Public Justice: Toward a State Action Theory of Alternative Dispute Resolution

Richard C. Reuben†

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Various forms of alternative dispute resolution (ADR) are increasingly taking the place of litigation to resolve disagreements among parties. ADR is frequently imposed by court rule or legislative command for certain types of cases, or compelled by courts when private parties contract to use ADR. To date, ADR doctrine has focused on the structural issues attendant to bringing these processes into the mainstream of American dispute resolution. This Article contends that courts must now address the question of whether ADR—both court-related and contractual—can constitute state action, and therefore be subject to constitutional restraints. The author surveys the history and modern structure of ADR, and, focusing primarily on arbitration, analyzes it in light of the United States Supreme Court’s state action doctrine. He concludes that both court-related and contractual ADR can constitute state action, and therefore be subject to constitutional protections, such as due process, at some level.

INTRODUCTION

As we near the apex of millennial change, the age-old public/private distinction in law is proving more challenging than ever. Governmental contraction is leading to the privatization of many government functions,1 while private conduct is increasingly taking on

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public characteristics. The very process of law is being forced to confront this challenge, as more and more cases are delegated—legislatively, judicially, and contractually—out of public courts and into private hearings, thanks to the rise of alternative dispute resolution (ADR).


3. ADR is a popular umbrella term that is used to describe a number of different processes of dispute resolution. Principally, the processes include:

Arbitration—A less formal means of dispute resolution, undertaken largely outside the sphere of formal public law, in which two or more parties authorize a neutral third party (or panel) to decide their dispute. The nature of the process is adjudicatory, much like the traditional public litigation system, although the key differences are highly significant: The environment is private rather than public, and the proceedings are not conducted according to traditional rules of evidence or procedure and need not even take the rule of law into account. In contractual arbitrations, the arbitrator's decision is final and binding, and appeal rights are generally restricted to misconduct by the arbitrator. For a description of the arbitration process, see generally 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 19.2.1 (Supp. 1994); 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 1:01 (rev. ed. 1991).

Some courts have sought to ease the hardship of the general rule of non-reviewability by adopting a doctrinal rule permitting arbitration awards to be set aside if they are made in "manifest disregard of the law." See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483-86 (D.C. Cir. 1997) (potentially much further reaching in appearing to require that arbitration awards affirmatively comply with legal standards). This to date is clearly a minority position, selectively embraced in individual cases. The dominant position remains that arbitration awards are not subject to substantive legal review. See, e.g., Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 n.4 (1956); Moncharsch v. Helley & Blase, 3 Cal. 4th 1 (1992); Merrill, Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986); R.M. Perez & Assoc. v. Welch, 960 F.2d 534 (5th Cir. 1993); Rostad & Rostad Corp. v. Investment Management & Research, Inc., 923 F.2d 694 (9th Cir. 1991).

Early Neutral Evaluation—The U.S. District Court for the Northern District of California is among the courts that have experimented with a dispute resolution mechanism known as early neutral evaluation (ENE), under which an evaluator, not the trial judge, is assigned by the judge to meet with the parties to review the case, discuss disputed issues, explore settlement possibilities, and evaluate the parties' relative chances of prevailing. For an overview of ENE and an analysis of the Northern District of California program, see Joshua D. Rosenberg & H. Jay Folberg, Alternative Dispute Resolution: An Empirical Analysis, 46 Stan. L. Rev. 1487 (1994).
Fact-Finding—In one respect, this relatively underdeveloped form of dispute resolution may be thought of as a settlement enhancement technique, in which the parties (which can include governmental bodies) agree to appoint a mutually acceptable fact-finder and to stipulate to the factual findings of such a neutral. Historically, however, the concept of neutral fact-finding pursuant to court authority is familiar; for centuries, courts have used magistrates and referees for assistance with accounting and other preliminary factual determinations.

Mediation—A process in which a third-party neutral, called a “mediator,” assists the parties in resolving their own dispute. In the “facilitative” model of mediation, the mediator facilitates the parties’ own decision-making process, often in highly creative ways. The mediator has no authority to impose a solution on the parties. Rather, the mediator guides the parties through a series of stages to resolve the dispute in a way mutually agreeable to the parties. The results are only as binding as the parties’ commitments to the results of the mediation, although such agreements are often formalized and confirmed as court judgments. This is the approach to mediation endorsed by the drafters of the Model Standard of Conduct for Mediators, which was produced by the American Arbitration Association (AAA), the Litigation and Dispute Resolution sections of the American Bar Association, and the Society for Professionals in Dispute Resolution. See Model Standard of Conduct for Mediators Rule VI cmt. (1995) (“The primary purpose of a mediator is to facilitate the parties’ voluntary agreement.”). The “facilitative” approach to mediation should be distinguished from the “evaluative” approach, in which the mediator evaluates the parties’ positions and renders opinions on how the conflict should be resolved. On mediation generally, see C. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 32-33 (1987); Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy, Practice §3:02 (2d ed. 1994); Jay Folberg, A Mediation Overview: History and Dimensions of Practice, 1 Mediation Q. 3 (1983).

Mediation/arbitration—“Medarb” refers to an entire class of procedures that combine various aspects of mediation and arbitration. For example, some banks now require mandatory ADR of all disputes involving customer deposit accounts, such as personal or business checking and savings accounts, and specify that disputes that cannot be resolved informally go first through mediation and then through mandatory and binding arbitration if mediation fails. This form of dispute resolution is provided for as a grievance mechanism in labor-management agreements and, increasingly, in consumer banking. See generally Stephan B. Goldberg, The Mediation of Grievances Under A Collective Bargaining Contract: An Alternative to Arbitration, 77 NW. U. L. REV. 270 (1982) (describing labor-management arbitration process under a collective bargaining contract); Richard C. Reuben, Banking on ADR, CAL. LAW., Sept. 1992, at 17 (discussing adoption of mandatory mediation by Wells Fargo and Bank of America for certain account disputes).

Mini-trials—This form of private dispute resolution is best thought of as an aid to settlement. Although approaches vary, the concept is that the parties present their cases in truncated form to a third-party neutral, who renders an opinion. The opinion is generally not binding, but provides an elaborated basis for settlement discussions between the parties, that may or may not include the neutral. See Mini-Trials: Opportunities for Compromise, 51 TEX. B.J. 34 (1988).

Negotiation—This is the fundamental dispute resolution process, in which two or more disputing parties try to work out their differences without intervention by a neutral. While it is easy to overlook negotiation as a means of dispute resolution, recent scholarship has more fully developed its principles and applications, and has emphasized its usefulness for fundamental problem-solving that can mitigate the need for many of the other dispute resolution techniques. See, e.g., Roger Fisher & William Ury, Getting to Yes (Bruce Patton ed., 2d ed. 1991).

Ombudsman—An ombudsman is a third party who intervenes to address concerns that individuals or dependent groups have with larger and more powerful organizations or bureaucracies. As such, their function may be that of a mediator or that of an advocate. The principal distinction between a factfinder and an ombudsman is that the ombudsman is classically more concerned with preventing future conflict by effectuating systemic changes while also working to resolve individual grievances. See generally Walter Gellhorn, Ombudsmen and Others: Citizens’ Protectors in Nine Countries (1966); Donald C. Rowat, The Ombudsman: Citizen’s Defender (1965); Jeffrey S. Kahana, Reevaluating the Nursing Home Ombudsman’s Role with a View Toward Expanding the Concept of Dispute Resolution, 1994 J. Disp. Resol. 217; Mary P. Rowe, The Ombudsman’s Role in a Dispute Resolution System, 7 Negotiation J. 353 (1991).
practical implications, not only for the role (and rule) of law in the vindication of individual, property, and other positive rights, but also for the character and quality of our constitutional democracy.

A public system of justice is the linchpin of a democratic scheme, reinforcing a multitude of democratic ideals. For example, it provides a neutral and centralized means of ensuring that the democratic structure and legal system function properly and also guarantees public participation in the development, administration, and ultimate application of the laws that govern our society. By doing so, a public system of justice reinforces and deepens the democratic experience. For this reason, ADR arguably presents one of the greatest challenges American civil justice has ever encountered. After all, as currently understood, public justice has little place in ADR, which need not even look to the formal law for its substantive or procedural standards.

As ADR steadily seeps into the landscape of disputes, one can readily envision it silently but surely displacing public litigation as the

Summary Jury Trials (SJT)—Pioneered by U.S. District Judge Thomas Lambros, the SJT is a form of court-ordered mini-trial in which the neutral rendering an opinion is a jury drawn from the same population as that used in actual trials. Again, the SJT should be seen as an aid to settlement. For a description of the history and process of SJTs, see Thomas D. Lambros, The Summary Jury Trial and Other Alternative Means of Dispute Resolution, 103 F.R.D. 461 (1984); Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. CHI. L. REV. 366 (1986).

4. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that the central function of courts is to ensure the proper functioning of representative democracy).

5. While the issue, as any other, may be debated, I generally subscribe to a consensus theory of democracy, of which there are many varieties. See, e.g., I BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (contending that the Constitution is the subject of an ongoing dialogue amongst scholars, professionals, and the people at large, and that the people’s voice is sovereign and heard either through ordinary politics or during periods of extreme mobilization); Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 653-79 (1993) (arguing that “constitutional interpretation is an elaborate discussion between judges and the body politic”). For a contrary point of view, see DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 206-14 (1989).


7. While ADR can be found in the criminal context, this Article focuses on its application in the civil context.

8. For an interesting debate concerning the impact of settlement (which may have effects upon public justice similar to those of ADR) on the public democratic process, see David Luban, Settlements and the Erosion of the Public Realm, 83 GEO. L.J. 2619 (1995) (arguing that settlement most often reduces the public’s participation in dispute resolution, reduces the production of rules and precedents, and leads to an erosion of the public realm); cf. Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 GEO. L.J. 2663 (1995) (arguing that settlement can be participatory, democratic, empowering, educative, and transformative for the parties). For an argument that ADR is a more democratic process than litigation because of its potential to include more parties in the resolution of a dispute, see LAWRENCE SUSSKIND, DEALING WITH AN ANGRY PUBLIC (1996).

