CIVIL RIGHTS AND ARBITRATION

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Labor arbitration in the United States is widely supported as a means of quickly and efficiently resolving grievances between employers and unions and as a forum for social justice for workers.[1] It is important to recognize that arbitration is more than a tribunal to air employer-union differences; it is a mechanism by which the employee is supposed to seek justice.[2] Bringing differences between employer, employee, and union to light in the arbitration process reduces the impact of the inevitable and disturbing tensions created by day-to-day contact between these parties. As a result, the use of private arbitration has been recommended by Congress[3] and promoted extensively by the Supreme Court.[4] With this legislative and judicial support, the use of arbitration has increased dramatically since World War II.[5]

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1. *See, e.g.*, K. BRAUN, THE SETTLEMENT OF INDUSTRIAL DISPUTES 130-35 (1944); C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS 5, 19-23 (3d ed. 1970) [hereinafter cited as UPDEGRAFF].

2. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); *cf.* Brandt v. United States Lines, Inc., 246 F. Supp. 982 (S.D.N.Y. 1964).

3. 29 U.S.C. § 173(d) (1970):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

See also id. §§ 108, 158(d). In addition, arbitration is commonly encouraged and regulated at the state level. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-107 (1971); MD. ANN. CODE art. 89, §§ 3-13 (1969); MINN. STAT. ANN. §§ 179.09, 572.03-.08 (1966, Supp. 1973); N.J. REV. STAT. §§ 2A:24-1 to -11 (1952); N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1963).

4. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

5. *See* UPDEGRAFF 2-3, 10. The need to avoid work stoppages during World War

Because arbitration performs an important function in promoting the resolution of labor disputes, criticism of arbitration has largely been confined to advocating minor reform rather than major overhaul.[6] In fact, support in the United States is so broad that European countries, where arbitration is seldom resorted to, have been urged unsuccessfully to follow the lead of the United States. For example, the International Labour Organisation in 1951 strongly recommended the use of arbitration in Europe.[7] In 1971 the English Parliament passed a law[8] which was to lay the groundwork for the introduction of private arbitration, although so far there is no evidence that the parliamentary will has been heeded. Arbitration is not employed in France, Spain, or Italy to resolve disputes if an employer-union contract is in effect. Arbitration's legion of supporters in the United States cannot understand why the European nations, especially those in the Common Market, do not turn to arbitration. Do Americans overvalue arbitration or do the European nations recognize defects that we do not?[9]

While even the staunchest supporters of arbitration concede the need for some improvement, they tend to overlook or minimize its shortcomings out of self-interest, because of an apprehension of increased involvement of the judicial system, or simply because arbitration is regarded as superior to known alternatives. After all, they reason, employer-union disagreement is inevitable, and what can replace

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II resulted in the granting of extensive authority to the National War Labor Board to arbitrate disputes and was partially responsible for the growth of arbitration. *Id.* at 2-3; *see* Updegraff, *War-Time Arbitration of Labor Disputes*, 29 IOWA L. REV. 328 (1944).

6. *See generally* R. FLEMING, THE LABOR ARBITRATION PROCESS (1965); Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L.J. 605 (1959); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490-93 (1959).

7. 1 INTERNATIONAL LABOUR CODE 1951, arts. 876(H)-(O); INTERNATIONAL LABOUR ORGANISATION, CONVENTIONS AND RECOMMENDATIONS 1919-1966, at 804 (1966) (Recommendation No. 92, 34th Session of the International Labour Conference, 1951); *see* G. JOHNSTON, THE INTERNATIONAL LABOUR ORGANISATION 182 (1970). *See generally* J. COT, INTERNATIONAL CONCILIATION 260, 299-328 (1972).

8. Industrial Relations Act 1971, c. 72. For an earlier attempt in England to provide for arbitration of disputes between employers and workers, see Conciliation Act 1896, 59 & 60 Vict., c. 30.

9. *See generally* LABOR COURTS AND GRIEVANCE SETTLEMENT IN WESTERN EUROPE (B. Aaron ed. 1971); E. KASSALOW, TRADE UNIONS AND INDUSTRIAL RELATIONS: AN INTERNATIONAL COMPARISON (1969); Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971); Ross, *Prosperity and Labor Relations in Western Europe: Italy and France*, 16 IND. & LAB. REL. REV. 63 (1962); Sturmthal, *Collective Bargaining in France*, 4 IND. & LAB. REL. REV. 236 (1951).

arbitration that would better serve an industrial society?[10] Many observers of the present system concede a need to train a greater number of young arbitrators, to publish all arbitration awards, to develop stricter standards for the acceptance of evidence, to follow more closely the precise meaning of provisions in collective bargaining agreements, and to increase the scope of judicial review of awards. While much of this criticism is legitimate, these suggested changes are incremental. The purpose of this Article is to present a view favoring radical change.

One area of arbitration in need of close scrutiny today is the civil rights arena. For the purposes of this Article, the meaning of "civil rights" is limited to situations involving employer or union discrimination on the basis of race, religion, nationality, sex, or age. While employers and unions generally respect and abide by arbitration awards in civil rights disputes, do employee grievants find—and should they find—equal comfort? Although I believe the need for reform is much more extensive, this Article is primarily devoted to civil rights issues brought to arbitration. Specifically, it addresses the question of whether arbitration is a just means of adjudicating civil rights disputes.

State and federal legislation[11] require "fair employment" by employers and unions; yet, arbitrators resolving civil rights disputes function under controls which retard, or at least hinder, advancement toward "fair employment." To support the argument for reform, I will review the legal regulation of arbitration and examine the arbitration process itself. I will also present empirical evidence which points to the shortcomings of arbitration in civil rights disputes and suggest reforms.

I. THE LEGAL ATMOSPHERE AND CIVIL RIGHTS IMPLICATIONS

Historically, people have resorted to some form of legislation, judicial resolution, or arbitration to settle disputes and minimize warfare. For example, for centuries Bedouin tribes turned to *hakims* to resolve disputes quickly. The *hakim*, or Muslim wise man, had authority to make binding dispensations between disputing tribes.[12] Because they

10. This attitude is reflected in the questionnaire-survey reproduced in the tables in Part II *infra*.

11. 42 U.S.C. §§ 2000e to e-17 (1970, Supp. II, 1972).

12. *See generally* A. MUSIL, THE MANNERS AND CUSTOMS OF THE RWALA BEDOUINS

wandered far from the seats of Arabic justice, Bedouin tribes had to find peaceful means of settling inter-tribal conflict. Disputing African tribes still call upon respected spiritual leaders to settle conflicts which threaten the tribal peace, another form of arbitration.[13] The mercantile law that flowered in Italy, and ultimately was carried to England and the United States, more closely resembled arbitration than a legal system.[14] European merchants trading in Italy found it necessary to devise ground rules that foreign and resident buyers and sellers could live with, rules that were not legislatively or judicially supplied.

Although early public policy in the United States was antagonistic to both unions and labor arbitration, commercial arbitration was already endorsed, curiously, when Congress decided to regulate labor relations.[15] Prior to the Railway Labor Act of 1926[16] and the Wagner Act of 1935,[17] few unions were powerful enough to force employers to agree to arbitration even though an alternative forum to settle conflicts was not publicly provided. Where agreements to arbitrate were entered into, the employer could ignore his contract to arbitrate or persuade the judiciary to find some reason to overturn the award.[18] In spite of some private will to solve differences peacefully,

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426-37 (1928); Patai, *Nomadism: Middle Eastern and Central Asian*, 7 SW. J. ANTHROPOLOGY 401 (1951).

13. It has been argued that arbitration antedates law, and even history, because it appeals to a "deep underlying instinct . . . to prefer voluntary arbitration rather than submission to authority." UPDEGRAFF 5, *citing* Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934). Arbitration sometimes has the advantage of permitting consideration of ethical, religious, social, and other extra-legal factors; as a result,

> there has been an element consisting of the older, more responsible, and clearer minded folk in every age of society who opposed use of force and advocated settlement of controversies through the application of logic and a study of the developed principles and practices of custom, ethics and law, and public opinion based upon them, such as they were at that particular time and place.

UPDEGRAFF 5, *citing* Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240 (1927).

14. *See* 5 ENCYC. SOCIAL SCIENCES *Law Merchant*, 270-74 (1937).

15. *Cf.* General Elec. Co. v. Local 205, United Elec. Workers, 353 U.S. 547 (1957); Pennsylvania Greyhound Lines v. Amalgamated Ass'n of Street Ry. Empl., 193 F.2d 327 (3d Cir. 1952); Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944); Lewittes & Sons v. United Furniture Workers, 95 F. Supp. 851 (S.D.N.Y. 1951).

16. Ch. 347, 44 Stat. 577 (1926), *as amended*, 45 U.S.C. §§ 151-63, 181-88 (1970).

17. Ch. 372, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151-68 (1970).

18. *See* Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905 (1955), *cert. dismissed*, 351 U.S. 292 (1956); *cf.* Textile Workers Union, Local 1386 v. American

public regulators either refused to become involved or reserved the right to alter decisions by arbitrators.

At this time, states regulated employers and unions, even where their activities affected interstate commerce, because contracts generally were within the sphere of state control. To understand the unequivocal support given arbitration by the Supreme Court since 1956, it is necessary to appreciate fully the extent to which state courts before that time hindered the arbitration process.[19] As unions and labor arbitration were increasingly accepted after 1935, judicial regulation of arbitration under state law became less desirable.[20] And while enactment of the Norris-LaGuardia Act in 1932[21] and the Wagner Act in 1935 effectively aided union growth, neither these laws nor the subsequent Taft-Hartley Act[22] contained a set of arbitral ground rules, such as those which regulated commercial arbitration. To this day, the Norris-LaGuardia, Wagner, and Taft-Hartley Acts only endorse arbitration as a means of bringing about industrial peace, without spelling out mechanics. Given this legislative background, the Supreme Court, after granting certiorari in cases concerning arbitration, could have enthusiastically embraced arbitration, lent it partial support, or ignored the general congressional endorsement by claiming a lack of clear congressional direction. In *Textile Workers Union v. Lincoln Mills*[23] and the *Steelworkers* trilogy,[24] the Court chose to support arbitration fully and to create rules governing arbitration disputes in the federal courts.

In *Lincoln Mills*, the backbone case, the Supreme Court held that an agreement to arbitrate could be specifically enforced by a union against an employer under section 301 of the Taft-Hartley Act.[25]

Thread Co., 291 F.2d 894 (4th Cir. 1961); Vulcan-Cincinnati, Inc. v. United Steelworkers, 289 F.2d 103 (6th Cir. 1961); International Ass'n of Machinists, Local 402 v. Cutter-Hammer, Inc., 297 N.Y. 519, 74 N.E.2d 464 (1947). *See also* Red Cross Line v. Atlantic Fruit Co., 233 N.Y. 373, 135 N.E. 821 (1922), *rev'd*, 264 U.S. 109 (1924).

19. *See* Kovarsky, *Labor Arbitration and Federal Pre-emption: The Overruling of Black v. Cutter Laboratories*, 47 MINN. L. REV. 531 (1963).

20. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

21. Ch. 90, 47 Stat. 70 (1932), *as amended*, 29 U.S.C. §§ 101-15 (1970).

22. Ch. 120, 61 Stat. 136 (1947), *as amended*, 29 U.S.C. §§ 141-87 (1970).

23. 353 U.S. 448 (1957).

24. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

25. 29 U.S.C. § 185 (1970):

Even though Congress had been silent concerning the enforceability of agreements to arbitrate and state laws generally gave employers the option of whether to abide by their agreements, the Court found enough congressional direction to rule that section 301 not only provided the federal courts with jurisdiction in controversies involving labor organizations in industries that affect commerce, but also "authorize[d] federal courts to fashion a body of federal law for the enforcement of those collective bargaining agreements and include[d] within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[26] *Lincoln Mills* served as an impetus for the lower federal courts to develop "substantive federal law"[27] in suits arising under section 301; as a result, courts, rather

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce . . . and any employer whose activities affect commerce . . . shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . .

26. 353 U.S. at 451. The Court thus resolved conflicting constructions of § 301 by the lower federal courts. *Compare* United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323 (7th Cir. 1957), International Ladies' Garment Workers' Union v. Jay-Ann Co., 228 F.2d 632 (5th Cir. 1956), *and* Mercury Oil Refining Co. v. Oil Workers Int'l Union, 187 F.2d 980 (10th Cir. 1951) (§ 301 merely jurisdictional grant), *with* Association of Westinghouse Empl. v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd on other grounds*, 348 U.S. 437 (1955), United Elec. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953), Textile Workers Union v. Arista Mills, 193 F.2d 529 (4th Cir. 1951), Shirley-Herman Co. v. International Hod Carriers Union, 182 F.2d 806 (2d Cir. 1950), Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950), *and* AFL v. Western Union, 179 F.2d 535 (6th Cir. 1950), *cited in* 353 U.S. at 450-51 nn.1 & 2.

Justice Douglas, writing for the majority, found in the legislative history, *see* S. REP. No. 105, 80th Cong., 1st Sess. (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. (1947); H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. (1947), expression of "a federal policy that federal courts should enforce these agreements [to arbitrate] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." 353 U.S. at 455. Justice Frankfurter, dissenting, described § 301 as "plainly procedural," *id.* at 461, and vigorously disputed the majority's conclusion that Congress "by implication" had repealed the common law rule against enforcement of executory agreements to arbitrate and of § 1 of the Arbitration Act of 1925, 9 U.S.C. § 1 (1970), which specifically excludes contracts of employment of workers in interstate commerce from the scope of its rule that executory agreements to arbitrate are enforceable in federal court. 353 U.S. at 465-66.

27. 353 U.S. at 457:

than Congress, have provided the framework under which civil rights questions have been arbitrated. Moreover, this framework has been created for the most part in cases not pertaining to civil rights, in contrast to the development of ground rules in the related area of fair employment, which were predicated on state and federal civil rights legislation.

It is strange that Congress staunchly endorsed arbitration without providing guidelines, aware as it must have been of the negative approach taken under state law. With the substitution of Keynesian economics for *laissez faire* theory in the 1930's came increased government involvement in the market place when necessary to promote the public good—and the endorsement of arbitration constitutes involvement in the market place. Perhaps there was unexpressed opinion in Congress that procedural rules of arbitration were unnecessary; but the failure to enact rules while promoting union growth and arbitration generally is not easily explained. It is possible that the Depression and World War II so completely occupied Congress that the promulgation of a comprehensive arbitration code was ignored from 1935 to 1945. But this explanation is also unsatisfactory. After World War II, Congress found the time to control unions through specific requirements and guidelines developed under the Taft-Hartley and Landrum-Griffin[28] Acts. Or perhaps Congress felt that the Supreme Court had provided satisfactory regulation through its interpretation of section 301; why face political pressures and criticism if the Supreme Court has created adequate guidance under the guise of interpreting the existing law? But this explanation is also tenuous, since the piecemeal regulation of arbitration by judicial decision, as Congress presumably realizes, leaves much to be desired.

> The [Taft-Hartley] Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy.

Although only four other Justices concurred with Justice Douglas, the decision has not been overruled and has had tremendous influence on the development of arbitration law. *See* UPDEGRAFF 30-31.

28. Pub. L. No. 86-257, 73 Stat. 519 (1959), *as amended*, 29 U.S.C. §§ 401-531 (1970).

Another possible explanation for the lack of congressional direction centers on the states' rights theory which had so effectively stymied the federal regulation of social problems in the past.[29] While relying on the commerce clause for constitutional justification of federal regulation of labor and civil rights, members of Congress—many from the South or conservative Midwest—promoted the states' rights theory in an effort to limit the federalization of the civil rights movement.[30] Since the amalgamation of the colonies into a nation, the laws regulating contracts were of state origin, and "states' rights" promoters were aided by a limited concept of the commerce clause. Employer-union contracts calling for arbitration should remain within exclusive state control if traditional states' rights theory is followed. But Congress and the courts had already loosened state control by expanding the scope of federal regulation of a significant variety of economic activities under the commerce clause.[31] Activities in the factory were now considered "in interstate commerce" because goods were ultimately shipped across state lines. In the civil rights arena, Congress later took the position that states' rights are secondary to human rights and that the commerce clause justified federal control;[32] the states' rights doctrine was never intended to shield localized wrongdoers, even if it was necessary to extend federal powers.

