Reconciling Differences: The Theory and Law of Mediating Labor Grievances

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While grievance arbitration is the most common method of resolution of disputes arising under collective bargaining agreements, the author proposes that there is also a place for grievance mediation. The author compares mediation to arbitration and negotiation, and describes the strengths and weaknesses of mediation. She explains how mediation clauses in labor agreements could be enforced under section 301 of the LMRA, to protect rights created by those agreements, and proposes that mediation clauses be a basis for injunctions against strikes during the term of an agreement in certain situations. However, the author suggests that courts and the National Labor Relations Board should still have primary responsibility for enforcing nonwaivable statutory rights. The author discusses the legal standards for review of arbitration and mediation in Title VII cases, in which the courts generally do not defer to prior findings. She then analyzes the Board's deferral doctrines in depth, and suggests that agreements to mediate should be given deference by the Board when the rights at issue are waivable. The author concludes that, under that standard, mediation could help maintain the relationships necessary for effective collective bargaining without sacrificing protections guaranteed by the law.

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INTRODUCTION

Imagine this scenario: The production employees at American Wid-gets, Inc. ("AWI"), a heavily unionized widget manufacturer, have gone out on strike for the third time in a year, even though the current contract prohibits work stoppages during the contract term. The dispute is over management’s alleged failure to install safety devices called for in the contract. After difficult negotiations, the union and AWI management settled the safety dispute, and the employees returned to work without penalty. AWI management then suspended the new union president, a black woman, for three weeks for failure to stop the work stoppage.

The union now is protesting the president’s suspension. The union asserts that there is no contract term permitting the disparate discipline and that the company’s actions violate the president’s right to engage in union activity. The union also claims that the company has discrimi-nated against the president due to her race and gender, which the contract forbids, as the company did not suspend the previous president (a white male) after the previous work stoppages. The union has threatened to strike.

AWI management, on the other hand, believes that suspension was appropriate under the contract’s just cause clause. It believes that the previous president made serious efforts to stop the previous strikes, while the new president took no preventive steps. Furthermore, the management feels a need to take strong action in the face of a continuing problem.

The union has filed a grievance, but the early steps have yielded a stalemate. Both AWI management and the union leadership are exasperated. Both want to avoid arbitrating the dispute, partly because they are not certain they will be pleased with the award; partly because they know arbitration will exacerbate already strained relations; and partly because they have become dissatisfied with the expense, delay, and formality of arbitration.

A possible answer to this dilemma is grievance mediation. In mediation, a neutral third party assists the disputants in reaching their own settlement through structured negotiations, but—unlike an arbitrator—does not render a decision.¹ Mediating grievances under collective bar-

¹. Ad Hoc Panel on Dispute Resolution and Public Policy, Paths to Justice:
gaining agreements is nothing new. However, it seems to be experiencing a resurgence as part of a general heightened interest in alternative dispute resolution.

This Article describes the process of grievance mediation and proposes a place for it in American labor law. Part I assesses the potential of mediation in grievance processing. Part II answers the following questions regarding its legal implications:

A. How should courts treat an agreement to mediate grievances which one party seeks to avoid or a settlement reached through mediation now challenged by a disgruntled party?
B. Should courts enjoin strikes in order to protect grievance mediation?
C. How should federal agencies and courts charged with enforcing statutory employment rights treat an agreement to mediate or a mediated settlement?

The answers to these questions will determine the viability of grievance mediation.

I

FUNDAMENTALS OF GRIEVANCE MEDIATION

If the union and AWI management were to use grievance mediation, what would they gain or lose? This section sets out a theory of grievance mediation, differentiating it from negotiation and arbitration and surveying mediation's strengths and weaknesses. It then discusses several important considerations in creating a grievance mediation process. Both dispute resolution theory and the reported data suggest that, properly constructed, grievance mediation shows significant promise.

MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 36-37 (1984) [hereinafter PATHS TO JUSTICE].


3. Several organizations have begun efforts in this area, including the Federal Mediation and Conciliation Service; American Federation of Government Employees; National Federation of Federal Employees; and American Federation of State, County and Municipal Employees. See Bowers, Grievance Mediation: Another Route to Resolution, 1980 PERSONNEL J. 132, 134.

4. For a general, balanced discussion of what has come to be known as the "alternative dispute resolution" movement, see J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION (1984); PATHS TO JUSTICE, supra note 1.
A. Grievance Mediation in Theory

1. A Definition of Mediation

Mediation is a loosely structured process in which a third-party neutral assists in negotiating a settlement. Mediators are not empowered to, and do not, decide the dispute. Rather, mediators help the parties to create and apply their own norms and structures. Mediation is distinctively different from negotiation and arbitration, the processes most commonly used to resolve disputes under labor contracts.

a. Mediation vs. Negotiation

The classic grievance process begins with a series of informal presentations by the grievant or the union representative followed by negotiations with the management representative. How does mediation differ from these negotiations?

First, mediators manage the parties' communications. They bring the parties together and keep the negotiations going and "establish a constructive ambience for negotiation." They help the parties identify divisive issues and points of agreement, create options, and explore compromises. They raise issues the parties had not thought about and

5. Gregory & Rooney, Grievance Mediation: A Trend in the Cost-Conscious Eighties, 31 Lab. L.J. 502, 503 (1980); Marks, E. Johnson & P. Szanton, supra note 4, at 28; Paths to Justice, supra note 1, at 37.
6. Gregory & Rooney, supra note 5, at 503; Paths to Justice, supra note 1, at 37.
7. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305, 307-08 (1971); Marks, E. Johnson & P. Szanton, supra note 4, at 28.
8. For one of the most authoritative and comprehensive texts on the social psychology of conflict, see M. Deutsch, The Resolution of Conflict: Constructive and Destructive Processes (1973). According to Deutsch, conflict can be constructive or destructive. Conflict is destructive if the parties are dissatisfied with the outcome and feel they lost as a result of the conflict; constructive, if they are satisfied and feel they gained. Id. at 17.

Deutsch listed the following observations regarding labor-management relations in the 1950's as examples of when conflict can be regulated in a cooperative vein: management and the union accept each other as viable and helpful to the other; the union is strong; management does not interfere with the union; there is mutual trust; neither party has adopted a legalistic approach; negotiations are centered on problems, not abstract principles; there is widespread sharing of information; and the parties resolve their grievances promptly, flexibly, and informally. Id. at 380-81 (citing National Planning Ass'n, Case Study No. 14, Causes of Industrial Peace Under Collective Bargaining 93-94 (1953)) (emphasis added).
help them to think realistically about settlement. They guide the parties' discussion toward the merits of their dispute and away from squabbles (or worse) based on personal animosity. They encourage the sharing of information needed to resolve the dispute and to reduce misunderstandings. They provide a neutral's perspective on their positions and a norm of fairness and equity. They allow both sides to tell their stories and vent their emotions in a setting made "safe" by a neutral presence. They can increase the perception of progress and thus the likelihood that the parties will find a solution. While much of the communication occurs with all parties present, mediators may also use separate caucuses.

Second, mediators fulfill an educative role in teaching the parties to adopt useful negotiation techniques. For example, they can instruct the parties in use of a problem-solving approach, which is well-suited to the labor context.

Third, mediators fill the trust vacuum that has created the impasse. Mediators must initially win the parties' trust—by saying little, making only neutral or positive comments, listening, and safeguarding the parties' confidence. Mediators then transfer that trust to the negotiation process, for example, by helping the parties to reach agreement on an easy preliminary point. Finally, as the negotiators bargain under the mediator's guidance, they come to trust each other.

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13. They can cause the parties to think about their values and what might constitute a reasonable settlement. H. Raiffa, supra note 12, at 108. They can also cause them to think about what it takes to settle and the consequences of not settling. Colosi, Negotiation in the Public and Private Sectors: A Core Model, 27 Am. Behavioral Scientist 229, 244 (1983). Experiments show, for example, that negotiators for each side estimate their chances of winning in court should negotiations fail as higher than their opponent estimates their own chances of winning. Persons outside the situation estimate the chances of winning somewhere between the estimates of the two sides. H. Raiffa, supra note 12, at 75. A mediator can also show parties that they have more to lose if the relationship is damaged than if the dispute is lost. See M. Deutsch, supra note 8, at 100.

14. See M. Deutsch, supra note 8, at 255.


16. Pruitt, supra note 15, at 168; Colosi, supra note 13, at 239-40; H. Raiffa, supra note 12, at 109. A skilled mediator can also provide the framework by which to analyze and solve the problem, without deciding the matter. H. Raiffa, supra note 12, at 220.

17. Problem-solving works where both parties are concerned about their own and the other's outcomes. Pruitt, supra note 15, at 173. See generally R. Fisher & W. Ury, Getting to YES: Negotiating Agreement Without Giving In (1981), especially pp. 22-30. Professors Fisher and Ury implicitly assert that this approach is always desirable.

18. See J. Folberg & A. Taylor, supra note 11, at 32 (the first of seven stages of mediation is creating trust); Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 121-22 (1976).


20. Id. at 239-40.

21. See id. at 240; see also M. Deutsch, supra note 8, at 168. The mediator can facilitate trust between the parties by changing their perceptions of each other. For parties to trust one another to produce a benevolent event, they must perceive one another to have the ability, a reliable intention,
Mediation is particularly well-suited where parties are concerned about losing face,22 as in the labor setting.23 Because mediators are external to the conflict and credible, the parties seek to impress them. Thus, negotiators may view themselves as giving in not to the opponent, but rather to please the mediator.24 If the agreement proves a good one, negotiators can take credit; if not, they can blame the mediator.25

b. Mediation vs. Arbitration

In the classic grievance procedure, a grievance not settled at the early stages proceeds to arbitration. Arbitration is an adjudicatory process. The parties select an expert to hear the facts and arguments submitted by the two sides and to decide the case. The hearing is less formal than traditional litigation, and the decision tends to be brief and untechnical.26

Unfortunately, while arbitration offers many advantages27 over civil
litigation and strikes, it is not problem-free. Labor arbitration has become costly, prohibitively so for some bargaining units, and time-consuming. Labor arbitration has taken on many of the trappings of civil litigation, such as briefs, transcripts, and lawyers. Some fear that arbitration decisions are losing their force as clear statements of contract rights. The arbitration process may very well disappoint and alienate the grievant.

Mediation differs from arbitration in that mediation rests on negotiation, not adjudication. Adjudication is binary; each party is either

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30. The per diem cost for an arbitrator was $340.47 in 1983, and the per case cost in that year was $1,215.21. FEDERAL MEDIATION & CONCILIATION SERV., THIRTY-SEVENTH ANNUAL REPORT 20 (1984) [hereinafter ANNUAL REPORT]. Union costs were as high as $2,200 for a one day hearing in 1976, including the costs of transcripts, legal fees, filing fees and lost time payments. Zalusky, Arbitration: Updating a Vital Process, 83 AFL-CIO AM. FEDERATIONIST No. 11, at 1, 3 (Nov. 1976).


32. [T]he formal negotiations and grievance arbitration processes no longer are the effective “problem solving” and flexible instruments that scholars of an earlier generation believed them to be. Grievance arbitration is unduly legalistic, slow, cumbersome, expensive, and conservative. It is less a vehicle for developing a “common law of the shop,” and adjusting the contract to fit unexpected circumstances, than a procedure for transferring income from workers and their employers to arbitrators and labor lawyers. Kochan, supra note 29, at 179. In an American Arbitration Association survey of over 7000 cases in 1984, 73% of the employers and 50% of the unions used attorneys. Briefs were filed in 57% of the cases and transcripts prepared in 18%. Coulson, supra note 9, at 79.

33. See Jones & Smith, supra note 29, at 1117.

34. With rare exception, the plaintiff in a typical fair representation suit inevitably tells the story of how he waited for months to have his grievance heard, during which period he never spoke with his business representative. On the day of the hearing, he told his business representative his version of the story as they walked into a room filled with people that he did not know. At that point he heard for the first time the company present the actual evidence that it possessed underlying the discharge. Confronted by lawyers and an arbitrator who speaks a language that he does not understand and thoroughly confused as to what is happening around him, there is little wonder why the grievant subsequently questions the integrity of the piece of paper permanently terminating his employment relation that he receives several months later. Jennings, supra note 29, at 501; see also Jones & Smith, supra note 29, at 1128.

35. In this respect, mediation also differs from “expedited arbitration,” a procedure which calls for an arbitrator to decide the case quickly after an abbreviated and informal hearing. See F. ELKOURI & E. ELKOURI, supra note 26, at 293-95. As Professor Bowers has observed, cases properly deemed appropriate for expedited arbitration probably could be handled as well or better through mediation. Bowers, supra note 3, at 133.
right or wrong, wins or loses. Negotiation, on the other hand, is accommodative and graduated; it tolerates degrees of right and wrong.

An arbitrator, as a judge, generally must decide that a single rule applies to the exclusion of others; the universe of norms used in negotiation tends to be wider-ranging. Adjudication relies on conduct-oriented rules; in mediation, negotiators may take into account personal feelings and relationships. Facts must be reconstructed and the "truth" determined in adjudication, while negotiators can accept ambiguity. Finally, the range of remedies in adjudication is more limited than in negotiation—an adjudicator cannot order an apology, while negotiators may arrive at such a remedy. Where right and wrong are less important than good future relations, adjudication can be counterproductive.

Furthermore, disputants tend to feel better about a negotiation-based system than about an adjudicatory system—an important consideration where the disputants must continue to deal with each other. Turning a dispute over to a third-party decisionmaker tends to defeat disputants, for it carries a tacit admission that they cannot handle their own affairs, forces them to conform to the decisionmaker's rules, limits their ability to tell their story, and entails a risk that they will be labeled at fault. By contrast, negotiating disputants maintain control of the process, participate directly and fully, and do not risk the assignment of blame.

2. Mediation's Strengths and Weaknesses

With mediation's increased use in a wide variety of contexts, scholars of dispute resolution have begun to chart its advantages and

36. Eisenberg, Private Ordering through Negotiation: Dispute Settlement and Rulemaking, 89 HARV. L. REV. 637, 654-55 (1976). But see Jones & Smith, supra note 29, at 1148-49 (on "baby splitting" by arbitrators, where, e.g., the arbitrator rules there were no grounds for discharge but there were grounds for suspension).
37. Eisenberg, supra note 36, at 654.
38. Id. at 644-45.
39. Id.; Fuller, supra note 7, at 328.
40. Eisenberg, supra note 36, at 657-58.
41. Id. at 658.
42. J. FOLBERG & A. TAYLOR, supra note 11, at 35 (people are less likely to resolve their own disputes once they have experienced adjudication); Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 371 (1978).
43. Eisenberg, supra note 36, at 659-60.
44. Id. at 658-59.
45. See generally J. FOLBERG & A. TAYLOR, supra note 11; PATHS TO JUSTICE, supra note 1. at 3. For more in-depth discussions of particular uses, see Barrett & Tanner, The FMCS Role in Age Discrimination Complaints: New Uses of Mediation, 32 LAB. L.J. 745 (1981) (discrimination of various sorts); Pearson, supra note 11 (custody, neighborhood disputes); Susskind & Madigan, New Approaches to Resolving Disputes in the Public Sector, 9 JUST. SYS. J. 1979 (1984) (resource allocation disputes in the public sector).
disadvantages. For the most part, the advantages of mediation commend it to the grievance context, and the disadvantages pose no insurmountable obstacle given the right legal framework.

a. Mediation's Strengths

In his seminal 1971 article on mediation, Professor Fuller analyzed the success of mediation in its most common application, the negotiation of labor agreements. Much of what he said there also applies to grievance resolution. First, mediation tends to succeed where the dispute arises in a dyadic relationship, for impasse is particularly difficult to break with two locked-in disputants. Second, mediation succeeds where the disputants share a "bilateral monopoly"—an ongoing relationship of relatively permanent interdependence which pulls them toward cohesion. Third, mediation helps the parties to bargain cooperatively over tradeoffs to achieve mutual gain. Fourth, contract negotiations result in a constitution to govern the future dealings of the parties, and the mediator serves as an objective, outside reader who provides insight into how later readers may interpret the contract. Finally, in collective bargaining negotiations, agents act on behalf of principals; these agents may bring with them feigned or real limitations on their authority, which the mediator

46. For typing of disputes and dispute resolution processes see Bush, Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 893. Professor Bush has identified seven goals of the civil justice system: resource allocation, social justice, protection of fundamental rights, public order, human relations, legitimacy, and ease of administration. Id. at 908-21. Associated with each goal is a cost society and disputants incur when the goal is not met. Id. at 934-42. For example, a failure to meet the human relations goal leads to enmity costs. Id. at 936-37. The analysis calls for identifying the goals having significant force in a particular dispute and crafting a dispute resolution mechanism to minimize the associated cost. Id. at 940.

According to Professor Bush's analysis, mediation works well where legitimacy and human relations concerns are high and the goals of resource allocation, social justice, and fundamental rights also are important. These characteristics accurately describe a labor grievance. Id. at 985. Mediation reduces enmity because it is voluntary and consensual and because the mediator seeks to translate each party's views for the other. Id. at 963. Presumably the same characteristics make mediation legitimate to its users. Mediation also entails formulating and applying rules that are particularly effective due to the interparty translation preceding their development and are not predictably worse than externally imposed rules. Therefore, mediation also does well at allocating resources, preserving fundamental rights, and achieving social justice by forestalling improper gains by the more powerful party. Id. at 979-82. Professor Bush also noted that arbitration does not do as well at reducing enmity because it lacks the interparty translation feature. Id. at 994.


48. Fuller, supra note 7.
can pierce.\textsuperscript{49}

The primary benefit of mediation in the labor context is its focus on self-determination.\textsuperscript{50} Mediation reduces the alienation and tension that often arises between two parties and creates mutual understanding and trust.\textsuperscript{51} The parties thus find it possible to resume a good working relationship.\textsuperscript{52} Persons on the periphery of the dispute, such as coworkers of the grievant, also benefit.\textsuperscript{53}

Indeed, the benefits of mediation may carry over into the way the parties handle subsequent disputes.\textsuperscript{54} By showing the parties how to negotiate well and strengthening their reliance on collective bargaining,\textsuperscript{55} mediation can reduce the need for outside help in resolving future grievances.\textsuperscript{56}

Mediation should yield substantively satisfactory settlements. Mediation allows the parties to get beyond the symptomatic dispute—which is all adjudication can reach—to the underlying cause of the conflict and resolve it.\textsuperscript{57} Mediated settlements tend to be integrative; they accommodate the various needs of the parties in creative ways.\textsuperscript{58} In mediation, the parties decide how to actually handle the situation, based on rational and informed discussion of a concrete problem.\textsuperscript{59}

\textsuperscript{49} Id. at 310-25. The interdependence factor is the element most commonly cited as a prerequisite to effective mediation. See, e.g., J. FOLBERG & A. TAYLOR, supra note 11, at 13; Riskin, Mediation and Lawyers, 43 OHIO ST. L.J. 29, 33 (1982); Sander, supra note 18, at 121.

Some aptly describe the labor-management relationship as a mixed-motive relationship, i.e., one characterized by conflicting and common interests. See, e.g., Kochan & Verma, Negotiations in Organizations: Blending Industrial Relations and Organizational Behavior Approaches, in NEGOTIATING IN ORGANIZATIONS (M. Bazerman & R. Lewicki eds. 1983).

\textsuperscript{50} See J. FOLBERG & A. TAYLOR, supra note 11, at 35.

\textsuperscript{51} Fuller, supra note 7, at 326; Goldberg, supra note 2, at 283; PATHS TO JUSTICE, supra note 1, at 34; Pearson, supra note 11, at 422. Mediation does so by eliminating the negative effects of the adversarial process. Felstiner, Abel & Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . ., 15 LAW & SOC'Y REV. 631, 641 (1980-1981); Goldberg, supra note 2, at 283; PATHS TO JUSTICE, supra note 1, at 34; see also Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 956-57 (1979) (effects of negotiation, or private ordering, in the divorce context).

\textsuperscript{52} Pearson, supra note 11, at 421; Riskin, supra note 49, at 34.

\textsuperscript{53} See Mnookin & Kornhauser, supra note 51, at 956-57.