9. Determining the magnitude of the ADR movement in the United States remains one of the most important challenges for empirical researchers. This is such a complex and far-reaching task that it may not be attempted on a comprehensive scale. Nonetheless, the growth of ADR may be reckoned by reference to the following measures:
primary means of resolving galvanized civil disputes. Indeed, this phenomenon has already taken place in the high-stakes securities industry where, apart from class actions, public litigation has been all but replaced by mandatory and binding private arbitration and, to an

Court-Related Programs—In 1980, only 10 state courts and one federal district court had ADR programs. See Telephone Interview with Judith Filner, Senior Researcher, National Institute for Dispute Resolution (Mar. 21, 1996). By 1996, nearly half of all federal district courts used mediation programs and about one-fourth also had arbitration programs. See Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers 72-308 (1996) (providing a district-by-district description of ADR programs in federal courts). All federal appeals courts, other than the Fifth and Federal Circuits, have some form of mediation program. Similarly, nearly half of the states have statewide arbitration and/or mediation programs at the trial level and nearly all of them have at least one court that has a mediation program. See Richard C. Reuben, The Lawyer Turns Peacemaker, A.B.A. J., Aug. 1996, at 54, 56 [hereinafter Reuben, Peacemaker].

Non-Court Related Activities—Since its founding in 1926, the (AAA) has been the most substantial provider of arbitration and other internal procedures that today would be called ADR. It administered 62,423 cases in 1995, nearly twice as many as the 35,156 it handled in 1975. See Telephone Interview with Toni Griffin, Director of Communications, AAA (Mar. 27, 1996). Today, industry experts estimate that there are more than 1000 ADR brokerages other than the AAA. Judicial Arbitration and Mediation Services/Endispute (JAMS), a private California company founded in 1979, is AAA's chief competitor as of this writing. JAMS's own growth has been remarkable, from approximately 200 cases in all of 1983 to nearly 1200 per month in 1993, thanks in part to a merger with Endispute in 1994. See Richard C. Reuben, King of the Hill, CAL. LAW., Feb. 1994, at 55. JAMS's officials project a caseload of more than 22,000 in 1997, more than double its 1991 volume of 10,860 cases. See Telephone Interview with Jack Unroe, President, JAMS/Endispute (Apr. 4, 1996).

Professional Memberships—Membership in the country's oldest and largest association of dispute resolution professionals, the Society of Professionals in Dispute Resolution, doubled in the seven years between 1989 and 1996. It currently has approximately 3700 members. See Telephone Interview with Mary Kay LeFevour, Executive Director, Society for Professionals in Dispute Resolution (Mar. 25, 1996). Similarly, the ABA Committee on Dispute Resolution matured into a full ABA Section on Dispute Resolution in 1993 and enrolled more than 5000 members in its first six months. As of September 1996, it had more than 6000 members. See Telephone Interview with Jack Hanna, Unit Manager, ABA Section on Dispute Resolution (Sept. 16, 1996).

Institutional Acceptance—The legal profession's acceptance of ADR has been meaningful, but still somewhat grudging. For example, an American Bar Association Journal poll of a sampling of ABA members who participated in an ADR hearing within the last five years showed that respondents favored mediation to traditional litigation (50.5% to 30.8%), but favored traditional litigation to arbitration (42.5% to 30.8%). Similarly, more than half of all respondents said their law firms were expanding their mediation practices (52.5%), while only 38.1% said their firms were expanding their arbitration practices. The growth in both categories was most prominent among large and mid-sized firms (more than 20 lawyers). The survey had a margin of error of five percent. See Reuben, Peacemaker, supra, at 56-60. Similarly, more than 800 of the nation's largest companies, on behalf of themselves and their more than 2800 subsidiaries, and more than 1500 law firms, including 400 of the country's 500 largest law firms, have signed on to a "pledge" to consider ADR procedures sponsored by the CPR Institute for Dispute Resolution. See Telephone Interview with Barbara Reno, Senior Advisor, CPR Institute for Dispute Resolution (Apr. 4, 1996).

10. I am not suggesting that such a displacement is necessarily undesirable. While ADR may present procedural problems, public litigation certainly presents its own as well. See, e.g., Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. REV. 494, 545-47 (1986). My observations here are merely descriptive of the ADR movement presently underway.
increasing but still much lesser degree, mediation.\textsuperscript{11} The resolution of disputes in other settings, such as employment, construction, medical malpractice, and domestic relations, also appears to be moving in a similar direction.

As informal private justice, ADR has long been recognized as a maze of contradictions and dilemmas.\textsuperscript{12} The hope, of course, is for faster, less expensive, and, perhaps, more satisfying resolution of disputes.\textsuperscript{13} Proponents have praised mediation's power to transform conflict into repose\textsuperscript{14} and arbitration's capacity for efficiency and expertise in the resolution of disputes.\textsuperscript{15} Critics, however, have condemned ADR as just another assault on the jury system.\textsuperscript{16} These critics charge that ADR's processes are secret, not “private,” and deliver a skewed brand of justice that flouts structural safeguards, commercializes dispute resolution,\textsuperscript{17} exploits inequality of bargaining power,\textsuperscript{18} and ultimately fails to

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\textsuperscript{16} See, e.g., Donna Steinsra & Thomas E. Willgang, \textit{Alternatives to Litigation: Do They Have a Place in the Federal Courts?} 57 (1995) ("Mandatory ADR amounts to tort reform under the guise of court reform and has the subtle effect of diminishing opportunities for a jury trial for most litigants by reallocating court resources to alternatives.").


provide adequate remedies for weaker parties, such as women, minorities, and those with less economic power.

Consider the hypothetical story of John A., a thirty-five-year-old African-American middle manager for a major multinational corporation. Throughout his career with the company, John has watched again and again as less-qualified white men and women received promotions that he was denied. He finally sues for race discrimination under state anti-discrimination law, as well as Title VII of the Civil Rights Act of 1964, as amended. John expects a public trial that will expose his company's institutionalized racist policies. His lawyer has even come into possession of a tape in which senior company executives made disparaging remarks about persons of color. He files his claim in superior court, but is forced to take it to arbitration, pursuant to a mandatory and binding arbitration clause in the updated employment manual he had received about five years before.

Because the company's conduct was undeniably egregious and both state and federal law are plainly on his side, his lawyers have rightly told him that he would have prevailed before a jury if the case had gone to trial. However, arbitration is a lower-cost, faster, and more private alternative to litigation. The arbitration clause in John's employment manual specifically requires arbitration of all civil claims, including, but not limited to, claims of employment discrimination on the basis of race, sex, age, religion, color, national origin, disability and veteran status (including claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and any other local, state, or federal law concerning employment or employment discrimination), statutory claims, and claims against individuals or other entities.

It also required that arbitration be initiated within one year after an event giving rise to a dispute, and provided that an employee involved in an arbitration could be represented by an attorney, at her own expense. Finally, it stated that the arbitrator could not award punitive or exemplary damages.
had stayed in public court. The arbitrator in the case, however, is a retired judge\(^2\) who is moving into arbitration, and who recognizes that her natural constituency is the management side of the employment bar. In this case, the arbitrator chooses to ignore the law by holding the company to a standard of proof lower than that which federal law would have required, and rejects John’s claim as that of yet another disgruntled worker. Even though John can move to vacate the award, under the current state of the law a trial court would confirm it because there was no misconduct by the arbitrator, and the formal law need not be applied in an arbitration.\(^7\)

Consider, too, the hypothetical plight of Jane B., a woman in San Mateo County, California, seeking a divorce in order to get away from her famous husband, a frequent batterer. Like many other jurisdictions, San Mateo has adopted a court rule requiring all family law matters to be mediated by a private mediator before resorting to trial, if either party so requests.\(^2\) Jane’s husband does not want to go to court, so he requests a mediation instead. Jane, having a good sense of what mediation is, does not want anything to do with it, fearing her husband’s reprisals at home. As a result, she is not particularly forthcoming during the court-compelled session, and this prompts the (male) mediator to suggest openly that her refusal to cooperate is an attempt to sabotage the process. Unfortunately, the mediator has had no meaningful training in spotting or dealing with domestic violence situations. Under the duress of that pressure, Jane discloses the beatings she endured and her attendant feelings of fear, frustration, and anger toward her husband. That night, the two get into a fight over what she said at the mediation. As the argument escalates, her husband begins to beat her again, this time hitting her so hard that she falls and hits her head on a piece of furniture, which kills her.\(^2\)

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26. Our neutral here, of course, need not be an attorney with any legal training as an arbitrator. See, e.g., 3 MacNeil et al., supra note 3, §27.2, at 27:2-27:4; Rogers & McEwen, supra note 3, §11:02. Moreover, to the extent she is a lawyer, the hypothetical could just as easily have been constructed to include a situation in which she and her former firm had represented the corporation in the past. Such complexities, however, are not necessary to make the point.

27. See Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854) (“If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.”); Moncharsh v. Heily & Blase, 832 P.2d 899, 900 (Cal. 1992) (holding that “an arbitrator’s decision is not generally reviewable for errors of fact or law, [even if] such error appears on the face of the award and causes substantial injustice to the parties”); 4 MacNeil et al., supra note 3, §40.1.4; see also Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846, 861 (1961) (citing a study demonstrating that while 80% of arbitrators believed their decisions should be based on substantive legal principles almost 90% considered themselves free to ignore these principles if justice required).


29. This is, admittedly, a rather extreme hypothetical, although some research has indicated that “approximately half of all cases submitted for mediation involve some history of spousal abuse.” See
Were the decisions of John and Jane to participate in their respective arbitration and mediation really the products of voluntary agreements? Was it proper for the trial court in John's case to force him to have his dispute resolved by a neutral with a financial incentive to rule in favor of one of the parties, or, in Jane's case, by a mediator with tragically insufficient training to see and accommodate the inherent risk in her situation? Was the trial court correct in confirming an award in John's case that directly contradicts settled law, ultimately depriving John of the benefit of the very public law that society has democratically determined should govern situations such as his? To what degree is the state responsible for Jane's death?