After New York[33] and other states[34] passed laws curbing racial discrimination in employment, Congress enacted Title VII of the Civil Rights Act of 1964, authorizing the Equal Employment Opportunity Commission (EEOC) to conciliate discrimination disputes and permit-

29. Dissenting in *Lincoln Mills*, Justice Frankfurter counselled that the supposed grant of legislative power to the judiciary under § 301 would create problems that "present hazardous opportunities for friction in the regulation of contracts between employers and unions. They involve the division of power between State and Nation, between state courts and federal courts . . . ." 353 U.S. at 464. *See also* Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 637 (1959).

30. *See Hearings on S. 1731 & S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 265-66, 341-49 (1963).

31. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (unfair labor practices); Brooks v. United States, 267 U.S. 432 (1925) (transportation of motor vehicles); Swift & Co. v. United States, 196 U.S. 375 (1905) (conspiracy to monopolize supply and distribution of products). *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 23-24 (1959).

32. 42 U.S.C. §§ 2000e to e-17 (1970, Supp. II, 1972).

33. N.Y. LABOR LAW § 220-e (McKinney 1965, Supp. 1973).

34. *E.g.*, ILL. ANN. STAT. ch. 48, §§ 851-67 (Smith-Hurd 1966, Supp. 1973); IND. ANN. STAT. §§ 40-2307 to -2328 (1965); OHIO REV. CODE ANN. §§ 4112.01-.08 (Page Supp. 1972).

ting private civil rights suits in federal courts.[35] Federal regulation thus began not only after many states had already passed fair employment laws but after the National Labor Relations Board (NLRB) and courts decided that the Taft-Hartley Act required fair representation for black employees.[36] Title VII permits states to regulate firms and unions in intrastate commerce, and gives them the first opportunity to regulate those in interstate commerce.[37] The federal law controlled or could be brought to bear where state law did not prohibit discrimination in employment and where the complainant was not satisfied with the decision announced under state law. Clearly, the federal government was to assume control where the state failed to act or provided unsatisfactory relief.

Judicial decisions limited the application of state law in labor relations. In *Charles Dowd Box Co. v. Courtney*[38] and *Teamsters Local 174 v. Lucas Flour Co.*,[39] the Supreme Court ruled that while state courts have concurrent jurisdiction to adjudicate industrial relations problems of employers and unions operating in interstate commerce, federal law must control.[40] These rulings thus require state court in-

35. 42 U.S.C. §§ 2000e-1, 2000e-5 (1970, Supp. II, 1972). The 1964 law was amended in 1972 to permit suits by the EEOC.

36. *See* Syres v. Oil Workers Local 23, 350 U.S. 892, *rev'g* 223 F.2d 739 (5th Cir. 1955). The NLRB has also ruled that the unfair labor practice sections of the Taft-Hartley Act can be used to protect minority workmen. *See* NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1 (9th Cir. 1965); NLRB v. Intracoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961); NLRB v. Whittenberg, 165 F.2d 102 (5th Cir. 1947); Certain-Teed Products Corp., 153 N.L.R.B. 495 (1965); Local 12, Rubber Workers Union, 150 N.L.R.B. 312 (1964); Local 1367, Longshoremens Union, 148 N.L.R.B. 897 (1964); Durant Sportswear, 147 N.L.R.B. 906 (1964); Metal Workers Local 1, 147 N.L.R.B. 1573 (1964); Associated Grocers of Port Arthur, 134 N.L.R.B. 468 (1961); National Lime & Stone Co., 62 N.L.R.B. 282 (1945).

37. 42 U.S.C. § 2000e-5(c) (Supp. II, 1972).

38. 368 U.S. 502 (1962).

39. 369 U.S. 95 (1962).

40. In *Lucas Flour* the Court decided what was implicit in both *Charles Dowd* and *Lincoln Mills*:

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of

terpretations of section 301 to follow *Lincoln Mills*, the *Steelworkers* trilogy, and other federal decisions in a growing body of "federal" law. Consequently, even in state courts, agreements to arbitrate are to be enforced and interference with arbitrators' awards is not to be tolerated. Thus, a majority of civil rights disputes brought to arbitration are tentatively locked under federal control, since many employers and unions operate in interstate commerce, and many agreements call for fair employment.

In *Smith v. Evening News Association*[41] the Supreme Court held that suits under section 301 for violation of collective bargaining agreements are not preempted under the rule in *San Diego Building Trades Council v. Garmon*,[42] even when an employer's conduct concededly constitutes an unfair labor practice under section 8(a) of the Taft-Hartley Act. By discriminating against union employees, the employer in *Evening News* was apparently guilty of both an unfair labor practice under section 8(a) and of violation of a collective bargaining agreement actionable under section 301. The Supreme Court took the position that the employee could seek redress either before the NLRB under the unfair labor practice provisions or by litigating under section 301. Thus, while *Lucas Flour* and *Charles Dowd* provided multiple arenas of state and federal regulation, *Evening News* provided a multiplicity of federal remedies.

These Supreme Court decisions did not specifically call for overlapping jurisdiction of arbitrators, courts, and the NLRB. Yet, if there can be jurisdiction of the NLRB and courts over the same subject matter, then arbitration should not be excluded as a possible regulator. These decisions created a situation in which different goals and needs could be adjudicated at various levels, via arbitration, administrative decision, and state and federal judicial rulings.

There are significant differences, however, between administrative and court regulation and arbitration. First, there is a right of appellate review in unfair labor practice cases, a right barred for the most part

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federal labor law uniformly to prevail over inconsistent local rules. *Id.* at 104. *See generally* Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959).

41. 371 U.S. 195 (1962).

42. 359 U.S. 236, 245 (1959). Under the *Garmon* rule, conduct which is arguably protected or prohibited by the Taft-Hartley Act is within the exclusive jurisdiction of the NLRB. *See generally* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

by the *Steelworkers* trilogy in arbitration cases arising under section 301. Neither the facts reported nor the law applied by the arbitrator are to be subjected to further scrutiny.[43] Secondly, the employer and union select the arbitrator without the consent of the grievant. While attorneys may shop for the most favorable forum available, they cannot appoint the judge who will hear the case. And trial examiners working for the NLRB cannot be selected by the accused or accuser. For these reasons, caution and control should have been exercised in extending jurisdiction to arbitrators.

In the *Steelworkers* trilogy, Justice Douglas, writing for the Supreme Court, announced a rule granting nearly unlimited authority to the arbitrator, with the reviewing judge to act as little more than a bystander. Limited almost solely by the terms of the contract and submission agreement, the arbitrator was granted discretion not shared by judges or agency administrators, whose decisions are subject to extensive appellate scrutiny. This power and responsibility frequently are not understood by arbitrators, who can be publicly useful without being publicly responsible. Accountability to the appointing employer and union is different from accountability to the public and to the grievant. To draw an analogy, it was one thing to allow an employer to secure an injunction in a labor dispute and another to authorize an NLRB official to do so, as was provided in the Taft-Hartley Act. Permitting an arbitrator's decision to go largely unchallenged, except on procedural or contractual grounds, is particularly dangerous since the grievant does not participate in the selection of the arbitrator, and thus exercises little control over his decision.

In *United Steelworkers v. American Manufacturing Co.*[44] a union filed a grievance, on behalf of a member injured at work, under a collective bargaining agreement which called for the arbitration of all questions involving interpretation of the agreement. When the employer refused to arbitrate, the union sued under section 301 to compel arbitration. The Supreme Court reversed the lower courts, which had determined that the grievance was frivolous and not subject to arbitration under the agreement,[45] and held that, regardless of whether the grievance was recognized as justiciable, a court's function in examining a refusal to arbitrate is limited to deciding whether the

43. *See* notes 44-52 *infra* and accompanying text.
44. 363 U.S. 564 (1960).
45. 264 F.2d 624 (6th Cir. 1959).

collective bargaining agreement calls for arbitration.[46] Since the disagreement in *American Manufacturing* was whether the employer had violated a specific provision of the agreement, arbitration should have been ordered.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*[47] the collective bargaining agreement contained a broad arbitration clause, excluding only "matters which are strictly a function of management;" it also provided that disputes over the meaning of provisions in the agreement were to be resolved through a grievance procedure which culminated in arbitration.[48] The employer decided that subcontracting was "strictly a function of management" and, consequently, was not to be questioned by the union or submitted to arbitration. The union claimed that management's decision to subcontract work resulted in a reduction of work available for employees, and thus was arbitrable. Again, the Supreme Court decided that where agreements provide for the arbitration of all disputes, they are binding in the absence of specifically enumerated exceptions, and restricted the judicial function to a determination of whether the grievant's claim actually involves the meaning of such an exception in the agreement. The decision on the merits is reserved to the arbitrator.

How any clause in a collective bargaining agreement is interpreted by the signatories reflects their respective interests: employers tend to see most activities and decisions as functions of management, while unions concede only that a few activities and decisions entail the need for unilateral decision by management. The self-serving views of employers and unions were recognized by the Supreme Court in *Warrior*, but without a full appreciation that arbitrators also serve their own special interests. The Court emphasized that arbitration is a

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46. 363 U.S. at 567-68:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
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> The courts, therefore, have no business weighing the merits of the grievance. . . .

47. 363 U.S. 574 (1960).

48. *Id.* at 576-77.

"substitute for industrial strife,"[49] an alternative to resolving disputes by the momentary relative strengths of the parties. Viewed as part of a private agreement rather than as a substitute for litigation, arbitration must be respected and protected.[50]

The question presented in *United Steelworkers v. Enterprise Wheel & Car Corp.*[51] was whether an arbitrator could reinstate an employee with back pay after expiration of the collective bargaining agreement. The Supreme Court held that courts may not review the merits of the arbitration decision or resolve ambiguities in the arbitrator's opinion by rendering an independent interpretation of the agreement. Courts, rather, are merely to decide whether the arbitrator acted within the authority conferred on him by the contract or submission agreement. Justice Douglas did not establish convincingly those elements in the contract which supported the arbitrator's authority to act after the agreement had expired, and conceded that the arbitrator's jurisdiction was uncertain. Yet the award was upheld, apparently in deference to the anticipated benefits of leaving decisions on the merits to the arbitrator's discretion.[52]

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49. *Id.* at 578.

50. The Taft-Hartley Act directs employers and unions to bargain over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1970). Since subcontracting can have a direct economic effect on employees, bargaining seems compelled. Yet, the *Warrior* Court is dealing with employer-union bargaining power, in which individual rights are peripheral, in contrast to civil rights disputes in which individual rights should be paramount to those of the signatories.

In a recent case, Gateway Coal Co. v. UMW, 94 S. Ct. 629 (1974), the Supreme Court held that a dispute between union and employer over safety conditions in a mine must be arbitrated, and the union prevented from striking, under a collective bargaining agreement which called for arbitration of "any local trouble of any kind aris[ing] at the mine," and excepted from arbitration only disputes that were "national in character." *Id.* at 635-36. The Court disagreed with the conclusion of the Third Circuit that public policy prohibited the arbitration of safety disputes, finding instead that safety matters were appropriate for resolution by the arbitration procedure:

> We see little justification for the [appellate] court's assumption [that arbitrators might not appreciate the workers' interest in safety], especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust. . . . Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure employee safety.

Id. at 637. If matters affecting life and health can be compelled to arbitration, there appears no reason why civil rights disputes may not be similarly compelled under the rationale of *Gateway Coal.*

51. 363 U.S. 593 (1960).

52. In dissent, Justice Whittaker argued that any decision rendered four months after expiration of the collective bargaining agreement was clearly outside the submission

In the landmark *Lincoln Mills* and *Steelworkers* cases, Justice Douglas' extension of broad jurisdiction and protection to arbitrators, if legally questionable, could be supported by social policy. Given the time and circumstances of these decisions, there is considerable social merit to the judicial philosophy enunciated by the Supreme Court. There was evidence, based upon past decisions, that courts would not permit the development of arbitration unless emphatically prohibited from interfering.[53] While the juridical traditionalist prefers to wait for the more definitive guidance of Congress, the need for industrial peace and the absence of sufficient reason not to enforce agreements to arbitrate support the Supreme Court.[54]

While the broad protection extended by the Supreme Court to arbitration was in the public interest, the function performed by an arbitrator has a different impact upon the employer, union, and employee. To the employer whose judgment is questioned, arbitration signals a loss of control over the worker while it enhances union power and prestige. Can an employer be found who is not dedicated to the maintenance of his power and the minimization of union control? To the union official, arbitration signals some control over decisions at the work place and over contracts, a symbol of justice for members, and proof of the value of union membership to workers.[55] For the employee, arbitration means that the employer's decision is not final. It is possible that an award favorable to the employee can be viewed with disfavor by other union members, especially in civil rights matters.

These diverse interests were not carefully considered by Justice Douglas in *Lincoln Mills* and the *Steelworkers* trilogy because they

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agreement, and thus could be reversed. *Id.* at 600. Justice Douglas merely indicated that it was "not *apparent* that [the arbitrator] went beyond the submission." *Id.* at 598 (emphasis added). While the burden is on the party challenging the award to show that it was not authorized by the agreement, evidence that the parties had bargained on the subject of subcontracting was ignored by Justice Douglas. Questions of construction of the agreement are left exclusively to the judgment of the arbitrator once it is determined that he is acting within the agreement. *Id.*

53. *See* note 18 *supra.*

54. *See* Kovarsky, *The Enforcement of Agreements to Arbitrate*, 14 VAND. L. REV. 1105, 1106 (1961).

55. *See* Smith v. Evening News Ass'n, 371 U.S. 195 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Cutter Labs., 15 Lab. Arb. 431 (1950).

were not germane. Justice Douglas clearly saw the need for a legal framework that extended arbitration and the arbitrator's authority. That most workers would benefit from the line taken by Justice Douglas followed without question. Certainly the needs of minority workmen could not at this point be of primary concern, especially since they too could anticipate some benefit. When the Supreme Court decided *Lincoln Mills*, the *Steelworkers* trilogy, and *Evening News*, the interests of employees and unions largely coincided. Yet in the civil rights area there can be conflict of interest between the grievant and his employer and union. Today, more than ninety percent of the negotiated collective bargaining agreements provide for arbitration, with employee needs and rights in civil rights disputes lumped together with the goals of the employer and union who select the arbitrator.[56]

There is another dimension to an arbitrator's decision. While the decision affects the grieving employee, union interest extends beyond the immediate award. Obviously the arbitrator's decision can direct the future turn of events if many workers have the same or opposing interests as the grievant. In civil rights cases, unions and employers, often smug in the safety of their coinciding interests, only pay lip service to fair employment; the grievant's needs are ignored in light of these mutual interests.

The difficulties faced by the individual grievant were increased by *Vaca v. Sipes*,[57] in which the Supreme Court held that an employee may not recover damages from his union for its failure to take his grievance to arbitration unless the union breaches its duty of fair representation. An employee thus cannot compel arbitration, but must accept his union's decisions as to whether, and how far, to proceed through whatever grievance procedure has been bargained for with the employer, unless the "union's conduct toward [the employee] is arbitrary, discriminatory, or in bad faith."[58] The difficulty of meeting this burden is illustrated by the two examples offered by the Court

56. *See* A. MYERS, LABOR LAW AND LEGISLATION 665 (4th ed. 1968).

57. 386 U.S. 171 (1967).