\textsuperscript{54} PATHS TO JUSTICE, supra note 1, at 34. Indeed some view mediation as a tool for conflict management, not so much dispute resolution. See J. FOLBERG & A. TAYLOR, supra note 11, at 8, 10.

\textsuperscript{55} McPherson, Grievance Mediation Under Collective Bargaining, 9 INDUS. & LAB. REL. REV. 200, 205 (1955).

\textsuperscript{56} Goldberg, supra note 2, at 283. Indeed, a spin-off of mediation may be the establishment of an ongoing body to resolve problems in related areas. Bowers, supra note 3, at 132.

\textsuperscript{57} Felstiner, Abel & Sarat, supra note 51, at 641; McPherson, supra note 55, at 205; PATHS TO JUSTICE, supra note 1, at 34; Pearson, supra note 11, at 421.

\textsuperscript{58} PATHS TO JUSTICE, supra note 1, at 34; Riskin, supra note 49, at 34.

\textsuperscript{59} Goldberg, supra note 2, at 283.
Mediation generally is inexpensive and quick, informal and flexible. The parties can craft the process to reflect their procedural needs. And mediation allows complainants, respondents, and others to tell their own stories and affect the resolution. Where disputes arise frequently and touch on livelihoods and productivity, a dispute resolution system must be efficient and inexpensive and accommodate not only the issues but also the people involved.

For these reasons, mediated settlements tend to be durable and enjoy a high rate of compliance. Of course, mediation will not yield settlements in all cases. Even in cases of failure, however, mediation clarifies issues, sorts out facts, and reduces hostility.

b. Mediation's Weaknesses

Notwithstanding this litany of mediation's praises, mediation has weaknesses. Most are of little weight in the labor grievance context and

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<tr>
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<th>mediating couples</th>
<th>litigating couples</th>
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<tr>
<td>reached agreement on their own</td>
<td>80%</td>
<td>50%</td>
</tr>
<tr>
<td>satisfied with process</td>
<td>77%</td>
<td>40%</td>
</tr>
<tr>
<td>liked result</td>
<td>69%</td>
<td>53%</td>
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<tr>
<td>rated relationship with ex-spouse favorably</td>
<td>82%</td>
<td>53%</td>
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<tr>
<td>long-term compliance</td>
<td>79%</td>
<td>67%</td>
</tr>
<tr>
<td>later had major dispute over settlement</td>
<td>6%</td>
<td>33%</td>
</tr>
<tr>
<td>filed for judicial modification</td>
<td>13%</td>
<td>35%</td>
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The Project also found that the custody arrangements obtained through mediation tended to be more detailed and accommodating, i.e., they favored joint custody. Unfortunately, only half of the couples routed to mediation would participate. Pearson, supra note 11, at 431-35.

A study of mediation of minor criminal matters reported that 75% of the participants rated the agreement as fair, 85% were complying with the agreement, and 92% felt that mediation was a good program (although 42% stated that mediation would work better where the problem was less intratable and the opponent less stubborn). Merry & Sibley, What Do Plaintiffs Want? Reexamining the Concept of Dispute, 9 Just. Syss. J. 151, 152 (1984).

Barrett and Tanner reported that, out of 94 age discrimination complaints mediated, 55% of the cases were concluded at the mediation stage, by compromise or dropping the complaint. Barrett & Tanner, supra note 45, at 752; see also Cooke, Mediation: A Boon or a Bust?, 28 N.Y.L.S. L. Rev. 3 (1983) (reporting other studies).
can be minimized through legal safeguards or careful structuring of the mediation process.

First, because mediation typically is a totally voluntary system, it generally lacks a mechanism for compelling participation, settlement, and enforcement of any settlement reached. Mediation depends on the parties' willingness to negotiate in good faith. In the grievance mediation setting, the parties' need to get along should prompt them to take mediation seriously, and their experience with good faith bargaining should enable them to do so. Furthermore, as discussed below, the legal system can enforce mediation sufficiently to motivate the recalcitrant party.

Some observers also are concerned that mediation may not produce a principled outcome. However, negotiating parties seem to rely on general legal principles, although they may not necessarily follow legal rules strictly. Mediation also may not set a precedent or public standard for future disputes. Yet, while a mediated settlement has little or no precedential force in the traditional sense of the word, the parties may well remember the settlement in future cases and follow its lead. And in some difficult disputes, the parties may even seek a nonprecedential outcome. Finally, a public precedent is not of primary importance in the labor grievance context, for disputes generally arise from private contracts, not the application of public law.

Some observers have expressed concern that mediation does not conform to traditional notions of due process. Yet this is not new to labor law, where informal processes of resolving disputes predominate.

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69. Nader, Disputing Without the Force of Law, 88 Yale L.J. 998, 1019 (1979); Paths to Justice, supra note 1, at 15-16, 34.
70. Introduction to Symposium, Dispute Resolution, 88 Yale L.J. 905, 908 (1979) [hereinafter Introduction to Symposium]; Paths to Justice, supra note 1, at 15-16, 34.
71. Paths to Justice, supra note 1, at 14.
73. Paths to Justice, supra note 1, at 14.
74. J. Folberg & A. Taylor, supra note 11, at 245; Eisenberg, supra note 36, at 644-45; Mnookin & Kornhauser, supra note 51, at 975, 993.
75. Paths to Justice, supra note 1, at 14; see also Mnookin & Kornhauser, supra note 51, at 974.
76. Bush, supra note 46, at 980-81; Eisenberg, supra note 36, at 653. But see J. Folberg & A. Taylor, supra note 11, at 10.
77. J. Folberg & A. Taylor, supra note 11, at 245; Paths to Justice, supra note 1, at 34; Sander, supra note 18, at 132.
Furthermore, the legal system can require minimally adequate procedures in mediation.

In addition, critics note that mediating parties are not necessarily informed of or encouraged to pursue their substantive legal rights. Indeed, some disputants may lower their expectations due to mediation's orientation toward compromise. This problem is mitigated in the grievance setting where the rights at issue stem from the private agreement between labor and management, not from the public law. Just as the parties agree to the contract, so can they agree to modify it in a mediated settlement. Where a labor dispute also involves rights protected by federal statute, mediation remains appropriate, but only with certain legal safeguards as noted below.

Another common reservation is that case-by-case, private resolution does not expose systemic problems. In the labor setting, the parties have an ongoing relationship and can be expected to detect a pattern of problems.

Mediation may also be ineffective if the issues are too broad, the facts not well enough developed, or the parties not sufficiently committed to compromise. The grievance process preceding resort to mediation should ameliorate this concern by forcing a preliminary discussion of the facts and issues.

The major weakness of mediation—and a real concern in the labor grievance setting—is that an imbalance of power may skew the negotiations and result in a settlement that improperly favors one side. One side may have more information, resources, or experience with mediation, and mediation's "legal" character may allow that side to dominate. To some extent, the labor-management relationship diminishes such imbalances. Labor and management have always negotiated. Labor and management will share the mediation system and will have equal access to information bearing on the grievance. Management has the power of the purse, while the union, in most cases, will have the allegiance of employees and the threat of the strike. Nonetheless, some employers are more powerful than unions, and vice versa. Much the same

79. PATHS TO JUSTICE, supra note 1, at 15-16; Riskin, Mediation and Lawyers, supra note 49, at 34-35.
80. Introduction to Symposium, supra note 70, at 908; McPherson, supra note 55, at 207-08.
81. Nader, supra note 69, at 1020; PATHS TO JUSTICE, supra note 1, at 15-16.
82. PATHS TO JUSTICE, supra note 1, at 15-16.
83. Power is not static but rather alters over the course of the negotiations. See Kochan & Verna, supra note 49, at 27.
85. J. FOLBERG & A. TAYLOR, supra note 11, at 244.
risks attend other dispute resolution systems, and Congress, in devising our labor-management system, arguably chose to tolerate rather than eliminate such differences.

A related power issue arises out of the union-employee relationship. The union's and employee's interests may diverge; indeed, the employee's legal rights may be adverse to the interests of the union. To some extent, a skilled mediator can handle such complexity in the dynamics within one "side." And the process can be structured to minimize this problem.

Another real concern is the potential narcotic effect: the parties may become so dependent on mediation that they cease to resolve disputes unaided. The expense and time required to use mediation and the experience of the parties in unaided negotiations should reduce such dependence.

Grievance mediation, like any new system, will suffer some start-up costs and may encounter resistance by grievants and parties. Even so, its benefits generally will outweigh its costs. There are, nonetheless, situations where mediation would not be needed or useful.

First, mediation is not needed where the parties can resolve the
grievance unaided. Some labor-management relationships, however, preclude effective unaided negotiations. For example, a new union operating under significant political pressure may resist agreeing to a result favoring management.93

Second, where very important beliefs are deeply held, mediation may face such an uphill battle that it is not worth the effort.94 However, the parties should not be hasty to categorize a dispute as unnegotiable. For example, mediation has been used successfully in discharge cases where a great deal is at stake.95

Finally, mediation rests on negotiation; therefore it is not appropriate where there are no trade-offs and no middle ground,96 where the parties cannot settle even with the face-saving intervention of mediation. Again, the parties should be cautioned against hastily deciding that there is no room to negotiate.

B. Grievance Mediation in Practice

Of the several reported studies of grievance mediation, the work by Professors Brett and Goldberg97 is the most extensive and telling. They introduced grievance mediation to the bituminous coal industry,98 an industry plagued by wildcat strikes and high incidences of arbitration.99 Eighty-nine percent of the mediated grievances were resolved without arbitration. Settlement discussions continued and settlement was reached in sixty-four percent of the cases that were not considered settled.

93. Id. at 285; see also Gerhart & Drotning, Dispute Settlement and the Intensity of Mediation, 19 INDUS. REL. 352, 354-55 (1980) (factors making for difficult disputes in the collective bargaining process are a new relationship or negotiating teams, negative interpersonal relations, management’s negative attitude, intra-organizational conflict on the management or labor side, union strength, bargaining structure, and insufficient ability to pay).
94. Introduction to Symposium, supra note 70, at 909; see Rubin, supra note 24, at 135.
96. See Mnookin & Kornhauser, supra note 51, at 974-75.
98. As a result of the experiment, the 1984 National Bituminous Coal Wage Agreement contains an explicit recognition that mediation is appropriate in grievance processing. Goldberg, Industrial Grievances, 1984 PROC. SOC’Y PROF. DISPUTE RESOLUTION 83, 84.
99. See Brett & Goldberg, Wildcat Strikes in Bituminous Coal Mining, 32 INDUS. & LAB. REL. REV. 465 (1979). Mediation was used before arbitration as a voluntary extension of the grievance negotiation process. Brett & Goldberg, supra note 95. In some cases, the mediator rendered an advisory opinion as to what the result would be should the dispute go to arbitration. Id. at 50. The classic dispute mediated under their program was a dispute over premium pay, where the dollar value was low, the contract issue well-settled, and a range of settlements possible. Id. at 57. Of the 73% that settled through simple mediation, the parties compromised 51%, the union withdrew 15%, and the company granted 7%. The other 16% settled after the advisory opinion was issued. Id. at 55.
at the end of the mediation process. Professors Brett and Goldberg also reported encouraging data on the relative costs and speed of mediation and arbitration. Most importantly, Professors Brett and Goldberg found widespread satisfaction with the process. People who had experienced both mediation and arbitration indicated a definite preference for mediation. Other studies parallel the Brett and Goldberg data.

100. Brett & Goldberg, supra note 95, at 55-56. Furthermore, settlement rates at the stages before mediation did not drop significantly after the introduction of the mediation program. Id. at 59.

101. They estimated that the parties saved $95,489 over 153 cases by using mediation, even taking into account the “double” costs of mediating and arbitrating the cases that went to arbitration after mediation. The average cost of mediation under their program was $295, compared to $1,034 for arbitration. Mediation took on average 15 days from the request for mediation to its conclusion, compared to 109 days from the request for arbitration to the issuance of the award. Id. at 61. Under the implemented schedule mediators appeared biweekly or slightly more frequently than once a month at the mines, and most grievances were scheduled to last one-third of a day. Id. at 53. According to Professor Bowers, federal mediators report that the actual mediation sessions take about a day. Bowers, supra note 3, at 132.

102. The grievants, however, were the least satisfied; the outcome tended to color their views. Brett & Goldberg, supra note 95, at 62-67. For example, where the result was a compromise, 47% of the grievants, 68% of the union representatives, and 89% of the company officials indicated satisfaction with the result. The comparable figures where the result favored the union were: grievants 100%, union 80%, company 80%; where the result favored the company: grievant 14%, union 86%, company 56%. Id. at 63.

103. The spread ranged from 75% preference for mediation/6% preference for arbitration/15% uncertain among district union representatives to 48%/30%/22% among company labor relations representatives. Id. at 65. Participants indicated that they liked the informality, the air of cooperation, resolving their own problems, and mediation’s effect on building their negotiation skills.

104. Professor Weiler reported that the British Columbia Labour Board obtained settlement through mediation in 440 out of 675 cases brought to it in 1976. Weiler, The Role of the Labour Board as an Alternative to Arbitration, 30 Proc. Nat’l Acad. Arb. 72, 80 (1977). British Columbia has an additional step to mediation and arbitration: an investigation by a government employee and recommendation to the Labour Board, which decides the case. Id. at 82-85. The Board proceedings disposed of 110 cases. See id. at 78. Furthermore, Professor Weiler found that 90% of the parties were involved in only one or two mediations that year, refuting the narcotic effect argument. Id. at 81; see also Repas, Grievance Procedures Without Arbitration, 20 Indus. & Lab. Rel. Rev. 381 (1967) (describing a less than successful process where mediation was used before strikes and there was no arbitration); Zack, Suggested New Approaches to Grievance Arbitration, 30 Proc. Nat’l Acad. Arb. 105, 112-13 (1977) (describing a successful process that seems to fall somewhere between mediation and informal arbitration); Bierman & Youngblood, supra note 47, at 53-58 (data re. South Carolina’s mediation of unjust discharges in nonunion settings).

The McPherson study of 14 companies using mediation in the late 1950’s found a settlement rate of nearly 80% over nearly 300 mediated grievances and refuted the narcotic effect argument. Settlement rates by company ranged from 50% to 100% of all grievances. See McPherson, supra note 55, 203-07.

In the O’Grady study, 11 state mediation agencies that provided grievance mediation services in the private sector reported settlement in about 950 cases out of about 1,000 aggregated. O’Grady, Grievance Mediation Activities by State Agencies, 31 Arb. J. 125 (1976). The settlement rates by agency varied from about two-thirds to 100%. Id. at 128.

A fairly recent survey of Federal Mediation and Conciliation Service and comparable agencies in 15 states produced interesting results: The state mediators obtained a settlement rate of 87.4%, while the federal mediators succeeded in only 25.5% of their cases. Bowers, Seeber & Stallworth, Grievance Mediation: A Route to Resolution for the Cost-Conscious 1980’s, 33 Lab. L.J. 459, 462 n.9
Of course, parties contemplating mediation should construct their systems carefully. There are many points to consider: mediation's relationship to negotiation and arbitration, whether it would be voluntary or automatic, the credentials of the mediator, the techniques he may use, whether he has power to balance out power disparities, limits on the types of cases that can go to mediation, the fee structure, scheduling, and confidentiality rules.\footnote{105} Three features merit further discussion in light of their impact on the law's treatment of mediation.

What should be the role of the individual employee/grievant in cases involving individual rights? Where the employee's personal interests do not coincide with those of the union, a triadic relationship results.\footnote{106} Under the principle of exclusive representation, the union has a duty to represent the employee's interests without negligence or favoritism,\footnote{107} and the union controls the grievance procedure.\footnote{108} Nonetheless, it may be prudent\footnote{109} in cases involving important individual rights to provide a clear role for the employee.\footnote{110} Options include enabling the grievant to participate in the selection of the neutral,\footnote{111} providing the employee with separate representation or allowing it,\footnote{112} and affording the employee third-party status.\footnote{113} As circumstances warrant, the grievant...
should be present at many of the mediation sessions, encouraged to participate fully, and apprised of major developments. The employee may accept the settlement more readily as a result of these measures.

A vexing issue is the role, if any, of attorneys for the parties. The participation of lawyers may tend to turn negotiations into adjudication, thereby exacerbating the dispute, perhaps because they bring to bear the litigator's approach that rests on detachment and reasoned argument. On the other hand, attorneys can provide useful services, such as rationally assessing the dispute and the resolution, generating ideas, assuring compliance with legal norms, and empowering the parties by appraising them of their legal rights. Furthermore, the legal system may better accept a settlement if legal counsel had been provided. On balance, parties should proceed cautiously, assuring at the least that any attorneys participating be supportive of mediation and generally confining the attorney's involvement to review of the proposed settlement and not representation during the sessions.

The effect of the settlement on subsequent proceedings may also be a difficult issue. Should there be a waiver of the employee's right to pursue a claim in the courts or before federal agencies based on the same facts? The waiver could be a precondition to participating in the pro-

114. On the role of the attorney as mediator, see generally Riskin, supra note 49.
115. Id. at 45; see also Mnookin & Kornhauser, supra note 51, at 986-87.
116. Mnookin & Kornhauser, supra note 51, at 986-87; see also Riskin, supra note 49, at 40-41.
117. Compare Dewey v. Reynolds Metal Co., 291 F. Supp. 786, 789 (W.D. Mich. 1968), rev'd, 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971) (union member can not challenge agreement union negotiated on his behalf on the grounds that he did not have a private attorney because he gave the case to the union and had the chance to have an attorney review the settlement), with Wilson v. Woodward Iron Co., 362 F. Supp. 886, 893 (N.D. Ala. 1973) (union member should not be denied contractual remedy where the union did not provide legal representation in a grievance proceeding in response to the employee's legal maneuvering).
119. In the routine case, the employee will be precluded from bringing a lawsuit for breach of contract. See generally Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). There are exceptions, however, such as where the union breaches its duty of fair representation, Vaca v. Sipes, 386 U.S. 171, 185 (1967); the employer repudiates the grievance procedure, id.; resort to the grievance procedure would be futile, Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 330 (1969); and the
cess, or it could be an element of the settlement. While some may object to such waivers on the ground employees should not be compelled to waive legal rights to resolve a contract dispute, such a waiver does promote finality. And an employer may be willing to offer more in settlement to be safe from the "second bite at the apple." Yet waiver imposed as a precondition to mediation may deter the union and employee from participating in mediation; it may also lead to harder bargaining as the union and employee realize that other avenues have been foreclosed. Thus, the best approach is to allow a waiver to be negotiated in the settlement.

II

THE LAW OF GRIEVANCE MEDIATION

A. Introduction

If the union and AWI management in the Introduction scenario tried grievance mediation, what would be the legal consequences? While there is an extensive body of law on grievance arbitration, the law of grievance mediation is not well developed. In the abstract, labor law favors resolution of disputes according to the parties' chosen methods.

procedure is not intended to cover the dispute, Republic Steel, 379 U.S. at 657-58. On the other hand, employees may more easily resort to the courts and federal agencies under statutes protecting employees. See generally Levy, The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances, 118 U. PA. L. REV. 1036 (1970).

In a process using both mediation and arbitration, the waiver could apply to the entire process or just to arbitration in the event mediation fails to produce a settlement. Waiver should not be used where mediation only is anticipated, as mediation may not yield a solution at all and other avenues for resolving the dispute should remain available.

In a case of employment discrimination, such a waiver would be ineffective. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1964) (waivers are not permissible in employment discrimination cases because the individual's rights under Title VII can not be undermined by the collective bargaining process).

Any such waiver should be knowing, voluntary, and unequivocal to maximize its chances of enforcement. See id. at 52 n.15; Roadway Express, 246 N.L.R.B. 174, 175 (1979) (Truesdale, Mbr., concurring), enforcement denied, 647 F.2d 415 (4th Cir. 1981).

See, e.g., Hoyman, supra note 111, at 100.

See id.

Waiver should not pose a significant deterrent to entering into a mediation-only process, as each side maintains the ability to block a resolution. However, waiver is not appropriate in such a process, for the dispute may go unresolved.