These are important jurisprudential questions, and ones with all-too-human faces: just moments before being wheeled into serious knee surgery, a Utah housewife in her surgical gown is told she must sign a mandatory arbitration agreement in order to proceed with the operation; a businessman loses his business and life's savings when a private judge, brought in to settle a minor partnership dispute orders, the


However, such screening may not always be effective, as victims of domestic violence may not always be forthcoming about their plights, and definitions of domestic violence can vary. See Mary Pat Treuthart, All That Glitters is Not Gold: Mediation in Domestic Abuse Cases, 30 CLEARINGHOUSE REV. 243, 244 n.7 (1996). Moreover, while most court-connected programs either provide for or insist upon mediator training for domestic violence situations, the effectiveness of such efforts will nonetheless depend, at the least, upon the quality of the mediator in his or her ability and willingness to detect signs of a domestic violence problem during the course of a mediation (and to promptly and safely halt the mediation) as well as the victim's willingness to accept and disclose such information. This hypothetical, of course, is drawn from a situation in which structural safeguards were ineffective, with catastrophic results.

30. See Bingham, supra note 17 (arguing that empirical research reveals a substantial bias among arbitrators in favor of repeat players).

31. There is substantial controversy within the mediation community over whether domestic violence cases should be mediated, even when both parties consent, much less in compelled situations like the one offered in our hypothetical. Compare, e.g., Karla Fischer et al., The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU L. REV. 2117 (1993), and Andree G. Gagnon, Ending Mandatory Divorce Mediation for Battered Women, 15 HARV. WOMEN'S L.J. 272 (1992) (arguing that domestic violence cases are fundamentally incompatible with the mediation process) with Peter Salem & Ann L. Milne, Making Mediation Work in a Domestic Violence Case, FAM. ADVOC., Winter 1995, at 34, and Rosenberg, supra note 14.

32. See Bary Meier, In Fine Print, Customers Lose Ability to Sue, N.Y. TIMES, Mar. 10, 1997, at A1, C7. Remarkably, the agreement Doncene Sosa signed with Salt Lake City, Utah, surgeon Dr. Lonnie Paulos included a provision requiring "patients who won less than half the amount they sought against Dr. Paulos in a medical malpractice claim . . . to pay the doctor both his legal fees and $150 for every hour he spent on the case, even if he was found liable." Id.
distribution of all partnership assets;\textsuperscript{33} in an arbitration alleging that his broker has defrauded him, a securities investor is effectively precluded from presenting evidence.\textsuperscript{34}

Still, such questions have been largely unasked and unanswered, at least at a constitutional level, during what may properly be seen as the first generation of modern ADR litigation.\textsuperscript{35} Instead, this initial era of ADR jurisprudence has centered around the historical and legal barriers to the facial legitimacy of ADR. Given the need for efficiency in the public resolution of disputes, overcoming such barriers was a necessary first step. This first generation of jurisprudence saw the evolution of judicial attitudes from centuries of distrust into a powerful policy favoring ADR,\textsuperscript{36} the adoption of a contract model for private ADR that practically precludes the application of contractual defenses,\textsuperscript{37} and the embrace of an increasingly broad reading of state and federal ADR laws, especially the Federal Arbitration Act and its preemptive effect.\textsuperscript{38}

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34. See Telephone Interview with Jeffrey Liddle, Attorney (Feb. 9, 1996).
35. This first generation of litigation took place between 1976 and 1996. The modern ADR movement is generally acknowledged to have been born with the Pound Conference in 1976, which was cosponsored by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States. The conference invoked a speech presented to the ABA by Harvard Law School Dean Roscoe Pound on August 29, 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337 (A. Leo Levine & Russell R. Wheeler eds., 1976) [hereinafter THE POUND CONFERENCE]. The 1976 conference was chaired by Chief Justice Warren Burger and featured, among other presentations, a speech by Harvard Law School Professor Frank E.A. Sander entitled "Varieties of Dispute Processing," which called for courts to use processes other than adjudication to solve disputes. Sander's speech described a concept later known as the "multi-door courthouse." See id. at 65; see also Jeffrey W. Stempel, Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?, 11 OHIO ST. J. ON DISP. RESOL. 297, 308 (1996).
37. See infra notes 118-127 and accompanying text.
\end{flushright}
These are the structural issues that are to be expected during an initial period of institutionalization. Ahead, however, lies a second generation that promises to focus more closely on the substance of ADR processes. Attorneys frustrated with the inadequacy of contractual and statutory remedies provided in the current system of alternative dispute resolution are just beginning to look toward their state and federal constitutions for protection. As this happens, state and federal courts will be forced to confront, at a constitutional level, the blurred distinction between public and private justice and the critical role of the state in the ADR system.

A necessary predicate of these inquiries is the question of whether seemingly private ADR hearings constitute government action so that constitutional principles apply. This Article addresses that issue, contending that the United States Supreme Court’s “state action” doctrine can often compel an understanding of ADR providers as “state actors” when their services are court-ordered, legislatively mandated, or contractually compelled. While conventional wisdom holds that ADR and public litigation operate as independent “public” and “private” spheres, I contend that they really represent two different spheres within the single galaxy of public dispute resolution. So understood, it is

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These should be seen as early cases, however, as no court yet has comprehensively analyzed the state action question. At least two current challenges to the constitutionality of the mandatory arbitration of disputes in the securities industry seem to present arguments more sophisticated than those rejected in the foregoing cases. See Duffield v. Robertson, Stephens & Co., C-95-109 (EFL) (Aug. 6, 1996); Martens v. Smith Barney, Inc., No. 96-3779 (S.D.N.Y. 1996); Cremin v. Merrill Lynch, No. 96C3773 (N.D. Ill.); see also De Guerre v. Universal City Studios, Inc., No. BC61389 (Cal. Sup. Ct.), appeal docketed, No. B0912904 (Second District, Cal. Ct. App. 1996) (challenging the constitutionality of California’s judicial reference statutes).

40. It can be argued that ADR is really an alternative to settlement processes attendant to public litigation. JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 9-10 (1996). But such a view, reduced to its basic terms, would convert all dispute resolution processes into settlement vehicles. This may be
Of course, this argument seems more intuitive when ADR is directly related to the judicial system itself, either through legislative mandate or court rules. Even in this context, it is remarkable to note the paucity of reported decisions on constitutional claims beyond those involving jury trial rights. This Article, therefore, is primarily concerned with private contractual ADR, arguing that the history and operation of the statutory schemes delegating the government's traditionally exclusive role in legally binding dispute resolution to seemingly private parties, and the intense entanglement of public courts in that delegation, often establish state action that must trigger constitutional protections at some level.

The implications of a realization that seemingly private ADR hearings often constitute state action are both reassuring and startling. The sensitive integration of constitutional norms into ADR should enhance the popular legitimacy of those processes by restoring to some degree forsaken elements of procedural fairness that have provided the basis for some of ADR's severest critics. It should also provide far greater empirically grounded, but at a structural level renders the term "alternative" virtually meaningless in the context of dispute resolution.

41. This concept, of course, draws on Frank E.A. Sander's vision of a multi-door courthouse, in which disputants would be routed to the type of dispute resolution forum—litigation, arbitration, mediation, fact-finding, etc.—that would be most appropriate for the resolution of the dispute. See Frank E.A. Sander, Varieties of Dispute Processing, in THE POUND CONFERENCE, supra note 35, at 65. For similar views, see Robert M. Parker & Leslie J. Hagin, "ADR" Techniques in the Reformation Model of Civil Dispute Resolution, 46 SMU L. REV. 1905, 1912-14 (1993); Kim Karelis, Private Justice: How Civil Litigation Is Becoming a Private Institution—the Rise of Private Dispute Centers, 23 Sw. U. L. REV. 621, 637-39 (1994).

42. For an overview and summary of cases that do address these problems, see Lucy V. Katz, Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?, 1993 J. Disp. Resol. 1, 22-31. The Seventh Amendment has largely consumed the limited judicial energy devoted to constitutional questions to date. See, e.g., Dillard v. Merrill Lynch, Pierce, Fenner & Smith, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) (finding Seventh Amendment rights waived by signing of valid arbitration agreement); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1179-81 (5th Cir. 1979) (holding that mandatory mediation of medical malpractice claims does not violate Seventh Amendment); Kimbrough v. Holiday Inn, 591 F.2d 1164, 1179-81 (5th Cir. 1979) (holding that mandatory mediation of medical malpractice claims does not violate Seventh Amendment); Firelock, Inc. v. District Court, 776 P.2d 1090 (Colo. 1989). Despite some insightful early work, even legal scholarship has hardly given the state action question much thought. See, e.g., Dwight Golann, Making Alternative Dispute Resolution Mandatory: The Constitutional Issues, 68 Or. L. REV. 487, 495 (1989) (arguing that, because constitutional rights can be waived, the issue is whether binding, consensual arbitration infringes on constitutional rights, but whether there was a voluntary and informed waiver). But see Edward Brunet, Arbitration and Constitutional Rights, 71 N.C. L. REV. 81, 111-13 (1992) (recognizing the potential state action issue in ADR, but dismissing the possibility of a litigant being able to argue successfully that ADR is state action).

43. This should be the case both as a substantive doctrinal matter, as well as through a "Hawthorne effect," improving best practices within the industry. For more on the Hawthorne effect, see E. MAYO, THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION (1933); E. MAYO,
justification for the expenditure of public funds and other resources on state and federal court-related programs, as well as governmental oversight of private ADR providers in the form of competency and quality assurances, as well as disciplinary processes currently left to self-regulation.

Yet this integration process promises to be as challenging as it is necessary. While due process under the Fifth and Fourteenth Amendments provides a central concern, the application of equal protection principles in a dispute resolution system that is arbitrary by design, the role of a free press in a system that cherishes its privacy, and the civil rights liability of ADR providers are other questions that scratch only the surface of a jurisprudence in waiting.

