

CHAPTER 2

ADVANTAGES OF ARBITRATION OVER LITIGATION: REFLECTIONS OF A JUDGE

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I. Introduction

Some of you may recall that during the 1980 meeting of the Academy, in Los Angeles, Tom Roberts was planted as a “voice from the audience” to engage in a dialectical discussion with Mickey McDermott during the presidential address.¹ I want to make it clear that I have no such collaborator in this audience. I should also advise you that, fearing the worst from some notable and devilish pranksters, such as Jim Hill, Lew Gill, Tom Roberts, Arnold Zack, and Richard Bloch, I have instructed the hotel security guards to arrest anyone who rises or motions as if to speak during my talk.

Seriously, I am truly delighted to be here today to see so many old friends and esteemed former colleagues from the labor relations community. When Professor St. Antoine called to invite me to speak, I accepted without hesitation and with a feeling of honor. Even though a number of you have warned me that our friendships will suffer if I talk too long, I still relish the opportunity to share some time and a few thoughts with so distinguished an audience.

II. The Life of a Federal Appellate Court Judge

When Rolf Valtin and I met to discuss my proposed speech, he asked me to share with you some of my experiences as a judge, especially in comparison with some of my professional

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¹McDermott, *The Presidential Address—An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?* in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1981), 1 [hereinafter “McDermott”].

pursuits as an arbitrator. After much deliberation, I finally decided that the best way for me to address Rolf's request would be to indicate to you some of the benefits that are lost when one leaves arbitration to become a judge. For example,

1. As a federal judge, my earnings capacity has been reduced.
2. In addition, I can no longer claim a tax deduction for an "office" at home.
3. I have no opportunities, like Richard Bloch and Arnold Zack, to produce commercial movies.
4. Unlike Ted St. Antoine, I have never had my picture in *Sports Illustrated*.
5. And, I will never have a chance, like Tom Roberts, to travel widely at home and abroad to sample the fare at the world's best hotels.

As a judge, I am the beneficiary of life tenure and a guaranteed pension, in return for which I am required to perform in a hot robe, write long opinions with numerous footnotes, speak to no one about my work (save my judicial colleagues and my law clerks), avoid political issues, and make routine public disclosures of all of my associations and earnings. In a sense, being a judge is like being imprisoned in a cage with steel bars in the middle of Times Square in New York City. You can see and hear all that is happening around you, but your participation in those events is seriously circumscribed.

Actually, much of what I have just said is offered with tongue-in-cheek. I have truly enjoyed my time as a judge, notwithstanding some feelings of isolation. The work load is incredibly heavy, but it is made tolerable because of the invaluable assistance that I receive from two secretaries, three law clerks and, occasionally, a legal intern. In my most weary moments, my chambers staff gives me strength through their youthful energy, extraordinary intelligence, loyalty, and constant devotion to the public responsibility inherent in their jobs. They are also interesting and fun people to have around, so the office has been a pleasant place to be during my first two years as a judge.²

In addition to the joys of working with my personal staff, I have gained the great rewards associated with good relations

²Edwards, *A Judge's Views on "Justice, Bureaucracy, and Legal Method,"* 80 Mich. L. Rev. 259 (1981).

with some brilliant colleagues on the bench. I have found that the challenge to produce truly quality legal opinions is sometimes raised to euphoric heights when I have worked on difficult and critically important cases with my fellow judges on the D.C. Circuit.

I have also found that the supposed cloistered life of a judge is tempered by opportunities to teach, lecture, write, and participate in various public endeavors. Indeed, in some ways I felt more cloistered as an arbitrator than I do now as a judge. As an arbitrator, I rarely received any direct feedback on my opinions. As a judge, however, I get constant feedback from the comments or dissents of my colleagues, in petitions for rehearing filed by attorneys on the losing side of a case, in published articles in the law reviews and, occasionally, even in a decision by the Supreme Court.