Along the same lines, what should be the effect of the settlement on future similar disputes? It may promote settlement to know initially that the result will not be binding. However, granting a settlement precedential effect would help to provide stability under the contract and may help to cause courts and agencies reviewing the settlement to grant it due consideration. See Bowers, supra note 3, at 135. The most flexible approach would be to negotiate the precedential effect of any settlement on a dispute-by-dispute basis as a term of the settlement.

Section 203(d) of the Labor Management Relations Act states: "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." 29 U.S.C. § 173(d) (1982) (duties of the Federal Mediation and Conciliation Service).
Nonetheless, some employment disputes raise public policy concerns, and the law must accommodate both private dispute resolution and public policy. Two factors should be considered: the characteristics of mediation and the nature of the rights at issue.

I. Characteristics of Mediation

Grievance mediation is both like and unlike other forms of dispute resolution used in labor law. Like arbitration, mediation is a private and speedy means of resolving labor disputes, yet mediation relies on negotiation, not adjudication. In some ways, mediation parallels grievance resolution through joint employer-union committees, where bipartisan committees, typically consisting of union and management representatives from similar businesses in the vicinity, negotiate or deliberate. Mediation is also similar to negotiated settlement of grievances by the parties themselves. But mediation differs from joint committees and classic negotiation, for a third party participates. The law developed for these three processes is set out below as background and a point of departure. While the law on mediation may borrow from each of these bodies of law, it should not follow any completely.

The law on grievance mediation could track the law on mediation of collective bargaining agreements. But the two contexts differ. Contract negotiations deal with future interests and create new rights and rules; grievance negotiations deal with past events and enforce vested rights and stated rules. Contract negotiations always pertain to the interests of the collective; many grievance negotiations pertain primarily to the specific interests of the individual grievant.

The law should thus approach grievance mediation on its own terms. It is a negotiation-based process that may, but not necessarily will, yield a resolution to a contract dispute. A third-party neutral participates and may have a forceful impact on the conduct of the negotiations and the resolution. The union and the employer will dominate the negotiations, although the individual employee may have some rights of participation. The result will be an agreement settling the dispute, possibly promising future action or modification of the labor contract. Finally, mediation represents the parties' chosen method for resolving their

127. See Chicago Cartage Co. v. International Bhd. of Teamsters Local 710, 659 F.2d 825, 829 (7th Cir. 1981) ("Resolution of a dispute by a Joint Committee with equal employer and union representation requires free and open discussion in an informal environment."). For in-depth descriptions of how the Teamsters joint committees work and conflicting assessments of their value, see Summers, Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication, 7 INDUS. REL. L.J. 313 (1985); Miller, Teamster Joint Committees: The Legal Equivalent of Arbitration, 7 INDUS. REL. L.J. 334 (1985).

128. Of course, the remedy in grievance negotiations may well look to the future. There are, of course, grievances that address collective interests, such as grievances over changes in work rules or plant closings.
grievances and offers a quick and inexpensive alternative to arbitration, litigation, and strikes.

Grievance mediation thus fits well with the major principles underlying American labor law. As is described in detail below, American labor law favors the "private ordering" of arbitration and private grievance resolution, as well as freedom of contract and a governmental laissez-faire approach toward contract terms. Finally, American labor law places great emphasis on the role of the union, the exclusive representative selected by the majority of employees, in negotiating employment terms with employers.

2. The Nature of the Rights at Issue

The Supreme Court has drawn various images of the labor contract: a trade agreement with the individual employee partaking of the contract's benefits "somewhat as a third-party beneficiary", two successive bilateral contracts, one between the employer and the union, the other between the employer and each employee; a document erecting a "system of industrial self-government" which evolves constantly through the resolution of grievances; a contract which creates not only substantive entitlements but also procedures for enforcing those entitlements.

Professor Feller's theory of the contract and grievance processing synthesizes those images. According to Professor Feller, the collective bargaining agreement not only memorializes the compensation package obtained for the employees by the union, but also creates a set of rules needed to run the enterprise. Management has the first opportunity to interpret the rules, but the agreement provides a means through the

129. The term "private ordering" is developed in Eisenberg, supra note 36.
130. See, e.g., H.K. Porter Co. v. NLRB, 397 U.S. 99, 103-04 (1970) (the Board may not impose contract terms as a remedy for bad faith bargaining):

The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.
131. The Supreme Court has consistently upheld the principle of exclusive representation. See generally Emporium Capwell Co. v. Western Addition Community Org'n, 420 U.S. 50 (1975); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
137. Id. at 720-23.
grievance process of balancing the employer's power. The employees gain a system of law, and management gains employee cooperation and a means of policing itself against abuses of discretion. The agreement then is not a contract between the employer and employees; rather it imposes a set of rules and the consequences for violation of those rules. On the other hand, there is a contract between the employer and the union: to comply with the grievance process and not to strike respectively. Finally, the union has a legally imposed fiduciary duty toward employees to insure that the governance system is fairly administered.

The description thus far assumes that the grievance involves only rights created by the contract. However, some employment disputes also involve the application of public law, typically federal statutes creating worker rights. As Judge Edwards has noted, there is cause for concern when the system "mak[es] use of non-legal values to resolve important social issues or allow[s] those the law seeks to regulate to delimit public rights and duties." The parties may view the judgments of the public law as irrelevant, the disadvantaged or weak may forfeit their rights, and the development of the law may be stifled. In the labor grievance setting, a particular concern arises: the union, acting on behalf of the collective, may dominate the processing of the grievance to the detriment of the legal rights of the individual employee. Thus, where the rights at issue derive from public law, private ordering must be constrained, and the public agencies charged with enforcing the law must be involved.

This section recommends a body of law on grievance mediation and addresses the following questions, which parallel the major concerns in the law of grievance arbitration:

1. How should the courts treat grievance mediation in breach of con-

138. Id. at 769-70.
139. Id. at 761, 764-65, 770.
140. Id. at 773-74.
141. Id. at 773, 792.
142. Id. at 773-74, 805. According to Professor Feller, this duty should be enforced in an employee suit to compel the union to process the grievance. Id. at 774, 813.
144. Id. at 676.
145. Id. at 679.
146. Judge Edwards has proposed a system where factual disputes in employment discrimination cases would be resolved by an alternative method according to legal rules set by the courts and cases raising novel legal issues would be resolved by the courts. Id. at 680.
147. Other issues that may arise include the duty to arbitrate past the contract term. see Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243 (1977); a successor employer's duty to arbitrate, compare Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249 (1979) (no obligation to arbitrate), with John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (obligation to arbitrate); and the union's duty of fair representation in grievance processing, see Vaca v. Sipes, 386 U.S. 171 (1967).
tract suits? When should a court compel a recalcitrant party to mediate? What standard should the court use in reviewing a mediated settlement? (2) When should a court enjoin a strike to facilitate grievance mediation? (3) What effect should grievance mediation have on the enforcement of statutory employment rights? When should the courts and agencies charged with enforcing those rights defer a claim to mediation and hold off the more formal statutory process? When should the courts and agencies accept mediated settlements as final resolutions of statutory claims?

The proposal set out below seeks to reflect both the nature of mediation and the nature of the rights at issue in particular contexts. It has three overriding purposes: (1) generally to support and enforce the private ordering accomplished by grievance mediation, (2) to draw a line between private matters and rights embodying public policy, and (3) to afford minimally adequate “due process” for the individual employee.

B. Enforcement of Grievance Mediation in the Federal Courts

Under section 301 of the Labor-Management Relations Act of 1947, the federal district courts have jurisdiction over suits for breach of collective bargaining agreements. State courts have concurrent jurisdiction, but federal law applies whether the suit is brought in federal or state court. The law of section 301 suits derives from federal statutes, the “penumbra” of those statutes, and “judicial inventiveness.”

These cases fall into two categories: suits to compel specific performance of the contract’s clause on grievance processing and suits to enforce the resolution obtained through the contractual process. The routine section 301 suit involves private rights created by the labor contract. The following section thus argues that the courts’ role should be simply to enforce the parties’ bargain. The courts should enforce agreements to mediate grievances as an element of the union-employer bargain; they should be creative in constructing injunctions to ensure prompt mediation and that the parties move on if mediation fails. The courts also should readily enforce mediated settlements, refusing enforcement only for violation of well defined public policy or for procedural unfairness during mediation.

1. Compelling Mediation

Nearly thirty years ago, the Supreme Court decided that federal law

152. Lincoln Mills, 353 U.S. at 457.
favors specific enforcement of an agreement to arbitrate disputes arising under a collective bargaining agreement. Under the first of the "Steelworkers Trilogy," United Steelworkers v. American Manufacturing Co., courts must compel arbitration of even patently frivolous claims. The Court explained its reasoning:

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 then 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.

... The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.

In the second Steelworkers case, United Steelworkers v. Warrior & Gulf Navigation Co., the Court determined that arbitrability is a question for the court in the first instance, but also established a firm presumption favoring arbitration: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." The Court reasoned:

The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. ... The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather

153. *Lincoln Mills* rejects the argument that the Norris-LaGuardia Act. 29 U.S.C. §§ 101-115 (1982), bars injunctions to compel arbitration. The Court reasoned that an injunction compelling arbitration was not an abuse at which the Norris-LaGuardia Act aimed and noted that the Norris-LaGuardia Act favors private resolution by denying injunctive relief to anyone who has failed to make every reasonable effort to settle the dispute by negotiation, mediation, or arbitration. 353 U.S. at 458-59. This reasoning should extend to grievance mediation as well.


155. *Id.* at 568.

156. *Id.* at 567-68 (footnote omitted).


158. *Id.* at 583 n.7; accord AT&T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415 (1986).

159. *Warrior & Gulf*, 363 U.S. at 582 (footnote omitted).
than a strike, is the terminal point of a disagreement.\textsuperscript{160}

*American Manufacturing* and *Warrior & Gulf* both address questions of substantive arbitrability.\textsuperscript{161} Arbitrators are to decide in the first instance whether procedural prerequisites to arbitration have been met.\textsuperscript{162}

Agreements to mediate should be enforced with the same vigor as agreements to arbitrate.\textsuperscript{163} Where the contract calls for mediation as a prelude to potential arbitration, the issue before the court is virtually identical to that in the *Steelworkers* cases. The *Steelworkers* rule should apply as well to grievance processes which end in mediation. Although compelling mediation does not lead to an arbitrator’s judgment, where parties bargained for mediation their bargain should be enforced. More important, mediation, even more so than arbitration, can be therapeutic, give meaning to the agreement, continue the collective bargaining process, and provide an alternative to the strike.

There are, nonetheless, two questions to answer. First, would the court be engaging in a futile exercise? There may be cases where a party resists mediation on the technical ground that the mediation clause does not cover the dispute; the court’s order could break the deadlock. On the other hand, compelled mediation may not be very effective where the recalcitrant party resisted out of sheer intransigence, unless the mediator is very skilled. Even then, the parties would lose little other than time or money. And the court order would serve to enforce their agreement to mediate.

Second, how can a court be satisfied that the resistant party will truly participate in mediation? Mediation does not always yield a concrete resolution. The court should retain jurisdiction to assure that mediation has occurred and was conducted fairly, as developed below. The court also may use its equity powers to promote compliance. For example, the court could require the parties to report on their progress periodically. Or, where the contract permits a strike if mediation fails, the court could set a date for the strike right to mature absent a settlement or evidence that mediation is progressing. In the end, the court must rely

\textsuperscript{160} *Id.* at 583.

\textsuperscript{161} See also *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374-80 (1974) (compelling arbitration of a dispute over a work stoppage triggered by the employer’s retaining a foreman who had falsified mine safety records).


\textsuperscript{163} Few cases address the courts’ obligation to compel grievance proceedings other than arbitration. Cf. *Twin Excavating Co. v. Local 731, Excavating [Workers]*, 337 F.2d 437, 439 (7th Cir. 1964) (refusing to enjoin a damages suit arising out of a secondary boycott, in part because the court has concern over the joint employer-union committee’s jurisdiction); *Window Glass Cutters League v. American St. Gobain Corp.*, 47 F.R.D. 255, 257 (W.D. Pa. 1969) (the court allowed joinder of a second union in a jurisdictional dispute, intimating the union will succeed on its motion to compel grievance processing culminating in arbitration), *aff’d*, 428 F.2d 353 (3d Cir. 1970).
on the talents of the mediator and trust that most parties will comply with court orders.

2. Enforcing the Mediated Settlement

   a. Enforcement of Nonmediated Resolutions

   Not surprisingly, the law also favors enforcement of arbitration awards and other grievance resolutions. The third case in the Steelworkers Trilogy, United Steelworkers v. Enterprise Wheel & Car Corp., instructs the courts to go lightly in reviewing arbitration awards. The Supreme Court rebuffed the lower court for overturning the award simply because the court differed with the arbitrator on how to interpret the contract:

   The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in United Steelworkers of America v. Warrior & Gulf Navigation Co., the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

   When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

   The federal courts have struggled to give meaning to the “essence

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164. For the most part, the cases discussed in this part were brought by parties to the award or settlement, i.e., the employer or union. The employee generally may not bring suit to enforce or challenge the award. See supra note 119. Much of the approach set out below should apply as well to the review of a settlement at the employee's instigation in cases where employees are permitted to challenge settlements. The procedural challenge may well take a different form in actions by employees. For a critique of the bar on employee suits where there is no arbitration, see Mason, Collective Bargaining Agreements Without Arbitration Clauses: Does the Finality Doctrine Bar Section 301 Suits?, 7 U. DAYTON L. REV. 382 (1982).


166. Id. at 596-97 (citation and footnote omitted); accord, W.R. Grace & Co. v. Local 59, Rubber Workers, 461 U.S. 757, 767, 771 (1983) (affirming an arbitral award requiring the employer to pay backpay to employees protected by a seniority agreement inconsistent with a conciliation agreement in a related employment discrimination case).
from the collective bargaining agreement” standard. Even in routine cases, courts have reviewed the merits of an award en route to deciding whether it draws its essence from the contract. The courts seem especially likely to do so when the arbitrator’s award rests on the parties’ past practices rather than the four corners of the written contract.

Some courts also refuse to enforce awards that are contrary to law or public policy. In *Enterprise Wheel*, the Court intimated that an award based “solely on the arbitrator’s view of the requirements of enacted legislation” would be improper. More to the point, in *W.R. Grace & Co. v. Local 759, Rubber Workers*, the Supreme Court ruled that courts may not enforce awards contrary to public policy that is “well defined and dominant, and . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed


168. For displays of judicial disagreement on the power of the courts to overrule arbitrators on the merits in fairly routine cases, see the various opinions in Lackawanna Leather Co. v. United Food & Commercial Workers Int’l Union, Dist. 271, 692 F.2d 536, 538-40 (8th Cir.), *vacated on reh’g en banc*, 706 F.2d 228, 231-32 (8th Cir. 1982), and United Elec. Workers, Local 1139 v. Litton Microwave Cooking Prods., 704 F.2d 393, 395-97 (8th Cir.), *vacated on reh’g en banc*, 728 F.2d 970, 972 (8th Cir. 1983).


170. The most widely cited example of judicial resistance to the past practice doctrine is *Torrington Co. v. Metal Prods. Workers Union Local 1645*, 362 F.2d 677, 682 (2d Cir. 1966). But see, e.g., *Chicago Web Printing Pressman’s Union No. 7 v. Chicago Newspaper Publishers’ Ass’n*, 772 F.2d 384, 385 (7th Cir. 1985); *Edward Hines Lumber Co. v. Lumber & Sawmill Workers Local 2588, 764 F.2d 631, 635-36 (9th Cir. 1985), cert. denied, 106 S. Ct. 1661 (1986)*; *Boise Cascade Corp. v. United Steelworkers Local 7001, 588 F.2d 127, 129-30 (5th Cir.), cert. denied, 444 U.S. 830 (1979)*.

171. For recent examples of the range of views and situations, see *Local 863 Int’l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534-35 (3d Cir. 1985) (the arbitrator is free to disregard a conviction in state court); *Misco, Inc. v. United Paperworkers Int’l Union*, 768 F.2d 739, 742-43 (5th Cir. 1985) (an award reinstating an employee found in a car with marijuana is overturned where the employee operates dangerous equipment); *Jones Dairy Farm v. Local P-1236, United Food & Commercial Workers Int’l Union*, 760 F.2d 173, 176-77 (7th Cir.), *cert. denied*, 106 S. Ct. 136 (1985) (the arbitrator’s construction of NLRB case law is upheld where the contract called for a legal result); *United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822, 825-26 (1st Cir. 1984) (an award reinstating a postal employee convicted of embezzling is overturned). Arbitrators themselves disagree on the impact of public law principles on arbitration awards. See *Mittenthal, The Role of Law in Arbitration*, 21 Proc. Nat. Acad. Arb. 42 (1968); *Zirkel, The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1 Det. C.L. Rev. 31, 32-33 (1985).

172. The problem with such an award would be that it exceeded the parties’ submission. *Enterprise Wheel*, 363 U.S. at 597.

public interests.' 174 There the court upheld an arbitration award of backpay against the company for layoffs which were in violation of a collective bargaining agreement but pursuant to a conciliation agreement in a discrimination case. 175 A public policy must be weighty indeed to override an award.

In addition, some courts apply the Federal Arbitration Act 176 which focuses not on the substance of the award, but rather on its procedural integrity. 177 Section 10 of the Act allows a court to vacate an award:
(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matt-

174. Id. at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
175. Id. at 759-64, 766-72. The Court first noted that the company was cornered by its own actions. Second, a district court had instructed the company to follow the consent decree; but the Court found that enforcement of the award would not undermine the authority of the district court, which retained civil contempt powers.
176. 9 U.S.C. §§ 1-14 (1982). The Act excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. § 1. The Supreme Court has skirted the issue of the Act's applicability to labor cases. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 466 (Frankfurter, J., dissenting). In a companion case to Lincoln Mills, the lower court had used the Act as authority for compelling arbitration. Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85, 97 (1st Cir. 1956), aff'd, 353 U.S. 547 (1957). Although the Supreme Court affirmed, it stated "We follow in part a different path . . . ." General Elec. Co. v. Local 205, United Elec. Workers, 353 U.S. 547, 548 (1957).

Some lower federal courts have applied the Act in labor cases. See, e.g., Pietro Scalzitti Co. v. International Union of Operating Eng'rs, Local 150, 351 F.2d 576, 579-80 (7th Cir. 1965); Hoover Motor Express Co. v. Teamsters, Local 327, 217 F.2d 49, 53 (6th Cir. 1954). Section 4, 9 U.S.C. § 4, which allows district courts to compel arbitration, has been relied upon occasionally in labor cases. E.g., International Union of Operating Eng'rs, Local 139 v. Carla A. Morse, Inc., 529 F.2d 574, 578 (7th Cir. 1976); Ward Foods, Inc. v. Bakery & Confectionery Workers Union, 360 F. Supp. 1310, 1312 (S.D.N.Y. 1973). Other federal courts have declined to apply the Act to labor cases. See, e.g., San Diego County Dist. Council of Carpenters v. Cory, 685 F.2d 1137, 1141 (9th Cir. 1982); Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees, Local 1210 v. Pennsylvania Greyhound Lines, 192 F.2d 310, 313 (3d Cir. 1951). And some courts have applied principles drawn from the Act without expressly holding it applicable. See, e.g., Grahams Serv. Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982); General Warehousemen Local 767 v. Standard Brands Inc., 579 F.2d 1282, 1294-95 n.9 (5th Cir. 1978), cert. dismissed, 441 U.S. 957 (1979).

177. It is at least arguable that Enterprise Wheel assumes that the award was rendered in a fair procedure. See Kaden, supra note 167, at 297. For examples of the application of § 10 to substantive issues, see Mobil Oil Corp. v. Local 8-766, Oil, Chemical & Atomic Workers Int'l Union, 600 F.2d 322, 330 (1st Cir. 1979); Storer Broadcasting v. American Fed'n of Television & Radio Artists, 600 F.2d 45, 47-48 (6th Cir. 1979); Western Elec. Co. v. Communications Workers, 450 F. Supp. 876, 881-84 (E.D.N.Y.), aff'd, 591 F.2d 1333 (2d Cir. 1978).
The federal courts have resorted to section 10 to handle various claims, for example: failure of the arbitrator to hear the evidence of one side, irregular procedures leading to a majority award, arbitrator bias and failure of the arbitrator to postpone a hearing. In general, a procedural flaw must be significant for the court to intervene.