Plainly, public policy considerations regarding the potential for efficiency, effectiveness, and party satisfaction strongly favor the availability of alternative forms of dispute resolution—not a mere recreation of the public litigation system. It seems clear, therefore, that constitutional power should apply with less force in ADR processes than in full-blown adjudication, much as it does in the administrative context. ADR processes vary widely, as do their relationship to the government and the factual and legal questions they raise. Therefore, it seems equally clear that applying such a principle will require step-by-step consideration of ADR goals and practices and constitutional standards, constitutional right by constitutional right, ADR procedure by ADR procedure, and factual application by factual application. Surely broader principles will emerge. The right to a neutral, competent, and impartial tribunal—free from personal economic incentives in decision making—would for example seem a basic requirement of any constitutionally grounded hearing. But this is particularly problematic, as one
must concede that it is difficult to define competency and neutrality, much less assure it, in today's seemingly private, competitive, and coercive ADR environment.\(^4\)

For such reasons, this Article takes only the first step toward a constitutional understanding of ADR, and indeed invites the debate over its implications that matters so fundamental to our national character deserve.\(^4\) It addresses only the threshold question of whether there can be state action in seemingly private ADR, leaving for another day important issues of how to integrate constitutional norms into these seemingly private processes without sacrificing the very virtues of those processes that oblige public policy to favor their use.\(^4\) Moreover, it

business associate of the arbitrator, and was intimately involved with the Association's board of directors. The award was later vacated by a trial court on grounds of actual bias. See Indio Centre Partners v. Soderstrom, L.A. Sup. Ct. Case No. NS 004752 (copy of complaint on file with author). For a news article about the cases and another questionable arbitration involving SCAA in which the trial court refused to provide relief, see Myron Levin, Caveat: Know Your Arbitrator, L.A. TIMES, Jan. 19, 1997, at D1.

In another example, MCI Telecommunications Corp. v. Matric Communications Corp., Civil Action No. 96-11975-EFH (E.D. Mass), an outside provider of marketing services for MCI is seeking to void a trial court decision to compel arbitration, after the discovery of an allegedly previously concealed contractual relationship between the provider of arbitration services specified in the MCI/Matrix contract and MCI. Among other things, the contract called for the provider to provide special administrative and other services to MCI—including quarterly reports analyzing the provider's settlements and recommendations, specialized training of arbitrators who will hear MCI cases, and financial incentives to the provider if it asserts jurisdiction over cases brought to it by MCI. See Memorandum in support of motion of Matrix Communication Corporation under Fed. R. Civ. P. Rule 60(b) for relief from court's order of October 10, 1996 Compelling Arbitration 14-17. The memorandum also alleges that MCI has paid more than $200,000 to the provider for dispute resolution services. See id.\(^4\)

47. See, e.g., Nancy H. Rogers & Frank E.A. Sander, Whither Certification: A Dialogue on Qualifications, 3 DISP. RESOL. MAG., Spring 1997, at 5-6.\(^4\)

48. This analysis specifically excludes any consideration of ADR procedures that arise from collective bargaining agreements. Such agreements involve collective rights arising from voluntary membership in trade or other organizations, subject to intense bargaining by sophisticated parties, and have a long and rich judicial history that addresses many of the issues not currently considered in the jurisprudence surrounding other forms of ADR. For more on ADR in collective bargaining situations, see Frank Elkhouri & Edna Asper ElKhouri, How Arbitration Works (4th ed. 1985); John Kagel & Douglas H. Barton, The Practice and Law of Labor Arbitration (1985); Theodore J. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, 75 MICH. L REV. 1137 (1977).

I am also excluding consideration of contractual situations in which there is no dispute over the ADR provision and the result is confirmed by court order, as well as non-contractual private ADR situations in which the ADR results are not confirmed by courts. These raise very difficult questions that are beyond the scope of this Article's more preliminary effort to begin assessing the state action issue in situations in which there is at least some direct governmental compulsion of ADR proceedings.

49. It should be noted that we already have seen a recognition of the need for due process standards in the private employment sector, as well as some efforts to define them. The President's Commission on the Future of Worker-Management Relations, chaired by Harvard economist and former Labor Secretary John Dunlop, for example, called for "quality standards" in private ADR that may be seen as the functional equivalent of due process standards. See U.S. DEP'T. OF LABOR AND
focuses primarily on arbitration as an ADR technique because of its rich recorded heritage, its fundamental similarity to traditional litigation as an adjudicatory process involving a third-party decision maker, and its prominent role in the rise of modern ADR. Finally, this Article will proceed with specific constitutional concern for the Fifth and Fourteenth Amendment rights to due process, as procedural rights are arguably the core concerns implicated by a seemingly private dispute


While the protocols are a remarkable effort to solve difficult problems, they fall short on at least two key points. The drafters failed to reach agreement on the core issue of the acceptability of predispute arbitration agreements among parties of unequal bargaining power, leaving that core issue unresolved. The voluntariness question is crucial for plaintiffs' employment lawyers, who generally contend that predispute arbitration agreements cannot be voluntary because of the inherently imbalanced and coercive nature of the employment relationship, and because the employee cannot make a knowledgeable waiver of legal rights in the absence of a specific factual context for the dispute. See Richard C. Reuben, Mandatory Arbitration Clauses Under Fire, 82 A.B.A. J., Aug. 1996, at 58-60.

Moreover, the protocols fail to provide for enforcement or oversight mechanisms, thus rendering their standards purely aspirational. This is particularly problematic when one considers that it was the overreaching of employers in requiring mandatory arbitration, under often extraordinarily one-sided terms, that generated the need for the protocols in the first instance. Without any disincentives for noncompliance, assurances that such overreaching behavior will be deterred seem rather hollow. See 7 World Arb. & Mediation Rep. 123 (1996). For another criticism of the protocols, see Van Wezel Stone, supra note 18, at 1044-46.

Despite these weaknesses, the protocols have provided a standard that major ADR providers, have said they will use to determine whether to accept cases, a potentially significant step.

50. Mediation, early neutral evaluation, and other forms of ADR raise separate, difficult problems worthy of much more focused attention than our more fundamental inquiry here permits. Mediation, for example, calls for decision by facilitated consensual agreement of the parties. Thus, it seems easier to question how state action could possibly be implicated by such a process—apart, of course, from the state's direct compulsion of attendance at such processes (even as a mere condition precedent for trial), and its often significant role in the selection of the possible mediators through roster development, mediator training, and other necessary incidents of program implementation. See, e.g., Charles Pou Jr., "Wheel of Fortune" or "Singled Out"?: How Rosters "Matchmake" Mediators, 3 Dispute Resol. Mag., Spring 1997, at 10-13.

Similarly, early neutral evaluation by definition does not produce a legally binding result. But an evaluator's role is to help bring the parties to settlement by providing a candid—and, under court auspices, neutral—assessment of the case. Therefore, how the evaluator frames the factual and legal issues and arguments can, and indeed should, be enormously influential. See Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 Science 453 (1981) (arguing that decision frames are partly controlled by the formulation of the problem, and partly controlled by the norms, habits, and characteristics of the decision maker).
resolution process.\textsuperscript{51} Despite these necessary analytical limitations, this Article will frequently refer beyond arbitration to the larger concept of ADR, admittedly sacrificing some precision in order to underscore the broader context in which the more focused analysis proceeds.

Part I traces the landscape and history of modern ADR in order to provide a proper context for the state action discussion in Part II.

I

THE LANDSCAPE AND HISTORY OF MODERN ADR

A. A Disputant's Route Into ADR

The route into public litigation is as simple as filing a complaint in the appropriate court or defending against an action there. That the route into ADR often commences at that point begins to sensitize us to the critical role of the state in modern ADR. An understanding of the basic routes by which a disputant may find himself or herself in an ADR hearing begins to demonstrate how the government plays a central, indispensable, and inseverable role in the seemingly private ADR system.

One common route to ADR is through legislatively or judicially mandated programs for certain types of disputes.\textsuperscript{52} Many state legislatures have enacted statutes that require certain cases—identified primarily by subject matter and/or the amount in controversy—to be arbitrated or mediated before they may be tried in court.\textsuperscript{53} These statutes generally provide the neutral with full judicial immunity\textsuperscript{54} and

\textsuperscript{51} ADR certainly brings into focus other constitutional questions, such as separation of powers and the rights to a jury trial, equal protection, and a free press. See Edward Brunet, \textit{Arbitration and Constitutional Rights}, 71 N.C. L. REV. 81 (1992); Katz, \textit{ supra} note 42.


broad, quasi-judicial power backed by the comprehensive enforcement resources of the state. Similarly, many courts have adopted ADR programs as court-management efforts for certain types of cases, such as child custody cases in state courts and pro se civil rights cases in federal courts. Because the legislatively enacted ADR schemes typically direct courts to handle certain classes of cases in certain ways, both legislatively mandated and judicially initiated programs hereafter will be referred to collectively as “court-related” ADR.

Contractual ADR, on the other hand, is the product of private contractual arrangement. There are two contractual routes to an ADR hearing, distinguished on the basis of when the parties agreed to resolve the dispute in this manner. In the post-dispute setting, the parties agree after a conflict has arisen to have a third party decide the dispute, without resort to courts for adjudication. In the more controversial pre-dispute setting, the parties have agreed, at least theoretically, prior to the dispute, to resolve the problem through ADR. Such agreement is commonly reflected in the form of a “mandatory arbitration clause” in a formal written contract, although one’s understanding of such mandatory clauses need not be limited to arbitration. These clauses often

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55. See generally PLAPINGER & STIENSTRA, supra note 9; Susan Keilitz, Court Annexed Arbitration, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 36, 36-50 (Susan Keilitz ed., 1993).