I would not trade my life as a judge for any other at this time. However, I must tell you that my work as a judge has caused me to more fully recognize the extraordinary skills possessed by an untold number of labor arbitrators in this country. It has also helped me to better understand the fundamental significance of the arbitration process in the administration of justice. With these insights in mind, I come here today first and foremost to sing your praises.

III. The Advantages of Arbitration Over Litigation

My basic message to you today is actually quite simple. It is this: If I were employed in a job from which I could be fired, and if I did get fired and had a right to challenge my discharge in a forum of my choice, *I would rather be in arbitration than in court.* Having served as an arbitrator and as a judge, and having worked as an advocate in each forum, I am now of the view that arbitrators are nonpareil as “judges” in a wide variety of cases involving personnel and labor relations matters. I concede that what I am saying is merely impressionistic and is born out of my own professional experiences. Nevertheless, I would like to pursue my thinking with you, albeit briefly, both to discard certain ideas to which I have previously subscribed and to raise some questions and suggestions for your digestion. Along the way, I will attempt to explain the bases for my impressions.

1. *The Hays Assault on Arbitration*

Probably the best place for me to start is with a historical reference to an opinion about arbitration that is plainly at odds with my own view. The senior members of the Academy will no doubt recall that, in 1964, Judge Paul Hays, a former arbitrator and labor law professor, launched a massive attack on the entire institution of labor arbitration.³ I was only a senior in law school when Judge Hays gave his infamous Storrs lectures at the Yale Law School; therefore, I have no clear recollection of the arbitration profession about which he spoke. Nevertheless, I was truly astonished by the viciousness of the Hays assault, especially given the conspicuous absence of analytical and empirical support for many of his assertions.⁴ A few short excerpts will highlight Hays' principal theme:

"[L]abor arbitration has fatal shortcomings as a system for the judicial administration of contract violations. . . . An arbitrator is a third party called in to determine a controversy over whether one of the parties to the collective bargaining agreement has violated that agreement . . . he does not in fact have any expertise in these matters and is not actually expected to have any, since it is expected that he will listen to the evidence presented by the two parties and decide on the basis of that evidence whether the charge of contract violation is or is not sustained. For his task he requires exactly the same expertise which judges have and use every day. . . .

"There are only a handful of arbitrators who, like Shulman and Cox, have the knowledge, training, skill, and character which would make them good judges and therefore make them good arbitrators. . . . A system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood or even for substantial supplements to his regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system. . . .

"I believe that the courts should not lend themselves at all to the arbitration process. Labor arbitration is a private system of justice not based on law and not observant of law. There is no reason why it should be able to call upon the legal system to enforce its decrees. . . . We know that a large proportion of the awards of arbitrators are rendered by incompetents, that another proportion, we do not know how large but are permitted by the circumstances to suspect that it is quite substantial, are rendered not on the basis of any proper

³Hays, *The Future of Labor Arbitration*, 74 Yale L.J. 1019 (1965) [hereinafter "Hays"].

⁴See Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), at 2-7 [hereinafter "Meltzer"].

concerns, but rather on the basis of what award would be best for the arbitrator's future."⁵

My research indicates that the response to Judge Hays was both swift and effective in denouncing the attack. For example, the inimitable Bernard Dunau tersely observed,

"It is unfortunately true that the level of judging, whether judicial, administrative or arbitral, is in the overall quite mediocre, but for those who have worked in all three forums, the arbitrator does not suffer by comparison."⁶

Saul Wallen⁷ and Bernie Meltzer⁸ both successfully refuted Hays' claim that arbitrators' economic self-interest, linked with future acceptability, will distort adjudication. As Professor Meltzer aptly noted:

"[T]he principal question for an arbitrator, assuming for the moment that he is ruled by a greedy desire for more customers, is how to reduce the risk implicit in the fact that one party generally will lose. I can think of no better answer to that question than conscientious workmanship, for such workmanship appears to be the best protection against the veto that labor and management will each be able to exercise in the future. The need for future acceptability would thus appear to bring the arbitrator's self-interest and disinterested adjudication into harmony rather than conflict. Consequently, even if one accepted a devil's view of arbitrators as a group ruled by love of money, it would not follow that the pressure for future acceptability would corrupt the decisional process."⁹

Probably the clearest indictment of the Hays critique has been history itself. One need only consider the growth of the Academy since 1964, the founding of the Society of Professionals in Dispute Resolution (SPIDR), the expansion of the FMCS and the AAA, the widespread adoption of both interest and rights arbitration in the public sector, the use of arbitration in the federal service, and the employment of arbitration techniques in the resolution of international disputes, small claims matters, and a variety of malpractice and commercial issues, in order to fully understand the wholesale rejection of the Hays thesis. Arbitra-

⁵Hays, *supra* note 3, at 1034-35.

⁶Dunau, *Review of Hays, Labor Arbitration: A Dissenting View*, 35 *The American Scholar* 774-76 (Autumn 1966).

⁷Wallen, *Arbitrators and Judges—Dispelling the Hays' Haze*, in *Labor Law Developments, Proceedings of the 12th Institute on Labor Law*, Southwestern Legal Foundation (Washington: BNA, Inc., 1966), 159.

⁸Meltzer, *supra* note 4.

⁹*Id.* at 3-4.

tion has stood the test of time in a marketplace where the consumers have demanded effective and fair systems of voluntary adjudication. If anything, these past two decades have revealed certain fallibilities of our court system, not of arbitration, as an excessive caseload has more and more burdened the judiciary.

2. *Why Is Arbitration Better?*

As I suggested earlier, I would go one step further in my response to the Hays thesis. I not only believe that Judge Hays has been proven wrong, I also believe that arbitrators are unsurpassed as “judges” in cases involving personnel and labor relations matters. This is not just because arbitrators bring a special expertise to their work. Nor is it because arbitrators are smarter or more skilled than judges. In fact, it seems clear to me that there are many superb judges who would be equally good as arbitrators, and vice versa. I therefore conclude that if labor arbitrators are indeed nonpareil as “judges” in cases typically brought to arbitration, much of their success must be attributable to certain unique features of the *arbitration process*.

Before I continue, let me stress that, at this point, the only types of cases to which I am referring involve those that are routine fare for arbitrators. In particular, I have in mind disputes focused on employee and management rights in the workplace, in situations involving discipline, work assignments, pay and fringe benefit claims, creation or classification of new jobs, and application of principles such as seniority, merit, nondiscrimination and just cause. These cases generally involve interpersonal relations, straightforward contract claims brought by individuals or small groups of employees, and matters that usually can be heard within one day without significant discovery. This is not an all-inclusive list, but I think it accurately describes traditional labor arbitration practice.

Judges, like arbitrators, also decide *private law* cases of the sort heard in labor arbitration. However, judges are additionally required, on a routine basis, to hear and decide a host of *public law* cases involving criminal prosecutions, statutory enforcement, review of agency regulations, complex constitutional claims, and class action suits. Nothing that I say today is meant to suggest that our court system is inadequate to handle public law issues or that we should expand arbitration to encourage the development of public law in private tribunals. Arbitrators fre-

quently must consider public laws in order to resolve private disputes. However, I do not consider this to be the same as arbitrators deciding cases brought pursuant to public law. On this point, I am inclined to concur in Ted St. Antoine's thoughtful analysis of the arbitrator as a "contract-reader:"

"[T]here [are] obviously . . . situations in which the arbitrator is entitled or even mandated to draw upon statutory or decisional sources in fashioning his award. That is when the parties call for it, either expressly or impliedly. If a contract clause . . . plainly tracks certain statutory language, an arbitrator is within his rights in inferring that the parties intended their agreement to be construed in accordance with the statute. Similarly, the parties may explicitly agree that they will abide by the arbitrator's interpretation of a statute whose meaning is in dispute between them. In each of these instances, I would say that technically the arbitrator's award implements the parties' agreement to be bound by his analysis of the statute rather than by the statute itself. . . .