The courts' deferential attitude toward classic arbitration has prevailed as well in joint employer-union committee cases. In General Drivers, Local 89 v. Riss & Co., the Court overturned the lower court holding that a decision by a joint area cartage committee, designated as final and binding under the contract, was not an enforceable arbitra-

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178. 9 U.S.C. § 10 (1982). Compare the grounds for vacating an award under the Uniform Arbitration Act:
   
   (1) The award was procured by corruption, fraud or other undue means;
   
   (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
   
   (3) The arbitrators exceeded their powers;
   
   (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party; or
   
   (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under [another section] and the party did not participate in the arbitration hearing without raising the objection;

   But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.


183. Local Union No. 251 v. Narragansett Improvement Co., 503 F.2d 309, 312 (1st Cir. 1974).

184. Bell Aerospace Co., Div. of Textron, Inc. v. Local 516, Int'l Union, UAW, 500 F.2d 921 (2d Cir. 1974), is a primer on § 10. A disgruntled union involved in a jurisdictional dispute challenged the arbitrator's reliance on the contracts of both unions at issue and the NLRB's certification on the grounds that the arbitrator exceeded his powers under § 10(d); the court found the arbitrator's actions justified in light of the nature of the dispute. Id. at 923. The union also asserted that the arbitrator committed misconduct under § 10(c) by relying on an affidavit not placed into evidence, which had been part of the record in a related NLRB proceeding. The court found no § 10(c) misconduct. An arbitrator "need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing." Id. Nor was the arbitrator guilty of bias under § 10(b) where the only allegation was that the arbitrator relied on the evidence and rendered a conclusion favorable to the winning union. Id. On the other hand, the court agreed with the employer that the award (the arbitrator's second try), which could be read to allocate the same work to both unions and which the parties could not agree on, was so ambiguous and contradictory as to require a remand under § 10(d). Id. at 923-24.


186. General Drivers, Local 89 v. Riss & Co., 298 F.2d 341, 343 (6th Cir. 1962).
tion award. The Court focused on the parties’ choice in creating this scheme:

It is not enough that the word “arbitration” does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act “can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.” Thus, if the award at bar is the parties’ chosen instrument for the definitive settlement of grievances under the agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee’s award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance.

Courts generally affirm joint committee decisions, at least absent violations of clear public policy. While the courts have borrowed from the law on arbitration awards to review procedural flaws, these arguments generally fail. In Sheet Metal Workers Local 420 v. Kinney Air Conditioning Co., for example, the court rejected a challenge on the

188. Id. (citation omitted).
189. E.g., Chicago Cartage Co. v. International Bhd. of Teamsters Local 710, 659 F.2d 825, 828 (7th Cir. 1981); International Bhd. of Elec. Workers Local 12 v. Professional Hole Drilling Inc., 574 F.2d 497, 503 (10th Cir. 1978); see also Brotherhood of Teamsters Local 70 v. Celotex Corp., 708 F.2d 488, 491 (9th Cir. 1983) (it is proper for the court to rehabilitate a very brief award by fleshing it out); cf. Teamsters Local 30 v. Helms Express, Inc., 591 F.2d 211, 216 (3d Cir.), cert. denied, 444 U.S. 837 (1979) (suit by disgruntled local and individual employees seeking to set aside award obtained by a national). The Sixth Circuit’s statement is colorful and representative:

If any principle is generally recognized in labor relations these days, it is that grievance procedures, leading ultimately to arbitration, if provided in a labor contract, as they almost always are, are to be given the broadest possible construction. . . . [T]he process of hearing and passing on grievances is part of the regular warp and woof of industrial labor-management relations.

Morris v. Werner-Continental, Inc., 466 F.2d 1185, 1190 (6th Cir. 1972), cert. denied, 411 U.S. 965 (1973) (citation omitted) (the court enforced a dovetailed seniority decision in a case brought by a disgruntled employee, even though it would not have decided the dispute that way).

190. Cf. Dansberry v. Ryder Truck Lines, 109 L.R.R.M. (BNA) 3325, 3326-27 (W.D. Tenn. 1982) (there are no grounds to overturn an award challenged by an aggrieved employee even though it rests on an overturned DWI conviction). Compare General Teamsters, Local 249 v. Consolidated Freightways, 464 F. Supp. 346, 349-50 (W.D. Pa. 1979) (the court vacated the award where express statutes on safety precautions were violated) with Finn v. Yellow Freight Sys., 120 L.R.R.M. (BNA) 2101, 2106 (E.D. Pa. 1983) (the violation of safety statutes was not clear enough, and the evidence showed the discharge was for failure to follow the employer’s check-out procedure; suit brought by individual employee).

191. E.g., Teamsters Freight Employees Local 480 v. Bowling Green Express Co., 707 F.2d 254, 257-58 (6th Cir. 1983) (enforcement even though the employer did not participate); Chicago Cartage Co. v. International Bd. of Teamsters Local 710, 659 F.2d 825, 828 (7th Cir. 1981) (rejecting the argument that petty union misconduct requires vacating the decision); Local 24 Int’l Bd. of Elec. Workers v. Wm. C. Bloom & Co., 242 F. Supp. 421, 425-26 (D. Md. 1965) (the union representative presented the case and then deliberated on the panel; though not as objective as judicial proceedings, the procedure is permissible as it assures expertise and the parties agreed to it); cf. Kemner v. District Council of Painting & Allied Trades No. 316, 768 F.2d 1115, 1120 (9th Cir. 1985) (the court rejected an appeal on the grounds that deadlocks at lower levels are final in favor of the employer under the contract).

192. 756 F.2d 742 (9th Cir. 1985).
merits and several procedural arguments. In response to a challenge based on section 10(b)'s prohibition against partiality, the court ruled that Kinney knew in advance that certain of the employer representatives were fellow union contractors and so had an adverse stake in the outcome and did not properly object. Nor was there improper partiality when a potential union member of the panel withdrew to represent the union. Thus true neutrality is not really expected in joint committees cases.

On rare occasions, courts have been asked to enforce self-settled grievances where neutrality is non-existent and the procedures very informal. In United Mine Workers, District 2 v. Barnes & Trucker Co., the contract called for a five-step grievance procedure culminating in arbitration where settlement at any stage was final and binding. The union sought to compel employer compliance with promises made during an arbitration hearing, in the grievance settlement process, and in the express terms of a settlement agreement when new disputes implicating these promises arose. The court held the promises were enforceable as enforceability stems not from arbitration per se but from the law's favoring of the parties' chosen means of achieving a final and binding solution. However, a promise must be sufficiently specific to be capable of enforcement; vague, ambiguous, or incomplete settlements could not be enforced. Otherwise the court would enmesh itself in the day-to-day administration of the contract. The court thus refused enforcement of the promises, as they simply restated troublesome provisions of the contract.

Aside from these specificity constraints, courts will be willing to en-

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193. The issue was whether the unit employees deserved work performed by a Kinney affiliate, and the committee issued a damages award in favor of the union. Id. at 743. The court upheld the award as it was not in manifest disregard of the contract or in violation of a specific legal edict. Id. at 746-49.

194. Namely, bypassing early steps in the grievance, failing to convene within the time required by the contract, and violating a district court injunction barring involvement of Kinney's affiliate. Id. at 744-45. The court also rejected a § 10(d) argument that the award was too vague and ambiguous, noting that it succinctly stated the sanctions levied and the committee's basic rationale. Id.

195. Id. at 746.

196. Id.

197. Professor Feller has argued that joint committee decisions are more like settlements at lower levels than arbitration awards, because the members of the committees serve as advocates. Therefore these decisions should be viewed as agreements of the parties, not, for example, analyzed for excess of authority. Feller, supra note 136, at 837-38.

198. 561 F.2d 1093 (3d Cir. 1977).

199. Id. at 1095-96.

200. Id. at 1096-97.

201. Id. at 1097.

202. Id. at 1098.

203. For example, one promise was that supervisors would not perform unit work, but the promise did not elaborate when the contract exceptions for training and emergencies would be pertinent. Id.; see also Bakers Union Factory, 326 v. ITT Continental Baking Co., 749 F.2d 350, 352-53
force negotiated agreements obtained during grievance processes, so long
as such resolutions are to be final and binding under the contract. In
Amalgamated Meat Cutters, Local 195 v. M. Feder & Co., the union
sought enforcement of a grievance settlement obtained during arbitration
but not formalized in an award. The court held that the settlement
itself constituted an agreement under section 301(a), as it was the prod-
uct of an accord obtained by the employer and the union.

The important policy considerations which favor the early settlement of
labor disputes without outside interference would be frustrated if settle-
ment agreements reached in the grievance process were refused enforce-
ment unless incorporated in a formal arbitrator's award. For if a final
and binding settlement such as the one the union achieved here with the
employer were not enforceable in the federal courts the incentive would
be gone for early settlement after the grievance procedure had been set in
motion. The union would be required to carry its controversy to the
ultimate end of the grievance process or lose the right to enforcement in
the federal courts.

b. Enforcement of Mediated Settlements

Mediated grievance settlements should be as favored as arbitration
awards, joint committee decisions, and routine negotiated settlements. Under Riss and section 203(d), the law favors and should support

(6th Cir. 1984) (the arbitrator is bound by a previous grievance settlement regarding the same employee).

205. Id. at 565.
206. Id. at 568; cf. Retail Clerks Int'l Ass'n, Local 128 v. Lion Dry Goods, Inc., 369 U.S. 17, 28-30 (1962) (a strike settlement agreement between a union which may not have had exclusive
representative status and the struck employers is a § 301(a) contract).
207. Feder, 234 F. Supp. at 567. Note also that agreements pertinent to the specific dispute at
hand should be more readily enforced than agreements lingering from grievances of previous disputes. The effect to be given an agreement from a previous grievance should be an issue considered in the processing of the new grievance under the contractual procedures, just as the effect to be given language in the contract is. Barnes & Tucker, 561 F.2d at 1099. See also Pittsburgh Metro Area Postal Workers Union v. United States Postal Serv., 463 F. Supp. 54, 57 (W.D. Pa. 1978) (dictum) (a previous settlement agreement will not be enforced to bar the processing of a new grievance where the first grievance is not all that similar to the second and the contract states that only arbitration is final and binding), aff'd, 609 F.2d 503 (3d Cir. 1979), cert. denied, 445 U.S. 950 (1980).

See also Ford v. General Elec. Co., 395 F.2d 157, 160 (7th Cir. 1968) (an employee breach of
contract suit is barred where the union failed to press forward under a system terminating in strike
or arbitration and the failure of the union to press the grievance means the most recent resolution is
final and binding); Haynes v. United States Pipe & Foundry Co., 362 F.2d 414, 418 (5th Cir. 1966)
(an employee suit for breach of contract is barred where the union declined to go to a strike under a
contract providing for a strike as the terminal point and that failure of the union to press the griev-
ance means the most recent resolution is final and binding); Mosco v. Corning Glass Works, 120
grievance is final and binding even absent a contractual provision to that effect), aff'd & rev'd, 611
F.2d 661 (6th Cir. 1980).

whatever process the parties choose. The law should enforce settlements to avoid forcing full arbitration. Furthermore, mediation, even more so than arbitration, is a continuation of the collective bargaining process and clearly brings the parties' labor-management expertise to bear on the dispute.

Greater deference should be paid in judicial review of mediated settlements than of arbitration awards and joint committee decisions. First, overturning a mediated settlement on substantive grounds overrides the parties' own informed judgment, while overturning an arbitration award entails substituting the judgment of one neutral (the arbitrator) with that of another (the judge). Second, a mediated settlement is itself a contract, the product of the parties' meeting of the minds. Thus the Federal court rightly posited its task as simple enforcement of an agreement under principles of contract law. There is no need to evaluate the settlement for conformance to the collective bargaining agreement.

The primary substantive ground for judicial review should be compliance with public policy, a restriction well established in contract law. Courts should apply the W.R. Grace requirement that the public policy be "well defined and dominant, and . . . ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests'" before overturning settlements. In addition, courts should require a clear and substantial violation in recognition of the greater deference to be afforded a settlement.

This point merits illustration. In Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Co., the arbitrator ordered the reinstatement without backpay or other accrued benefits of an employee who had been convicted of gambling on the employer's premises. Two district court judges believed it a violation of public policy to reinstate an employee who gambled at work, one pointing out that the award "indulge[d] crime, cripple[d] an employer's power to sup-

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209. Lion Dry Goods provides a loose analogy; there the Court held a mediated strike settlement to be an enforceable contract under § 301(a). 369 U.S. at 27.
210. It may be that the parties' agreement will "contradict" the collective bargaining agreement. This is not a problem since the parties themselves chose to do so—not a third-party neutral. The contradictory settlement may be a modification of the agreement or an isolated departure.
213. Cf. Restatement (Second) of Contracts § 178(3)(d) (1981) (in weighing the public policy interest against that of the parties, the court should consider "the directness of the connection between [the] misconduct and the term").
214. 314 F.2d 25 (2d Cir.), cert. denied. 373 U.S. 949 (1963). Four other employees were involved, but were not charged with criminal violations or convicted. The arbitrator relied on the employee's 24 years of satisfactory service, his family obligations, his risk of losing pension rights, and the employer's failure to discipline the other employees. Id. at 26-27.
port the law, and impair[ed] his right to prevent exposure to criminal liability. The court of appeals disagreed, reasoning that the laws against gambling required only the criminal penalties that had been levied and that public policy favors rehabilitation of criminals. Clearly any public policy involved in the discipline of the employee, as opposed to his criminal prosecution, was not “well defined and dominant.” Thus the lower court lacked grounds to overturn the award.

More important, had the resolution been a mediated settlement, a court would have even less justification for rejecting the result. The parties’ joint judgment, that the best way to safeguard everyone’s interests was to reinstate the employee with a loss of benefits, should be allowed to stand where public policy concerns are ill-defined.

Even if there were a well defined public policy in Otis calling for discipline, the award should be upheld. The employee was penalized in loss of pay and benefits. An award that levied no penalty, by contrast, could constitute a clear and substantial violation of public policy.

In rare cases, courts also may be asked to refuse enforcement of a settlement due to impracticability or frustration. These circumstances should arise infrequently, as a skillful mediator should be able to force consideration of such latent problems.

Courts also may be asked to review the finality and definiteness of the settlement, a mixed substantive/procedural challenge. If a party seeks enforcement of a settlement of the original dispute before the court, the court should ordinarily do so without altering the settlement in any way; if the parties are confused about what their own settlement means, they should reprocess the dispute as a grievance. Similarly, if a party seeks “enforcement” of a settlement in the context of a new dispute, the court should decline to review the effect of the settlement on the new dispute, but instead instruct the parties to use the grievance process.

Second, courts may be asked to review mediated settlements on procedural grounds. As noted above, labor law does afford review of analogous processes. In addition, the duty of fair representation doctrine

216. Otis Elevator, 314 F.2d at 29.
218. This is parallel to 9 U.S.C. § 10(d) (1982), quoted supra in text accompanying note 178.
219. Under some processes, arbitration may need to be used to finally resolve the dispute. See also supra note 207.
220. When an arbitration award is vacated under the Federal Arbitration Act, it is remanded for further arbitration. See 9 U.S.C. § 10(e).
provides a standard for measuring union conduct in both grievance processing and the negotiation of contracts. Finally, the law requires good faith bargaining, both in contract negotiations and during the contract term.

On the other hand, while it may be appropriate for courts to scrutinize competing adjudicatory processes, they are less well suited to scrutinize negotiation-based processes. Hasty judicial intrusion into the mediation process may impair flexibility, and hence effectiveness, as parties structure mediation with an eye towards judicial review. Procedural review can easily shade into review on the merits. Finally, the confidentiality required for mediation to succeed may preclude effective review in any event. Thus, courts should proceed with a very light touch.

The primary responsibility of the courts should be to entertain challenges to mediated settlements on the grounds of mediator bias, parallel to section 10(b) of the Federal Arbitration Act. The test of mediator neutrality should not, however, duplicate the apparently absolute standard of section 10(b)—"evident partiality or corruption." Rather, the courts should follow Justice White's lead opinion in Commonwealth Coatings Corp. v. Continental Casualty Co., which declares the parties best able to evaluate whether a neutral is unduly partial. Neutrals should not be "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." This check guards against partiality weighing heavily in the mediator's influence on the resolution and against the disillusion of potential mediation participants should biased mediators be allowed to serve.


222. See generally Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); C. Morris, supra note 72, at 1337-43.


224. Increased judicial scrutiny may be one reason for the increasing formality of arbitration.


227. Id. at 150. This standard has been applied in labor cases and to business and personal relationships. E.g., Morelite Constr. Corp. v. United Bhd. of Carpenters, 748 F.2d 79, 80-81 (2d Cir. 1984); cf. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes § 2B (1974) (required disclosures).
The courts also should entertain challenges to mediator refusals to postpone sessions upon sufficient cause shown, parallel to section 10(c), with the limitation, however, that only a truly compelling case should prevail.\textsuperscript{228} For example, the courts should intervene when the mediator’s schedule forecloses participation by a crucial participant through no fault of the participant’s.\textsuperscript{229} While permitting this judicial review would intrude somewhat into the mediation process, it would afford a minimum assurance that due process has been followed.

Finally, the courts should entertain challenges to mediated settlements\textsuperscript{230} based on the contract doctrines of fraud\textsuperscript{231} and mistake,\textsuperscript{232} problems which should arise only rarely due to the mediator’s involvement. The courts should require clear and compelling evidence of these problems and require the fact at issue to be significant, to avoid inviting spurious challenges and unnecessary judicial inquiry into inevitably murky records.

In summary, courts should readily enforce mediated settlements. While the courts should safeguard public policy in cases of clear violation and assure that the rudiments of fair process have been met, the role of the courts in supervising grievance mediation should be small indeed.\textsuperscript{233}

3. \textit{Summary and Example}

Recall the introductory hypothetical where AWI management has suspended the union president, who is black and female, for failure to forestall a work stoppage. Assume that the contract provides that discipline must be based on “just cause” and the parties must mediate “all


\textsuperscript{229} Compare Automobile Mechanics Local 701 v. Holiday Oldsmobile, 356 F. Supp. 1325, 1327-28 (N.D. Ill. 1972) (upholding a denial to postpone where the request was based on mere inconvenience), \textit{with} Allendale Nursing Home, Inc. v. Local 1115 Joint Bd., 377 F. Supp. 1208, 1213-14 (S.D.N.Y. 1974) (it was error not to postpone where a crucial party was taken to the hospital for a sudden illness).

\textsuperscript{230} This inquiry roughly parallels the inquiry under the Federal Arbitration Act into “corruption, fraud, or undue means.” 9 U.S.C. § 10(a) (1982); cf. Note, \textit{supra} note 225, at 1886-91 (“the duty of procedural openness”).


\textsuperscript{233} A final note: Some disputes may involve parties who are not signatories to the contract. One hopes they would choose to participate in the mediation. If not, the settlement must be confined to matters the participants control. Nonsignatories benefitted by the settlement may, in appropriate cases, rely on third-party beneficiary theories to enforce the contract. \textit{See generally} \textit{Restatement (Second) of Contracts} §§ 302-315 (1981); E. Farnsworth, \textit{supra} note 211, at §§ 10.1-7.
disputes regarding the meaning of this contract.” Assume further that
the contract forbids discrimination based on gender and race. Finally,
assume that the contract forbids work stoppages and states, “It is the
union’s responsibility to assure that there are no work stoppages during
the term of this contract.”