56. These are also variously referred to as court-annexed, court-encouraged, and court-ordered processes, among other labels. While there may be subtle differences within this taxonomy, they are immaterial for purposes of this Article. All of these processes are referred to collectively hereinafter as “court-related” programs.
contain mediation, "med/arb," early neutral evaluation, and other types of procedures, as well as such dispute-resolution limiting efforts as an agreement to cap the length of trials at a certain number of days.\textsuperscript{57} Such clauses have been enormously controversial, raising substantial questions of voluntariness, as well as ones over the ability of the parties (especially those with lesser power) to make such a knowledgeable choice in the absence of a specific context.\textsuperscript{58}

For historical reasons discussed more fully below, all fifty states and the District of Columbia have enacted specific statutes, most patterned after the New York Arbitration Law of 1920 and the Federal Arbitration Act of 1925, or the Uniform Arbitration Act,\textsuperscript{59} providing for the enforcement of pre-dispute arbitration agreements and for the confirmation of the conclusions of arbitration proceedings as a court judgment or a rule of court.\textsuperscript{60} California's statutory scheme is typical,

\begin{itemize}
\item \textsuperscript{57} This agreement is occasionally entered into by parties associated with the Intel corporation. See Telephone Interview with Tom Dunlap, Vice President and General Counsel, Intel Corporation (Apr. 30, 1996).
\item \textsuperscript{58} Substantial questions may be posed concerning the voluntariness of such predispute agreements because of the direct and indirect coercion that often accompanies their use. For example, many businesses now require assent to such procedures as a condition of prospective or continuing employment. In response, the U.S. Equal Employment Opportunity Commission (EEOC) has issued a formal policy statement "reiterating" its previous positions that such practices are contrary to the right-to-trial provisions of Title VII of the Civil Rights Acts of 1964 and 1991. The National Labor Relations Board (NLRB) has also determined that such coercive procedures can constitute an unfair labor practice and has authorized its local offices to bring complaints based on such acts. See Richard C. Reuben, Two Agencies Review Forced Arbitration, A.B.A. J., Aug. 1995, at 26; see also EEOC v. River Oaks Imaging, 1995 WL 264003, at *1 (S.D. Tex. 1995) ("The EEOC has shown by a preponderance of the evidence that the so-called [mandatory] 'ADR Policy' of ROID is so misleading and against the principles of Title VII of the Civil Rights Act of 1964 that its use violates such law."); Bentley's Luggage Corp., NLRB Case No. 12-CA-16658 (Advice Memorandum issued Aug. 21, 1995) (authorizing issuance of a complaint against an employer who fired a worker for refusing to sign a provision requiring the employee to arbitrate any dispute arising out of the employment relationship). See also Carrington & Haagan, supra note 18.
\item While a full discussion of voluntariness in ADR agreements is beyond the scope of this Article, the issue is addressed briefly below. See infra notes 189-199 and accompanying text. For more on this issue, see Stephen J. Ware, Employment Arbitration and Voluntary Consent, 25 Hofstra L. Rev. 83 (1996).
\item The UAA was developed in 1955 by the Commissioners on Uniform State Laws and is substantially similar to the FAA and the 1920 New York Act. For a detailed comparison of the FAA and the UAA, see Joseph Calagiovanni & Thomas W. Hartmann, Enforcing Arbitration Awards, 50 Disp. Resol. J. 14 (1995).
providing for the validity, enforceability, and irrevocability of pre-dispute arbitration agreements,\(^6\) delineating procedures for conducting the hearings, including a right to counsel,\(^6\) investing broad judicial powers in the neutrals to order depositions\(^3\) and discovery,\(^4\) including subpoena\(^5\) and sanction\(^4\) powers, and conferring “judicial” immunity upon the arbitrators.\(^7\) In addition to judicial enforcement of the clauses, the statute also establishes an essential and active supervisory role for public courts. It provides that challenges to the validity of the agreements to arbitrate be decided by trial courts.\(^8\) It empowers trial courts to correct, modify, or vacate arbitration awards and, perhaps most significantly, authorizes them to confirm private arbitration awards\(^7\) and enter them as judgments of the court that are generally unappealable on substantive grounds.\(^2\)

The formalization of mediation is more recent, but such agreements are often treated as arbitration awards under these statutes for enforcement purposes, a process called the “confirmation” of the agreement. See, e.g., CA. CIV. PROC. CODE § 1297.401 (Deering 1996); CAL. FAM. CODE § 3186 (Deering 1995). See generally ROGERS & McEWEN, supra note 3, § 3.02 (discussing the format and techniques of a typical mediation session); id. § 8.02 (discussing the enforcement of mediation clauses in contracts).

61. See CAL. CIV. PROC. CODE § 1281 (West 1996).
62. See id. §§ 1282.2., 1282.4.
63. See id. §§ 1283, 1283.05.
64. See id. § 1283.05.
65. See id. § 1282.6 (West Supp. 1996).
66. See id. §1283.05(b) (West 1982).
68. See id. § 1281 (West 1982); see also First Options, Inc. v. Kaplan, 115 S. Ct. 1920, 1921 (1995).
70. See id. §§ 1286-1286.6.
71. See id. § 1286 (West 1982).
72. See id. § 1287.4.
enforceable," except upon grounds sufficient to revoke any contract. 74 It authorizes courts to hear formation-based challenges to the agreement to arbitrate 75 and, upon determining the validity of the agreement, empowers the court to enforce it by staying a pending legal action until after the arbitration, 76 and by appointing an arbitrator or umpire if a contract so provides and/or the parties cannot agree on a neutral. 77 It also confers upon arbitrators the power to compel the attendance of witnesses and the production of documents, with the same contempt power for noncompliance as that given to traditional federal judges, 78 and, if the parties' prior agreement to arbitrate so designates, permits the prevailing party to have the court enter the award as a judgment of the court. 79 Finally, the federal scheme limits the grounds for appealing arbitration awards to situations in which the award was procured by corruption, fraud, undue means, or upon the misconduct of the arbitrator. 80 It also limits the bases for vacating and modifying the awards. 81

As will be seen below, the nature of these routes into ADR bears crucial significance in the application of the rationales of state action to ADR, as does a dramatic shift in judicial policy toward ADR.

B. The Historical Relationship Between Contractual ADR and the Courts

Court-connected ADR is a relatively recent phenomenon, 82 but contractual ADR has a rich heritage, seen most formally in the contractual arbitration context. While a full exposition of ADR's pedigree is well beyond the scope of this Article, 83 it is essential to note that questions over the enforceability of private agreements to arbitrate disputes, particularly those involving pre-dispute agreements, have dominated the historical relationship between arbitration and the courts over many centuries, and so may be seen as a vehicle to characterize the relationship between the courts and other, less tested ADR processes as well. Simply stated, without a mechanism for enforcing the agreements to arbitrate, such promises were seen as essentially illusory; either party could walk away from the agreement with impunity.

74. Id. § 2.
75. See id. § 4.
76. See id. § 3.
77. See id. § 5.
78. See id. § 7.
79. See id. § 9.
80. See id. § 10.
81. See id. § 11.
82. See supra note 9.
1. Historical Reluctance to Enforce Agreements to Arbitrate

Enforceability was not a problem during arbitration’s formative years in medieval England, where it was used primarily by traveling crafters’ guilds and merchants to resolve commercial disputes quickly. In that setting, arbitration awards were largely enforced through communitarian norms. But, as England became more sophisticated and the use of arbitration expanded, disputants increasingly looked to courts of law to enforce private agreements to arbitrate, first through mutually signed written instruments called “deeds,” and then through conditional bonds that required each of the parties submitting a dispute to arbitration to include a bond under seal that was enforceable by the obligee whenever any of the conditions in it were not met. As a compliance incentive, English courts often set these bonds at high values, even double the amount of the debt, which would be redeemable in full upon noncompliance with the arbitrator’s decision.

The earliest English judicial decisions, however, demonstrate the reluctance of courts to enforce these private agreements. The theory behind this reticence was first articulated by an eighteenth-century King’s Bench court in Kill v. Hollister, which bluntly ruled that such agreements wrongly “oust” properly constituted courts of their jurisdiction. Commentators have advanced two primary reasons for the existence of what has come to be known as the “ouster doctrine.” The first of these has suggested that judges were wary of the fact that arbitration could result in miscarriages of justice because the process included no procedural safeguards to prevent bias in the determination

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85. The intersection of law and arbitration has long been difficult and complex. While arbitration is a private procedure, early English courts “undertook to fit it into the regular common law system.” Sayre, supra note 83, at 598. Professors Bruce Mann and Jerold S. Auerbach have argued forcefully that arbitration progressed inevitably from an informal process to a practice fully integrated with the formal law. See Jerold S. Auerbach, Justice Without Law? (1983); Mann, supra note 86, at 468-81.


87. I am speaking here of the initial agreement to arbitrate, not the enforcement of an arbitration award.


89. Kill was not the first significant case on arbitration. That distinction commonly falls on Vyniar’s Case, 77 Eng. Rep. 597 (K.B. 1609), in which Lord Coke voided an arbitration award made after the revocation of one party’s agreement to arbitrate, but sustained the right of the other party to recover damages under a bond intended to secure arbitration. The case is conventionally cited as the wellspring of what would become a deeply entrenched doctrine of judicial distrust of arbitration agreements, the “doctrine of revocability.” See, e.g., Howard, supra note 83, at 28; Sayre, supra note 83, at 598-605.
of rights and duties and could easily lead to many different forms of abuse.\textsuperscript{90} A more cynical theory, however, pinned judicial reluctance to enforce arbitration agreements on greed, arguing that private arbitration was seen as an economic threat to English judges, whose incomes often depended on fees from disputants.\textsuperscript{91} In any case, Parliament responded to commercial interests by enacting in 1684 an arbitration statute that authorized judicial enforcement of agreements to arbitrate as rules of court.\textsuperscript{92} This made properly executed agreements irrevocable and enforceable through the courts' contempt powers.\textsuperscript{93}

The history of ADR in the United States involved both arbitration and mediation, and tracked the English evolution in many ways. Both techniques were commonly used in the colonial period.\textsuperscript{94} While some arbitrations were litigated, some scholars have suggested that enforcement during this time was a lesser issue because of cultural considerations; the socio-religious structure of religiously-based covenant communities, mutual trust, interdependence, and good faith made non-compliance impractical.\textsuperscript{95} However, as the collection of independent colonies matured into the United States, disputes and their resolution became more sophisticated, and communitarian norms proved ineffective at securing compliance. Once again, disputants began looking to courts to enforce private promises to arbitrate. While the courts were willing to enforce arbitration awards, American judges, like their English counterparts, were reluctant to enforce the actual agreement to arbitrate. State courts readily embraced the ouster doctrine in the early nineteenth century; the United States Supreme Court did the same in 1874.\textsuperscript{96} Overwhelmingly, however, American judges seemed to be motivated by concerns for fairness of the judicial process, rather than by their personal financial gain.\textsuperscript{97}

\textsuperscript{90} See Howard, supra note 83, at 27. A variation of this theme is that public policy favors governmental, rather than mere private, resolution of disputes.