58. *Id.* at 190, *citing* Humphrey v. Moore, 375 U.S. 335 (1964), *and* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). *See generally* Note, *Federal Protection of Individual Rights under Labor Contracts*, 73 YALE L.J. 1215 (1964). The duty of fair representation in racial discrimination cases was established by Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944), and Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

of situations constituting a breach of the duty of fair representation: (1) when the employer's conduct "amounts to a repudiation of [the] contractual procedures;"[59] and (2) when the union has "sole power under the contract to invoke the higher stages of the grievance procedure, *and* if . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance."[60] The Court, as in the *Steelworkers* trilogy, was concerned primarily with the effective role of arbitration within the private machinery created for the resolution of industrial disputes. Specifically, the Court suggested that enabling individuals to compel arbitration would undermine the "settlement machinery" by destroying the employer's confidence in the authority of unions and by returning the grievant to "the vagaries of independent and unsystematic negotiation."[61]

The impact of *Vaca* in restricting the available remedies of the individual grievant is even greater in light of the NLRB's earlier holding in *Spielberg Manufacturing Co.*[62] that it will decline jurisdiction to review alleged section 8(a)(3) violations which have been resolved by arbitration, unless the award is "at odds with the statute."[63] Consequently, the Board retains discretionary jurisdiction to remedy unfair labor practices only when the arbitration proceedings are not "fair and regular," when it appears the contracting parties—but not the grievant—had not agreed to be bound by the award, or when the award is "clearly repugnant to the purposes and policies of the Act."[64]

The *Spielberg* rule was extended in *Collyer Insulated Wire*[65] to

59. 386 U.S. at 185, *citing* Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U.S. 254 (1962).

60. 386 U.S. at 185 (emphasis original).

61. *Id.* at 191. As additional reasons, the Court cited increased delay and cost, increased difficulty in isolating major problems for resolution, and potential inconsistency of resolution. *Id.* Perhaps aware that its holding might result in inequities for particular grievants, the Court indicated that some grievances ought to be resolved prior to arbitration: "In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration." *Id.*

62. 112 N.L.R.B. 1080 (1955).

63. *Id.* at 1082.

64. *Id. See also* Wertheimer Stores Corp., 107 N.L.R.B. 1434 (1954); Monsanto Chem. Co., 97 N.L.R.B. 517 (1951), *enforced*, 205 F.2d 763 (8th Cir. 1953); Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946).

65. 192 N.L.R.B. 150 (1971).

cases in which the employer refuses to arbitrate. In *Collyer* the employer was accused of unilaterally changing the terms of the collective bargaining agreement. Since the underlying dispute was arbitrable, the NLRB declined jurisdiction to hear the union's complaint that the employer's refusal to arbitrate constituted an unfair labor practice under section 8(a)(5).[66] Part of the rationale underlying the NLRB's decision in *Collyer* was the need to respect the superior technical expertise of the arbitrator. Yet the NLRB is presumably expert in its handling of unfair labor practices.

Thus, while *Evening News* recognized the grievant's right to seek redress under either section 301 or section 8(a), *Spielberg* and *Collyer* effectively eliminated the section 8(a) option when the grievance falls within a category which is subject to arbitration under the collective bargaining agreement. And the *Collyer* rule has been expanded by the NLRB to encompass the other substantive sections of the Taft-Hartley Act.[67]

In *Dewey v. Reynolds Metals Co.*[68] the Sixth Circuit Court of Appeals held that a grievant who initially sought redress through arbitration is barred by his election from seeking subsequent adjudication under state or federal fair employment laws. The grievant in *Dewey* alleged that he had been discharged because of his religious beliefs

66. *Id.* The Board retained jurisdiction, however, to ensure that the arbitration procedure comported with the standards of procedural fairness and compatibility with the Taft-Hartley Act established by *Spielberg*. *Id.*

67. Tyee Constr. Co., 202 N.L.R.B. No. 34 (Mar. 9, 1973); Enterprise Publishing Co., 201 N.L.R.B. No. 118 (Feb. 12, 1973); A.S. Abell Co., 201 N.L.R.B. No. 5 (Jan. 9, 1973); Associated Press, 199 N.L.R.B. No. 168 (Oct. 27, 1972); Houston Chronicle Publishing Co., 199 N.L.R.B. No. 69 (Oct. 18, 1972); George Koch Sons, Inc., 199 N.L.R.B. No. 26 (Sept. 20, 1972); L.E.M., Inc., 198 N.L.R.B. No. 99 (Aug. 4, 1972); Peerless Pressed Metal Corp., 198 N.L.R.B. No. 5 (July 31, 1972); National Biscuit Co., 198 N.L.R.B. No. 4 (July 31, 1972); National Radio Co., 198 N.L.R.B. No. 1 (July 31, 1972); Bethlehem Steel Corp., 197 N.L.R.B. No. 121 (June 21, 1972); Wrought Washer Mfg. Co., 197 N.L.R.B. No. 14 (May 24, 1972); Norfolk, Portsmouth Wholesale Beer Distr. Ass'n, 196 N.L.R.B. No. 165 (May 19, 1972); Great Coastal Express, Inc., 196 N.L.R.B. No. 129 (May 2, 1972).

Recent guidelines from the NLRB's General Counsel leave the role of the individual grievant in doubt: "[N]o case will be deferred if the respondent fails or refuses to express its unwillingness to submit the dispute to arbitration. . . ." NLRB General Counsel, Arbitration Deferral Policy Under *Collyer*—Revised Guidelines 17 (May 10, 1973). Whether a case should be deferred if an employee rather than an employer or union objects to arbitration has not been decided by the Board. The use of "its" suggests that the guidelines did not contemplate individual objection.

68. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

and sued for reinstatement with back pay under Title VII.[69] Prior to initiating suit, the grievant had brought the same complaint to the attention of his union, which submitted it to an arbitrator who denied relief. The court reasoned that since employers were bound by arbitration awards under the doctrine of the *Steelworkers* trilogy, it would be inequitable and would discourage employer agreements to arbitrate if employees were permitted to litigate.[70] The court expressly left open the possibility of simultaneously bringing suit and submitting the grievance to arbitration.[71] Subsequent decisions established that such simultaneous actions may be permitted,[72] that an action is not foreclosed unless the issues presented for arbitration are identical to those arising under Title VII,[73] and that courts may retain jurisdiction to hear Title VII cases following an award under special circumstances.[74]

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69. 42 U.S.C. § 2000e-2(a) (1970):

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

70. 429 F.2d at 332. *Accord,* Thomas v. Philip Carey Mfg. Co., 455 F.2d 911 (6th Cir. 1972); Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971), *aff'd,* 466 F.2d 1209 (10th Cir. 1972), *rev'd,* 94 S. Ct. 1011 (1974).

71. 429 F.2d at 332.

72. *Cf.* Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118, 1121 n.4 (9th Cir. 1973); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (election-of-remedies doctrine not applicable when employee abandons grievance procedure short of final decision).

73. Jamison v. Olga Coal Co., 335 F. Supp. 454 (D.W. Va. 1971); Fekete v. United States Steel Corp., 300 F. Supp. 22 (W.D. Pa. 1969), *rev'd on other grounds,* 424 F.2d 331 (3d Cir. 1970); *cf.* Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973).

74. In Rios v. Reynolds Metal Co., 467 F.2d 54 (5th Cir. 1972), the court permitted an employee to maintain a Title VII suit against his employer following an adverse determination of related issues in arbitration. The court held that it retained discretionary jurisdiction, analogous to that of the NLRB under the *Spielberg* rule, and was free to defer to arbitration subject to the following limitation: (1) no deferral if the employee's contractual rights coincide with Title VII rights; (2) no deferral if the award violates rights or policy under Title VII; (3) no deferral unless the factual issues are identical, fully developed and decided by the arbitrator, supported by evidence, and determined in accordance with procedural fairness. *See also* UAW v. Avco Corp., 3 Fair Empl. Prac. Cas. 936 (D. Conn. 1971). *See generally* Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. CHI. L. REV. 30 (1971); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971).

Since Title VII expressly permits recourse to the EEOC to alter a decision by a state fair employment commission, 42 U.S.C. §§ 2000e-5(b), -5(c) (1970), there appears to be little reason to bar relief after adjudication elsewhere. This rationale was adopted

The importance of *Vaca, Spielberg, Collyer,* and *Dewey* was that they restricted civil rights grievants' access to public authorities. In large measure, the grievant's freedom to seek redress was confined by his union, and the range of approaches might be limited by the election doctrine. Meaningful "election" requires that the grievant be fully aware of his options. Yet it was the union which frequently exercised the option, and the union might be subject to different influences and might entertain different notions than the grievant as to the benefit of seeking redress in a particular case. And the faith expressed by the courts in the expertise of arbitrators probably was not warranted in the adjudication of civil rights greivances, because there is no evidence that arbitrators are in fact experts, and because arbitrators are subjected to kinds of "political" pressures that are largely absent in public agencies. In short, despite the implicit policy established by Congress in Title VII that civil rights controversies are to be resolved before a public tribunal, the judicial promotion of arbitration resulted in the private resolution of civil rights questions in many disputes.[75]

In *Alexander v. Gardner-Denver Co.*[76] the Supreme Court recognized these problems and held that an employee's statutory right to a trial de novo under Title VII is not foreclosed by his submission of the same grievance to arbitration. Following his discharge, the employee in *Alexander* filed a grievance under the collective bargaining agreement entered into by his employer and union, alleging racial discrimination. Prior to the arbitrator's ruling that the employee was discharged for cause, the employee filed a complaint of racial discrimination which was referred to the EEOC. After the EEOC determined that there was no reasonable ground to believe that the employer had violated Title VII, the employee brought suit in a federal court.

The *Alexander* Court, reversing the granting of summary judgment for the employer, clearly established the right of employees to seek relief under both private arbitration procedures and Title VII. The Court's grounds for decision included: (1) Title VII does not indicate

by the Supreme Court in Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974). *See* notes 76-81 *infra* and accompanying text.

75. There is reason to believe that minority grievants would not seek NLRB or court redress following arbitration even when they were permitted to do so. Many minorities have a distrust of the machinery of justice, and may be influenced by their unions that further effort would be futile.

76. 94 S. Ct. 1011 (1974).

that submission to arbitration bars judicial determination of claims of discrimination;[77] (2) Congress favors multiplicity of remedy, for example, endorsing state and federal jurisdiction in civil rights cases;[78] (3) the doctrine of election of remedies is inapplicable because permitting the enforcement of both a contractual right to arbitrate and a statutory right to bring a lawsuit does not produce inconsistent results;[79] (4) the expertise of the arbitrator is in technical and industrial matters, and in construing the intention of the parties, rather than in interpreting laws—yet an arbitrator's interpretation of Title VII would be largely unreviewable, contrary to congressional intent in providing a federal remedy for the vindication of civil rights;[80] and (5) the argued unfairness to employers of making arbitration binding on them but not on employees fails to recognize that Title VII rights rest solely in employees, while the employer's willingness to arbitrate is a bargained exchange for the union's agreement to refrain from striking.[81]

The arbitration cases prior to *Alexander* reflect a developing judicial policy in the area of industrial relations: The collective interests of organized labor are to be promoted over the interests of individual employees in the context of particular disputes. Thus the Supreme Court carefully delimited local influence on evolving labor policy by reserving major interpretations of the labor laws, including control over the arbitral ground rules, to the federal courts, and the Court has discouraged a potential weakening of unionism by putting union leadership in strong control over decisions affecting members' status in the union and position within the grievance machinery.

This umbrella-type policy can be supported as being necessary to protect the integrity of collective bargaining agreements and union representation. But the policy is not as persuasive when viewed from

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77. *Id.* at 1019.

78. *Id.* at 1019 n.9. *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

79. 94 S. Ct. at 1020. The Court expressly rejected the reasoning of the Sixth Circuit in *Dewey*, arguing that whether *Dewey*'s "election of remedies" rationale was premised on notions of res judicata or collateral estoppel, the "policy reasons for rejecting [it] are equally applicable . . . ." *Id.* at 1020 n.10.

80. *Id.* at 1022. *See generally* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398 (1969); Note, *Judicial Deference to Arbitrators' Decisions in Title VII Cases*, 26 STAN. L. REV. 421 (1974).

81. 94 S. Ct. at 1023.

the perspective of the civil rights grievant. The dangers of not forcing employers and unions to be bound by their agreements, and by the award of an arbitrator, are clear; but the same rationale is strained when the grievant—who is not a signatory—is included. The grievant does not negotiate with the employer,[82] nor, except in unusual circumstances, may he hold his union responsible for failure to prosecute his grievance.[83] Finally, if his grievance is submitted, the arbitrator's award is substantially immune from challenge.[84] The problems of the grievant are more acute in civil rights cases, in which preconceived attitudes are less easily changed than elsewhere, and in which fear of potential divisiveness within the union may induce leaders not to vigorously prosecute the grievance. Put another way, industrial peace and the promotion of civil rights are not always compatible goals; in an area where discrimination is still widespread, subordinating the latter goal to serve the former is questionable. The *Alexander* decision by the Supreme Court is limited recognition of this dichotomy.

II. Empirical Study and Commentary

It is difficult to uncover the extent to which progress in the area of civil rights has been impeded by the Supreme Court's arbitration decisions. First, most arbitration awards are not published because the contestants must approve publication; even when publication is approved, few awards are published. Secondly, from my examination of both published and unpublished awards[85] it was disturbing to find that the quality of many opinions—particularly with respect to composition and grasp of legal issues—was poor. Many arbitrators are verbose, as though they justify their fees by the length rather than quality of their decisions. Rationale for a decision is often unclear, facts are not fully reported, and legal decisions cited to support the award are frequently not in point or have been overruled. Consequently, it is difficult to determine whether unions representing grievants were poorly prepared or whether the arbitrator failed to report the evidence supporting the union's position.

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82. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

83. Vaca v. Sipes, 386 U.S. 171 (1967). *But cf.* J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

84. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

85. In 1972 the American Arbitrators Association gave the University of Iowa many unpublished awards.

The arbitration process has been the object of some criticism. It has been observed, for example, that because arbitrators depend on the concurrence of unions and employers for future appointments, they tend to make compromise decisions, even when a clear-cut decision may be called for.[86] A compromise decision—defined as giving part of an award to each contestant—is often a necessary or correct solution. When each opponent holds meritorious but conflicting views, the neutral problem-solver properly recognizes the legitimacy of the diverse claims and the need to temper them. But if compromise decisions are intended to attract and retain clientele, the problem-solver is no longer neutral; instead, the decision-maker is himself the direct beneficiary of the industrial "justice" he is paid to dispense to the parties. Such an award is in effect a political, or self-serving, decision. Admittedly, determining with certainty when a particular compromise decision is political in this sense would tax the most astute observer.

A second criticism of the arbitration process is that the arbitrator should not function as a mediator.[87] Private arbitrators in the United States, unlike England, adjudicate disputes leading to the interpretation of an existing contract but do not help employers and unions negotiate new agreements. A third criticism is that arbitrators do not necessarily follow legal rules of evidence or rely on prior relevant determinations in making awards.[88]

The independence of arbitrators has not yet been thoroughly discussed or examined.[89] Freedom from political influence and the

86. Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1117, 1148-49 (1964); Raffaele, *Needed: A Fourth Party in Industrial Relations*, 13 LAB. L.J. 330 (1962).

87. *See* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1022-23 (1955); Syme, *Opinion and Awards*, 15 LAB. ARB. 953 (1951); Note, *A Study of Labor Arbitration—The Values and Risks of the Rule of Law*, 1967 UTAH L. REV. 223, 225-28. *But see* Bailer, *Arbitration Procedure and Practices: Arbitrator Viewpoint*, N.Y.U. 15TH ANN. CONF. ON LAB. 349 (1962); Braden, *The Function of the Arbitrator in Labor-Management Disputes*, 4 ARB. J. (n.s.) 35 (1949); Davey, *The Proper Uses of Arbitration*, 9 LAB. L.J. 119 (1958). *See generally* Garret, *The Role of Lawyers in Arbitration*, in ARBITRATION AND PUBLIC POLICY 133 (S. Pollard ed. 1961); Johnson, *Contrasts in the Role of the Arbitrator and of the Mediator*, 9 LAB. L.J. 769 (1958).

