express a common uneasiness regarding judicial and administrative use of traditional litigation models.

Although all four systems process disputes between private parties, court-annexed arbitration primarily resolves pure common-law claims, while the other three adjust rights that are either created by or ancillary to federal regulatory measures. Both pension plan and FIFRA arbitration deal with federally created statutory rights; in the former these rights are actually a modified substitute for common-law contract rights, while in the latter the rights are pure creations of federal statute. The rights adjudicated in commodity futures arbitration include pure federal statutory creations, federal statutory rights serving as modified

the cite-all regulations. In 1984 EPA responded to this decision by amending its regulations so as to give a follow-on registrant the option of citing and paying for previously submitted data or developing its own as a basis for registration. 40 C.F.R. § 152.86, .90, .92 (1988).

substitutes for common-law claims, state statutory claims, and pure common-law claims.

Components of fairness also differ among the four systems. For example, formal standards of decision exist only in the case of pension plan arbitration, although informal and largely unpredictable standards may work their way into the other systems. In all systems except one, neither party has a realistic choice about using the arbitration procedure; in commodity futures arbitration, the customer has access to a range of dispute resolution alternatives while the professional has none. Review of the arbitral decision also varies. Review of commodity futures and FIFRA arbitration is similar in that no inquiry into the merits of the decision may be made, whereas restricted merit review of pension plan arbitration is available. A party to court-annexed arbitration may obtain trial *de novo* subject to an assortment of disincentives. Trial *de novo* is available in court-annexed arbitration for obvious reasons. Although it may or may not be a constitutional necessity, some form of very thorough review is unquestionably necessary for constitutionality when pure common-law claims are simply removed to a nonjudicial forum without the consent of the parties. Moreover, when such claims are involved, any hope that nonconsensual arbitration will receive a workable level of acceptance among users is probably dependent on access to thorough review.

In addition to analyzing the contexts and properties of the four nonconsensual arbitration systems, this study explored their constitutional dimensions. When government requires disputants to employ nontraditional fora and procedures, constitutional questions are to be expected and constitutional parameters must be defined and respected. Constitutional concerns are most serious in the case of court-annexed arbitration, the major challenge thereto asserting denial of the right to trial by jury. When court-annexed systems are kept simple, so that the preliminary layer added by the system causes insubstantial delay or expense for a dissatisfied party seeking further recourse, courts have found a sufficient palliative in the availability of trial *de novo*. Some specialized versions of court-annexed arbitration, such as those limited to the processing of medical malpractice claims, have run into trouble when their complexity generated enough additional delay or expense to unduly encumber the right to jury trial. In addition, specialized versions have occasionally run afoul of procedural due process when the required composition of the tribunal has created doubts about its impartiality.

Constitutional barriers to the use of nonconsensual arbitration as one component of a regulatory program are predictably lower. When legitimate regulatory purposes are demonstrable, the interests implicated relate only to property, and the consequences for recalcitrants are nonpenal, designers of nonconsensual conflict resolution procedures have much latitude. Today's Supreme Court shows little jealousy for the traditional role of the judiciary and consequently is receptive to innovative dispute resolution techniques. The Court is likely, for example, to find an impermissible encroachment on the power of article III courts only in extreme cases where legislative or executive aggrandizement is clear and pervasive. Likewise, while delegations of ill-defined authority to nontraditional decision makers may not represent good law or policy, they will

seldom violate either article I or due process parameters. The circumstances in which nonconsensual arbitration generates really serious constitutional difficulties will be highly idiosyncratic, as in the case of multiemployer pension plan arbitration. There, the use of and deference to an initial decision maker of highly questionable impartiality has generated nontrivial procedural due process concerns. Even so, all but one of the federal circuit courts considering the issue have upheld the system, and the Supreme Court's view of it is uncertain. The one relevant issue to which the Court may have actually developed a heightened constitutional sensitivity is the definitional scope of property rights under the fifth amendment's taking clause.

FIFRA arbitration, to which the most extensive attention was paid in this study because of its unusual characteristics, provides an especially vivid illustration of the lengths to which designers of nonconsensual arbitration systems may go without infringing constitutional principles. Although greater legislative latitude should be permitted when, as in FIFRA, the affected interests are pure creations of federal statute, the Court's approval of virtually standardless adjudications of disputes between private parties without any meaningful review starkly demonstrates the wide expanse of that latitude.