\textsuperscript{92} See Arbitration Act, 1698, 9 & 10 Will. 3, ch. 15 (Eng.).

\textsuperscript{93} See Sayre, supra note 83, at 605-08. The 1698 Act has been amended several times. An 1833 amendment provided the parties some protection by establishing a compulsory process for the production of witnesses and testimony. In 1889, the Act was amended again to make any agreement irrevocable, except by leave of the court or unless a contrary intent was expressed. The amendment also ensured that an agreement was to have the same effect as if it had been made an order of the court, and it provided for court review of questions of law raised in the arbitration hearing itself. See id. at 606-07.


\textsuperscript{95} See id.; Mann, supra note 86, at 454-55.

\textsuperscript{96} See Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874).

\textsuperscript{97} See, e.g., Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065).
The ouster doctrine remained the common law rule in the United States until the early twentieth century, when the nation's established commercial and legal communities united to bring down the doctrine through legislative means.\(^9\) The first such effort culminated in 1920 with the adoption of New York legislation that rendered enforceable any "written agreement to submit any controversy thereafter arising or any existing controversy to arbitration" and permitting "the courts of the state to enforce it and to enter a judgment on an award."\(^9\) This landmark New York law was soon followed with the U.S. Arbitration Act,\(^10\) later renamed the Federal Arbitration Act (FAA),\(^10\) which created virtually identical federal legislation and formally eliminated the ouster doctrine in federal courts for commercial cases. The New York law also spurred similar legislation in other states.\(^10\)

Even so, judicial acceptance of arbitration agreements was, for the most part, grudging. Skeptical courts tended to read the statutes narrowly, refused to enforce arbitration submissions that did not strictly comply with the terms of the statutes, and welcomed defenses to enforcement based on "public policy" grounds that generally turned on the ability of parties to access public courts and to avail themselves of public law.\(^10\) This position was reflected in the Supreme Court's decision in *Wilko v. Swan,*\(^10\) a securities fraud case decided nearly a half-century ago under the FAA. There, Justice Stanley Reed, writing for the Court, refused to enforce a mandatory arbitration clause in a securities brokerage agreement under the FAA, holding that "the right to select the judicial forum is the kind of 'provision' that cannot be waived" under the Securities Act of 1933.\(^10\) In theory, then, the statutory reforms of the early twentieth century banished the ouster doctrine. But in practice, the common law rule disfavoring agreements to arbitrate remained vibrant.\(^10\)

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98. I am speaking here of the coordinated efforts of the national, state, and local chambers of commerce, the American Bar Association, and, to a lesser extent, the state and local bar associations of the early twentieth century.


102. See statutes cited *supra* note 60.

103. For a discussion of public policy defenses, particularly during this period, see 2 MacNeil et al., *supra* note 3, §16.


105. *Id.* at 435.

2. The Modern Era

Such was the judicial mood until the 1980s, when the high court, initially reflecting Chief Justice Burger’s concerns about the caseload of the federal courts and the quality of the justice they dispensed, began issuing a series of decisions that took an expansive and forceful view of the FAA’s reach as a reflection of the “national policy favoring arbitration.” In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court ruled that the FAA established a presumption of consent to arbitration agreements, and extended the reach of the FAA to include all statutory claims in which Congress has not “evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” Earlier, in *Southland Corp. v. Keating*, over the vigorous dissent of Justice Sandra Day O’Connor, the Court had held that the Act preempts any contrary state law restricting arbitrability. Near the end of the decade, the Court formally overruled *Wilko*, a move as important for its symbolic rejection of the ouster doctrine as it was to practical claims in the securities industry. The Supreme Court’s broad judicial support of ADR has continued into the 1990s—as the Court has cast


110. See id. at 626.

111. See id. at 628.


113. See id. at 10-16.


115. State courts have been following the Justices’ lead. See, e.g., *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992). In *Moncharsh*, which involved a dispute over client billings between a lawyer and his former firm, the California Supreme Court held that “an arbitrator’s decision is not generally reviewable for errors of fact or law, [even if] such error appears on the face of the award and causes substantial injustice to the parties.” Id. at 900.

At the same time, there is some evidence of a retrenchment at both the state and federal levels. See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (holding that employee’s agreement to waive statutory rights must be knowing to be effective); Sturlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997) (holding that a mandatory arbitration clause in an adhesive employment contract may be unconscionable and therefore unenforceable); Engalla v. Permanente Med. Group, Inc., 43 Cal. Rptr. 2d 621 (Cal. Ct. App.), cert. granted, 46 Cal. Rptr. 2d 747 (1995) (involving “issues concerning the enforceability of arbitration provisions in group health plan medical and hospital service agreements”); *Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243
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aside generalized concerns over power imbalances and upheld mandatory arbitration of statutory employment discrimination claims.\(^6\) It has also expanded the reach of the FAA by giving the term "commerce," as used in the Act, its broadest possible construction.\(^7\)

During this time of expansion by the high court, lower courts have bolstered ADR by virtually fictionalizing the consent-based contract defenses provided for in both federal and state statutory schemes. Those schemes provide a safeguard in what are commonly known as "savings" clauses,\(^118\) which explicitly condition the validity of arbitration clauses on the principles of mutual assent that govern all other contractual provisions.\(^119\) The theory is that, as with other contracts, such safeguards will assure actual assent to the subject matter of the agreement. The problem in practice, however, is that the very safeguard that has been provided in theory has been taken away in judicial practice as the courts have moved to hasten the use of ADR in the modern era.\(^20\)


118. See, for example, the savings clause in the Federal Arbitration Act, requiring that statutorily defined commercial contracts "be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994).

119. See E. Allan Farnsworth, Farnsworth on Contracts, §§ 3.1-3.3, at 160-64 (1990); see also Restatement (Second) of Contracts § 17.1 ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

120. For a comprehensive criticism of the Court's recent jurisprudence in this area, see Carrington & Haagan, supra note 18. They write,
For example, even though contract principles call for neutrality in the interpretation of terms, courts have held that the FAA creates a presumption of consent, requiring that, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of the arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."121 Similarly, the doctrine of implied consent has also been read broadly enough to enforce arbitration clauses included in boilerplate agreements where a specific objection has not been made.122 Courts have also taken a broad view of circumstances that allow for a finding that an arbitration agreement has been incorporated by reference,123 have upheld the concept of consent by conduct,124 and have routinely upheld ADR provisions in adhesion contracts.125 They have taken an equally narrow view of substantive defenses to the enforceability of arbitration clauses, such as fraud, duress, mistake, undue influence, and lack of capacity. As the authors of a prominent treatise on federal arbitration law have observed, "[i]t is relatively easy to identify the principles for avoiding contracts on such grounds in general contract law. There are, however, relatively few examples of

As architecture, the arbitration law made by the Court is a shantytown. It fails to shelter those who most need shelter. And those it is intended to shelter are ill-housed. Under the law written by the Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees; the protective police power of the federal government and especially of the state governments is weakened; and at least some and perhaps many commercial arbitrations will be made more costly while courts determine whether arbitrators have been faithful to certain federal laws.

Id. at 401.


122. See, e.g., Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 471 (9th Cir. 1991) (holding that ambiguously worded "Memorandum of Intent" must be construed to create contract to arbitrate disputes, and contractual defenses to such agreement must be decided by arbitrator); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2nd Cir. 1987) (holding that parties who sign contract including arbitration agreement are bound by that agreement, even if they did not realize it was in the contract); In re Cajun Elec. Power Coop., 791 F.2d 353, 354 (5th Cir. 1986) (holding that commercial party who signed a writing containing an arbitration provision was compelled to arbitrate, even though unaware of the provision); Middlebrooks v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. CV 89-HM-5015-NW, 1989 WL 80446 (N.D. Ala. Apr. 5, 1989) (holding that retention for 8.5 years of a check with a confirmation stub containing an arbitration provision implied consent to arbitration).

123. See Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1218 (1995) (holding that a manual provided to NASD arbitrators containing guidance on the issue of punitive damages was incorporated into the parties' standard form brokerage agreement containing an arbitration provision).