88. *See* Gray, *Some Thoughts on the Use of Precedents in Labor Arbitration*, 6 ARB. J. (n.s.) 135 (1951); Jones & Smith, *supra* note 86, at 1128-29; Roberts, *Precedent and Procedure in Arbitration Cases*, N.Y.U. 6TH ANN. CONF. ON LAB. 149 (1953).

89. Many knowledgeable critics agree with Arthur Goldberg, former Supreme

avoidance of compromise awards is particularly important in civil rights grievances if discrimination is to be ended as quickly as possible. Yet maintaining independence is perhaps more difficult for arbitrators in civil rights disputes, where the parties cannot be "separated" from the issues. The pressure on arbitrators to appease the parties is increased by the ability of the parties to "shop" for arbitrators whose opinions are predictable and acceptable.[90] At the least, in order to realistically anticipate being selected to adjudicate an issue, an arbitrator must have exhibited some "sympathy" or "impartiality" toward that issue.[91] That participants return to "sympathetic" arbitrators is demonstrated by the fact that in 1970, of the American Arbitration Association's National Panel of 1400 arbitrators, only 458 made awards.[92] A 1971 study [93] showed that this selectivity is not drawn along lines of experience, since decisions in hypothetical situations did not vary significantly between experienced and inexperienced arbitrators.

Court Justice and labor lawyer, that arbitrators are fair, competent, dedicated, and exercise their best judgment. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. (n.s.) 13 (1965). *See, e.g.*, Finley, *Labor Arbitration: The Quest for Industrial Justice*, 18 CASE W. RES. L. REV. 1091, 1120 (1967); Strauss, *Labor Arbitration and Its Critics*, 20 ARB. J. (n.s.) 197, 205-06 (1965). There is a minority who are extremely critical, however. *E.g.*, Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019, 1034-35 (1965):

> There are only a handful of arbitrators who . . . have the knowledge, training, skill, and character which make them . . . good arbitrators. In literally thousands of cases each year decisions are made by arbitrators who are wholly unfitted for their jobs. . . . In fact, a proportion of arbitration awards, no one knows how large a proportion, is decided not on the basis of the evidence or of the contract . . . but in a way calculated to encourage the arbitrators being hired for other arbitration cases . . . . [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. . . . In my opinion no discussion of arbitration which does not consider the effect of the arbitrator's dependence on the goodwill of the parties is completely honest.

Accord, Koven, *Limits to Accommodation*, in PROBLEMS OF THE AD HOC ARBITRATOR 313 (Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, 1967).

90. *See* McDonald, *The Selection and Tenure of Arbitrators in Labor Disputes*, N.Y.U. 1ST ANN. CONF. ON LAB. 145 (1948).

91. *See* Manson, *Is Arbitration Expendable?*, N.Y.U. 12TH ANN. CONF. ON LAB. 1, 1-20 (1959).

92. *See* Westerkamp & Miller, *The Acceptability of Inexperienced Arbitrators: An Experiment*, 22 LAB. L.J. 763, 765 (1971). There is evidence that employers and unions are also becoming more selective and critical of arbitrators; as long ago as 1959 the Federal Mediation and Conciliation Service noted an increase in the number of re-

To determine whether arbitrators make "political" decisions, questionnaires were sent to labor lawyers, management, and union officials, and unpublished and published awards were reviewed.[94] A total of 1169 questionnaires were mailed, 229 to unions, 286 to employers, and 654 to lawyers.[95] The names of union officials were secured from the national and international headquarters of their respective unions. The names of employers were secured from the *Fortune* magazine list, which is comprised of the 500 largest corporations in the United

quests for more than one panel. *Report of Federal Mediation and Conciliation Service, 1958*, 82 MONTHLY LAB. REV. 408, 410 (1959).

93. Westerkamp & Miller, *supra* note 92.

94. In addition, the Federal Mediation and Conciliation Service and the American Arbitration Association were asked to endorse a project in which psychological tests were to be given to arbitrators to measure motivation and partiality. Permission was refused.

95. The questionnaires sent to unions, employers, and lawyers differ slightly. The questions contained in each are reprinted in the Appendix. Table I reflects the disposition of the 1169 questionnaires mailed. Table II is an account of responses received but not tabulated.

TABLE I

QUESTIONNAIRES AND RESPONSES*

	Questionnaires Mailed	Responses Received But Not Tallied**	Questionnaires That Could Not Be Delivered	Number Not Responding	Total Number of Questionnaires Tabulated
Unions	229	17	20	102	90
Employers	286	33	6	51	196
Lawyers	654	73	13	185	383
Total	1169	123	39	338	669

* Where responses in the subsequent tables do not tally with the totals presented in Table I, the respondent failed to reply to a specific question.

** *See* Table II for explanation.

TABLE II

RESPONSES NOT TABULATED AND REASONS

Unions	Number	Employers	Number	Lawyers	Number
Lack of experience	13	Lack of experience	13	Works as arbitrator	6
Does not believe in arbitration	1	Does not bargain with a union	10	Died or retired	3
Uses permanent arbitrator	2	Uses permanent arbitrator	7	Works for NLRB or state labor board	2
Canadian union	1	Unable to understand response	3	No or insufficient experience with labor law or arbitration	62
Total	17	Total	33	Total	73

States. The largest unions and employers were contacted because it appeared likely that their representatives would have had more experience with arbitration than would representatives of smaller organizations. The names of lawyers specializing in labor law and collective bargaining were secured from state bar associations and the American Bar Association. Most of the lawyers contacted represent employers; this was not intentional. Of the 383 tabulated lawyer-respondents, 287 (74.9%) represent employers, 69 (18.1%) represent unions, and 27 (7.0%) represent both. A total of 301 attorneys claimed to have extensive experience in labor law and arbitration, while 82 did not consider themselves to be specialists. Of the latter group, however, only 15 alleged limited exposure to labor law and collective bargaining problems, while the balance claimed considerable experience.

To ascertain the extent to which attorneys, employers, and unions are responsible for the selection of arbitrators, we asked the respondents to indicate on a frequency scale their degree of involvement in the selection.[96] Lawyers and management representatives participated more frequently in the selection of arbitrators than did the union respondents: 86.1% of the lawyers and 90.3% of the employers indicated that they participated either "always" or "very often." In contrast, only 73.3% of the responding unions fell within these two groups. This statistical difference demonstrates that management and lawyers (remembering that three-fourths of the respondent lawyers represent employers) play a more significant role in selecting arbitrators than unions, and presumably have attained greater expertise. Finally, a greater number of questionnaires were sent to, and greater percentage returned from, employers and lawyers than from unions.

96. TABLE III

FREQUENCY WITH WHICH LAWYERS, UNIONS, AND EMPLOYERS PARTICIPATE IN THE SELECTION OF ARBITRATORS

Frequency	Lawyers	Unions	Employers
Always	211 (55.2%)*	27 (30.0%)	112 (57.1%)
Very Often	118 (30.9%)	39 (43.3%)	65 (33.2%)
Sometimes	41 (10.7%)	21 (23.3%)	18 (9.2%)
Never	12 (3.2%)	3 (3.3%)	1 (0.5%)
Total	382	90	196

* Percentage figures represent the portion of each group of respondents within each frequency. Thus, 211 of 382, or 55.2%, of responding lawyers always participate in the selection of the arbitrator.

The respondents were asked if they knew the "factors considered important" in the selection of arbitrators.[97] To further evaluate the expertise of the informants, they were asked to indicate whether they had made at least one personal appearance before an arbitrator. Many respondents indicated an awareness of the criteria of selection, and very few had not participated in an arbitration hearing.[98]

Since the management respondents represented large firms with industrial relations typically under central control, whereas much of the day-to-day operation of unions is left in local hands, all respondents were asked whether employers or unions more carefully select an arbitrator. While national union officials are skillful, many at the local level, like shop stewards and business agents, are not as well-trained or experienced as employer representatives.[99] Thus it could be ex-

97. TABLE IV
EXPERIENCE OF ARBITRATORS

Respondents	Personal Knowledge of the Qualities Determining Selection of Arbitrators	Personally Appeared Before Arbitrator
Lawyers	136 (35.5%)	372 (97.3%)
Employers	74 (37.7%)	183 (93.4%)
Unions	74 (82.2%)	85 (94.4%)

98. *Id.*

99. The competence of union officials is less important when attorneys represent them. Our survey reveals, however, that in a significant percentage of civil rights cases, one party is not represented by an attorney:

TABLE V
DEGREE OF LEGAL REPRESENTATION

Kind of Civil Rights Case	Representation				Total
	Only Employer Represented	Only Union Represented	Both Sides Represented	No Lawyers Shown	
Race & Religion	7	0	11	8	26
Sex	20	6	24	34	84
Race & Sex	0	0	1	2	3
Age	1	0	0	3	4
Total	28	6	36	47	117

These results were tabulated from 117 discrimination awards published in arbitration reporters from 1961 to 1970: I-I-E Imperial Corp., 55 Lab. Arb. 1284 (1970); Gross Distr., Inc., 55 Lab. Arb. 756 (1970); Titanium Metals Corp., 55 Lab. Arb. 690 (1970); Community Unit School Dist. 205, 55 Lab. Arb. 895 (1970); Owens Publications, Inc., 55 Lab. Arb. 586 (1970); Agrico Chem. Co., 55 Lab. Arb. 481 (1970); Missouri Pac. R.R., 55 Lab. Arb. 193 (1970); New York Tel. Co., 55 Lab. Arb. 525

pected that management and lawyers representing either employers or unions probably exercise greater care in the selection of arbitrators

(1970); Dayton Tire & Rubber Co., 55 Lab. Arb. 357 (1970); ITT Gilfillan, Inc., 55 Lab. Arb. 1210 (1970); Frito-Lay, Inc., 54 Lab. Arb. 1142 (1970); United Aircraft Corp., 55 Lab. Arb. 484 (1970); Weyerhaeuser Co., 54 Lab. Arb. 857 (1970); Lockheed-Georgia Co., 54 Lab. Arb. 769 (1970); Avco Corp., 54 Lab. Arb. 165 (1970); Allied Thermal Corp., 54 Lab. Arb. 441 (1970); East Detroit Bd. of Educ., 54 Lab. Arb. 330 (1970); Western Airlines, Inc., 54 Lab. Arb. 600 (1970); Corn Prods. Co., 54 Lab. Arb. 303 (1970); Sterling Faucet Co., 54 Lab. Arb. 340 (1970); Sylvania Elec. Prods. Co., 54 Lab. Arb. 320 (1969); American Standard, Inc., 53 Lab. Arb. 1157 (1969); American Enka Corp., 54 Lab. Arb. 562 (1969); General Foods Corp., 53 Lab. Arb. 291 (1969); Allison Steel Mfg. Co., 53 Lab. Arb. 101 (1969); Canton Provision Co., 52 Lab. Arb. 942 (1969); Grand Rent A Car Corp., 52 Lab. Arb. 1065 (1969); Hall China Co., 51 Lab. Arb. 1259 (1969); Super Valu Stores, Inc., 52 Lab. Arb. 112 (1968); Hercules Box Co., 52 Lab. Arb. 79 (1968); Hough Mfg. Co., 51 Lab. Arb. 785 (1968); Oldberg Mfg. Co., 51 Lab. Arb. 509 (1968); Electric Cord Sets, Inc., 51 Lab. Arb. 418 (1968); Owens-Illinois, Inc., 50 Lab. Arb. 871 (1968); Phillips Petroleum Co., 50 Lab. Arb. 522 (1968); Great Atl. & Pac. Tea Co., 49 Lab. Arb. 1186 (1967); Combustion Eng'r, Inc., 49 Lab. Arb. 204 (1967); Franklin Appliance Div., Studebaker Corp., 49 Lab. Arb. 105 (1967); Creative Indus., Inc., 49 Lab. Arb. 140 (1967); Scott Paper Co., 49 Lab. Arb. 45 (1967); United States Steel Corp., 48 Lab. Arb. 1340 (1967); Alsco, Inc., 48 Lab. Arb. 1244 (1967); American Airlines, Inc., 48 Lab. Arb. 705 (1967); United Airlines, Inc., 48 Lab. Arb. 727 (1967); Allegheny Airlines, Inc., 48 Lab. Arb. 734 (1967); Morton Salt Co., 48 Lab. Arb. 487 (1967); General Fireproofing Co., 48 Lab. Arb. 819 (1967); Pitman-Moore Div., Dow Chem. Co., 49 Lab. Arb. 709 (1967); Pangborn Corp., 48 Lab. Arb. 629 (1967); Allen Mfg. Co., 49 Lab. Arb. 199 (1967); VR/Wesson Co., 48 Lab. Arb. 339 (1967); Robertshaw Controls Co., 48 Lab. Arb. 101 (1967); Marathon County Farmers Union Coop., 48 Lab. Arb. 206 (1967); McCall Corp., 67-2 CCH LAB. ARB. AWARDS ¶ 4751 (1967); Kaiser Founda ion Hosp., 67-2 CCH LAB. ARB. AWARDS ¶ 4665 (1967); Peer Food Prods., 67-1 CCH LAB. ARB. AWARDS ¶ 3714 (1967); Land-Air, Inc., 67-1 CCH LAB. ARB. AWARDS ¶ 3600 (1967); Victor Balata & Textile Belting Co., 47 Lab. Arb. 1167 (1966); Eaton Mfg. Co., 47 Lab. Arb. 1045 (1966); International Paper Co., 47 Lab. Arb. 896 (1966); Buco Prods., Inc., 48 Lab. Arb. 17 (1966); Hotel Empl. Ass'n, 47 Lab. Arb. 873 (1966); Ingraham Co., 48 Lab. Arb. 884 (1966); National Lead Co., 48 Lab. Arb. 405 (1966); National Cash Register Co., 47 Lab. Arb. 248 (1966); Pittsburgh Steel Co., 47 Lab. Arb. 88 (1966); Lockheed-Georgia Co., 46 Lab. Arb. 931 (1966); Ozark Smelting & Mining Div., 46 Lab. Arb. 697 (1966); Paterson Parchment Co., 47 Lab. Arb. 260 (1966); W.M. Chace Co., 48 Lab. Arb. 231 (1966); American Sugar Co., 46 Lab. Arb. 396 (1966); Schaefer Super Markets, Inc., 46 Lab. Arb. 115 (1966); Northwest Airlines, Inc., 46 Lab. Arb. 238 (1966); Sperry-Rand Corp., 46 Lab. Arb. 961 (1966); Lockheed-Georgia Co., 66-3 CCH LAB. ARB. AWARDS ¶ 6686 (1966); Rold Gold Foods, 66-3 CCH LAB. ARB. AWARDS ¶ 6046 (1966); Federal Servs., Inc., 66-2 CCH LAB. ARB. AWARDS ¶ 4306 (1966); Collins Radio Co., 45 Lab. Arb. 939 (1965); Yale & Towne, Inc., 45 Lab. Arb. 923 (1965); Apex Mach. & Tool Co., 45 Lab. Arb. 417 (1965); Hercules Powder Co., 45 Lab. Arb. 448 (1965); Westinghouse Elec. Corp., 45 Lab. Arb. 621 (1965); Braniff Airways, Inc., 48 Lab. Arb. 769 (1965); Goodyear Tire & Rubber Co., 45 Lab. Arb. 240 (1965); L.D. Schreiber Cheese Co., 44 Lab. Arb. 873 (1965); Board of Educ., 45 Lab. Arb. 265 (1965); Whittaker Corp., 44 Lab. Arb. 152 (1965); American Mach. & Foundry Co., 66-1 CCH LAB. ARB.