"The treatment of an arbitral award by a reviewing court is also clarified by the notion of the arbitrator as a contract-reader. A 'misinterpretation' or 'gross mistake' by the arbitrator becomes a contradiction in terms. So long as he is dealing with a matter duly submitted to him, the arbitrator is speaking for the parties, and his award is their contract. . . .

". . . As between the parties themselves, I see no impediment to their agreeing to a final and binding arbitral declaration of their statutory rights and duties. Obviously, if an arbitrator's interpretation of an OSHA requirement did not adequately protect the employees, or violated some other basic public policy, a court would not be bound by it. But if the arbitrator imposed more stringent requirements, I would say the award should be enforced. . . .

"Whatever damage may be done to the pristine purity of labor arbitration by this increased responsibility for statutory interpretation, I consider an expanded arbitral jurisdiction inevitable. . . . [R]ecent statutes [such] as Title VII . . . are so interwoven in the fabric of collective bargaining agreements that it is simply impracticable in many cases for arbitrators to deal with contractual provisions without taking into account statutory provisions. . . . I conclude, in contrast to the forebodings of my friend Dave Feller, that we are actually entering a new 'golden age' for the arbitration process."¹⁰

¹⁰St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, in *Arbitration—1977, Proceedings of the 30th Annual Meeting*, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978), at 35–36 [hereinafter "St. Antoine"]. See also Bloch, *Some Far-Sighted Views of Myopia*, in *id.* at 233. In contrast to the views of St. Antoine and Bloch, see Feller, *The Coming End of Arbitration's Golden Age*, in *Arbitration—1976, Proceedings of the 29th Annual Meeting*, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 97. For a time, many of my own views were quite similar to certain of the principal themes expressed in Professor Feller's *Golden Age* article. See note 21 *infra*.

Before trying to explain to you my views as to *why* arbitration may be better than litigation to handle cases of the sort normally brought in arbitration, I should first indicate to you the bases for my qualitative judgment. There are two factors that are clearly supported by objective evidence and there are two additional factors that are supported solely by the impressions that I have developed after working as an advocate and a decision-maker in the arbitration and litigation arenas.

As to the objective evidence, I would cite the factors of *speed* and *expense*. In a recent article published by the American Bar Association, it was reported that the average time to process a grievance to the arbitrator's award was approximately 250 days. The time is substantially less in expedited cases.¹¹ In-court litigation time in comparable cases is much longer. For instance, to offer a limited sample, I would cite three cases that I have heard during the 1981–82 term involving employee dismissals. In one case, an employee was fired from a government job in December of 1973 and the final judgment in the case—following the employee's second trip to the Court of Appeals—did not issue until January of 1982.¹² In the second case, a government employee was fired from his job with the Army as an alleged "security risk" in August of 1980. The final decision in his favor did not issue until almost two years after his discharge.¹³ In the third case, yet another government employee was discharged in March of 1979 for alleged misconduct on the job. The case is still pending three years after the challenged action. In each one of these cases, the issues were complex, but not unlike those found in literally hundreds of cases that are satisfactorily and expeditiously decided by arbitrators each year.

As for the factor of expense, I think that no evidence need be cited to make the point that full-blown litigation, including discovery and appeals, is significantly more expensive than arbitration.

My final two points, indicating the bases for my view that arbitration is superior to litigation *in comparable cases*, raise two suggestions. First, I would argue that the *results* in arbitration are, on the average, qualitatively better than judicial decisions.

¹¹American Bar Association, *A New Look at Methods, Procedures and Systems Designed to Expedite the Labor Arbitration Process*, in Section of Labor and Employment Law, 1981 Committee Reports, Vol. II (Chicago: ABA Press, 1981), 198.