If either party refused to mediate, the court should compel media-
tion as the mediation clause “is susceptible to an interpretation that cov-
ers the asserted dispute.”234 Indeed, even if the contract lacked
references to discrimination, just cause, or the union’s duty regarding
work stoppages, the court should compel mediation.235

Assume the parties agreed through mediation to clear the presi-
dent’s record and restore her benefits, but to award only two weeks
backpay. Such a settlement may raise public policy concerns: that the
president was discriminated against due to her gender or race and that
she has been penalized due to protected acts taken on behalf of the union.
Freedom from race and sex discrimination qualifies as a “well defined
and dominant”236 public policy,237 although it is difficult to say the same
about freedom on the part of union officials to engage in protected activi-
ties.238 In any event, the settlement does not clearly and substantially
violate these public policies, for the parties agreed to rescind a portion of
the penalty and the facts are complex enough to preclude a certain find-
ing that the actions were not taken for legitimate business reasons.239
Absent a serious procedural flaw, the court should enforce the
settlement.

C. Grievance Mediation and the Strike

1. The Strike and Nonmediated Resolutions

Federal law implies a no-strike clause coextensive with the scope of
an arbitration clause.240 The question of whether courts may then enjoin
strikes over disputes subject to arbitration arises in the intersection of
section 301 of the Labor Management Relations Act241 and the Norris-

235. If the work stoppage and discrimination clauses were omitted, the issue for mediation
would be the meaning of “just cause.” If the just cause clause were omitted, the issue would be
whether past practices, industry custom, and the like permitted the discipline.
238. See generally Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705-08 (1983) (although
the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3) (1982), protects the right
to engage in union activities, the union may waive the right of union officials to freedom from dispa-
rate penalties).
239. See generally NLRB v. Transportation Management, 462 U.S. 393 (1983); McDonnell
240. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-05 (1962) (suit for damages due
to a strike).
LaGuardia Act’s prohibition of federal court injunctions against strikes.\textsuperscript{242}

In \textit{Boys Markets, Inc. v. Retail Clerks’ Local 770},\textsuperscript{243} the Supreme Court ruled that federal courts may enjoin strikes over matters subject to mandatory grievance arbitration.\textsuperscript{244} The contract provided for arbitration of all controversies concerning the interpretation or application of the agreement and stated that there would be no work stoppages; the dispute pertained to supervisors doing unit work.\textsuperscript{245} The Court overturned its decision dismissing a similar injunction action in \textit{Sinclair Refining Co. v. Atkinson}\textsuperscript{246} and reasoned:

The \textit{Sinclair} decision . . . seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking. On the other hand, the central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration. We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.\textsuperscript{247}

Thus, injunctions against strikes are available where both parties are contractually bound to arbitrate the dispute and ordinary principles of equity favor the injunction.\textsuperscript{248} The Court implied that the equities ordinarily will favor the employer, as a damages action is no substitute

\begin{itemize}
\item \textsuperscript{242} 29 U.S.C. §§ 101-115 (1982). The Act broadly prohibits federal court injunctions in peaceful labor disputes, see \textit{id.} § 13, and specifies procedural safeguards in cases where injunctions may be issued, \textit{id.} § 16.
\item \textsuperscript{243} 398 U.S. 235 (1970).
\item \textsuperscript{244} \textit{Id.} at 253.
\item \textsuperscript{245} \textit{Id.} at 239.
\item \textsuperscript{246} 370 U.S. 195, 203 (1962).
\item \textsuperscript{247} \textit{Boys Markets}, 398 U.S. at 252-53 (footnote omitted).
\item \textsuperscript{248} \textit{Id.} at 254. There are two pieces to the contractual requirement to arbitrate: that there be a mandatory arbitration procedure, and that the grievance fall within its scope. Equity concerns are: whether breaches are occurring and will continue or have been threatened and will be committed; the employer has or will suffer irreparable injury absent the injunction; and denial of the injunction will hurt the employer more than issuance will hurt the union.
\end{itemize}
for an injunction. Finally, the employer must be ready to arbitrate, and the court must order the employer to do so.

The Court extended the implied no-strike clause to reach disputes under a very broad arbitration clause in *Gateway Coal Co. v. United Mine Workers*, where the employees walked out due to concerns for their safety. The Court also determined that courts should apply the Steelworkers presumption of arbitrability in injunction cases. Nonetheless, arbitrability is a prerequisite to implying a no-strike clause. No injunction will issue against a sympathy strike where the dispute is not subject to arbitration under the contract. Similarly, an injunction will not issue against a work stoppage where the underlying political dispute could not be arbitrated.

A *Boys Markets* injunction thus is designed to prevent the union from evading its obligation not to strike when the contract calls for arbitration, not to prevent strikes generally. Furthermore, aside from the equity analysis, a request for an injunction against a strike is to be treated much like the clearly favored request to compel arbitration. The Court's willingness to bend the law's general rule of protecting the strike to promote arbitration is noteworthy.

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249. *Id.* at 248.


251. 414 U.S. 368, 370-72 (1974). The arbitration clause encompassed "any local trouble of any kind arising at the mine." *Id.* at 376. Such an implication would be improper if there were a contrary express provision on point. *Id.* at 382.

252. *Id.* at 379-80. For a critique of the courts' application of the presumption, see *Note, Judicial Interpretation of Collective Bargaining Agreements: The Danger Inherent in the Determination of Arbitrability*, 1983 DUKE L.J. 848. The Court also read the statute protecting employees who strike over abnormally dangerous conditions, 29 U.S.C. § 143 (1982), narrowly, so as to allow the injunction. *Gateway Coal*, 414 U.S. at 385-87.

253. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410 (1976). But the employer can compel arbitration on whether the sympathy strike violated the contract. *Id.* at 405.


2. The Strike and Mediation

Courts should enjoin strikes over disputes subject to mediation, even if that is the only form of dispute resolution provided for. Indeed, the language of Boys Markets arguably compels this view: “We deal only with the situation in which the collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure.”

There is a “congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes.” The core rationale of Boys Markets applies as well: Employers may not be willing to agree to mediation if there is no effective way to prevent the union from striking over a dispute subject to mediation.

This approach is fairly debatable, however. It is one thing to require a party to participate in mediation, quite another to deprive the union of its economic weapon. Where the contract does not also call for arbitration, the union loses its right to strike in order to engage in a process that, unlike arbitration, may not yield a concrete resolution.

Further, if the union has gone on strike or threatened to, the relationship between the parties may not be amenable to consensual problem solving.

The answer lies in the dynamics of the typical case and the court’s equity powers. First, an employer must stand ready and willing to mediate in order to secure the injunction and will be ordered to do so. The employer presumably will be quite anxious to participate in mediation to avoid the strike. The union, deprived of its strike weapon and facing a
willing employer, may well soften its harsh stance. Second, to assure that mediation proceeds promptly, the court may provide appropriate instructions. For example, the court may set a deadline at which point the union may strike or the dispute will go to arbitration as appropriate. Finally, the court should retain jurisdiction for purposes of dissolving the injunction and assessing whether mediation has proceeded.

Finally, the rule that an arbitration clause implies a coextensive no-strike promise should not be extended to a contract providing only for mediation. In the arbitration context, the union is at least assured of a relatively quick, authoritative resolution. The law should decide that the union has made this trade-off only when the union does so expressly.

3. **Summary and Example**

Assume again that in the original hypothetical, the contract contains the clauses set out in section IIB3 above; that the union has refused to mediate the president’s suspension, although AWI management stands ready and willing to do so; and that the union has instead gone on strike. The federal court should issue an injunction against the strike. The underlying dispute of the validity of the suspension is subject to mediation under the clauses pertaining to just cause, discrimination, and the union’s duty to avoid work stoppages. The equities favor the employer, especially in light of the recent strike history. AWI management will mediate. And the union has agreed to a no-strike clause. The union should be required to fulfill its side of the bargain.

**D. Grievance Mediation and Statutory Rights**

1. **Introduction**

Federal statutes create a wide range of employment rights. In the introductory hypothetical, for example, the union official may claim that

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261. See, e.g., Hanna Mining Co. v. United Steelworkers, 464 F.2d 565, 569-70 (8th Cir. 1972) (per curiam) (requiring the employer to reinstate the employees and take certain safety precautions, the union to order employees back to work, the employees to submit their grievance at a fixed date and time; setting a schedule for the various steps in arbitration).

262. Cf. Chief Freight Lines, 514 F.2d at 579 (analyzing a joint committee award on grounds of ambiguity).

263. See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 108-09 (1962) (Black, J., dissenting) (soundly criticizing the majority for adding promises that the parties did not make solely because the Court viewed a no-strike clause as good social policy).


the employer has violated Title VII, which forbids race and sex discrimination in employment.266 Or she may claim that she has been illegally discriminated against due to her involvement in protected, concerted activities in violation of the National Labor Relations Act.267 This section analyzes the accommodation of grievance mediation and statutory rights, in particular Title VII and labor law.

This question raises difficult issues. The law's preference for private ordering of labor disputes has some force even where the grievance involves statutory rights. On the other hand, where public law grants employees legal rights and provides administrative and judicial mechanisms to enforce those rights, there must be limits on private ordering.268 These limits are defined by the nature of the specific legal right and the system created for its enforcement, viewed against the backdrop of the private ordering system in dispute.

The concept of waiver by collective action is central in defining the nature of the legal right. Where the union may waive the right on behalf of affected employees, substantial deference to private ordering, including mediation, is appropriate; but where the right is absolute and nonwaivable, deference is less warranted. Waiver matters because the mediation process is primarily a union-employer process. Thus mediation of waivable rights disputes should be favored, but not necessarily disputes regarding nonwaivable legal rights, which belong to individual employees.

Second, courts must take account of procedural entitlements created by law. When the law defers to private ordering in lieu of an employee's right to pursue civil litigation, the employee has lost a significant procedural entitlement created by Congress to be controlled by the employee. Where an employee is only entitled to file a complaint with a public agency, the employee loses only a speculative claim controlled by that agency. Presumably, the system of enforcement reflects congressional commitment to vindication of the right and thus demonstrates that the more absolute the right, the greater the procedural entitlement.269

Deference to private resolution amounts to a substitution of the private process for the public, legal process. Thus there must be a focus on the procedural protections afforded individual employees affected by the settlement. This protection is especially crucial where the rights are nonwaivable.

In accommodating private grievance processing and statutory rights, the law has several options: to bar private processing; to allow

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268. See generally Edwards, supra note 143.
269. Of course, it could be that Congress creates a private cause of action (versus a federal agency with exclusive prosecutorial powers) to save federal dollars, rather than as an expression of great commitment to substantive rights.
private processing but afford it no deference; to require the employee to exhaust the private process before proceeding to the public process; to provide limited or broad deferral to the private process and deference to the results; and to provide that the employee elects the remedy.\textsuperscript{270} The law recommended here calls for deference, as does the law on grievance arbitration.

2. \textit{Title VII}

\textit{a. Background and Introduction}

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on an employee's race, color, religion, sex, or national origin.\textsuperscript{271} It is unlawful for employers to refuse to hire, discharge, or classify employees or discriminate in employment terms on these bases.\textsuperscript{272} It also is unlawful for unions to exclude or classify employees or cause employers to discriminate on these bases.\textsuperscript{273}

Congress created a federal agency, the Equal Employment Opportunity Commission ("EEOC"), to prevent, investigate, and eliminate violations of the law.\textsuperscript{274} The EEOC's procedures include conciliation and civil actions in federal court; victims of discrimination may also pursue civil actions.\textsuperscript{275} Remedies include injunctive relief, reinstatement, backpay, and other equitable relief.\textsuperscript{276}

Many labor contracts expressly forbid discrimination,\textsuperscript{277} and nondiscrimination principles can be read into standard contract clauses.\textsuperscript{278} Many contracts also call for arbitration of all disputes regarding the


\textsuperscript{272} 42 U.S.C. § 2000e-2(a) (1982). Where religion, sex, or national origin is a bona fide occupational qualification, however, some disparate treatment is permissible. \textit{Id.} at § 2000e-2(e). Also bona fide seniority systems which do not grow out of an intent to discriminate are protected. \textit{Id.} at § 2000e-2(h).

\textsuperscript{273} \textit{Id.} § 2000e-2(c). The bona fide occupational qualification doctrine applies to union conduct as well.

\textsuperscript{274} \textit{Id.} §§ 2000e-4 to 2000e-5. Parallel state agencies may also handle employment discrimination cases. \textit{Id.} § 2000e-5(c), (d).

\textsuperscript{275} \textit{Id.} § 2000e-5(b), (f).

\textsuperscript{276} \textit{Id.} § 2000e-5(g).


\textsuperscript{278} For example, a clause forbidding discharge unless there is just cause could be read to forbid discharge based on race alone.
meaning or interpretation of the contract. Nonetheless, Title VII affords no guidance on how to accommodate Title VII and breaches of labor contracts.

The Supreme Court has provided some guidance, albeit a bit murky, in Alexander v. Gardner-Denver Co. The Court held that prior submission of a claim to final arbitration does not foreclose an employee's right to a de novo trial under Title VII. The Court observed that "Title VII was designed to supplement, rather than supplant, existing laws and institutions. . . ." Title VII primarily embodies a strong public policy against employment discrimination. And the statute assigns federal courts plenary enforcement powers. Thus an employee may pursue private, contractual remedies through grievance arbitration without forfeiting the statutory right to a Title VII lawsuit. Neither the arbitration clause nor the actual use of arbitration constitutes a waiver of the right to go to court, or an election of remedies because [Title VII] concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

The Court also noted that arbitration is not commensurate to the federal litigation process Congress intended for Title VII lawsuits. The informal arbitral process is not sufficiently parallel to the judicial process. The arbitrator effectuates the intent of the parties and has no authority to invoke public law. Arbitrators are expert in the "law of the shop, not the law of the land." Finally, the Court expressed concern that the union, which controls arbitration, may improperly

281. Id. at 59-60.
282. Id. at 48-49.
283. Id. at 45.
284. Id. at 49-50.
285. Id. at 49-52. The Court also rejected the argument that the arbitral award has res judicata or collateral estoppel effect. Id. at 49 n.10.
286. Arbitration uses lax rules of evidence; lacks discovery, compulsory process, the oath, and the like; does not yield a complete record; and may not result in a written opinion with supporting reasoning. Id. at 57-58.
287. Id. at 51-52.
288. Indeed an arbitral award resting on public law and not on the contract should be denied enforcement. Id. at 53 (citing United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)); see also id. at 56-57.
289. Id. at 57.
subordinate the employee's interests to those of the collective. Nonetheless, the Court did not intend to "sound the death knell" for arbitration of discrimination cases:

[T]he grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

The Court reaffirmed the role of the contractual process in resolving discrimination disputes in *Emporium Capwell Co. v. Western Addition Community Organization*. There a group of disgruntled employees who sought to deal directly with management on discrimination issues picketed the store and were discharged; the union had been dealing with the company through the contractual procedures. The Court rejected the employees' argument that collective bargaining and grievance procedures are so ill-suited to the resolution of discrimination disputes as to allow more aggressive action by concerned employees. The grievance system could well resolve these disputes, and the bargaining system works best when these claims are collectively resolved. 


293. *Id.* at 53-56. The Court held that the employees' actions were not protected under the NLRA, as the employees were seeking to bargain directly with the employer. *Id.* at 52, 60-61, 71-72.

294. *Id.* at 65-66.

295. Id. at 65-66.

Capwell thus crystallizes the holding of Alexander: that case is not a statement against resolving discrimination disputes through arbitration, but rather establishes more narrowly that contractual processes do not displace the federal courts.297

Alexander has engendered significant controversy. Some commentators argue that the Court gave short shrift to such competing concerns as the importance of arbitration in American labor relations298 and the unfairness to the employer stemming from the employee's "two bites at the apple."299 Yet most agree that the Court properly depicted Title VII rights as absolute, individual rights which are better adjudicated by the courts based on the law300 than compromised by the representative of the collective.301 While most commentators see the potential for unchecked union-employer collusion in arbitration as a distinct problem,302 there is much disagreement over the capacity of arbitrators and arbitration to

297. The Court has since applied the Alexander approach in other contexts. In Barrentine v. Arkansas-Best Freight Sys., Inc., for example, the Court extended Alexander to a case brought under the Fair Labor Standards Act. Barrentine, 450 U.S. 728, 737-45 (1981) (an adverse arbitral award does not preclude a federal court action). The grievance procedure in Barrentine was joint committee "arbitration"; the Court did not distinguish between classic arbitration and alternative approaches. The Court did note, in reviewing the deficiencies of the process, that joint committee members are less likely to be lawyers and thus even less adept at statutory questions than arbitrators. Id. at 743 n.21.


299. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 944 (1976) (if the employee had a one-in-five chance of success and four forums offering de novo litigation, the employee's chances rise to three-in-five). Others have noted that the Court did not adequately address the burdens of duplicate litigation. E.g., Siegel, Arbitration of EEO Issues: A Positive View, 32 N.Y.U. ANN. NAT'L CONF. ON LAB. 139, 147 (1980). Others cite the potential of using arbitration to cut EEOC backlogs. Hill, The Authority of a Labor Arbitrator to Decide Legal Issues Under a Collective Bargaining Contract: The Situation After Alexander v. Gardner-Denver, 10 IND. L. REV. 899, 929 (1977); Siegel, supra, at 140, 146, 148. On the backlog issue, see 18 EEOC ANN. REP. 9 (1984) (in fiscal year 1984, cases were processed in an average of 155 days).


301. E.g., Isaacson & Zifchak, supra note 298, at 444. Professor Edwards contrasts Title VII rights and other statutory rights on the grounds Title VII sets absolute protections, while other statutes set frameworks where there may be bargaining. Edwards, supra note 270, at 86.

302. Edwards, supra note 270, at 79; Isaacson & Zifchak, supra note 298, at 463-64; see Oppenheimer & LaVan, Arbitration Awards in Discrimination Disputes: An Empirical Analysis, 34 ARB. J. 12, 16 (1979) (analyzing several cases where there was a union/employee conflict, but coming to no clear conclusion).
handle Title VII issues.\textsuperscript{303}

Mediation of Title VII disputes raises fewer concerns than arbitration. Mediation is not a deficient form of adjudication; thus the Court need not be concerned with such items as the lack of compulsory process and oath taking. Rather, mediation offers a distinct alternative—the parties' own solution to the problem. There is real value in such private ordering, for the resolution may better reflect the parties' needs than would a litigated result, the process may reduce conflict, and the resolution may come quickly and inexpensively.

This view is supported by the role of conciliation under Title VII. Once the EEOC determines that reasonable cause exists to believe there has been a violation of the law, it must make an effort to settle the case "by informal methods of conference, conciliation, and persuasion."\textsuperscript{304} The EEOC conciliation process is essentially mediation with an EEOC conciliator functioning as the "neutral."\textsuperscript{305} Conciliation agreements are enforceable in federal court,\textsuperscript{306} even though they are voluntary, non-adjudicated settlements. Of course, a government employee is involved in the EEOC conciliation process, whereas there would be no government voice in grievance mediation.

Nonetheless, there is cause for some concern. When parties settle a discrimination dispute through mediation, they resolve an issue with public policy overtones through a private process; the private, informal process displaces the more formal, public process. The employee's interests may be weighed against collective interests, and mediated settlements may yield less than a court would order. These concerns call for judicial oversight protecting the interests of the public and the individual employee, but not for rejection of mediation altogether.

If mediation may be used in Title VII cases, questions arise concerning exhaustion and preclusion. While grievance mediation of Title VII disputes should be allowed, exhaustion of mediation should not be required before a plaintiff can sue. Where the parties do mediate, a mediated settlement that represents the employee's knowing and voluntary

\begin{itemize}
  \item \textsuperscript{303} For a balanced overview, see Barlett, \textit{Employment Discrimination and Labor Arbitrators: A Question of Competence}, 85 W. VA. L. REV. 873 (1983). Compare Edwards, \textit{supra} note 300, at 24 (reporting a survey where attorneys were used only rarely, briefs in only half of the cases, the law relied on in only 12.5% of the cases, and the evidence cited as deficient in over half the cases) with Oppenheimer & LaVan, \textit{supra} note 302, at 13, 16 (most arbitrators cited the law; two-thirds of the arbitrators were lawyers, but there was no correlation between the arbitrator's career and whether the law was cited). Commentators have even argued that arbitrators lack effective compliance powers. Rubenfeld & Strouble, \textit{Arbitration and EEO Issues}, 30 LAB. L.J. 489, 490 (1979).
  \item \textsuperscript{305} EEOC COMPLIANCE MANUAL (CCH) §§ 1221-1268 (1979), §§ 1291-1298 (1986).
\end{itemize}
act should be viewed as dispositive, while other settlements may be given some consideration by the courts.

b. Exhaustion

Although the Alexander Court did not decide the issue of exhaustion, much of its reasoning applies to that issue. For example, the Court noted that Title VII specifies jurisdictional prerequisites and contractual remedies are not mentioned. The Court rejected the employer arguments that the employee had elected his remedy or waived his right to proceed with Title VII litigation.