than do union officials.[100] To a large extent we anticipated that all

AWARDS ¶ 3110 (1965); Gremar Mfg. Co., 66-1 CCH LAB. ARB. AWARDS ¶ 3008 (1965); DeMello's Office Furniture Co., 65-2 CCH LAB. ARB. AWARDS ¶ 5642 (1965); Mead Corp., 65-2 CCH LAB. ARB. AWARDS ¶ 5329 (1965); Standard Oil Co., 65-2 CCH LAB. ARB. AWARDS ¶ 5210 (1965); United States Plywood Corp., 65-1 CCH LAB. ARB. AWARDS ¶ 4374 (1965); Holland Suco Color Co., 43 Lab. Arb. 1022 (1964); Reliance Elec. & Eng'r Co., 43 Lab. Arb. 1181 (1964); Akron Metallic Gasket Co., 44 Lab. Arb. 807 (1964); Oxford Paper Co., 44 Lab. Arb. 630 (1964); St. Clair Rubber Co., 43 Lab. Arb. 562 (1964); Mead Corp., 43 Lab. Arb. 391 (1964); Northern Engraving & Mfg. Co., 43 Lab. Arb. 460 (1964); Lockheed-Georgia Co., 43 Lab. Arb. 289 (1964); Dewey-Portland Cement Co., 43 Lab. Arb. 165 (1964); Riegel Paper Corp., 44 Lab. Arb. 129 (1964); Whittaker Controls & Guidance, 42 Lab. Arb. 938 (1964); Rockwell-Standard Seating Corp., 42 Lab. Arb. 638 (1964); Tri-City Container Corp., 42 Lab. Arb. 1044 (1964); Container Stapling Corp., 42 Lab. Arb. 182 (1964); Century Elec. Co., 42 Lab. Arb. 429 (1964); Quaker Oats Co., 42 Lab. Arb. 433 (1964); Owens-Illinois Glass Co., 43 Lab. Arb. 715 (1964); Armco Steel Corp., 64-2 CCH LAB. ARB. AWARDS ¶ 5197 (1964); Mead Corp., 42 Lab. Arb. 224 (1963); Phillips Chem. Co., 41 Lab. Arb. 411 (1963); Minute Maid Co., 63-2 CCH LAB. ARB. AWARDS ¶ 4893 (1963); United States Borax & Chem. Corp., 63-2 CCH LAB. ARB. AWARDS ¶ 4471 (1963); James R. Kearney Corp., 62-2 CCH LAB. ARB. AWARDS ¶ 5033 (1962); American Sugar Refining Co., 62-1 CCH LAB. ARB. AWARDS ¶ 3443 (1961).

In these 117 cases, at least 72, or 61.5%, of the arbitrators themselves were legally trained:

TABLE VI
BACKGROUND OF ARBITRATORS

Kind of Civil Rights Case	Background				Total
	Lawyer	Professor	Lawyer & Professor	Unknown	
Race & Religion	14	6	4	2	26
Sex	36	24	14	10	84
Race & Sex	1	0	2	0	3
Age	1	2	0	1	4
Total	52	32	20	13	117

100.

TABLE VII
DEGREE OF CARE EXERCISED IN SELECTING ARBITRATORS*

Respondent	Responses			
	Employers	Unions	Neither (equally careful)	Don't Know
Lawyers	144	37	107	82
Employers	121	1	16	45
Unions	33	17	26	12
Total	298	55	149	139

* The Table compiles the respondents' evaluations of the care exercised by the parties in arbitration in selecting an arbitrator. Thus, 37 lawyer-respondents indicated that unions exercised greater care than employers in selecting an arbitrator.

respondents would claim more, or at least equal, care. Since respondents representing employers outnumbered those representing unions, it was inevitable that the tabulation would favor management. What was surprising was that more union respondents felt management is more careful than unions; on the other hand, only one management respondent felt that unions exercise greater care. This raises doubt as to whether union officials are adequately representing civil rights grievants, particularly when it is recognized that unions are assisted by attorneys less frequently than employers.

The respondents were asked to specify why employers or unions more carefully select arbitrators.[101] The reasons assigned were num-

101. TABLE VIII
REASONS WHY EMPLOYERS OR UNIONS MORE CAREFULLY SELECT ARBITRATORS

Reason Assigned	Frequency		
	Lawyers	Employers	Unions
1. Employer has more resources and personnel	23	22	8
2. Union has more resources and personnel	0	0	1
3. Impact of decision greater on employer, so it is more careful	38	48	2
4. Impact of decision greater on union or member, so union is more careful	3	0	4
5. Staff of employer better trained and more carefully selects arbitrators	10	7	4
6. Arbitrators tend to favor unions and employees, forcing employers to be more careful	18	7	1
7. Employers have more information than unions	17	11	4
8. Employers more often than unions are represented by attorneys, who tend to be more careful in selecting arbitrator	23	5	2
9. Employers are more careful, preferring arbitrators with judicial temperament, training, or conservativeness	3	15	6
10. Unions are more careful, keep better records, and are more experienced	25	1	2
11. Unions get better legal advice	4	0	0
12. Employers are more careful because disputes involve moral issues or problems in which the answer is uncertain	3	1	1
13. Employers and unions are equally careful in selecting arbitrators by checking their past records	42	14	4
14. Unions are more careful because arbitrators favor employers	4	0	4
15. Unions are more careful because the criteria used for selection go beyond those necessary to win the grievance	2	0	3
16. Unions are more careful because employer is certain of the soundness of his position	3	1	1
17. Unions are more careful because employers' sole			

erous and not highly concentrated. Compiling the statistical frequency of answers was made difficult because the responses were not always clear. But the responses do tend to support and explain a conclusion reached in a 1967 study[102] that most awards favor management. The study assigned five reasons,[103] including that employers are better prepared than unions. The answers to our questionnaires reveal that a significant portion of all three groups found employers to have superior resources, personnel, and information.[104]

A large number of respondents believed that large employers have more resources and personnel to rely on than do local unions, permitting employers the luxury of selecting arbitrators more carefully. While many of the union respondents were affiliated with large and resourceful international or national unions, others represented locals with limited resources. Large corporations also hire outstanding legal talent, which is partly responsible for the greater care in the selection of arbitrators by management.

Regardless of which participant is more careful, civil rights griev-

concern is the company while unions represent many locals	2	1	2
18. Employers are more careful because they are less trusting than unions of arbitrators with an academic background	1	0	1

102. Finley, *supra* note 89, at 1107.

103. The other four reasons were: (1) because they are politically more vulnerable, union leaders are apt to bring "bad" cases before arbitrators; (2) unions are subjected to more adverse publicity than employers, which gives employers a psychological advantage; (3) many arbitrators feel that their judgment should not be substituted for that of employers—yet, management believes that too many arbitrators are reluctant to sustain a decision to discharge an employee, *see* Levitt, *Practical Problems in the Handling of Grievances and Labor Arbitrations*, 3 GA. L. REV. 411, 414 (1969); and (4) arbitrators accept irrelevant evidence to support employer positions. Finley, *supra* note 89, at 1107.

Newscasters and newspapermen have unfairly emphasized union wrongdoing and minimized employer wrongdoing in the civil rights arena. This is partly because unfair employment practice charges against employers brought under state or federal discrimination laws cannot be publicized until a public hearing is held. Since most charges are settled at the investigatory or conciliatory level, employers appear to have a better track record than unions. Probably more conscious of public relations than are unions, employers have managed to create the impression that either plant economics or unions are responsible for much discrimination. And it is possible that weak civil rights cases are taken to arbitration by politically vulnerable union officials who are subjected to both "inside" and "outside" criticism; this view is supported by our spot check of unpublished awards.

104. This conclusion reflects the frequency of assigned reasons 1, 5, and 7 in Table VIII. *See* note 101 *supra*.

ants do not select arbitrators, and it is reasonable to assume that arbitrators decide many cases that grievants would not submit to arbitration if they exercised a knowledgeable choice. Even when employers and unions are equally careful, arbitrators know that past decisions will influence future appointments. In civil rights cases, the "liberal" versus "conservative" label fairly or unfairly hung on the arbitrator can determine whether he is selected. Since an increasing number of civil rights disputes are arbitrated by a small circle of arbitrators—whose decisions are largely not subject to review—reexamination of public policy is necessary.[105]

One result of the factors discussed above—the greater expertise of management in the selection of arbitrators, the "political" pressures on arbitrators to avoid liberal awards, the finality of arbitrators' decisions, and union control over the decision to bring specific grievances to arbitration—is that the disposition of civil rights questions in labor controversies has not kept pace with judicial thinking. Federal labor legislation prior to 1964 was not focused on civil rights and discriminatory racial practices in employment. But with the judicial reduction of discrimination in other areas—for example, housing,[106] politics,[107] and economic rights[108]—the NLRB slowly began to discourage racial

105. *See* Kilberg, *The FMCS and Arbitration: Problems and Prospects*, 94 MONTHLY LAB. REV. 40, 43-44 (Apr. 1971). In response to the refusal of employers and unions to appoint new arbitrators, the Federal Mediation and Conciliation Service considered publishing all awards. While this could lead to the acceptance of a large number of arbitrators, it could also cause the blackballing of others on the ground that they were considered radical exponents of civil rights.

106. Shelley v. Kraemer, 334 U.S. 1 (1948).

107. Baker v. Carr, 369 U.S. 186 (1962); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953).

108. Syres v. Oil Workers Union, 350 U.S. 892 (1955) (per curiam); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); *see* Larus & Bros. Co., 62 N.L.R.B. 1075 (1945). In addition, with the expansion of constitutional and legislative protections for minorities came a gradual shifting of the burden of proof from plaintiff to defendant to support a new, liberalized public poilcy. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); Draper v. Clark Dairy, Inc., 27 L.R.R.M. 2072 (Sup. Ct. New Haven County, Conn. 1950); DeMatas v. Building Serv. Empl. Int'l Union, Local 32-B, 6 RACE REL. L.R. 1208 (N.Y. Comm'n Ag. Discr. 1961); Banks v. Capital Airlines, 5 RACE REL. L.R. 263 (N.Y. Comm'n Ag. Discr. 1960); Franklin v. TWA, 2 RACE REL. L.R. 867 (N.Y. Comm'n Ag. Discr. 1957); City of Pittsburgh v. Plumbers Local 27, 59 L.R.R.M. 2553 (County Ct. Allegheny County, Pa. 1965); *cf.* Arnold v. Ballard, 6 Fair Empl. Prac. Cas. 287 (N.D. Ohio 1973); *In re* Jeanpierre, 1 RACE REL. L.R. 685 (N.Y. Sup. Ct. 1956), *modified*, 3 App. Div. 2d

discrimination under the unions' duty of fair representation and the unfair labor practice provisions of the Taft-Hartley Act.[109] This not only provided a much needed forum to deal with discrimination in employment but also eased the burden of proof for grievants, since the hearings were held before an administrative agency.[110]

The change in judicial attitude toward discrimination in employment is illustrated by *Griggs v. Duke Power Co.*,[111] a 1971 Title VII case. An employer tested job applicants and candidates for promotion to determine their educational and intellectual fitness. Although it acknowledged that the resulting racial discrimination was not intentional, the Supreme Court found a violation of Title VII in the adverse impact of the employer's hiring and promotion procedures on the black community. Data established that blacks were given inferior schooling, were less likely than whites to complete high school, and did not score as well as whites on the tests. Thus Title VII is violated without any intentional wrongdoing when hiring techniques screen out blacks from job opportunities, unless the employer can prove that hiring techniques adopted after Title VII was enacted are *necessary* to secure good employees, an express exception to the rule in *Duke Power.*

Other practices which have a discriminatory effect may be less susceptible of Title VII disposition, and should be adjudicated before arbitrators in a fashion consistent with *Duke Power.* Other judicial decisions offer additional guidance. For example, the seniority clause found in most collective bargaining agreements gives a senior man of equal ability with other applicants the first opportunity at promotion. Most collective bargaining agreements provide for departmental, rather than plant, company, or job-wide, seniority, which has the effect of freezing blacks in the least desirable departments due to past hiring practices.[112] Fair employment legislation forbids the isolation

514, 162 N.Y.S.2d 506 (1957), *aff'd as modified*, 4 N.Y.2d 238, 149 N.E.2d 882, 173 N.Y.S.2d 597 (1958).

109. *See* Syres v. Oil Workers Union, 350 U.S. 892 (1955) (per curiam); Hughes Tool Co., 104 N.L.R.B. 318 (1953); Colorado Fuel & Iron Corp., 67 N.L.R.B. 100 (1946).

110. Section 101 of the Taft-Hartley Act does not require the NLRB to follow courtroom rules of evidence; it requires that "[a]ny such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence. . . ." 29 U.S.C. § 160(b) (1970).

111. 401 U.S. 424 (1971).

112. *See* Sabala v. Western Gillette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973); Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3 (S.D. Tex. 1972); Bragg v.

of blacks or women in particular departments or jobs, but this policy cannot be enforced if white male jobholders retain their seniority, built up when discrimination was not illegal, and blacks who are transferred to another department lose seniority accumulated in the past. To combat this "unintentional" discrimination, courts have found violations on the ground that the effect of these seniority clauses is to retard minority advancement.[113]

Court decisions on testing and seniority can be interpreted as examples of a shift toward the judicial acceptance of sociological and statistical evidence of discrimination practices in employment. These decisions have broadened Title VII coverage to include practices which were not intended to have discriminatory effects, despite a congressional declaration that neither employers nor unions are to be held responsible for violating Title VII without proof of intentional discrimination.[114] Employers believe that they should not be held responsible unless proof of intentional discrimination is produced. They reason that testing is "scientific," accurately weeding out the less suitable employees. While unions have not voiced serious objection to the testing decisions, they have been unhappy over the seniority clause rulings which erode job protection for white members. Union leaders argue that the seniority clause must be kept intact to protect job rights and promotion for members who have exhibited years of loyalty to their employers. Furthermore, union spokesmen contend that the seniority clause is non-discriminatory and will benefit minorities as fair employment spreads.

Arbitration has provided employers and unions which seek to discriminate or are unwilling to tolerate the "effect doctrine" enunciated in *Duke Power* with a means for retarding civil rights progress. It cannot be emphasized too strongly that the effect doctrine chips away at the control over hiring and promotion traditionally exercised by em-

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Robertshaw Controls Co., 355 F. Supp. 345 (E.D. Tenn. 1972); United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554 (D. Colo. 1971). *See generally* Kovarsky, *Current Remedies for the Discriminatory Effects of Seniority Agreements*, 24 VAND. L. REV. 683 (1971).

113. *See* Local 189, Papermakers Union v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970); Long v. Georgia Kraft Co., 62 CCH Lab. Cas. ¶ 6712 (N.D. Ga. 1970); United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

114. Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1970).

ployers and unions. Employers fear that the doctrine will increase costs and reduce their control, while union leaders fear an erosion of power when fair employment is pushed too quickly. Many blacks are critical of union leadership and some officials find this threatening. That more civil rights grievances are arbitrated now than ten years ago is suspect; after all, why should employers and unions bear the cost of arbitration when grievants can turn to publicly supported agencies for relief. In the last analysis, unions determine which grievances are carried to arbitration, thereby avoiding the "radical" policy and decisions of administrative agencies and courts. Since employers often share a similar view, complainants are channeled into arbitration where more traditional procedures can be followed.

The factors influencing an arbitrator are innumerable. To determine what factors are considered important in selecting arbitrators, respondents were asked to indicate what aspects were investigated to "predict" the arbitrator's decision. The answers reflected the importance of six qualities which affect the selection of arbitrators. First, a prospective arbitrator may have a history of holding liberal and conservative views on different issues. For example, an arbitrator may feel that discharge as an industrial penalty should be sparingly applied against long-term employees. Yet the same arbitrator may feel that civil rights progress must be slow to avoid industrial turmoil. "Inconsistent" views of an arbitrator may therefore cause him to be subjected to careful investigation.