¹²*Jolly v. Listerman*, 672 F.2d 935 (D.C. Cir. 1982). Three more months passed before the Court of Appeals decided not to hear the case en banc. *Id.*, 675 F.2d 1308 (D.C. Cir. 1982).

¹³*Hoska v. Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982).

Second, I would contend that the adversaries in a case are generally more *satisfied* with arbitration opinions than with those issued by courts. It may be foolhardy for me to offer such sweeping conclusions based solely upon subjective impressions, but I think that the points are important and may be worth pursuing. I will leave it to others, at a later date and with better research, to dispel my impressions.

Having indicated how I believe that arbitration is better than litigation in comparable cases, let me now explain why I think this is so.

As a general proposition, I have found that the judicial process is heavily steeped in procedures. Many cases may be won or lost on “procedural” points that have nothing whatsoever to do with the merits of the case. These procedural rules often are vitally important to preserve the integrity of the judicial process, but they also may obscure the real dispute between the parties. In complex litigation, involving difficult public law issues, it makes good sense to channel a case pursuant to rigid rules of procedure. It is difficult, however, to explain to an individual complainant that his challenge to a work assignment, alleged underpayment, or discharge cannot be fully heard because of a procedural bar. Although procedural bars are recognized in arbitration, they are not nearly so pervasive as in litigation.

As a related point, I would suggest that, in comparable cases, there appears to me to be more evidence of “common sense” at work in arbitral proceedings and decisions than in judicial proceedings and opinions. This may be because arbitrators have a freer rein than do judges to exercise common sense. Mickey McDermott probably best highlighted what I mean during his 1980 presidential address to the Academy. When asked whether arbitrators should “ignore the rules of evidence in arbitration,” he replied as follows:

“Just about—or better yet, develop a rather charitable sense of relevancy and then work out arbitration rules for deciding the proper weight to be given to evidence once it is in. That’s what counts in any event. More often than not, at least in my experience, the opponent of the evidence is not really so concerned about the evidence’s coming in. He is more concerned, should it come in, about the time he might have to spend and the lengths he might have to go to in order to dig up countervailing proof. Thus, if the doubtful evidence were admitted, the proponent would be satisfied, and if the opponent then were told that, although the evidence is in, it will carry almost no weight because it is only remotely relevant or

because it is unpersuasive hearsay, then the opponent would be satisfied, too. If the proponent thereafter were not successful on the merits, he could blame it on the arbitrator's stupidity, but he could not say that the arbitrator did not even listen. And there is a world of difference between those two positions—between losing after full argument and losing after having been shut off from making any argument because of rules that are not fully understood even by all lawyers and surely not by very many employees or supervisors."¹⁴

As a third point, I would suggest that it makes a positive difference that arbitrators are selected by the parties. As Bernie Meltzer has correctly noted, the "acceptability" factor gives an arbitrator a strong incentive to produce high quality decisions. In addition, the parties to an arbitration, having participated in the selection of their judge, rarely believe that a case is won or lost on the "luck of the draw" of the decision-maker.

Finally, and possibly most importantly, I would cite the lack of appellate review as a critical factor in the success of arbitration over litigation in comparable cases. In papers recently presented to this Academy, Professors Ted St. Antoine¹⁵ and Charles Morris¹⁶ both have reported that, with rare exceptions, judicial review of labor arbitration opinions has remained narrow pursuant to the mandate of *United Steelworkers v. Enterprise Wheel & Car Corp.*¹⁷ In my view, this is a salutary development that has helped foster the growth of arbitration in this country.

The problem with expanded judicial review is not necessarily the threat of "excessive intervention" by the courts.¹⁸ Rather, in my opinion, the potential hazard of judicial review is that it will likely result in arbitrators deciding cases and writing opinions in such a way as to insulate their awards against judicial reversal. As a judge, I have already seen too many cases in which ALJs, agency officials, and judges in lower courts have written opinions with an eye toward appellate review but blind to the heart of the issues before them. Decisions in such cases often parrot appropriate statutory standards, usually in conclusory terms, but suffer from a lack of reasoned analysis.