Since Alexander the federal courts accordingly have rejected employer arguments that they lack jurisdiction over Title VII suits because the parties had not exhausted the contractual processes. The courts have applied this rule in joint committee contexts and when the contractual process had already been initiated. However, courts have supported the use of grievance arbitration or similar processes where their use would not impair the courts' Title VII jurisdiction. Thus courts do view the grievance process as having a place in discrimination disputes, although failure to exhaust the contractual process will not defeat federal court jurisdiction.

307. Cf. Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 329-31 (1969) (there is no need to exhaust remedies under the labor contract and before the Railroad Adjustment Board before suing the union and railroad for breaches of the contract arising out of discriminatory conduct).


309. Indeed, the Court rejected both that the arbitration clause and the actual use of arbitration constituted a waiver of Title VII rights. Id. at 49-52.


311. Gibson v. Local 40, Supercargoes, 543 F.2d 1259, 1266 n.14 (9th Cir. 1976).


313. Courts have looked favorably upon dispute resolution mechanisms in a variety of contexts. One example is where a union has contested a decree obtained without its approval in a Title VII case. See, e.g., McAleer v. AT&T Co., 416 F. Supp. 435, 440-41 (D.D.C. 1976); cf. Winfield v. St. Joe Paper Co., 15 Fair Empl. Prac. Cas. (BNA) 1497, 1501 (N.D. Fla. 1977) (the union need not use the contractual process before cross-claiming against the employer in Title VII litigation).


Although mediation has many strengths, the law should not require exhaustion of mediation as a precondition to a Title VII lawsuit. As the Court clearly established in Alexander, Title VII rights are absolute protections for individual employees, not collective rights waivable by the union. Furthermore, the union's substantial control over the contractual process may result in the scales tipping toward the collective interest,\textsuperscript{314} which may be to discriminate against the minority employee. Finally, Congress created an enforcement scheme that gives the Title VII claimant a right to court; the statute does not list exhaustion of contractual processes as a jurisdictional prerequisite. The law should respect the judgment of the individual employee, who best knows the situation, to bypass mediation.

While exhaustion should not be a prerequisite to Title VII litigation, mediation may be appropriate in certain settings. Mediation may be a useful way to implement a seniority system after a court has found it legally valid, for example. If the parties choose to use mediation, what effect should the mediated settlement have in subsequent Title VII litigation?

c. Preclusion

Alexander holds that an adverse arbitration award does not preclude Title VII litigation in the federal courts.\textsuperscript{315} The Court wrote that "[t]he federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the district court deems appropriate."\textsuperscript{316} In footnote 21, the Court listed factors that the district courts should consider: a contract clause conforming to Title VII, procedural fairness, the adequacy of the record, the competence of the arbitrator, the extent to which the issue is one of fact rather than law—and Congress' judgment that a judicial forum is necessary for the ultimate resolution of Title VII rights.\textsuperscript{317}

\textsuperscript{314} The union, of course, may not carry out its duties in a discriminatory fashion. \textit{See} 42 U.S.C. § 2000e-2(c) (1982); Steele v. Louisville & N.R.R., 323 U.S. 192, 202-03 (1944) (it is a violation of the union's duty of fair representation to discriminate on the basis of race).

\textsuperscript{315} Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974). The Court could have adopted a deferral approach comparable to that discussed in Part II.D.3 \textit{infra}. The Fifth Circuit in Rios v. Reynolds Metals Co., 467 F.2d 54, 58 (5th Cir. 1972), set the following requirements for a deferral approach: (1) the contractual and statutory rights must coincide; (2) it must be plain that the arbitrator's decision does not violate private rights or public policy under Title VII; and (3) the court must be satisfied that (a) the factual issues are identical, (b) the arbitrator had the power to resolve the discrimination issue, (c) the evidence dealt with all factual issues, (d) the arbitrator actually decided the factual issues, and (e) the proceedings were fair and regular. The Supreme Court reasoned that the arbitration process would lose the attributes that make it attractive—simplicity, speed, etc.—if such a standard were adopted and that this deferral standard amounted to a de novo determination. \textit{Alexander}, 415 U.S. at 59.

\textsuperscript{316} \textit{Alexander}, 415 U.S. at 60.

\textsuperscript{317} \textit{Id.} at 60 n.21.
Alexander's footnote 21 has spawned some confusion.\textsuperscript{318} Arbitration is now "nonexclusive and inconclusive" in Title VII cases;\textsuperscript{319} exactly how inconclusive is the question. Commentators have read footnote 21 as calling for de facto deferral,\textsuperscript{320} and courts have responded by both placing little or no weight on arbitration awards\textsuperscript{321} and giving awards considerable weight.\textsuperscript{322} Courts seem to treat joint committee awards as similar to classic arbitration awards.\textsuperscript{323}

In another cryptic footnote, footnote 15, which discusses the argument that submission to arbitration could constitute a waiver of Title VII litigation rights, the Court noted in dictum that "presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement . . . ."\textsuperscript{324} To be effective, according to the Court, such a waiver must rest on "voluntary and knowing" action by the employee.\textsuperscript{325}

The law on settlements obtained through the grievance process, much less grievance mediation,\textsuperscript{326} is not well settled. \textit{Strozier v. General Motors Corp.} involved both arbitrated and settled claims.\textsuperscript{327} The arbitrator ordered the employee, who had been disciplined several times, reinstated with full seniority and backpay. The parties settled other grievances, also yielding reinstatement and backpay.\textsuperscript{328} According to the Fifth Circuit, Alexander furnishes no basis for a court action where the

\textsuperscript{318} See Jacobs, \textit{Confusion Remains Five Years After Alexander v. Gardner-Denver}, 30 \textit{LAB. L.J.} 623, 628-33 (1979) (arbitrators and courts have reacted with confusion); Hill, supra note 299, at 918-20 (also discussing the response by arbitrators).


\textsuperscript{320} E.g., Edwards, supra note 270, at 77; Isaacson & Zifchak, supra note 298, at 457; Jacobs, supra note 318, at 636.


\textsuperscript{324} Alexander, 415 U.S. at 52.

\textsuperscript{325} Id. at 52 n.15.

\textsuperscript{326} Professor Goldberg has written that courts are unlikely to defer to grievance mediation under Alexander because the defects seen in arbitration, e.g., the union's control of the grievance, are present in mediation as well. Goldberg, supra note 2, at 311. Professor Goldberg has argued that courts may honor employee waivers of Title VII rights, although the settlements should be evaluated under a "clearly repugnant" standard. Id. at 311-12. By contrast, Professor Bowers has argued that mediated settlements should be treated like any other informal settlement. Bowers, supra note 2, at 33.

\textsuperscript{327} 635 F.2d 424 (5th Cir. 1981) (per curiam).

\textsuperscript{328} Id. at 425.
employee received through arbitration relief "fully equivalent to what he seeks under his statutory cause of action." 

Regarding the grievance settlements, the court observed:

Settlement of a dispute is inherently different from resolution through arbitration. A settlement is a compromise voluntarily agreed to by the parties. Each party generally accepts something less than that to which he believes he is entitled based on a decision that the compromise is more advantageous to him than the sum of the risks and benefits involved in pursuing the claim. Arbitration, on the other hand, is an "adjudication" of conflicting interests by a neutral third party. In binding arbitration, neither party is free to accept or reject the ruling of the arbitrator. Once the dispute has been submitted to arbitration, the parties must abide by the arbitral decision. In light of these differences, different approaches are required in determining whether resolution of a claim through settlement or through arbitration bars a subsequent suit under Title VII.

The court then applied the rule that an employee who freely settles an unliquidated demand may not later sue simply because she becomes dissatisfied with the settlement. Therefore, Strozier's Title VII claim was barred because he had voluntarily accepted the settlement (by returning to work and accepting the backpay checks) and the settlement covered the remedies sought in the lawsuit. Furthermore, the employee had been represented by counsel at the time of the settlement.

Courts should approach mediated grievance settlements involving discrimination issues in the spirit of Strozier and according to the dictates of Alexander. For the reasons set out in Strozier, settlements should be generally favored. However, for the mediated settlement to dispose of the Title VII claim, under footnote 15, it must represent knowing and voluntary action by the employee. After all, the substantive right at issue is the employee's, and the jeopardized procedural entitlement is significant. Where the settlement does not amount to knowing and voluntary employee action, it simply merits consideration under footnote 21's guidelines for arbitration awards.

The first requirement under footnote 15 is action by the employee. Mere participation by the union should not bind the employee on an agency theory. Rather there must be affirmative employee action, such as a signature on the settlement agreement or unequivocal steps taken in

329. Id. at 426.
330. Id. at 425.
331. Id. at 426 (citing United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 858 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (the rule applied to settlements obtained in the course of federal litigation)).
332. Id.
333. Id.
334. See generally Edwards, supra note 300, at 24; Jacobs, supra note 318, at 634-35 (arguing for acceptance of grievance settlements).
accord with the settlement, as in Strozier. Indeed, it is tempting to require an employee signature in light of the impact the settlement will have. But actions can speak as loudly as words and may convey as clear an impression of what the employee understood as would a signature on a document. Furthermore, when the employee takes actions based on the settlement and receives its benefits, the employer is entitled to view the matter as laid to rest.

Second, the employee's action must be voluntary; this requirement amounts to a "due process" review. There are two distinct facets to this requirement in the grievance mediation setting. First, the procedures should pass the tests used in a routine suit to enforce a mediated settlement: an impartial mediator, opportunity for crucial persons to participate, and absence of fraud and mistake. Second, the court should assure itself that the employee's interests were adequately represented. The procedures must not be tainted by hostility between the union and employee; such hostility could be a signal of improper union-employer collusion. The employee must have had real participation rights: provision of independent counsel as in Strozier, right of intervention, presence at important sessions, and the like. No single feature should be required for all cases; the law should respect the parties' choice so long as it results in adequate protection of the employee. In sum, the court must be satisfied that there were procedural entitlements sufficient to make for voluntary employee action and to constitute a fair substitute for civil litigation.

Finally, the court must ascertain that the settlement represents "knowing" employee action. The court should look for evidence that the parties and the employee were aware of the employee's right to be free from discrimination. A statement to this effect in the settlement, the existence of a contract clause explicitly addressing or understood to forbid discrimination, or the provision of legal counsel could satisfy this requirement. These measures do not, of course, provide direct evidence of what the negotiators actually thought about. However, they are convenient extrinsic measures, and it may be difficult to pierce the negotiations sufficiently to answer this question more confidently.

These three requirements overlap to some extent. Compelling evidence of one may satisfy the others. In Strozier, for example, the provi-

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336. Procedural fairness is one of the requirements for consideration of an arbitration award under Alexander. Alexander, 415 U.S. at 60 n.21.
337. Cf. id. Because many contract clauses are widely viewed as impliedly prohibiting discrimination, an express anti-discrimination clause should not be required.
tion of legal counsel says much about the “knowing” and “voluntary” requirements and helps to identify the employee’s actions subsequent to the settlement as acceptance of it.

Where the three footnote 15 requirements are met, the court should essentially accept the settlement as dispositive. On the merits, the court should merely ascertain that the asserted Title VII claims are resolved. Admittedly, this analysis yields no assessment of the acceptability of the settlement from the perspective of the public. However, this feature is not a problem. The EEOC may proceed with its own litigation, even in the face of a private settlement, to protect the public interest. And the court’s action reflects the public policy favoring settlements.

If by contrast the court finds one or more of the three footnote 15 requirements lacking, it need not accept the settlement. The court may, however, “consider” the settlement under Alexander’s footnote 21, determining its weight by measuring it against the footnote 15 requirements and Title VII law. The court may, for example, view any statement of facts contained in the settlement as evidence and the settlement as an indication of what the parties at one point thought fair and reasonable.

In summary, the courts in Title VII litigation should be relatively hospitable toward mediated settlements under labor contracts. Indeed, where the court finds that the settlement represents employee action that is knowing and voluntary and disposes of the Title VII claims, the court should find the settlement dispositive.

3. The National Labor Relations Act

The National Labor Relations Act protects the right of employees to organize, bargain collectively, engage in other “concerted activity,” and refrain from doing so. Employees may select a union to represent them; the union selected by a majority of employees becomes their exclusive representative. The law prohibits employers from engaging in “unfair labor practices”: interfering with employee rights in general, dominating or assisting employee organizations, discriminating against employees to discourage union activities, discriminating against employ-

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340. See EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1363 (6th Cir.), cert. denied, 423 U.S. 994 (1975) (EEOC may file lawsuit separate from the ongoing private suit, when investigation of a charge has disclosed a number of violations which require judicial attention). Contrast the procedures under the NLRA, where deferral signals an end to the case altogether.
341. Alexander, 415 U.S. at 60.
342. The legal validity of the settlement is a factor in this setting, because the court has been called upon to adjudicate the case due to the absence of an effective settlement. By contrast, where there is an effective settlement, its legal validity need not be determined by the court.
344. Id. § 157.
345. Id. § 159(a).
ees who file charges or testify in legal proceedings, and refusing to bargain in good faith with exclusive representatives. Unions are prohibited from interfering with employee rights in general; causing employers to discriminate against employees due to union activities; refusing to bargain in good faith; and engaging in certain forms of strikes, boycotts and picketing.

The rights created by the NLRA are more diverse than Title VII rights. Of great importance here is the distinction between rights waivable by the union acting on behalf of employees in their collective interest and nonwaivable rights. The fact patterns of the decided cases draw a blurry line between waivable economic rights and nonwaivable associational rights. This line reflects the core judgment of the Act: that employees (and the public) benefit from government protection of the right to organize into unions and from labor-management negotiation, not government prescription, of employment terms. Several examples illustrate this distinction. A union may waive employees' economic rights, the right to strike and the right to refuse to cross a picket line. A union may bind its officials to higher standards of conduct than those applicable to other employees and subject the officials to harsher discipline in cases of unlawful strikes. By contrast, a union may not waive employees' rights to communicate regarding union matters on the employer's premises. The Supreme Court's most recent waiver case permits waiver when it is not contrary to the NLRA, which provides for collective benefits to be asserted over individual rights where the benefit is great and the harm to individual rights is small.

The NLRA is enforced by the National Labor Relations Board, which certifies unions as exclusive representatives and "prevents" unfair labor practices. The General Counsel accepts charges from aggrieved persons and investigates and prosecutes unfair labor practices; the Board adjudicates them and issues remedial orders enforced in the federal appeals courts. The Board may order violators to cease violat-

346. Id. § 158(a).
347. Id. § 158(b).
355. Id. § 160.
356. Id. § 153(d).
357. Id. § 160.
ing the law and take "affirmative action." The Board's powers are exclusive; aggrieved persons may not pursue unfair labor practice claims on their own.

Congressional guidance on the relative roles of the Board and private contractual dispute resolution processes is murky. The NLRA states that the Board's power to prevent violations of the NLRA “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.” The Labor-Management Relations Act also states, however, that “[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”

The Supreme Court has read this language as calling for concurrent jurisdiction for arbitrators and the Board in cases raising both contract and unfair labor practice issues. An arbitrator may consider and resolve a case with unfair labor practice overtones. More importantly, the Board may resolve disputes over contract terms in order to resolve unfair labor practices. The Board has the power to construe the contract; whether to do so lies in the Board's discretion.

The Board has formulated two deferral doctrines. Under the prospective deferral doctrine, the Board declines to pursue an unfair labor practice case pending use of the contractual procedures. Under the retrospective deferral doctrine, the Board honors the resolution

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358. Id. § 160(c).
359. Id. § 160(a).
360. Id. § 173(d).
361. Carey v. Westinghouse Corp., 375 U.S. 261 (1964) (a dispute raising both jurisdictional issues where the Board has a limited role under 29 U.S.C. § 158(b)(4)(D) and representational issues under the Board's power to certify unions as representatives of employees). The Court emphasized that, as a practical matter, arbitration could resolve the dispute, that resort to arbitration could have "a pervasive, curative effect," and that allowing arbitration would help to avoid fragmentation. Id. at 265, 272.
362. NLRB v. Strong Roofing & Insulating Co., 393 U.S. 357, 360-61 (1969) (the Board may construe the contract to resolve a claim that the employer committed an unfair labor practice by refusing to sign a contract negotiated on its behalf); NLRB v. Acme Indus. Co., 385 U.S. 432, 436-39 (1967) (the Board may decide unfair labor practices involving refusals to provide relevant information during the contract term); NLRB v. C & C Plywood Corp., 385 U.S. 421, 428-30 (1967) (the Board may interpret a contract in a unilateral change case where the agreement lacked an arbitration clause). In C & C Plywood, the Court noted the public policy against governmental regulation of contract terms, but found the Board's obligation to enforce the statute and the need to avoid duplicative adjudication more persuasive. Id. at 427-30. In Acme Industrial, the Court noted that the Board stands on a different footing than do courts vis-a-vis arbitration due to its statutory obligations and that the Board's limited interpretation of the contract there actually aided arbitration. 385 U.S. at 436-38.
363. Strong Roofing, 393 U.S. at 360-61.
364. Technically, retrospective deferral should be called deference, but the term "deferral" has become accepted.
achieved through the contractual process. This section recommends that the Board defer prospectively to mediation quite readily when the rights at issue are waivable, but not when the rights are nonwaivable. Similarly, the Board should defer retrospectively to a mediated settlement after only a minimal due process review when the rights are waivable, but exercise a much more stringent review when the rights are nonwaivable. These recommendations stand somewhat in opposition to current Board law, but conform to the spirit of the Supreme Court's decision in Alexander.\footnote{365}

\textit{a. Prospective Deferral}

\textit{(1) Deferral to Nonmediated Processes}

Under Collyer Insulated Wire, the Board declines to hear an unfair labor practice case which could be handled through, but has not yet been brought to, arbitration.\footnote{366} The Board does so where the respondent has no animosity toward the employees' statutory rights, the respondent asserts its willingness to arbitrate under a clause "unquestionably broad enough to embrace" the dispute, and the contract and its meaning are "at the center" of the dispute.\footnote{367} The Board dismisses the complaint, but retains jurisdiction to assure that the dispute has been resolved "by amicable settlement in the grievance procedure or submitted promptly to arbitration" and that the contractual procedure has been fair and regular and yielded a result that is not repugnant to the NLRA.\footnote{368}

The Board reasoned that the contract afforded a quick and fair means of resolving the dispute which could provide a full remedy. Because the issue was at base a contractual one, "[t]he determination of these issues ... is best left to discussions in the grievance procedure by the parties who negotiated the applicable provisions or, if such discussions do not resolve them, then to an arbitrator chosen under the agreement and authorized by it to resolve such issues."\footnote{369} The majority denied that it was compelling the parties to arbitrate; rather Collyer "merely giv[es] full effect to their own voluntary agreements."\footnote{370} Nor does Collyer strip away parties' statutory rights; it merely requires parties to use the contractual process in the first instance, while the Board retains jurisdiction to enforce statutory rights as needed.\footnote{371}

367. \textit{Id.} at 842 (plurality opinion). The Board also listed as persuasive the long and productive relationship between the parties. \textit{Id.} One member concurred, arguing for a broader deferral policy than that seemingly favored by the plurality. \textit{Id.} at 843-46 (Brown, Mbr., concurring). Two members dissented. \textit{Id.} at 846-50, 850-56 (Fanning & Jenkins, Mbrs., dissenting).
368. \textit{Id.} at 843.
369. \textit{Id.} at 840.
370. \textit{Id.} at 842.
371. \textit{Id.} at 843.
COLLYER involved an employer’s alleged unilateral change in terms of employment in violation of the statutory duty to bargain in good faith.\textsuperscript{372} The Board has vacillated\textsuperscript{373} on whether to defer under COLLYER in cases involving interference with individual employee rights.\textsuperscript{374} In United Technologies Corp.,\textsuperscript{375} for example, the employee allegedly was disciplined for filing too many grievances.\textsuperscript{376} The Board now generally does defer in individual rights cases, but not, however, where the union’s and employee’s interests are adverse or where the respondent’s conduct “constitutes a rejection of the principles of collective bargaining.”\textsuperscript{377} It is noteworthy that the dissent argued that unions may not waive the individual’s right of access to the Board merely by agreeing to arbitration.\textsuperscript{378}

The Board will not defer under COLLYER when the case involves questions of which union represents which employees\textsuperscript{379} or employer domination of an employee organization,\textsuperscript{380} as these questions are solely statutory and the answers may render the labor contract inapplicable.