Second, the weight attached to certain types of evidence by arbitrators is often scrutinized. Arbitrators of the "old school" may be unwilling to accept sociological or statistical data on the ground that they do not establish wrongful conduct in the particular case. On the other hand, younger and more liberal arbitrators may be willing to accept composite data. Moreover, since many arbitrators are legally trained and law schools today devote considerable attention to civil rights issues, younger arbitrators may sympathize with minorities and thus more readily accept changes in the traditional rules of evidence. This may in part explain the reluctance of management to hire young arbitrators. The views of older arbitrators are reinforced when they are continually sought after by employers and unions in civil rights grievances. Young arbitrators seeking economic success are aware of this, and it is likely to color the views they hold.[115]

115. In addition, sudden and catastrophic changes in economic or social conditions

Third, union leaders function with political acumen where internal democracy is practiced. To satisfy members and prove the value of the union, leaders sometimes take to arbitration grievances which are acknowledged to be weak. Under these conditions the arbitrator's decision is pre-ordained. One attorney-respondent mentioned a union leader, whom he had advised against taking a grievance to arbitration, who wanted to lose the case. Many rank-and-file union members employed in the construction and rubber trades exhibit hostility to minorities.[116] Some unions which are known for liberal leadership, like the United Auto Workers in Detroit, have experienced increasing dissatisfaction from white members who do not want blacks in better-paying jobs. The United Steelworkers has only slowly been prodded into improving the lot of minority members.[117] Under these circumstances, both weak and supportable grievances may be taken to arbitration—weak claims to satisfy minority members and supportable claims to keep them from resorting to public agencies.

Fourth, most arbitrators work on a part-time basis, engaging full-time most frequently in the practice of law or teaching. In fact, due to the current practice of selecting ad hoc arbitrators, there are only a few occupations where interested moonlighters with the necessary background can find the time during the day to add to their income. The concern here is whether part-time arbitrators are more likely than full-time arbitrators to compromise. Because part-time arbitrators have another source of income, it is possible that they are less dependent than full-time arbitrators on the income from arbitration and have less need to compromise. Yet the part-time arbitrator must be eco-

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can spearhead change in the thinking of an arbitrator. The Depression and World War II were certainly responsible for shifting government from a *laissez faire* economic philosophy to one of limited control of industry. Racial violence in the 1960's also increased the tempo of change. These economic and civil rights changes could influence arbitrators concerned with fair play and justice. Revolt and publicity may also create an impression that change has been too rapid and one-sided. This can negatively influence arbitrators—for example, in large cities where crime is more commonplace and industry is forced to deal with mounting tension in the factory. An arbitrator may be influenced by the physical aspects of a civil rights dispute and ignore its social background.

116. *See* H. NORTHRUP, THE NEGRO IN THE RUBBER TIRE INDUSTRY (Racial Policies of American Industry Rep. No. 6, 1969); Kovarsky, *Apprentice Training Programs and Racial Discrimination*, 50 IOWA L. REV. 755 (1965).

117. *See* United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970), *modified*, 446 F.2d 652 (2d Cir. 1971), *supplemented*, 4 Fair Empl. Prac. Cas. 1280 (W.D.N.Y. 1972).

nomically and professionally motivated to take on added responsibility, and thus may be equally susceptible to the pressures to make "political" awards.

Fifth, the submission and collective bargaining agreements may limit the arbitrator's authority. Disputes are frequently presented to arbitrators without a submission so that the collective bargaining agreement is the sole limitation. But limited by the agreement or the submission or both, arbitrators making civil rights decisions may be unable to render justice, and unable to take into account social and economic considerations that make arbitration attractive in other areas. In some jurisdictions, public agencies, such as state fair employment commissions, can adjudicate such disputes after decisions by arbitrators. But there is little likelihood that grievants will seek aid elsewhere after arbitration even where they are not subject to the election doctrine.[118]

Since the *Steelworkers* trilogy, some employers have sought by contract or stipulation to limit the authority of the arbitrator. If contracts exclude the arbitration of civil rights cases, arbitrators presumably would refuse to hear the disputes or face reversal by court order. But only where contracts clearly limit authority will courts void awards. To completely eliminate by contract the hearing of all civil rights cases, employers would have to specifically exclude the types of cases they wish to keep from arbitration. But since the grievant may find an adequate—but more expensive—remedy elsewhere, contracts generally do not exclude civil rights controversies from arbitration.

Finally, the size of the company or union, or the number of disputes brought to arbitration, are believed to slant the arbitrator's opinion.[119] The large firm and union are more likely to arbitrate grievances than the small firm and union. A particular industry or firm might consistently arbitrate more disputes than other industries or firms. For example, jurisdictional disputes are more common in the construction trades than in manufacturing, and unions have resorted to arbitration

118. Often the agreement is so vague that the arbitrator's personal sense of justice will tip the decision, buttressed by the published awards of others, absolving him from complete responsibility. *See* Tobias, *In Defense of Creeping Legalism in Arbitration*, 13 IND. & LAB. REL. REV. 596, 597-98 (1960). For a view that the use of precedent in arbitration is undesirable, see Doyle, *Precedent Values of Labor Arbitration Awards*, 42 PERSONNEL J. 66 (1963).

119. *See generally* Harris, *The Influence of Institutional Factors on Arbitration Awards*, 20 LAB. L.J. 716, 719 (1969).

to settle them.[120] Since sections 10(k) and 8(b)(4)(D) of the Taft-Hartley Act encourage unions to settle jurisdictional rivalries if employers agree, arbitrators will find the construction industry a profitable hunting ground.[121]

Our research revealed that the investigation of arbitrators before appointment is common.[122] An overwhelming majority of the respondents in each category indicated that investigation was conducted "very often." As might be anticipated, there was greater uncertainty of the practices of "other employers and unions," but more than fifty percent of the respondents in each category felt certain that others investigate artitrators at least to some extent. Experienced and inexperienced arbitrators are aware that they are frequently investigated.[123] While knowledge of investigation before selection does not

120. *See* Cole, *Jurisdictional Issues and the Promise of Mergers*, 9 IND. & LAB. REL. REV. 391 (1956); Dunlap, *Jurisdictional Disputes*, N.Y.U. 2D ANN. CONF. ON LAB. 477, 496 (1949).

121. *See* Herzog v. Parsons, 181 F.2d 781 (D.C. Cir.), *cert. denied*, 340 U.S. 810 (1950); Local 595, Bridge Workers Union, 112 N.L.R.B. 812 (1955); Los Angeles Bldg. Trades Council, 88 N.L.R.B. 1101 (1950).

122. TABLE IX

INVESTIGATION OF ARBITRATORS BEFORE SELECTION

	Investigation of Arbitrators by Respondents				Frequency of Investigation of Arbitrators by Other Employers and Unions*			
Respondents	Yes	No	If Yes, How Often		Yes	No	If Yes, How Often	
Unions	82	7	Very Often	59	76	1	Very Often	38
			Sometimes	20			Sometimes	19
			Don't Know	2			Don't Know	20
Employers	195	0	Very Often	180	75	115	Very Often	49
			Sometimes	8			Sometimes	49
			Don't Know	0			Don't Know	23
Lawyers	315	51	Very Often	272				
			Sometimes	47				
			Don't Know	4				

* Lawyers were not asked whether other lawyers investigate arbitrators because the nature of their work calls for investigation.

123. *See* P. PRASOW & E. PETERS, ARBITRATION AND COLLECTIVE BARGAINING: CONFLICT RESOLUTION IN LABOR RELATIONS 14-15 (1970); Friedin, *The Status and Expendability of the Labor Arbitrator*, in THE PROFESSION OF LABOR ARBITRATION 55 (National Academy of Arbitrators, Proceedings of the 10th Annual Meeting, 1957); MacDonald, *The Selection and Tenure of Arbitrators in Labor Disputes*, N.Y.U. 1ST ANN. CONF. ON LAB. 145, 178-79 (1948); Raffaele, *supra* note 86, at 234; Segal, *Arbitration: A Union Viewpoint*, in THE ARBITRATORS AND THE PARTIES 56 (National Academy of Arbitrators, Proceedings of the 11th Annual Meeting, 1958); Strauss, *supra* note

establish influence upon opinion, some effect is inevitable. Whether the effect is widespread, as I believe, or limited, cannot be positively established, but there has to be some influence.

Respondents were also asked to indicate the methods they rely on to investigate arbitrators.[124] Four means of investigating arbitrators—examining published awards, contacting other employers or unions, employing special investigators, and examining lists prepared by associations or unions—were listed in the questionnaire. It was anticipated that the published awards of arbitrators would be investigated and acquaintances contacted to evaluate arbitrators. In fact, a recurring criticism from respondents was the unavailability of more published awards to examine so that investigations could be more thorough. Specialized firms to investigate arbitrators are used frequently by employers, adding to arbitration costs. Union leaders, on the other hand, seldom hire special investigators. Evidently, there are a large number of lists prepared by employers and unions pertaining to the strengths, weaknesses, and social attitudes of arbitrators. Has a widespread system of blacklisting developed in civil rights disputes? That so few arbitrators handle the bulk of disputes points in this direction.

89, at 205-06; Tobias, *supra* note 118, at 597; Whiting, *Arbitrators and the Remedy Power*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 73 (National Academy of Arbitrators, Proceedings of the 16th Annual Meeting, 1963).

124. TABLE X

METHODS USED TO INVESTIGATE ARBITRATORS

Respondents	Published Awards*				Contact with Other Firms, Unions, or Lawyers			
	Very Often	Sometimes	Never	Don't Know	Very Often	Sometimes	Never	Don't Know
Lawyers	153	176	12	34	157	197	6	19
Employers	159	35	1	0	45	141	6	4
Unions	42	31	3	12	28	51	1	9
	Hire Specialized Firms to Investigate				Association or Union List of Arbitrators			
	Very Often	Sometimes	Never	Don't Know	Yes	Never	Don't Know	
Lawyers	55	61	196	67	186	112	75	
Employers	52	44	91	9	111	17	66	
Unions	1	4	33	51	42	21	26	

* American Arbitrators Association, Commerce Clearing House, and Labor Arbitration Reports.

Respondents were asked whether undertaking an investigation depended on whether the arbitrator is well-known or unknown.[125] As anticipated, unknown arbitrators undergo extensive investigation. Surprisingly, well-known arbitrators, while less often investigated than unknown arbitrators, also face considerable investigation. Well-known arbitrators were more frequently investigated in the "sometimes" category than unknown arbitrators; this may indicate a desire to ferret out the attitude of an arbitrator with respect to a particular subject. And one area where well-known arbitrators will be investigated is civil rights.

The investigation of the views of well-known arbitrators also disproves the claim that unions and employers are interested only in competency and not social philosophy. This conclusion is based on the assumption that well-known arbitrators have established their competency. Adding the "very often" and "sometimes" categories for both well-known and unknown arbitrators, there is little difference in the frequency of investigation. In fact, the investigation by management of known arbitrators is more frequent than of unknown arbitrators, as shown below:

	Well-known	Unknown
Lawyers	315	343
Management	190	163
Unions	67	77

It should be noted that only a few of the respondents claimed that arbitrators are never investigated.

Since most arbitrators are carefully investigated in civil rights disputes, it might be anticipated that they are selected for their social views, with ability a desirable but not paramount quality. Respon-

125. TABLE XI
FREQUENCY OF INVESTIGATION OF WELL-KNOWN AND UNKNOWN ARBITRATORS

Respondents	Well-Known Arbitrators				Unknown or Inexperienced Arbitrators			
	Very Often	Sometimes	Never	Don't Know	Very Often	Sometimes	Never	Don't Know
Lawyers	116	199	24	39	281	62	4	29
Employers	142	48	4	1	124	39	17	6
Unions	27	40	9	13	58	19	2	9

dents were asked whether arbitrators espousing "liberal"[126] social views are bypassed.[127] The results show that lawyers and employers frequently bypass liberal arbitrators if the "very often" and "sometimes" categories are totaled. While few union respondents turn down liberal arbitrators, it seems reasonable to assume that the frequency rate increases in disputes involving minorities.

Only twenty-three lawyers (6.1%) claimed that arbitrators are never turned down because of their social outlook. Lawyers do attempt to select the remedy, jurisdiction, and even the judge most likely to favor their clients. There is no reason to suppose that this perceived advantage is not sought in the selection of arbitrators. In fact, to do otherwise may be interpreted as legal incompetence by peers. That so many of the lawyer-respondents complained of the limited number of published awards may indicate that there is considerable interest in the social views of arbitrators.

Unions were asked if arbitrators with "conservative social views" are turned down.[128] The responses were split—exactly one-half indicated

126. One responding lawyer who represents employers objected to the language "liberal" and "conservative" in the questionnaire, feeling that management is not conservative or interested in fighting unions and that unions in civil rights cases are less progressive than employers. While there may be some merit to this position, the terms "liberal" and "conservative" were used as a description of the arbitrator and not of employers or unions. Naturally, if "conservative" arbitrators are selected it does reflect the bias of the selector. Furthermore, people supporting civil rights are usually labeled "liberal" rather than "conservative," although there are exceptions. *See generally* Peterson, *Consequences of the Arbitration Award for the Unions*, 21 LAB. L.J. 613, 615-17 (1970).

127. TABLE XII
FREQUENCY WITH WHICH LIBERAL ARBITRATORS ARE BYPASSED*

Respondents	Very Often	Sometimes	Never	Don't Know
Lawyers	129	128	23	96
Employers	33	89	35	29
Unions	1	13	29	45
Total	163	230	87	170

* It is conceded that the meaning of "liberal" is not precise.

128. TABLE XIII
FREQUENCY WITH WHICH CONSERVATIVE ARBITRATORS ARE BYPASSED BY UNIONS

Yes	44
No	39
Don't Know	5
Total	88

that they do bypass conservative arbitrators. If the question were pinpointed to the question of black promotion, it is possible that more union respondents would favor conservative arbitrators.

To gain full perspective on the tendency of the parties to bypass arbitrators with liberal social views, respondents were asked to characterize this tendency in both unions and employers.[129] There was substantial support from all three categories of respondents that employers are more likely than unions to turn down the liberal arbitrator. To determine whether the reaction of employers and unions to liberal arbitrators was related to the subject matter of the dispute we asked the respondents whether arbitrators are "less likely to be bypassed and/or investigated when the subject matter is of a technical nature."[130] The responses demonstrate that every category of respondent finds that the social outlook of arbitrators is less important in technical disputes. These data substantiate the hypothesis that the social views of arbitrators will be more carefully scrutinized in non-technical disputes, such as civil rights grievances.