Without the threat of appellate review, arbitrators have been free to focus solely on the case before them (rather than on the

¹⁴McDermott, *supra* note 1, at 17.

¹⁵St. Antoine, *supra* note 10.

¹⁶Morris, *Twenty Years of Trilogy: A Celebration*, in *Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting*, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1981), 331.

¹⁷363 U.S. 593, 46 LRRM 2423 (1960).

¹⁸Meltzer, *supra* note 4, at 12.

case as it might appear to an appellate court). In my experience as an arbitrator, I found that there was tremendous pressure to produce high quality opinions, not only to insure my future acceptability but also because I knew that I was the judge of last resort. In other words, arbitrators know all too well that a bad decision is costly because there is no appeal available to the parties; as a consequence, professional pride alone drives any good arbitrator to work extremely hard to avoid erroneous results. This is not to say that judges or ALJs indulge error; it is merely to suggest that they may sometimes focus on the wrong things because of the possibility—and in some cases, the inevitability—of judicial review.

IV. Some Thoughts About the Future

1. *The Problem of the “Magistrate Mentality”*

In preparing for my talk today, I had occasion to read John Kagel’s fine paper on “Grievance Arbitration in the Federal Service.”¹⁹ One thing in particular caught my eye in the Kagel article. In describing labor arbitrators in the federal service, John observed:

“A higher order of initial sophistication for the arbitrator will be needed to guide the parties to produce the relevant portion of regulations and statutes and administrative agency decisions, such as those of the FLRA, on which the arbitrator is to rely. For, quite clearly, the arbitrator, as the first link in one or more appellate chains, is serving as a magistrate in this regard.”²⁰

I hope that the Kagel thesis is wrong and that arbitrators in the federal service do not develop what I will call a “magistrate mentality.” The courts generally do not look to arbitrators merely to create a record for appeal. Instead, the courts expect the arbitrator to fully consider and decide the case just as might be done in any other labor arbitration setting. Most appellate judges give great deference to the judgments of arbitrators and ALJs in personnel cases. Thus, if the arbitrator adopts a “magistrate mentality,” and performs only as if he or she is “the first link in one or more appellate chains,” then it is entirely possible

¹⁹Kagel, *Grievance Arbitration in the Federal Service: Still Hardly Final and Binding?* in *Arbitration Issues for the 1980s*, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 178.

²⁰*Id.* at 192.

that no one will ever concentrate fully on the merits of the case. Indeed, if arbitrators in any sector begin to think of themselves as magistrates rather than arbitrators, the advantages of the arbitral process will be lost.

2. *The Old Bugaboo About "External Law"*

In the past, I have often expressed grave reservations about arbitrators deciding public law issues.²¹ In the light of my experience on the court, however, I have found that my reservations have been significantly tempered. Like my colleagues, Judge Alvin Rubin²² and Judge Betty Fletcher,²³ both of whom recently have addressed the Academy, I agree that

"[a]s new issues and problems in improving employment conditions arise, and as we deliberate better ways to handle issues now being resolved only in the courts, we must consider seriously the possibility that some problems can best be resolved by giving a wider hand to collective bargaining and to resolution of disputes in arbitration."²⁴

Judge Fletcher went so far as to suggest that, for individual claims,

"arbitration in the context we know it . . . is the best tool we have, the best forum for the grievant. And I think arbitrators have it within their power and their grasp to improve the process in order to accomplish the goals of Title VII, in the context of the traditional forum. . . ."