\textsuperscript{374} See 29 U.S.C. § 158(a)(1) (1982) (barring employer interference with the employee’s rights to engage in concerted activity); id. § 158(a)(3) (barring employer discrimination to discourage union membership); id. § 158(b)(1)(A) (barring union interference with the employee’s rights to engage in concerted activities); id. § 158(b)(2) (barring union collusion in employer discrimination).
\textsuperscript{375} Protected employee activities are set out in § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

\textsuperscript{376} 268 N.L.R.B. 557 (1984).
\textsuperscript{377} Id. at 557.
\textsuperscript{378} Id. at 560. Employer conduct in retaliation for use of the grievance procedure is an example of the latter. See Joseph T. Reyerson & Sons, 199 N.L.R.B. 461, 462 (1972). The Board defers in individual rights cases to prompt the parties to use the contractual process and thereby continue the process of collective bargaining, to limit the Board’s interference with the contractual process, and to conserve Board resources. United Technologies, 268 N.L.R.B. at 559. See also the reasoning of the majority in National Radio, 198 N.L.R.B. at 531-32 (arbitrators are experts in just cause cases, arbitration is therapeutic and Board litigation is not, and unions will be strongly motivated to protect individual employees).
\textsuperscript{379} The dissent also argued that individual rights cases are statutory, not contractual, and that arbitration is thus ill-suited to resolve them. The dissent reasoned that the arbitrator is bound to decide the dispute by reference to the contract, not public law. Furthermore the union may not press the statutory issue aggressively. United Technologies, 268 N.L.R.B. at 563 (Zimmerman, Mbr., dissenting). The dissent also argued that the Board should not defer because the case involved retaliation for using the grievance arbitration system. Id. at 564. See also the reasoning of the dissent in National Radio, 198 N.L.R.B. at 534 (arbitrators may well uphold a discharge for cause without considering the employer’s intent to discourage union membership), and the reasoning of the concurrence in General Am. Transp. Co., 228 N.L.R.B. 808, 810 (1977) (the Board should not allow the employer and the union, who committed the wrong, to control the adjudication of individual rights).
\textsuperscript{380} See Scottex Corp., 200 N.L.R.B. 446, 454 (1972).
Nor will the Board defer in cases alleging employer retaliation for an employee's filing charges or cooperating with the Board, because it is the Board's sole responsibility to maintain free access to its processes.\(^1\)

On rare occasions, the Board has addressed \textit{Collyer} deferral where the grievance process did not include classic arbitration. In the leading case, \textit{Nabisco, Inc.}, \(^2\) the Board deferred to a joint committee procedure which could have ended in arbitration or in a strike or lockout.\(^3\) The Board noted that there was no mandatory arbitration; however, a bipartisan panel, rather than the disputants, would determine whether the case would go to arbitration.\(^4\) The Board spoke broadly of remitting the parties "in the first instance to the procedures which they have devised for determining the meaning of the agreement."\(^5\) The Board will not defer to a joint committee process, however, where the representatives are too closely involved in the grievance\(^6\) or the power to decide is in the hands of one side.\(^7\) Thus, the Board requires a binding decision of some sort by parties other than the disputants.

It is far from clear whether \textit{Collyer} is a permissible exercise of Board discretion. The Supreme Court has referred to the doctrine with apparent approval in \textit{passing}.\(^8\) On the other hand, to the extent \textit{Collyer} calls for deferral in cases of nonwaivable rights, it is inconsistent with the rationale of \textit{Alexander}.\(^9\) And the Supreme Court, in extending \textit{Alexander} to cases under the Fair Labor Standards Act, also drew a like distinction between rights made absolute by statute and rights the statute made subject to collective bargaining.\(^10\)

In particular, \textit{Collyer} and its extension to individual rights cases have been very controversial. Some commentators argue that the Board

\(^{1\text{See, e.g., M & B Contracting Corp., 245 N.L.R.B. 1215, 1231 (1979); McKinley Transp., Ltd., 219 N.L.R.B. 1148, 1151 (1975).}}\(^1\)

\(^{2\text{Brotherhood of Teamsters Local 70, 198 N.L.R.B. 552 (1972), enforced sub nom. Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973); see also Kohls v. NLRB, 629 F.2d 173, 179 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981) (the Board abused its discretion in refusing to defer to a joint committee procedure).}}\(^2\)

\(^{3\text{Arbitration would be used in discharge cases or if a majority of the joint committee so voted. Nabisco, 198 N.L.R.B. at 553.}}\(^3\)

\(^{4\text{Id. at 554. The dissent viewed the procedure as inappropriate for deferral as its most likely terminus was a strike. Id. at 554-55 (Fanning & Jenkins, Mbrs., dissenting).}}\(^4\)

\(^{5\text{Id. at 554.}}\(^5\)

\(^{6\text{Local 367 Int'l Bhd. of Elec. Workers, 230 N.L.R.B. 86, 94-95 (1977), enforced, 578 F.2d 1375 (3d Cir. 1978), cert. denied, 439 U.S. 1070 (1979).}}\(^6\)

\(^{7\text{Westinghouse Elec. Corp., 206 N.L.R.B. 812, 819-20 (1973), enforcement denied and vacated, 506 F.2d 668 (4th Cir. 1974) (a team of three management and three union members).}}\(^7\)

\(^{8\text{NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 838 (1984) (mentioning \textit{Collyer} without criticism); William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16-17 (1974) (dictum stating that \textit{Collyer} harmonizes with Congress' preference for private dispute resolution); see also Machinists Lodge 700 v. NLRB, 525 F.2d 237, 239 (2d Cir. 1975); Associated Press v. NLRB, 492 F.2d 662, 688 n.24 (D.C. Cir. 1974).}}\(^8\)

\(^{9\text{Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).}}\(^9\)

\(^{10\text{Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 741 n.19 (1981).}}\(^{10\)}
abdicates its statutory responsibilities in deferring to an inferior tribunal; the Board process entails more thorough investigation, costs the grievant less, reduces the employee’s dependence on the union, and relies on the law more than arbitration.391 Others argue that the Board is reasonably exercising control over its workload392 and remitting the parties to their own chosen forum.393 Most agree that individual rights cases are least suited to Collyer deferral.394

(2) Deferral to Mediation

The merits and demerits of Collyer in the mediation context are best assessed by returning to the core concepts: the nature of the substantive rights at issue, the procedural entitlements under the statutory scheme, and the nature of the private resolution process.

The inquiry into the nature of the legal rights should focus on the concept of waiver,395 not, as the Board and commentators generally have, on whether the case involves individual employee rights. Some in-

392. See, e.g., Schatzki, A Response to Professor Getman, 49 IND. L.J. 76 (1973) (the parties choose arbitration, most disputes are covered by contract language, the Board operates too much by general fiat for contract disputes, and the law is not designed to aid poor unions).
393. Zimmer, A Little Bit Bit on Collyer Insulated Wire, 49 IND. L.J. 80 (1973) (Collyer rationally allocates Board resources; Board litigation upsets relations during the contract term); see, e.g., Schatzki, NLRB Resolution of Contract Disputes Under Section 8(a)(5), 50 TEX. L. REV. 225, 262-63 (1972); Zimmer, Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction, 48 IND. L.J. 141 (1973). For an argument advocating the abolishment of Collyer in favor of an election of remedies approach, see Alleyne, Arbitrators and the NLRB: The Nature of the Deferral Beast, 4 INDUS. REL. L.J. 587 (1981); see also Peck, A Proposal to End NLRB Deferral to the Arbitration Process, 60 WASH. L. REV. 355 (1985). Others prefer an expanded Collyer doctrine, on the theory the contract creates the substantive rights for the contract term and waives access to the Board. See, e.g., Edwards, Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB, 46 OHIO ST. L.J. 23 (1985) (cases raising Title VII issues, duty of fair representation issues, or individual rights issues would be exceptions).
394. E.g., Edwards, supra note 393, at 30 (individual rights cases are rare, and can be handled by the Board when they arise); Getman, supra note 391; Schatzki, supra note 392, at 76 (the statutory issues predominate, and individual employees should not be restrained by the union’s control of the dispute resolution process). But see Alleyne, supra note 393, at 594-96 (arbitrators are more likely to favor employees due to the breadth of the “just cause” question and can impose adequate remedies); Wolkinson, The Impact of the Collyer Policy of Deferral: An Empirical Study, 38 INDUS. & LAB. REL. REV. 377, 389 (1985) (based on a statistical study of Collyerized cases comparing likely Board results and arbitral results, Collyer should apply to individual rights, not collective rights, cases).
395. This approach has been urged with regard to Collyer deferral to arbitration. See Edwards, supra note 393, at 28; Harper, supra note 348. The argument is more difficult to make for arbitration than mediation. The theory is that the arbitration award results in a waiver of substantive statutory rights and the agreement to arbitrate waives the right to go to the Board. See Edwards, supra note 393, at 28-30. It is difficult to see that an imposed neutral’s decision constitutes a true waiver by the parties. For an alternative image, see Note, Limiting Deferral Under the Spielberg Doctrine, 67 VA. L. REV. 615, 624-29 (1981) (individual rights are not congruent with contract rights, while bargaining rights are).
individual employee rights are waivable;\textsuperscript{396} some group rights are not.\textsuperscript{397} Collyer deferral operates as a waiver as it amounts to a withholding of the Board's processes in favor of the union-management process. As the remedial scheme makes the right, so employees lose their legal rights under Collyer and receive instead a private resolution of the dispute, one that may not rest on legal principles.

This waiver approach makes common and legal sense. Mediation yields an agreement of the parties, that is, an extension of their contract. If the parties could have waived the right in the contract, so they ought to be able to waive it in an extension of the contract. Second, the law of waiver essentially divides rights into crucial rights that may not be impaired by the private contract and less critical rights. This law thus affords a ready basis for determining when the Board may withhold its administrative processes. Furthermore, this approach comports well with two key principles of labor law: freedom of contract and exclusive representation.\textsuperscript{398} Remitting matters that may be covered by contract to the parties' chosen process, indeed to the parties themselves in the case of mediation, keeps the government from setting contract terms. And promoting the grievance process (especially mediation) over Board litigation strengthens the role of the exclusive representative.

The nature of the procedural entitlements under the NLRA supports the view that deferral is appropriate in waivable rights cases. Unlike Title VII, the NLRA creates no more than a right to bring a charge to the Board; the Board retains the authority to determine which cases to pursue.\textsuperscript{399} The Board must decide how to allocate its resources, and contractual processes offer an alternative forum not available in some disputes handled by the Board, such as the processing of election disputes. So long as the Board's choices reflect proper judgments about the statutory rights at stake, deferral to private ordering is an appropriate exercise of Board discretion.

The final factor is the nature of the private process. Both arbitration and mediation serve the legitimate policies outlined in Collyer. The Collyer doctrine as it applies to arbitration may trouble some because it prefers a lesser adjudicative process over Board litigation. In the mediation context, by contrast, the Board favors the parties' own negotiations. A mediated result should be more accommodative and pleasing to the parties. Where the case entails waivable rights, resolution "by amicable settlement in the grievance procedure\textsuperscript{400} should indeed be the preferred

\textsuperscript{396} See, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 710 (1983).
\textsuperscript{398} See generally Edwards, supra note 393, at 30-32.
\textsuperscript{399} 29 U.S.C. § 164(c)(1) (1982).
\textsuperscript{400} Collyer, 192 N.L.R.B. at 843 (emphasis added).
Presumably Collyer itself applies to grievance processes with mediation followed by arbitration. A grievance process which concludes with mediation similarly warrants prospective deferral in many situations.402

The Board should first look to the type of case. As under Collyer the Board clearly should not defer in certain categories of cases, for example, claims touching on representation rights, claims alleging retaliation for use of the Board's processes or repudiation of the collective bargaining or grievance processes. Next the Board should ask whether the right violated by the respondent's actions is one that can be waived by the union in the contract. Once the Board has determined that the right is waivable, it should apply the Collyer requirements: a solid relationship free of animosity toward employee rights, an applicable mediation clause and a willing respondent, and a question which centers on the contract.

In addition, in individual rights cases where the union's interests may diverge from an employee's, the Board must be sure the process likely will be fair to the employee. Under United Technologies, the Board declines to defer where the union's and employee's interests are adverse. This inquiry is a sound first step, but the Board must probe further in the mediation setting. Because there will not be an independent arbitrator's decision, but rather a negotiated settlement, there may be overreaching. While a qualified mediator should be able to forestall overreaching, the Board cannot be sure of the mediator's qualifications. Thus the Board should determine whether there will be minimal protections for the employee, such as provision of counsel, an assured role for the employee in the mediation sessions, or an opportunity to approve of the settlement.

While the Board cannot be sure that mediation will yield a resolution, Collyer does require that the respondent stand ready to use the contractual process. Respondents presumably will mediate seriously if the alternative is Board litigation. Collyer also calls for retained jurisdiction to assure that the dispute has been promptly resolved and that the settlement comports with the Board's retrospective deferral standards. As with courts who compel arbitration, the Board may wish to provide appropriate instructions or timelines.

401. Thus, the Board's concern with obtaining an imposed neutral's decision, as shown in the Nabisco line of cases, is understandable in the joint committee context where the parties themselves are not responsible for the resolution, but such concern is unwarranted in the mediation context. Some may be concerned that the settlement will not prove to be "legal." However, parties may well follow legal dictates as they resolve grievances. In any event, whether the parties get the law right or not, in waivable rights cases, the law should promote their negotiations.

402. See Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985) (suggesting that deferral principles, including Collyer, should apply to grievance settlements), review denied, 808 F.2d 1342 (9th Cir. 1987).
Thus, Collyer should apply to mediation, although with several modifications. Put simply, the Board should defer to mediation in cases involving waivable rights. And the Board should be assured that the individual employee's procedural rights are minimally secure.

b. Retrospective Deferral

(1) Deferral to Nonmediated Resolutions

The Board also defers to the results of the contractual process. Under Spielberg Manufacturing Co., the Board defers to an arbitration award when all parties have agreed to be bound, the proceedings were fair and regular, and the award is not repugnant to the purposes and policies of the Act. Essentially, the Board declines to review the case de novo. The Board has explained Spielberg:

The Act . . . is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievances and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective. . . .

If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

The Spielberg requirement that all parties agreed to be bound plays a minor role, as agreement by the union and employer to the arbitration clause satisfies this requirement.

The requirement that the process be "fair and regular" has established a fundamental due process requirement. For example, where grievants and their representatives have a conflict of interest or there is

403. 112 N.L.R.B. 1080 (1955). Technically, Spielberg involves deference to an arbitration award, not deferral; but the term "deferral" has become the accepted one.
404. Id. at 1082.
405. In Spielberg itself, the Board merely cited "the desirable objective of encouraging the voluntary settlement of labor disputes." Id.
407. See C. Morris, supra note 72, at 968-70.
hostility, the Board will not defer.408

The primary substantive review comes under the "clearly repugnant" standard. In Olin Corp.,409 the Board stated its reading of this prong: “[u]nless the award is ‘palpably wrong,’ i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer.”410 The Board then deferred to an arbitration award which did not apply the Board’s requirement that waiver of statutory rights be clear and unmistakable.411 The Board has also deferred to an award which did not result explicitly in application of a balancing test required by Board law, on the theory the arbitrator implicitly balanced the relevant interests.412 Failure to grant the full remedy the Board would provide does not render an award “clearly repugnant.”413 By contrast, the Board refused to defer to an award imposing discipline on an employee for engaging in protected activity which did not interfere with the employer’s productivity.414

The thorniest aspect of Spielberg has been a fourth procedural/substantive requirement: determining whether the arbitrator adequately considered the unfair labor practice. The Board has used several rules, some fairly stringent, others not.415 The current Olin approach focuses on whether the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to the unfair labor practice. Differences between the contract and statutory standards are to be considered under the “clearly re-

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408. Longshoremen & Warehousemen Local 27, 205 N.L.R.B. 1141, 1147 (1973), enforced, 514 F.2d 481 (9th Cir. 1975). Many of the cases under this prong reflect the adjudicatory nature of arbitration. See, e.g., Precision Fittings, Inc., 141 N.L.R.B. 1034, 1040-43 (1963) (relevant evidence was deliberately withheld); Gateway Transp. Co., 137 N.L.R.B. 1763, 1763-64 (1962) (the grievant was denied sufficient time to prepare); Honolulu Star-Bulletin, 123 N.L.R.B. 395, 408, 416-17 (the grievant was denied the opportunity to confront witnesses), enforcement denied on other grounds, 274 F.2d 567 (D.C. Cir. 1959).


411. Id. at 576.


414. Garland Coal & Mining Co., 276 N.L.R.B. 963 (1985) (the union president refused to sign a company memorandum setting out the company's interpretation of committee duties).

415. Compare Raytheon Co., 140 N.L.R.B. 883, 884-86 (1963), set aside on other grounds, 326 F.2d 471 (1st Cir. 1964) (the unfair labor practice issue must be presented to and considered by the arbitrator); Electronic Reproduction Serv. Corp., 213 N.L.R.B. 758, 761-62 (1974) (presumption that the arbitrator considered the unfair labor practice issue, unless the evidence shows the arbitrator refused to or was prohibited from considering it); Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 146-47 (1980) (return to the "presented and considered" standard); Propoco, Inc., 263 N.L.R.B. 136, 136-37 (1982), aff'd, 742 F.2d 1438 (2d Cir. 1983) (rigorous application of Suburban Motor Freight).
pugnant” test, as the standard forecloses a preliminary review of the merits to decide whether to defer.416

In Olin, the Board also reversed the burden of proof on deferral to the party seeking to avoid deferral.417 While the majority offered no justification for the new rule, the dissent argued that deferral is an affirmative defense that should be proven by the winner in arbitration, who has the best access to the record and the greatest interest in obtaining deferral.418

As with Collyer, the Board declines to defer under Spielberg in some situations.419 The Board does not defer retrospectively in representation cases420 or in unfair labor practice cases alleging improper employer domination of unions421 or discrimination for filing charges with or giving testimony to the Board.422

Early on, the Board deferred under Spielberg to decisions of joint committees,423 rebutting the argument that the proceedings were inherently unfair and irregular. The Board reasoned that:

[F]ailure to adopt the decision of the Joint Committee would imply an obligation to fix standards of formality in procedure on the part of grievance and arbitration panels which must be met before their awards could receive endorsement. We consider it enough under Spielberg if the procedures adopted meet normal standards as to sufficiency, fairness, and regularity.424

This approach has been controversial; some Board members would not defer to joint committees because they lack a binding award from an

416. Olin, 268 N.L.R.B. at 574. The dissent argued that the Board lacks the authority to defer absent some assurance that the unfair labor practice has been resolved. The dissent also argued that public policy favors remedying unfair labor practices by the Board as much as it favors arbitration, that excessive deferral will overwhelm arbitration by requiring it to carry the burden of adjudicating unfair labor practices, and that parties may avoid arbitration as it becomes increasingly cumbersome. Id. at 577-81 (Zimmerman, Mbr., dissenting).


423. Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961). The structure called for committees with equal union and management representation, a final and binding decision by majority vote, and no appeal.