Information was sought from the respondents as to whether the pro-

129. TABLE XIV

WHO IS MORE LIKELY TO BYPASS LIBERAL ARBITRATORS

	Choices			
Respondents	Employers	Unions	Neither	Don't Know
Lawyers	303	4	8	64
Employers	138	3	6	40
Unions	80	1	5	4
Total	521	8	19	108

130. TABLE XV

LIKELIHOOD THAT LIBERAL ARBITRATORS WILL BE BYPASSED IN TECHNICAL DISPUTES

	Choices		
Respondents	Yes	No	Don't Know
Lawyers	157	114	108
Employers	74	70	36
Unions	36	31	22

cess of selection influenced the decisions of arbitrators.[131] There are four possibilities: (1) arbitrators cannot be influenced; (2) arbitrators are unaware that they accommodate their clientele; (3) industrial peace requires accommodation and arbitrators are simply doing their jobs; or (4) arbitrators knowingly compromise in order to succeed. Respondents were asked whether it is more likely that well-known or inexperienced arbitrators will make compromise awards to assure their selection in the future. Although many respondents indicated that they did not know—an understandable response since the answer requires an interpretation of another man's motive—many felt that both well-known and unknown or inexperienced arbitrators are likely to compromise. Although all groups indicated that well-known arbitrators are *less* likely than unknown or inexperienced arbitrators to compromise, a surprising 37.1% of all respondents believed that even well-known arbitrators are susceptible.[132]

It is useful at this point to consider explanations advanced to explain compromise that have been developed by sociologists and psychologists who study human behavior.[133] Even though specific studies of arbitration have not been published, sociological and psychological

131. TABLE XVI
COMPROMISE DECISIONS BY ARBITRATORS

	Well-Known Arbitrators			Unknown or Inexperienced Arbitrators		
Respondents	Yes	No	Don't Know	Yes	No	Don't Know
Lawyers	151	140	87	194	45	140
Employers	55	115	22	79	29	85
Unions	38	39	11	45	20	24
Total	244	294	120	318	94	249

132. It is appropriate to compare the role of the arbitrator with that of the federal judge, particularly since the civil rights grievant may now have an easier time bringing his complaint under Title VII. While federal judges also bring to their decision-making task their particular backgrounds and philosophies, and while their selection itself reflects their politics to a large extent, they are less likely to "accommodate" union leaders and management because of stare decisis and because of the economic independence of the federal judiciary. Arbitrators, on the other hand, are subject to great pressure to compromise so that they will be selected again; they do not enjoy life tenure, and the money and prestige they earn depend on the willingness of the parties to select them on a case-by-case basis.

133. *See generally* A. MASLOW, MOTIVATION AND PERSONALITY (2d ed. 1970); D. MCCLELLAND, THE ACHIEVING SOCIETY (1961); F. HERZBERG, WORK AND THE NATURE OF MAN 71 (1966).

data pertaining to motivation are relevant in trying to understand the factors which influence decision-making by arbitrators. Arbitrators, like others, seek material success and try to avoid failure and psychological discomfiture when possible.[134] To avoid stress when faced with new situations which may carry the possibility of criticism, inconsistency with previous beliefs, or other pressures, the arbitrator may attempt to reduce these pressures by reinforcing his beliefs or rationalizing them. Behavior patterns of arbitrators are likely to be consistent due to similarity of training, background, and economic expectation. Unless an arbitrator radically alters his thinking on a particular subject, his behavior can be predicted.[135] Predictability, whether from economic aspiration, social background, or psychological behavior, is important to society, for it avoids the confusion and misunderstanding that follow irrational or unexpected behavior. For this reason, for example, precedent in the law is valued highly.

Arbitrators function in this psychological milieu and there is no reason to believe that they are a unique group in this regard or that psychological or economic success follow by "calling the shots" as they see them.[136] Arbitrators solving employer-union disputes learn rapidly, through both trial and error and observation, that one-sided opinions are quickly labeled as biased, and are not tolerated by the parties.[137] And arbitrators can correctly anticipate unfavorable and costly reaction to civil rights and other decisions considered injurious either to plant efficiency or to union power.[138] Moreover, the arbitrator is much more vulnerable than a federal judge because he is appointed by people who expect a favorable decision.[139] The pressures on arbitrators to conform to expectations are thus unquestionably greater than on state or federal judges.[140] Clearly, arbitrators will frequently dis-

134. *See* Festinger, *An Introduction to the Theory of Dissonance*, in CURRENT PERSPECTIVES IN SOCIAL PSYCHOLOGY 347 (2d ed. E. Hollander & R. Hunt 1967); *cf.* J. ATKINSON, AN INTRODUCTION TO MOTIVATION 221-67 (1964).

135. *See* Zajonc, *The Concepts of Balance, Congruity, and Dissonance*, 24 PUB. OPINION Q. 280, 296 (1960).

136. *See* V. VROOM, WORK AND MOTIVATION 8-19 (1964).

137. *See* E. HILGARD & G. BOWER, THEORIES OF LEARNING 1-22, 457-90 (1966).

138. *See* B. BASS & J. VAUGHN, TRAINING IN INDUSTRY: THE MANAGEMENT OF LEARNING 32-41 (1966); J. DEESE & S. HULSE, THE PSYCHOLOGY OF LEARNING 170-207 (3d ed. 1967). *See generally* W. SCOTT, ORGANIZATION THEORY: A BEHAVIORAL ANALYSIS FOR MANAGEMENT (1967).

139. *See* note 132 *supra*.

140. *See* J. MARCH & H. SIMON, ORGANIZATIONS 136-71 (1958).

please employers and unions—any decision will displease someone to some extent—but because of their desire to succeed economically, and the many forces that push their thinking to the center, uncompromising positions are rare.

The respondents indicated[141] that arbitrators do make "political" decisions to assure future appointment. There is another possibility not considered by the respondents: an inherent or developed tendency in arbitrators to satisfy disputants. In fact, all decision-makers tend to repeat solutions that have met the test of acceptability.[142] However, the tendency of decision-makers to seek acceptability is enforced by the manner in which arbitrators are appointed. Knowing that future appointments hinge upon satisfying employers and unions, arbitrators are interested not in public acceptability but in industrial acceptability.

The tendency of arbitrators to favor industrial needs over civil rights advancement is largely the result of personal motivations and pressures. Arbitrators see themselves as offering an important service, namely keeping the industrial peace. The importance with which arbitration as an occupation is perceived results in increased pressure to conform.[143] This helps to explain the respondents' belief that both well-known and unknown or inexperienced arbitrators feel the effect of employer and union investigation and selection.[144]

Neophytes interested in becoming arbitrators are limited by the system. The arbitrator in a civil rights dispute is theoretically obligated to the grievant, employer, union, and public, but the grievant and pub-

141. *See* note 131 *supra.*

142. *See* Rapoport, *Prospects for Experimental Games,* 12 J. CONFLICT RES. 461 (1968). The author shows that prison inmates repeat the same solution in game after game.

143. *See* D. CARTWRIGHT & A. ZANDER, GROUP DYNAMICS 139-50 (3d ed. 1968).

144. TABLE XVII
EFFECT OF INVESTIGATION ON ARBITRATORS' DECISIONS

Respondents	Yes	No	Don't Know
Lawyers	140	72	167
Employers	66	38	86
Unions	37	20	31
Total	243	130	284

While a full-blown discussion of the value of modern psychology in understanding the decision-making process in arbitration is beyond the scope of this Article, it should be noted that the studies cited in notes 133-43 *supra* and 145-50 *infra* are of particular importance and interest in illustrating the forces that create an "informal" system of stare decisis that is largely unrecognized by attorneys.

lic take a back seat because of the system.[145] Arbitrators able to exercise considerable choice may ignore evidence that leads to a solution unacceptable to employers and unions.[146] While he approaches a dispute with more detachment than the employer, union, or grievant, the arbitrator's preconceptions and need to please could prohibit the consideration of evidence that would lead to a disturbing decision.

Experienced arbitrators should be more aware and sensitive to the whims of contestants than the inexperienced. Sensitivity bred by past experience prevents or retards change in spite of shifts occurring in other arenas resolving similar conflicts. In fact, the experienced arbitrator avoids discomfiture by ignoring information—why look for trouble when there is a palatable solution?[147] Arbitrators attach different weight to the same evidence—opinions vary as to what is primary, peripheral, or inconsequential evidence.[148] Experienced contestants are aware that arbitrators weigh evidence differently, and selection in part reflects the evidence that is likely to be produced. An arbitrator who attaches little weight to indirect proof will be avoided if that is the only kind of evidence that can be produced. Civil rights cases are frequently decided in favor of plaintiffs who are able to produce only indirect evidence of discrimination. There are "conventional" arbitrators who ignore or are unaware of the latest evidentiary developments. That following precedent is not required and awards are not subject to appellate review permits arbitrators to ignore legal change. Our study shows that employers are more likely than unions to bypass liberal arbitrators, in part because liberal arbitrators are more likely to accept sociological and indirect evidence[149] than conservative arbitrators; to permit this is to chill social change.[150]

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145. Vaca v. Sipes, 386 U.S. 171 (1967); *see* Hinton, *Environmental Frustration and Creative Problem Solving*, 52 J. APPLIED PSYCH. 211, 216 (1968); E. Lowell, The Effect of Conflict on Motivation, at 16-21 (unpublished Ph.D. thesis, Dep't of Social Relations, Harvard University, 1952).

146. *See* Mills & Jellison, *Avoidance of Discrepant Information Prior to Commitment*, 8 J. PERSONALITY & SOC. PSYCH. 59 (1968). This study pertains to the responses of people reading advertisements. It can be reasoned that the arbitrator by training and desire can limit preconceptions, but this position appears naive.

147. *See* Strub, *Experience and Prior Probability in a Complex Decision Task*, 53 J. APPLIED PSYCH. 112 (1969).

148. *See* Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCH. 258 (1946).

149. *See* note 127 *supra*.

150. *See* Wishner, *Reanalysis of "Impressions of Personality"*, 67 PSYCH. REV. 96 (1960).

The respondents were asked to indicate what signs of compromise they had observed in awards. They were given three prepared choices—increased use of precedent, condescending and apologetic wording, and "compromise" awards for grievants[151]—and also had the opportunity to indicate other signs.[152] The three prepared choices

151. TABLE XVIII
EVIDENCE OF COMPROMISE
(from choices on questionnaire)

Respondents	Increased Use of Precedent	Condescending and Apologetic Wording	Award Grievant Only Part of What He Seeks
Lawyers	84	61	70
Employers	47	25	21
Unions	35	12	12

152. TABLE XIX
EVIDENCE OF COMPROMISE
(provided by respondents)

Response	Frequency		
	Lawyers	Employers	Unions
1. Arbitrator twists, assumes, or ignores evidence or precedent	33	28	5
2. Arbitrator rewrites or misinterprets collective bargaining agreement, or hears case without jurisdiction	4	16	2
3. Arbitrator states that award will not be used as precedent, or limits scope of decision	4	3	0
4. Arbitrator urges parties to settle disputes, bases award on the settlement, and refuses to make an award	7	6	1
5. Arbitrator states circumstances under which the award would have been different	2	2	3
6. When several cases are heard, each side wins and loses some of the disputes	26	20	4
7. Arbitrator finds merit in both positions	6	12	1
8. Arbitrator reinstates employee after discharge but "adjusts" discipline—e.g., by not awarding back pay	23	22	15
9. When case involves several issues, each side wins and loses some of them	8	1	1
10. While finding merit in the grievance, arbitrator requires only future compliance with his decision	3	0	0
11. Arbitrator allows trial period in lieu of demotion	0	1	0
12. Arbitrator is determined to follow law or precedent	0	1	1
13. Arbitrator advises contestants to negotiate clearer agreement in future	1	0	0

were based on an examination of published awards. First, since the expressed use of precedent by arbitrators is unusual, reliance thereon might indicate an unwillingness to make an unpopular award, thereby shifting responsibility to other authorities.[153] Secondly, some arbitrators are by nature apologetic and courtly, so that language of this type does not necessarily suggest compromise. Yet, overconcern for the losing contestant, exhibited by apology, indicates some predisposition toward compromise.[154] Finally, while splitting an award may be just, it may also indicate compromise. For example, arbitrators frequently decide in favor of civil rights grievants without awarding back pay, or merely require a trial promotion.[155] Typical reasons for these

14. Arbitrator compromises differences between employer and employee	14	2	0
15. Arbitrator conducts hearing improperly	3	2	0
16. Arbitrator's award is too long and detailed	0	0	2

153. *See, e.g.*, American Standard, Inc., 53 Lab. Arb. 1157 (1969); Hall China Co., 51 Lab. Arb. 1259 (1969); Allegheny Airlines, 48 Lab. Arb. 734 (1967); United Airlines, Inc., 48 Lab. Arb. 727 (1967); Hotel Empl. Ass'n, 47 Lab. Arb. 873 (1966); American Sugar Co., 46 Lab. Arb. 396 (1966); Westinghouse Elec. Corp., 45 Lab. Arb. 621 (1965); DeMello's Office Furniture Co., 65-2 CCH LAB. ARB. AWARDS ¶ 5642 (1965); Mead Corp., 42 Lab. Arb. 224 (1963).

154. The following are examples of apology in civil rights disputes. In American Mach. & Foundry Co., 66-1 CCH LAB. ARB. AWARDS ¶ 3110 (1965), the arbitrator upheld the grievant's discharge from employment, but said, "The Union made a valiant effort in grievant's defense. . . . In the absence of any plausible excuse, the penalty must . . . stand, with clearly expressed regret on the part of all concerned." In Lockheed-Georgia Co., 54 Lab. Arb. 769, 772 (1970), the arbitrator held for the employer, but said, "I hope that [complainant] will understand and accept the fact that the grievance procedure and the arbitration hearing . . . have given him the opportunity to have his complaint fairly and sympathetically weighed . . . , an opportunity which was until recently not available and is still not available in many parts of the world." For other examples, see Allison Steel Mfg. Co., 53 Lab. Arb. 101 (1969); Hercules Box Co., 52 Lab. Arb. 79 (1968); Oldberg Mfg. Co., 51 Lab. Arb. 509 (1968); McCall Corp., 49 Lab. Arb. 183 (1967); American Airlines, Inc., 48 Lab. Arb. 705, 708 (1967); McCall Corp., 67-2 CCH LAB. ARB. AWARDS ¶ 4751 (1967); Minute Maid Co., 63-2 CCH LAB. ARB. AWARDS ¶ 4893 (1963); James R. Kearney Corp., 62-2 CCH LAB. ARB. AWARDS ¶ 5033 (1962).

155. I-T-E Imperial Corp., 55 Lab. Arb. 1284 (1970); Gross Distr., Inc., 55 Lab. Arb. 756 (1970); Frito-Lay, Inc., 54 Lab. Arb. 1142 (1970); Avco Corp., 54 Lab. Arb. 165 (1970); American Enka Corp., 54 Lab. Arb. 562 (1969); Allegheny Airlines, 48 Lab. Arb. 734 (1967); W.M. Chace Co., 48 Lab. Arb. 231 (1966); International Paper Co., 47 Lab. Arb. 896 (1966); Paterson Parchment Co., 47 Lab. Arb. 260 (1966); Northwest Airlines, Inc., 46 Lab. Arb. 238 (1966); Lockheed-Georgia Co., 66-3 CCH LAB. ARB. AWARDS ¶ 6686 (1966); Braniff Airways, Inc., 48 Lab. Arb. 769 (1965); Dewey-Portland Cement Co., 43 Lab. Arb. 165 (1964); Rockwell-Standard Corp., 42 Lab. Arb. 638 (1964).

awards are that the employer acted in "good faith" or that the employer viewpoint was "reasonable." The responses indicate that all three groups had witnessed evidence of compromise most frequently in the use of precedent by arbitrators—45.2% of the respondents selected this choice.

Respondents were asked to indicate the five most common reasons for not using particular arbitrators.[156] The respondents established that the background, philosophy, and past performance of arbitrators are of much greater concern to the participants than competency. This conclusion is further supported by responses to the question of how frequently arbitrators are rejected because of the disagreement

156. TABLE XX

COMMON REASONS FOR NOT SELECTING PARTICULAR ARBITRATORS
*(reasons provided by respondents)**

Response	Frequency		
	Lawyers	Employers	Unions
1. Bias or past experience favoring employers	54	3	20
2. Bias or past experience favoring unions	74	88	1
3. Excessive charges	6	3	0
4. Improper conduct at hearing	8	23	1
5. Arbitrator too busy or delays making awards	11	1	2
6. Past association with employer, union, or pro-union government agency	14	5	2
7. Analysis of past awards	63	41	37
8. Personal experiences with arbitrator	14	3	4
9. Lack of legal background	3	3	1
10. Arbitrator unwilling to discharge	7	3	0
11. Lack of technical knowledge or experience in a particular industry	5	2	4
12. Adverse comments of others	2	2	0
13. Personality	0	0	1
14. Nationality or religion	0	0	1
15. Tendency to compromise	5	2	2
16. Arbitrator either unknown or inexperienced	0	0	2
17. Liberal views of arbitrator	19	1	0
18. Incompetency	6	0	0
19. Arbitrator exceeds his authority	14	1	0
20. Arbitrator overly concerned with legal procedure, technicality, or theory	13	3	1
21. Legal background	2	0	2

* Admittedly, there is some overlap among the responses. Where the exact meaning of a response was unclear, it was not grouped with others. Many respondents did not answer this question.

of the selectors with the arbitrator's previous awards.[157] A vast majority of all groups of respondents indicated that arbitrators are either frequently or occasionally turned down because their awards are disagreed with.