"The advantage[] of relying on private arbitrators . . . [is] that . . . arbitration provides speedy dispute resolution by persons knowledgeable about the industry and the players, and persons who are skilled in resolving disputes in a way that does not disrupt ongoing relationships."²⁵

²¹Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 59; Edwards, *Labor Arbitration at the Crossroads: "The Common Law of the Shop" Versus External Law*, 32 Arb J. 65 (June 1977); Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 Lab. L.J. 265 (May 1976).

²²Rubin, *Arbitration: Toward a Rebirth*, in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1979), 30 [hereinafter "Rubin"].

²³Fletcher, *Arbitration of Title VII Claims: Some Judicial Perceptions*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 218 [hereinafter "Fletcher"].

²⁴Rubin, *supra* note 22, at 36.

²⁵Fletcher, *supra* note 23, at 228.

I not only agree with these sentiments, but I believe that arbitration should be explored as a mechanism for the resolution of individual claims of discrimination in *unorganized*, as well as unionized, sectors of the employment market.²⁶

As for concerns about the competence of arbitrators to hear such claims, I have no doubt that there are many highly qualified arbitrators who could easily be trained to deal with this limited category of public law issues. And as for the threat of public law issues being decided by private tribunals, I am now convinced that the most important public law issues inevitably find their way to the courts and as a consequence, the courts invariably take the lead in the development of controlling legal standards with respect to such matters.

V. Conclusion

When the *Steelworkers Trilogy*²⁷ was decided by the Supreme Court in 1960, what the Court knew and implicitly praised about arbitration was that: (1) it was a relatively *speedy* system of justice; (2) it was mostly *informal*; (3) it was *therapeutic* in the sense that it allowed workers to "have their day in court;" (4) it was *voluntarily binding*; (5) it usually involved a judgment from someone who was well-known and well-respected by the parties; (6) it was relatively *cheap*; (7) it was a *flexible* process that could easily be changed to suit the parties; and (8) most importantly, it was an *extension of collective bargaining*; that is, a private system of jurisprudence, created by and for the benefit of the parties. The system of arbitration in America has continued to be a successful venture in dispute resolution because the traditional characteristics of the process have not been altered. So long as this remains true, arbitration should endure as superior to formal litigation as a method for dispute resolution in cases involving personnel and labor relations matters.²⁸

²⁶See Meacham, *Mediation and Arbitration in Employment Discrimination Disputes: A Feasibility Study*, prepared for the Ford Foundation (Employment Discrimination Dispute Resolution Project, NOW Legal Defense and Education Fund, May 1982). See also Clark, *The Legitimacy of Arbitrating Claims of Discrimination*, in *Arbitration Issues for the 1980s*, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 235.

²⁷*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

²⁸This is not to suggest that there should be no further experimentation with alternative procedures for grievance handling. A number of interesting studies in the mediation of grievances and in expedited arbitration procedures have recently been published. See,

Furthermore, it is my belief that the labor arbitration techniques so well understood by members of this Academy may have broader applications in connection with dispute resolution in fields other than labor relations. The widely publicized National Institute for Dispute Resolution is nearly ready to launch a major project to consider alternative approaches to dispute resolution. It would seem to me that Academy members would have much to offer by way of counsel and advice to the leaders of any such project.

In conclusion, I would echo the words of Judge Rubin, given during his speech to the Academy at the 1978 meeting in New Orleans:

“It seems to me that arbitration is not only a just means of resolving disputes, but that even the most formal proceeding is much faster, less expensive, and more responsive to industrial needs than the best-run courts available today. It is a myth that access to justice must mean access to the courts.”²⁹

Arbitration is not perfect; however, for the resolution of certain types of cases, we have yet to develop a better system of justice.

e.g., Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration* (Chicago: Northwestern University Law School, 1982); Goldberg and Brett, *An Experiment in the Mediation of Grievances* (Chicago: Northwestern University, 1982); American Bar Association, *A New Look at Methods, Procedures and Systems Designed to Expedite the Labor Arbitration Process*, *supra* note 11. It is hoped that such experiments will continue.

²⁹Rubin, *supra* note 22, at 35.