124. See 2 MACNEIL ET AL., supra note 3, § 17.3.1.5.

their application in arbitration cases...."126 Indeed, there are almost no reported opinions in which such defenses were successful.127 With the judicial expansion of the enforceability of ADR agreements and the constriction of contractual defenses, it is hardly surprising that the use of ADR has increased exponentially and shows no sign of abating.128

3. Two Assumptions Underlying the Modern Judicial Acceptance of ADR

Legal scholars have generally attributed the remarkably swift change of judicial heart concerning the use of ADR to the interest of judges in reducing their workloads, rather than new doctrinal insights.129 At least two critical assumptions appear to have comforted the courts in furthering this interest. The first is that ADR represents only a change in forum, not in the substantive rights of the parties. Thus, in *Gilmer v. Interstate/Johnson Lane Corp.*,130 the U.S. Supreme Court upheld the mandatory arbitration of Age Discrimination in Employment Act (ADEA) claims, insisting that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."131 This interpretation of ADR appears to be simply an extension of the Court's precedents generally enforcing forum selection clauses in contracts that specify jurisdictions in which disputes will be resolved.132 The second assumption supporting the expanded use of

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126. 2 MacNeil et al., supra note 3, § 19.2.1.
127. MacNeil and his co-authors identify very few cases that might even plausibly be interpreted as supporting such a defense. See, e.g., id. § 19:13 n.25 (identifying Woodyard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 640 F. Supp. 760 (S.D. Tex. 1986), as possibly being a case which holds that nondisclosure will lead to the voiding of an arbitration clause). One case published after their work has held that a mandatory arbitration clause in an adhesive employment contract may be unconscionable and therefore unenforceable. See Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997).
128. See supra note 9 and accompanying text.
131. Id. at 25-26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
132. Historically, the courts viewed change of forum clauses with skepticism. See, e.g., Philadelphia, Baltimore & Washington Railroad Co. v. Schubert, 224 U.S. 603 (1912) (Lochner-era decision applying provision in Federal Employers' Liability Act of 1906 making workers' rights under the statute nonwaivable). For a general discussion, see Linda S. Mullinex, Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court, 57 Fordham L. Rev. 291, 308 (1988). More recently, however, the Court has come to view them more favorably. See,
ADR is that it is more efficient and effective in resolving conflicts, and, by extension, reducing judicial workloads.\(^\text{133}\)

Both assumptions are highly debatable, and I will leave their more exhaustive deconstruction to others.\(^\text{134}\) The very suggestion, however, that a forum that guarantees such procedural safeguards as the right to the benefit of public law, the right to a neutral tribunal, and the rights to present evidence and receive appellate review is the functional equivalent of a procedure that permits, but does not assure, any such safeguards seems astonishing on its face.\(^\text{135}\) One suspects, therefore, that the

\(^{133}\) See, e.g., The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (holding that “reasonable” forum selection clauses, while not historically favored, are prima facie valid when freely negotiated by commercial parties in an international context).

\(^{134}\) The Bremen was later followed by Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (extending The Bremen to consumer cases in upholding a forum selection clause in a standard form cruise line ticket requiring all claims to be decided in Florida).

\(^{135}\) Carnival Cruise Lines has been severely criticized, perhaps most strikingly by Justice Stevens, who affixed a copy of the contested standard form contract containing the fine print forum selection clause to his dissenting opinion. See Carnival Cruise Lines, 499 U.S. at 597-605; see also Lee Goldman, My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts, 86 NW. U. L. Rev. 700 (1992) (contending that economic analysis does not justify the Carnival decision); Linda S. Mullenix, Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction, 27 Tex. Int’l L.J. 323 (1992) (arguing that Carnival failed to properly apply well-established contract law); Northwestern Nat’l Ins. Co. v. Donovan, 916 F.2d 372, 376 (7th Cir. 1990). (Posner, J.) (“If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was Shute; and perhaps no stretch was necessary.”).
reason for such an expansive view of the change-in-forum doctrine is, at least in part, attributable to the second assumption regarding efficiency and effectiveness. While fairly stable during the last decade, judicial caseloads nevertheless remain heavy, making the use of ADR as a docket-clearing device an attractive option to judges who are responsible for those cases.

As the first generation of ADR jurisprudence evolves into the second, one can expect that both of these assumptions will be subject to more intense scrutiny. As was true in the first generation of litigation, securities-related ADR may prove an important bellwether for the change-of-forum doctrine in this regard. The Securities and Exchange Commission (SEC) is considering the adoption of the recommendations of a blue-ribbon task force calling for, among other things, specific limitations on the amount of punitive damages that may be awarded in arbitration cases. Given that punitive damages are widely available in public courts, the veracity of the change-of-forum doctrine would seem to be joined quite concretely. When it is, courts should realize that the change-of-forum doctrine is perhaps more apt than originally conceived—at least as long as we understand those arbitral and other ADR forums to be an expansion of public justice and, therefore, subject at some level to constitutional safeguards.

Continued empirical research into the bases for these assumptions is likely to be particularly important as the second generation moves forward. To date, our empirical understanding of ADR has been largely limited to qualitative issues such as perceptions of fairness and client satisfaction. Researchers only now are beginning to address the more substantive problem of efficiency-related claims. The results are mixed

F.3d 1465, 1486-87 (D.C. Cir. 1997) Remarkably, the court also extended this reasoning to hold that mandatory employment arbitration plaintiffs cannot be forced to pay arbitration fees when vindicating statutory and other rights because they would not be charged such fees in a public court. See id. at 1479-85.


139. See Keilitz, supra note 55, at 1-50.
and controversial, but certainly provide no strong support for the efficiency rationale for ADR.\footnote{140} Such challenges to the support for both assumptions can only influence judicial policy on ADR for the better. While the exercise of judgment is a personal matter,\footnote{141} judicial policy is far better served by objective analysis\footnote{142} than by the importation of personal preferences as to what might constitute "a better way" of resolving disputes.\footnote{143} The dissipation of ADR euphoria should permit judges and other legal policymakers and practitioners to more soberly understand, evaluate, and implement ADR. One reality that should become quickly apparent is that modern ADR is often driven by state action.

\footnote{140. The most comprehensive such effort to date is a congressionally mandated evaluation of pilot alternative dispute resolution programs authorized for certain federal district courts under the Civil Justice Reform Act of 1990. See Kakalik et al., supra note 40, at 48-53. The study was jointly performed by the RAND Institute for Civil Justice and the Federal Judicial Center (ICJ/FJC), and focused on five demonstration districts: California (Southern), New York (Eastern), New York (Southern), Pennsylvania (Eastern), Oklahoma (Western), and Texas (Southern). It concluded that efficiency gains have not been realized by the implementation of arbitration, mediation, or ENE in the federal courts under the Act. See James S. Kakalik et al., \textit{Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act} (1996). In particular, the study showed no strong statistical evidence of a reduction in time to disposition, the costs of litigation, perceptions of fairness, or client satisfaction, attributable to any of these procedures (although findings were inconclusive for views of fairness of arbitration). See id. at 17-20.}

\footnote{141. The results of the CJRA studies were consistent with other research indicating the real gains in ADR may be more qualitative than quantitative. See Kellitz, supra note 55, at 1-50; see also Carrie Menkel-Meadow, \textit{For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference}, 33 UCLA L. Rev. 485, 497-98 (1985); Neil Vidmar, \textit{An Assessment of Mediation in a Small Claims Court}, 41 J. Soc. Issues 127, 134-37 (1985) (stating that litigant satisfaction appears to depend upon perceptions of fairness, not whether process used was settlement or adjudication). But see Craig McEwen & Richard Maiman, \textit{Mediation in Small Claims Court: Achieving Compliance Through Consent}, 18 Law & Soc'y Rev. 11 (1984) (mediation perceived as more fair and satisfying than litigation). For an overview of empirical research that compares ADR claims and promises against the empirical literature, see Marc Galanter & Mia Cahill, \textit{Most Cases Settle: Judicial Promotion and Regulation of Settlements}, 46 Stan. L. Rev. 1339, 1351-88 (1994). Nonetheless, the CJRA research proved controversial. Several of the nation's leading ADR researchers and practitioners, for example, signed a statement coordinated by the CPR Institute for Dispute Resolution criticizing its methodology and cautioning policy makers against using it to guide policy on ADR (on file with author).}

\footnote{142. By contrast, an internal study of ADR in another demonstration district, the Western District of Missouri, reached an opposite result. It concluded that ADR reduced time to disposition by 28%, produced a median savings per case of $10,000 (based on attorney estimates) and an average per case savings of $36,215 (assuming two sides per case). See Kent Snapp, \textit{Five years of Random Testing Shows Early ADR Successful}, 3 Disp. Resol. Mag. (forthcoming Summer 1997).}

\footnote{143. For an overview of psychological factors affecting judgment, see Scott Plous, \textit{The Psychology of Judgment and Decision Making} (1993).}

\footnote{144. See Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 Harv. L. Rev. 1, 26-35 (1959) (criticizing judicial activism in post-New Deal civil rights cases).}

\footnote{145. See, e.g., Burger, supra note 13.
II
ADR AS STATE ACTION

In the preceding Part, I surveyed the terrain of modern ADR, briefly sketched the dramatic reversal of judicial policy toward agreements to use such procedures, and emphasized the role of legislatures and courts in directing the modern ADR movement. Does this dependence of ADR on public law bear constitutional significance? As we see in Part II, the answer is yes: The U.S. Supreme Court's modern "state action" jurisprudence seems to compel an understanding that, for constitutional purposes, ADR hearings can constitute state action when they are court-related or contractually enforced. ADR providers therefore must often be seen as "state actors." The state has established the structure through which such hearings are often compelled and legally binding—either through direct compulsion or the delegation of traditionally exclusive governmental power over binding dispute resolution to a private ADR provider—and is an active partner of the private party in the integrated execution of that structure. As noted above, court-related ADR provides the easier case and is treated only briefly here so that more time can be devoted to the more difficult question of seemingly private contractual ADR.

A. The Framework for Assessing State Action

The state action doctrine is a central, if not controversial, tenet through which the public/private distinction is played out in the application of constitutional law. It serves as a recognition that the Constitution and its Amendments are a limitation on government power, rather than on private conduct and choices. The state action doctrine developed over the last half-century primarily as a judicial response to private discrimination, particularly racial bias. Through the use of the doctrine, private businesses were found to have violated constitutional commands when they discriminated against African Americans in restaurants, and private individuals were found to have breached constitutional strictures when they perpetuated racially restrictive covenants or when they effectively foreclosed the right of African Americans to vote.

144. See works cited supra note 42.
While it may be easy enough to recognize a need for a distinction between the public and private spheres, drawing those lines has been, and remains, extraordinarily difficult. The fitful results of a half-century’s effort have left this area of constitutional law a perpetual target of harsh and often colorful scholarly criticism. The state action doctrine has been condemned as “incoherent,” a “conceptual disaster area,” a “failure,” a mere ruse to advance subjective policy goals (particularly in the pursuit of eradicating racial discrimination), and the product of a “misleading search” from the outset. Some scholars have gone so far as to suggest that the doctrine be abandoned altogether in favor of a balancing approach that focuses on constitutional values, while others have defended it for preserving the primacy of the law of a written constitution.