III. CONCLUSION

Few of the respondents favored a significant change in the current system of arbitration, which permits unfettered control by employers and unions. While there are some contractual provisions which limit the selection of arbitrators, on the whole contestants have considerable freedom. In fact, many of the suggestions made by the respondents—for example, publishing more awards, reducing delays, and increasing the supply of experienced arbitrators—serve the purpose of allowing the contestants an even wider range of selection.

Even though most of the respondents did not express an opinion or only favored limited change, many of them felt that arbitrators make "political" decisions, and that this is desirable because it reflects that the decision-makers are responsible to those who hire them. This control over selection appears to be exceptionally damaging to civil rights grievants. At a time when the cost of arbitration is rising while the number of civil rights disputes submitted to arbitration is increasing, the advocacy of continued employer-union control is suspicious since public agencies are well-equipped to protect these grievants.

Those few respondents who did recommend some change in the arbitration system supported the following innovations:

1. The collective bargaining agreement should designate arbitrators, allowing the signatories to select one from this list as disputes arise. Note that the employer and union initially decide who is acceptable and then limit their choice to those named.

157. TABLE XXI

FREQUENCY WITH WHICH ARBITRATORS ARE TURNED DOWN BECAUSE OF DISAGREEMENTS WITH PREVIOUS AWARDS

Respondents	Frequency		
	Very Often & Sometimes	Never	Don't Know
Lawyers	360	1	18
Employers	117	23	38
Unions	74	1	4
Total	551	25	60

2. Some public agency or tribunal, either state or federal, should appoint the arbitrator. Some lawyers felt that a federal judge should name the arbitrator. Presumably, the arbitrator's decisions would then be supported by the judge unless legally erroneous. It is presumed that the respondents did not wish that appointments be restricted to lawyers.
3. Either a separate arbitration court should be created, or arbitration duties should be delegated to the NLRB, which could create a separate division of arbitration.
4. The American Arbitration Association or Federal Mediation and Conciliation Service should either appoint the arbitrator or submit a list of names from which the employer and union must make a selection.

Ideologically, the arbitrator should be free to make any decision he considers just so long as it is authorized by the collective bargaining agreement. His responsibility in a civil rights dispute is not only to the employer and union but to the grievant and to society, which has forbidden discrimination. Given this responsibility, decisions cannot be tolerated when the needs of the grievant have to be compromised in order to satisfy employers and unions whose priorities differ from those declared by society.

Labor arbitration is a necessity in our society; its importance cannot be denied. There is nothing to indicate that arbitration will assume less importance in the future; in fact, in the civil rights arena there are indicators that arbitration will play a more important role. Yet, neither Congress nor the courts seem to acknowledge that the conditions favoring the promotion of arbitration at the time of *Lincoln Mills* and the *Steelworkers* trilogy have changed.

Some federal agency should be charged with the selection, training, and appointment of arbitrators. Due to the myriad of important problems submitted to arbitration, a persuasive argument can be made for the creation of an arbitration board. In this way, fees and craftsmanship can be standardized, with employers and unions assuming the cost of maintaining the system. The arbitration board would be responsible for selecting arbitrators who are competent, objective, and familiar with the peculiarities of the industry and dispute in question. Many employers, unions, and arbitrators would not welcome this change, out of self-interest. But the public policy of fair employment calls for an end to a private industrial spoils system.

Because courts do not review awards and employers and unions select the arbitrator, the needs of the grievant can be ignored with impunity. While the grievant could get a court to overturn an award if he can establish bad faith on the part of the selectors[158] and arbitrator, this rarely occurs because the manner in which arbitrators are selected eliminates the *need* for bad faith. Also, there is considerable difference between bad faith and bad judgment on the part of the arbitrator. While it is less difficult to establish bad judgment, seldom can it be established that the arbitrator acted in bad faith.[159]

Since the NLRB has taken the position that it will not hear unfair labor practice charges that are arbitrable, a system of compulsory arbitration is developing in which the grievant has little choice. The employer and union, given the NLRB approach, are also required to arbitrate, but they can select the arbitrator, which provides them with considerable flexibility. Placing selection of the arbitrator within the authority of a federal agency or arbitration board would permit arbitrators a freer hand to decide cases objectively, and would return civil rights disputes to public accountability.

158. *Cf.* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

159. *See* Whitmore v. Eastern Greyhound Lines, 83 L.R.R.M. 2978 (E.D. Mich. 1973).

APPENDIX

The following groups of questions were sent to unions, employers, and lawyers. Their answers supplied the information reflected in the Tables.

I. Unions

1. As a union representative, have you assisted in the selection of arbitrators?
   _____Always
   _____Very often
   _____Sometimes
   _____Never
2. If not personally involved, do you know the specific factors considered important by responsible union officials selecting arbitrators?
   _____Yes
   _____No
3. Have you ever served as a union representative during a hearing held before an arbitrator?
   _____Yes
   _____No
   If yes, how often?
   _____Very often
   _____Sometimes
4. Who do you think more carefully selects an arbitrator?
   _____Employers
   _____Unions
   _____Neither
   _____Don't know
   What accounts for employers or unions being more careful (if either side is) in the selection of arbitrators?
5. Are arbitrators carefully investigated by your union prior to selection?
   _____Yes
   _____No
   If yes, how often?
   _____Very often
   _____Sometimes
   _____Don't know
6. Do you think that arbitrators are carefully investigated by other

unions prior to selection?
____Yes
____No
If yes, how often?
____Very often
____Sometimes
____Don't know

7. How often are the published awards (Commerce Clearing House, American Arbitration Association, Bureau of National Affairs) of arbitrators carefully reviewed before their selection?
____Very often
____Sometimes
____Never
____Don't know
8. Do employers carefully investigate arbitrators before selection?
____Yes
____No
9. How often are *other* union officials or attorneys contacted to secure their opinions of a particular arbitrator?
____Very often
____Sometimes
____Never
____Don't know
10. How often are private firms specializing in the investigation of arbitrators hired by unions?
____Very often
____Sometimes
____Never
____Don't know
11. Do you know of any employers, associations, or unions that have prepared lists of arbitrators showing tendencies to make certain kinds of decisions or specific "weaknesses?"
____Yes
____No
____Don't know
If yes, are these lists referred to frequently?
____Yes
____No
____Don't know
12. How often are *well-known* arbitrators carefully investigated by unions before selection?
____Very often

_____Sometimes
_____Never
_____Don't know

13. How often are *unknown* or *inexperienced* arbitrators carefully investigated by unions before selection?
_____Very often
_____Sometimes
_____Never
_____Don't know

14. How often are arbitrators bypassed by unions because of their published or expressed liberal social views (such as on civil rights issues)?
_____Very often
_____Sometimes
_____Never
_____Don't know
Does your union tend to bypass arbitrators with conservative social views?
_____Yes
_____No
_____Don't know

15. Who in your opinion is more likely to bypass arbitrators with liberal social views?
_____Employers
_____Unions
_____Neither
_____Don't know

16. Are arbitrators with liberal social views less likely to be bypassed and/or investigated by unions when the subject matter of the grievance is of a technical nature?
_____Yes
_____No
_____Don't know

17. How often are arbitrators bypassed because union representatives disagree with previous decisions?
_____Very often
_____Sometimes
_____Never
_____Don't know

18. Is it likely that *well-known* arbitrators will try to appease both the employer and union by making a compromise-type award? (A compromise-type award is defined as one which gives something

to each contestant.)
_____Yes
_____No
_____Don't know

19. Is it likely that *unknown* or *inexperienced* arbitrators will make a compromise-type award to assure future selection?
_____Yes
_____No
_____Don't know
20. Is it likely that arbitrators, knowing that they will be investigated by employers or unions, will take this into account when making awards?
_____Yes
_____No
_____Don't know
21. If the current method of selecting ad hoc arbitrators affects their decisions, it will show up in
_____Increased use of precedent to support the award
_____Condescending and apologetic wording to placate the loser
_____Awarding the grievant only part of what he seeks
22. List other indications of a compromise-type award.
23. In your opinion, what are the most common reasons for unions not selecting a particular arbitrator?
24. What defects, if any, have you noticed in the current manner in which employers and unions select arbitrators?
25. Would you recommend other means of selecting ad hoc arbitrators?
_____Yes
_____No
If yes, explain.

II. Employers

1. As a representative of the firm, have you assisted in the selection of arbitrators?
_____Always
_____Very often
_____Sometimes
_____Never

If not personally involved, do you know what factors are considered important by the officials of your firm who select arbitrators?

_____Yes
_____No

2. Have you represented your firm before an arbitrator?
_____Yes
_____No
If yes, how often?
_____Very often
_____Sometimes

3. Who do you think more carefully selects an arbitrator?
_____Employers
_____Unions
_____Neither
_____Don't know
What accounts for the employer or union being more careful (if either side is) in the selection of arbitrators?

4. Does your firm carefully investigate arbitrators before selecting them?
_____Yes
_____No
If yes, how often?
_____Very often
_____Sometimes

5. Do you know if unions carefully investigate arbitrators before selecting them?
_____Yes
_____No
If yes, how often?
_____Very often
_____Sometimes
_____Don't know

6. How often does your firm review the published awards of arbitrators (Commerce Clearing House, Bureau of National Affairs, American Arbitrators Association) before selecting them?
_____Very often
_____Sometimes
_____Never
_____Don't know

7. How often are *other* firms or disinterested attorneys contacted regarding their evaluation of a particular arbitrator?
_____Very often
_____Sometimes

_____Never
_____Don't know

8. How often are private firms which specialize in the investigation of arbitrators resorted to by your firm?
_____Very often
_____Sometimes
_____Never
_____Don't know

9. Do employers or unions prepare lists of arbitrators showing tendencies to make certain kinds of decisions or showing specific "weaknesses?"
_____Yes
_____No
_____Don't know

10. How often are *unknown* or *inexperienced* arbitrators carefully investigated by your firm before selection?
_____Very often
_____Sometimes
_____Never
_____Don't know

11. How often are *well-known* arbitrators carefully investigated by your firm prior to selection?
_____Very often
_____Sometimes
_____Never
_____Don't know

12. How often does your firm bypass arbitrators because of their published or expressed liberal social views (such as on civil rights issues)?
_____Very often
_____Sometimes
_____Never
_____Don't know

13. In your opinion, who is more likely to bypass arbitrators with liberal social views?
_____Employers
_____Unions
_____Neither
_____Don't know

14. Are arbitrators with liberal social views bypassed because officials in or representing your firm disagree with past decisions?
_____Yes

_____No
_____Don't know

15. Are arbitrators with liberal social views less likely to be bypassed and/or investigated by your firm when the subject matter of the grievance is of a technical nature?
_____Yes
_____No
_____Don't know

16. Is it likely that *well-known* arbitrators will try to appease both the employer and union by rendering a compromise-type award? (A compromise-type award is defined as one which gives something to each contestant.)
_____Yes
_____No
_____Don't know

17. Is it likely that *unknown* or *inexperienced* arbitrators will render a compromise-type award to assure future selection?
_____Yes
_____No
_____Don't know

18. Is it likely that arbitrators, knowing that they will be investigated before selection by employers or unions, will take this into account when making awards?
_____Yes
_____No
_____Don't know

19. If the current methods of selecting ad hoc arbitrators affect their decisions, it will show up in
_____Increased use of precedent to support the award
_____Condescending and apologetic wording to placate the loser
_____Awarding the grievant only part of what he seeks

20. List other ways in which arbitrators show a tendency to make compromise-type decisions.

21. In your opinion, what are the most common reasons for employers refusing to accept a particular arbitrator?

22. What defects, if any, have you observed in the current manner in which employers and unions select arbitrators?

23. Would you recommend other means of selecting ad hoc arbitrators?
_____Yes
_____No
If yes, be specific.

III. Lawyers

1. I usually represent
   _____Employers
   _____Unions
   _____Both
2. Do you specialize in law regulating labor, collective bargaining, and/or arbitration?
   _____Yes
   _____No
   If not, how much exposure do you get to this kind of practice?
   _____Considerable
   _____Little
3. When representing a client, how often have you assisted in the selection of an arbitrator?
   _____Always
   _____Very often
   _____Sometimes
   _____Never
4. If not involved, do you know what specific factors your clients consider important when selecting an arbitrator?
   _____Yes
   _____No
5. Have you ever represented a client before an arbitrator during a hearing?
   _____Yes
   _____No
   If yes, how often?
   _____Very often
   _____Sometimes
6. Who do you think more carefully selects an arbitrator?
   _____Employers
   _____Unions
   _____Neither
   _____Don't know
   What accounts for the employer or union being more careful (if either side is) in the selection?
7. Do you think that arbitrators are carefully investigated before being approved by your clients?
   _____Yes
   _____No
   If yes, how often?

_____Very often
_____Sometimes
_____Don't know

8. How often are the published awards (Commerce Clearing House, American Arbitration Association, Bureau of National Affairs) of arbitrators carefully reviewed before their selection?
_____Very often
_____Sometimes
_____Never
_____Don't know

9. How often are other employers, union officials, or attorneys contacted to get their opinions of a particular arbitrator?
_____Very often
_____Sometimes
_____Never
_____Don't know

10. How often are private firms that specialize in the investigation of arbitrators resorted to by your clients?
_____Very often
_____Sometimes
_____Never
_____Don't know

11. Do you know of any employer associations or unions that have prepared lists of arbitrators, showing tendencies to make certain kinds of decisions or specific weaknesses?
_____Yes
_____No
_____Don't know

12. How often are *well-known* arbitrators carefully investigated before selection?
_____Very often
_____Sometimes
_____Never
_____Don't know

13. How often are *unknown* or *inexperienced* arbitrators carefully investigated before selection?
_____Very often
_____Sometimes
_____Never
_____Don't know

14. How often are arbitrators bypassed because of their published or

expressed liberal social views (such as on civil rights issues)?
____Very often
____Sometimes
____Never
____Don't know

15. Who in your opinion is more likely to bypass arbitrators with liberal social views?
____Employers
____Unions
____Neither
____Don't know

16. Are arbitrators with liberal social views less likely to be bypassed and/or investigated when the subject matter of the grievance is of a technical nature?
____Yes
____No
____Don't know

17. How often are arbitrators bypassed because employers or unions disagree with previous awards?
____Very often
____Sometimes
____Never
____Don't know

18. Is it likely that *well-known* arbitrators will make a compromise-type award to assure future selection? (A compromise-type award is defined as giving something to the employer and grievant.)
____Yes
____No
____Don't know

19. Is it likely that *unknown* or *inexperienced* arbitrators will make a compromise-type award to assure future selection?
____Yes
____No
____Don't know

20. Is it likely that arbitrators, knowing that they will be investigated before selection, will take this into account when making awards?
____Yes
____No
____Don't know

21. If the selection process affects arbitrators' decisions, it will show up in

_____Increased use of precedent to support the award
_____Condescending and apologetic wording to placate the loser
_____Awarding the grievant only part of what he seeks

22. List other means used by arbitrators who make a compromise-type award.
23. In your opinion what are the five most common reasons for not using a particular arbitrator?
24. What defects, if any, have you noticed in the current manner in which arbitrators are selected?
25. Would you recommend other means of selecting ad hoc arbitrators? Please be specific.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

VOLUME 1974 NUMBER 1

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published five times a year by Washington University,
St. Louis, Missouri.