424. Id. at 1421. The Board found the proceedings fair and regular although there was no neutral member on the panel, the hearing was brief, and no reasons were given. For criticism of the Board’s Spielberg deferral to joint committees, see Zimmerman, The Teamster Joint Grievance Committee and NLRB Deferral Policy: A Failure to Protect the Individual Employee’s Statutory Rights, 133 U. PA. L. REV. 1453 (1985).
impartial neutral.\textsuperscript{425} And specific joint committee decisions have been denied deferral on various procedural grounds.\textsuperscript{426} Nonetheless, the Board recently applied the new \textit{Olin} highly deferential approach to joint committee cases.\textsuperscript{427}

The Board has taken various approaches toward deferral to settlements obtained short of arbitration. Early on, the Board seemed to favor deferral.\textsuperscript{428} But in the late 1970s, the Board consistently ruled against deferral, on such grounds as the lack of a decision by an impartial neutral.\textsuperscript{429} In one case, the Board refused to defer despite the participation of a mediator, because it was not clear the mediator had authority to determine the outcome.\textsuperscript{430}

The debate came to the fore in \textit{Roadway Express, Inc.}, where the settlement called for reinstatement of an employee discharged for strike-related conduct, but without backpay.\textsuperscript{431} The majority stated that the Board would defer to a settlement where it would effectuate the policies of the Act,\textsuperscript{432} but found deferral inappropriate because the legal questions had not been resolved and the settlement was ambiguous.\textsuperscript{433} Mem-

\textsuperscript{425} See, e.g., Terminal Transp. Co., 185 N.L.R.B. 672, 675 (1970) (Jenkins, Mbr., dissenting) ("Whatever result such a Committee of the protagonists might reach, it is in part the product of economic power, adjustment with an eye on other disputes or differences between them or on their future bargaining positions and other considerations unrelated to the merits of the particular claim before the Committee.").

\textsuperscript{426} One common ground for the Board's refusal to defer is bias. E.g., Brown Co., 243 N.L.R.B. 769, 770 (1979), enforcement denied without opinion, 663 F.2d 1078 (9th Cir. 1981); Roadway Express, Inc., 145 N.L.R.B. 513, 514-15 (1963). Another common problem is that the Board cannot discern whether the unfair labor practice issue was adequately considered. E.g., American Freight Sys., Inc., 264 N.L.R.B. 126, 126-27 (1982), enforcement denied, 722 F.2d 824 (D.C. Cir. 1983) (the court of appeals overturned the refusal to defer on the theory contract rights replaced statutory rights); Herman Bros., 252 N.L.R.B. 848, 853 (1980), enforced, 658 F.2d 201 (3d Cir. 1981). For an example of a case caught in the Board's changing views on this issue, see Chemical Leaman Tank Lines, 251 N.L.R.B. 1058, 1058 (1980); see also NLRB v. Wolff & Munier, Inc., 747 F.2d 156, 160-61 (3d Cir. 1984) (the court reprimanded the Board for not clarifying its rationale in refusing to defer).

\textsuperscript{427} E.g., United Parcel Serv., Inc., 274 N.L.R.B. 667, 668 (1985), enforcement denied, 785 F.2d 807 (9th Cir. 1986); Ryder Truck Lines, 273 N.L.R.B. 713, 713 (1984), vacated, 786 F.2d 1516 (11th Cir. 1986).

\textsuperscript{428} E.g., Central Cartage Co., 206 N.L.R.B. 337, 338 (1973) (all the parties signed the settlement and abided by it, and all questions were considered and settled; the Board will defer in such a case where the settlement effectuates the policies of the Act); International Harvester Co., 199 N.L.R.B. 1009, 1010-11 (1972).

\textsuperscript{429} E.g., Melones Contractors, 241 N.L.R.B. 14, 18-19 (1979); Whirlpool Corp., 216 N.L.R.B. 183, 186 (1975); see also Ford Motor Co., 233 N.L.R.B. 698, 700 n.12 (1977) (the result also was repugnant to the policies of the Act). Another common ground for the Board's refusal was that the settlement did not indicate that the unfair labor practice had been considered. Owens Corning Fiberglas Co., 236 N.L.R.B. 479, 479 (1978); Sabine Towing & Transp. Co., 224 N.L.R.B. 941, 941 (1976), enforcement, 599 F.2d 663 (5th Cir. 1979).

\textsuperscript{430} T & T Indus., 235 N.L.R.B. 517, 517 n.2 (1978).

\textsuperscript{431} 246 N.L.R.B. 174 (1979), enforcement denied, 647 F.2d 415 (4th Cir. 1981).

\textsuperscript{432} Id. at 174.

\textsuperscript{433} Id. at 175.
ber Truesdale, concurring, declined to defer because there was no voluntary, unequivocal waiver by the employee of his right to bring charges before the Board; there was no neutral to assure that the individual employee's rights had been considered; and the unfair labor practice had not been directly addressed.\textsuperscript{434}

Members Fanning and Penello dissented. Fanning argued that the facts favored deferral: the employee authorized the union to settle, he was aware of the terms, he took the benefits, and the terms were lawful.\textsuperscript{435} Penello argued that deferral to settlements is more appropriate than deferral to arbitration awards, because a settlement represents the parties' agreement, and thus reasoned the \textit{Spielberg} factors should have been employed:

- Deferral in general will encourage parties to use their bargained-for and agreed-upon procedures to settle their disputes; deferral to grievance settlements will encourage the parties to negotiate rather than to litigate their differences. The establishment of grievance-arbitration procedures has been a major factor in promoting and achieving industrial stability and peace, [sic] encouraging parties to use such such [sic] procedures will further the fundamental purposes of the Act . . . .

- As an administrative agency the Board should not take a narrow, legalistic view of the Act and seek to rule on every dispute that may fall within the letter of the Act, but should instead take a broad view of the Act and seek to further the spirit and purpose of the Act. The Board should encourage employers and unions to negotiate their difference [sic] arising during the term of their bargaining agreement, to discuss and settle grievances, and, if necessary, to arbitrate their differences.\textsuperscript{436}

The Fourth Circuit agreed with the dissenters.\textsuperscript{437}

In 1985, Member Penello's view was adopted by the Board. In \textit{Alpha Beta Co.}, the employers and union agreed to a settlement of a grievance arising out of discharges for unsanctioned work stoppages; the employees agreed to accept the reinstatements without backpay—and also filed charges with the Board.\textsuperscript{438} The Board determined that its deferral principles now would "apply equally to settlements arising from the parties' grievance/arbitration procedures because they further the national labor policy which favors private resolution of labor disputes" and consequently found the process to be fair and regular.\textsuperscript{439} All parties had agreed to be bound; although the employees were not personally involved

\textsuperscript{434} Id. at 175-76 (Truesdale, Mbr., concurring).
\textsuperscript{435} Id. at 176 (Fanning, Mbr., dissenting). He noted that there would be different considerations if the unfair labor practice had been filed before the settlement. Id. at 176 n.21.
\textsuperscript{436} Id. at 177 (Penello, Mbr., dissenting). He also noted that the employee was bound by his acts and by the acts of the union, his agent.
\textsuperscript{437} Roadway Express, Inc. v. NLRB, 647 F.2d 415, 423-26 (4th Cir. 1981).
\textsuperscript{439} 273 N.L.R.B. at 1547.
in the discussions, they were fully informed of and finally approved the specific terms. In application of the "clearly repugnant" test, but without mention of the factual parallelism factor, the Board found the result acceptable "particularly because it resulted from negotiations between the Respondents and the Unions within the context of the agreed-upon grievance/arbitration procedures."

Spielberg has been much less controversial than Collyer, with much of the commentary focusing on the extent of the inquiry into the arbitral resolution of the unfair labor practice issue, a relatively minor point in the mediation setting. One commentator has argued that Spielberg should not be applied in individual rights cases, although it is appropriate for collective rights cases. The courts have generally accepted Spielberg, although the courts do not always concur with the Board on the requirement that the unfair labor practice be considered.

(2) Deferral to Mediation Settlements

The merits and demerits of Spielberg in the mediation setting can best be assessed by analysis of the core concepts. As a general principle, deferral is a permissible means of allocating Board resources under a statute resting enforcement powers in the Board rather than private parties. Furthermore, mediation should be a favored means of resolving contract disputes. Deferral to mediation will encourage peaceful resolution of contract disputes, forestall industrial strife, and prompt the parties to respect their contract. More precisely, as the Alpha Beta Board recognized, deferral to settlements will encourage negotiation over litigation. Deferral to mediated settlements in particular will promote a form

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440. Thus they were bound by their own acts and those of the union, their agent. Id.
441. Id.
443. For an interesting argument that Spielberg deferral should be limited to bargaining rights cases, see Note, supra note 395, at 629-35.
444. For examples of the response of the federal courts to Spielberg, see, e.g., St. Luke's Memorial Hosp. v. NLRB, 623 F.2d 1173, 1178 (7th Cir. 1980) (agreeing with Suburban Motor Freight, discussed supra note 411); NLRB v. Pincus Bros.-Maxwell, 620 F.2d 367, 374 (3d Cir. 1980) (where there are two rationales for the arbitrator's decision and one is permissible, the Board should defer); Banyard v. NLRB, 505 F.2d 342, 345-47 (D.C. Cir. 1974) (adding the requirements that the arbitral and statutory issues be congruent and the arbitrator decided an issue within his competence). See generally NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 838-39 (1984) (mentioning Spielberg without criticism); Comment, supra note 442.
445. Several commentators have urged the application of Spielberg to mediated grievances. See, e.g., Bowers, supra note 2, at 31-32; Goldberg, supra note 2, at 306-09; Gregory & Rooney, supra note 5, at 506.
of third-party intervention designed to bolster negotiation and strengthen the parties' bargaining.

While Spielberg provides a useful framework, it requires some modification to fit this context. As with Collyer deferral, the Board's approach to deferral under Spielberg should begin with the concept of waiver and feature protection of individual rights.

First, the Board should not defer at all to settlements in certain categories of cases: representation disputes, retaliation for involvement in the Board's processes, and the like. Public law and the public process should resolve these disputes.

The Board should not defer under Collyer to mediation in disputes involving nonwaivable rights. If, however, the parties choose to mediate such a dispute, the Board must first ascertain, as Spielberg requires, that all parties agreed to be bound. In nonwaivable rights cases, not only the union and employer must agree, but also the affected employee, for deferral must be predicated on a waiver by the individual employees of their legal rights. Mere participation by the union should not bind the employee on an agency theory. Rather there must also be action by the employee in clear accordance with the settlement, as in Roadway Express, or an employee statement accepting the settlement, as in Alpha Beta.

Of course, the clearest evidence of acceptance would be an express waiver by the employee of the right to go to the Board. The legal status of such a waiver is unclear. The Board has held that an employer is not guilty of interfering with employee rights when insisting on such a waiver as a condition of a settlement. However, the Board has also cited such waivers when refusing to defer to a settlement deemed clearly repugnant to the Act. If the waiver is voluntary and knowing, it may be used as evidence of the employee's agreement to be bound. The Board should not reject a settlement containing such a waiver out of hand.

If there is employee agreement to be bound, the Board may consider deferral. First, to merit deferral, the mediation process must have been "fair and regular," to borrow from Spielberg. (This requirement parallels

446. See generally Edwards, supra note 393; Harper, supra note 348 (arguing generally that waiver is the key in deferral to arbitration).
449. If a signed waiver is the only evidence of employee agreement to be bound, the Board may wish to require that it be unequivocal. Cf. Roadway Express, 246 N.L.R.B. at 175 (Truesdale, Mbr., concurring) (requiring a voluntary, unequivocal waiver for deferral).
the "voluntary" requirement of Alexander.\textsuperscript{450} The Board should follow the courts' inquiry into such factors as mediator impartiality and fraud.

Second, because the Board is searching for a valid waiver of employee rights, it must carefully inquire into the procedural protections afforded the employee. The Board must assure that there was no hostility between the union and the employee and verify that the employee was sufficiently involved through active participation in the mediation sessions, advice of counsel, diligent union representation affirmatively accepted by the employee, and the like. In Alpha Beta, for example, the employees were kept fully informed and had the power of final approval.

Third, the Board should inquire into whether the parties knowingly resolved the unfair labor practice issues. (This factor parallels Alexander's "knowing" requirement.\textsuperscript{451}) There may be an applicable contract clause or a statement to that effect in the settlement, or knowledge may be inferred from the provision of legal counsel.

Finally, the Board must evaluate the merits of the settlement in non-waivable rights cases. Defining the standard of review is difficult as the rights at issue are critical, yet the waiver process commands deference. The Board's "clearly repugnant" formula, as interpreted in Olin, serves the purpose well enough.\textsuperscript{452} Olin prohibits the Board from deferring where the private resolution is "not susceptible to an interpretation consistent with the Act."\textsuperscript{453} The key is a rigorous reading of "consistency with the Act." Thus, the Board may defer where the remedy is less than complete success at the Board would yield, for example.\textsuperscript{454} However, the Board should not defer when basic terms of the settlement affront the Act, as when, for example, an employer rule clearly denying employee rights is allowed to stand.\textsuperscript{455}

The Board's approach to waivable rights cases should be quite different. First, the Board should verify that the union and the employer—but not necessarily the employee(s)—agreed to be bound. Where the right is waivable, the union's agreement to be bound suffices. A mediation clause in the contract, a statement in the settlement, or participation in mediation and action in conformity with the settlement should suffice as evidence of this agreement.

Second, the Board should conduct a "fair and regular process" re-


\textsuperscript{451} Id.

\textsuperscript{452} The Board may also encounter ambiguous settlements, as in Roadway Express. Its approach then should conform to that of the courts as argued above: remit the matter to the grievance process.


\textsuperscript{454} In 1982, fewer than six percent of the cases closed went to trial. 47 NLRB Ann. Rep. 1-2, 278-79 (1982). Presumably there is some compromise in remedy in some of those settlements.

\textsuperscript{455} See NLRB v. Magnavox Co., 415 U.S. 322 (1974) (employee rights to communicate at the workplace regarding union issues).
It is tempting to argue that this review should not be necessary where the rights are waivable, but an alleged unfair labor practice may be at issue, and deferral precludes Board litigation. Furthermore, the Board regulates the negotiation process leading to collective bargaining contracts. The Board thus should evaluate the same factors as the courts in enforcement actions.

Where an individual employee is directly affected, the Board should verify that the individual was afforded procedural protection. This inquiry should be different than that called for in nonwaivable rights cases, however. There the focus is on the employee's actual participation in the process; here, the focus should be on the adequacy of the union's representation. The Board thus should adapt the standard now used when an employee sues the union for failure to represent her fairly: the union's representation must not be "arbitrary, discriminatory, or in bad faith." When a union fails to meet this standard, it commits an unfair labor practice, and employees can sue for breach of contract. So too should employees be able to obtain full Board handling of the underlying unfair labor practice.

Finally, where the procedure has been proper, the Board should simply accept the substance of the settlement in waivable rights cases. Had the parties contracted for the terms in the contract, the Board would not second-guess the clause; nor should it do so where the agreement is a mediated grievance settlement. Rather, the Board and courts confine their inquiry in waiver cases to whether the waiver is "clear and unmistakable." For example, the Supreme Court has intimated that a union's acceptance of a clear pattern of adverse arbitral decisions could constitute an effective waiver. A mediated settlement also should constitute an effective waiver, even if the settlement does not so explicitly state. In waivable rights cases then, the Board should generally restrain its processes in favor of the parties' negotiated resolution.

In both waivable and nonwaivable rights cases, there remains the question of who bears the burden on the deferral issue. Who has the evidence necessary to make the case? While some factors are better known to the parties (how much procedural protection the individual employee received, actions signifying an agreement to be bound), those facts should not be difficult to discover, and other factors are essentially

456. See supra the discussion in Part II.A.
457. Vaca v. Sipes, 386 U.S. 171, 190 (1967). For discussions of the duty of fair representation and grievance mediation, see Bowers, Seeber & Stallworth, supra note 104, at 463; Goldberg, supra note 2, at 286, 312-14; Gregory & Rooney, supra note 5, at 506.
458. See Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963); C. Morris, supra note 72, at 1308-11.
461. See id. at 708-10 & n.13.
legal arguments, e.g., clearly repugnant. The allocation of the burden tilts the law in favor of or against deferral, as the burden of proof decides close cases. Thus Olin’s allocation of the burden to the party seeking to avoid deferral is correct in cases of waivable rights, where deferral should be favored. But the party seeking deferral should bear the burden in nonwaivable rights cases, where deferral should be available but not easily secured.

In summary, the Board’s current approach in Alpha Beta has much to commend it. The Board correctly perceived that settlements deserve substantial deference and incorporated the waiver concept. The Board should also be vigilant to protect the rights of the individual employee.

4. Summary and Example

Assume that the contract between the union and AWI management in the original hypothetical contained the just cause, discrimination, work stoppage, and mediation clauses described in part II B3. How should the Board and the federal courts respond?

If the president brings a lawsuit in federal court alleging race or sex discrimination, the court should take jurisdiction of the case, even absent exhaustion of the mediation process. Neither Title VII nor public policy call for mediation as a prerequisite to civil litigation.

By contrast, if the union or an employee came to the Board asserting an unfair labor practice, the Board should defer prospectively to the mediation process. The basis of the asserted unfair labor practice would be unlawful discrimination in discipline based on union activities. A union official’s right to be free from such discipline is waivable by the union. The mediation clause covers the dispute, which is essentially a contract question. Thus, if there is a solid relationship between the union and management, AWI management is willing to mediate, and the Board is satisfied that the process will adequately protect the president’s interests, the Board should defer to mediation.

Assume now that the parties mediated the dispute, and they settled on reinstatement but a forfeiture of two weeks’ pay. Assume further that the employee was present at many of the mediation sessions, although not at several caucuses; that she did not question the representation afforded her at the time; that she returned to work and cashed the paycheck reflecting the docked pay; that the union handled the case fairly; and that the mediator was unbiased.

If the president brought a Title VII action in federal court, the court

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463. Metropolitan Edison, 460 U.S. at 705-07.
464. Under Metropolitan Edison, the contract must explicitly waive the president’s rights. Id. at 707-10.
should accept the settlement as dispositive. The employee has taken definite action in accord with the settlement. The court may infer that the employee's actions are voluntary from her participation in mediation. The contract clause covering discrimination, the union's statement of the case as involving race and sex discrimination, and the employee's prominent role in the union suggest that the parties and the employee knew of and handled the issue of discrimination. If the dispute is fully resolved, there is no basis for substantive review.

If the employee sought relief from the Board in unfair labor practice proceedings, the Board should defer to the settlement. The mediation agreement and the parties' participation in mediation signify an intent to be bound. The proceedings were fair, and there is no suggestion that the union violated its duty to represent the employee fairly. Thus the Board should defer to the settlement as it would to a contract clause along the same lines. 465

**CONCLUSION**

The primary strength of mediation is its reliance on informality, open and direct communication, the positive bonds shared by the parties, and their need to cooperate and collaborate rather than lay blame. 466 Thus, the central quality of mediation is "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." 467 "Mediation tends to heal wounds, not just pay for bandages." 468 Thus mediation holds promise as a means of reconciling—not just patching over—differences among labor, management, and employees arising under labor contracts.

On the other hand, "[o]ne essential function of law is to reflect the public resolution of . . . irreconcilable differences [about fundamental public values]. A potential danger of [alternative dispute resolution] is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers . . . ." 469 Thus, while the law should promote grievance mediation, it also must throw its shadow (or light) over the process and resolutions obtained through mediation. A recently enacted Minnesota statute, the Civil Mediation

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465. *Cf.* John Morrell & Co., 270 N.L.R.B. 1, 1 (1984) (the Board refused to defer to an arbitral award as clearly repugnant where it upheld the discharge of a union official in a work stoppage context and the contract had no provision imposing a special duty on union officials), *aff'd*, 770 F.2d 1400 (6th Cir. 1985).
466. Fuller, supra note 7, at 326; Pearson, supra note 11, at 420-21.
467. Fuller, supra note 7, at 325.
469. Edwards, supra note 143, at 679.
Act, 470 nicely summarizes the proper approach:
[A] court shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party. That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement unless it violates public policy. 471

471. Id. § 572.36.