Despite such criticism, the Supreme Court continues to adhere to the doctrine and its limiting effect on constitutional claims. The doctrine continues to be vibrant in a range of contexts, centered most prevalently on race (for example, peremptory challenges and voting rights), but also on creditors’ rights, defamation, and antitrust.

154. See Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 550-57 (1985) (arguing for the abandonment of the state action requirement); see also Black, supra note 150.
156. See infra notes 170-174 and accompanying text.
157. See New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that constitutional questions may be considered in a private action for defamation because “the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power in fact has been exercised”).
158. The Court’s antitrust “state action” doctrine is statutory. Generally, the issue in this area of the law is the extent to which the Sherman Act bars state efforts to stimulate and regulate their economies and the private actors of which they are comprised. Recognizing the important federalism principles at stake, the Court has carved out a “state action exemption” to federal antitrust laws. See Parker v. Brown, 317 U.S. 341 (1943) (effectively immunizing private actions that are performed at the direction of state law from federal antitrust liability). To qualify for this exemption, the private
among others. Historically, the Justices have used either of two tests in applying the doctrine, finding private conduct to be state action where the private actor performs a public function or performs a private function that has a close "nexus" to, or "entanglement" with, the government. The Court has also recognized that state delegation of governmental functions can be the basis for a finding of state action, although delegation as such has not yet achieved formal acceptance as an independent third strand of state action.

In recent years, the Court appears to have reiterated these different tests within a single, two-part framework for analyzing state action questions. This analytical framework was articulated in Lugar v. Edmondson Oil Co., amplified in Edmonson v. Leesville Concrete Co., and then refined in a synthesis of these two cases in Georgia v. McCollum:

conduct must satisfy the two-part test of California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself." Id. at 105.

Predictably, the Court has reached mixed results applying this standard. While a full analysis of these cases is beyond the scope of this Article, it is worth highlighting some of the similarities between the statutory and constitutional cases. In particular, the Court has been reluctant to find state action where the basis for the antitrust immunity claim is that state regulation merely authorizes private choices but does not compel them. At the same time, the Court has refused to find that actual compulsion is necessary. See, e.g., FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (holding that title insurance regulatory schemes that effectively force uniform rates are inadequate to establish state action because the level of state supervision is insufficient under Parker/Midcal); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (holding that New York law requiring liquor retailers to charge at least 112% of the wholesale price is not protected state action under Parker/Midcal because the state is not actively involved in the actual price-setting).

On the other hand, the Court has been ready to find the requisite state action where, as in the White Primary Cases (see infra notes 215-238), there has been a delegation of a public function to a private party or where an act of government expressly provides for the coercion of private choices. "[T]o obtain exemption, municipalities must demonstrate that their anti-competitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'” Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985) (holding that municipal monopoly over provision of sewage collection and treatment services is protected state action under Parker/Midcal).

Such similarities underscore the common understandings applied by the Court in assessing whether seemingly private conduct can be deemed state action. Moreover, given the emphasis of the earlier state action cases on racial discrimination, the antitrust cases also provide an important bridge from the individual rights orientation of the earlier generation of cases to the property rights orientation of the modern challenges. It is the latter orientation that is involved in challenging the proper character of ADR providers.


160. For a more complete discussion of these doctrines, see GUNTER, supra note 145, at 883-926.

161. See The White Primary Cases, discussed infra notes 215-238 and accompanying text.


The first inquiry is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority. . . .

The second inquiry is whether the private party charged with the deprivation can be described as a state actor. In resolving that issue, the Court [has] found it useful to apply three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."164

The Court has not articulated a reason for its reiteration of state action analysis. Justice Byron R. White's opinion in Lugar, however, all but concedes that the Court is finally responding to its critics.165 The new Lugar-Edmonson approach lends considerable support to those who have argued that the state action doctrine is really about balancing public interests and private harms.166 The prong that focuses on the question of whether the private conduct can be fairly attributed to the state requires a weighing of the level of government assistance, the degree of public functionality, and broader policy considerations against the general bar of constitutional application to private conduct. To the extent that Lugar-Edmonson requires consideration of both nexus and public function arguments, as well as larger policy considerations, it may well be the Court's most explicit acknowledgment that the state action assessment requires balancing rather than mere rote application of formalistic rules.167 The pressing issue, then, is determining what kinds of situations trigger the finding of state action. As we will see, this triggering generally occurs when the complained-of conduct touches the most fundamental of constitutional concerns. Because it represents the synthesized evolution of its historically disparate standards, with the additional and express consideration of the larger policy issues raised by the seemingly private conduct, I will use the new Lugar-Edmonson approach to organize my analysis of contemporary court-related and contractual ADR as state action.

165. In describing the origins of the state action requirement, White implicitly acknowledges the doctrine's critics but persists in adhering to it, stating, "[w]hether this is good or bad policy, it is a fundamental fact of our political order." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Later in the opinion, he notes that the various state action tests may be "simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court" in such cases. Id. at 939.
166. See Black, supra note 150; Chemerinsky, supra note 154.
B. Assessing ADR as State Action

1. The Source of ADR in State Authority

The first question in Lugar-Edmonson analysis is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority." The Court has recognized that private conduct pursuant to statutory or judicial authority is sufficient to satisfy this requirement. In so doing, it has repeatedly emphasized the role of public officials in effectuating private choices. A series of cases involving statutory remedies for private creditors helps illustrate this point.

The Court historically had been receptive to procedural due process challenges arising from summary procedures providing for the attachment or sale of debtors' property. In Flagg Brothers v. Brooks, however, it seemed to be embarking on a different path. In Flagg Brothers, the Court upheld a warehouseman's lien procedure on the ground that constitutional challenges to the procedure could not lie, for lack of state action, because the legislation upon which the procedure was based merely authorized, but did not compel, the private decision to sell the affected personal property.

The opinion generated much controversy, and the Court ultimately used Lugar to ease the tension between Flagg Brothers and earlier cases. Lugar involved a Virginia statutory prejudgment attachment procedure that allowed creditors to attach a debtor's property if the creditor alleged, in an ex parte petition, a belief that the debtor might dispose of property in order to defeat creditors. The Lugar court readily concluded that this "procedural scheme created by the statute obviously is the product of state action," and that therefore a private party's use of this procedure had its source in state authority. It distinguished Flagg Brothers by reference to the critical role of court personnel in executing the levy, stating:

168. Lugar, 457 U.S. at 939.
172. Lugar, 457 U.S. at 941.
173. See id. ("[A] private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment.").
We have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. . . .

... Whatever may be true in other contexts, [joint participation] is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute.174

The Court used a similar analysis in Edmonson, which dealt with the applicability of constitutional limitations to peremptory challenges in civil cases. In finding state authority in such contexts, the Edmonson Court noted that most jurisdictions have statutes authorizing and regulating the use of peremptory challenges, and that without statutory authorization the defendant "would not have been able to engage in the alleged discriminatory acts."175 Moreover, the Court also noted the significant involvement of the judge, arguably the ultimate state actor, in furthering the private actor's discriminatory peremptory challenge.176

a. Court-Related ADR Programs

Court-related ADR programs would seem to satisfy the threshold requirement of state authority handily. An arbitration conducted, for example, pursuant to California's statute177 requiring that all civil cases worth less than $50,000 be arbitrated as a condition for trial would plainly be an arbitration conducted pursuant to statutory authority.178 The private choice of dispute resolution forum is removed, and the parties are forced by the government into the ADR proceeding. Indeed, it is commonly understood that court-related ADR implicates the constitutional right to a jury trial, a fact that explains why all state court-related mandatory arbitration programs are non-binding.179 As such, these arbitrations serve as a preliminary settlement effort rather than an enforceable proceeding. In such cases, the ultimate right to a jury trial may well diminish the significance of routine process imperfections, but troubling questions can still arise with severe abuses of arbitral power, such as where a neutral distorts the trial process by aggressively siding against one of the parties and encouraging or intimidating it into disclosing sensitive information that may be privileged or otherwise

174. Id. at 941-42.
175. Edmonson, 500 U.S. at 621.
176. See id. at 623-24.
177. See CAL. CIV. PROC. CODE § 1141.11(a) (Deering Supp. 1995).
178. While our primary focus is on arbitration, it is worth noting that a mediation required by a court rule that family law cases be mediated rather than tried in open court would also appear to be a mediation conducted pursuant to judicial authority.
179. See Keilitz, supra note 55, at 38.
inadmissible at trial. Again, it is striking that court-related ADR processes have not yet been subjected to constitutional scrutiny for due process violations or other trespasses. As such programs become even more pervasive, and as courts and practitioners become more sensitive to the constitutional dimensions of the ADR movement, this situation seems almost certain to change.

b. Contractually Enforced ADR

While it seems obvious that court-related ADR procedures have their source in state authority, whether contractually mandated ADR constitutes state action would seem to raise a more difficult question. For example, it could, of course, be argued that the contractual arbitration statutes merely authorize private parties to resolve disputes in a particular way. Such an argument would be similar to that considered by the Court in *Moose Lodge No. 107 v. Irvis.*

There, the court rejected a claim that, because a private club served alcoholic beverages pursuant to one of a limited number of liquor licenses issued by the State Liquor Control Board, its racial discrimination was unconstitutional. In rejecting the state action claim, then-Justice William Rehnquist stressed the remoteness of the relationship between the club's discrimination and the state's licensing scheme.

"[T]he Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor...."

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"[Therefore, however detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination."

In the ADR context, the argument against the existence of state action would be that actions of the ADR neutral that raise constitutional problems could no more be attributed to the state than could the Moose Lodge's decision to discriminate on the basis of race.

The argument, however, does not withstand serious analysis. As a factual matter, it is plainly inconsistent with the Court's more recent

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180. See works cited supra note 42 and accompanying text.


findings of state action in cases like *Lugar* and *Edmonson.*

In *Lugar,* it must be recalled, the Court found state action in what a *Moose Lodge* analysis would have concluded was a creditor's purely private choice of electing to secure its rights through the prejudgment attachment procedure, a choice in which the government played "absolutely no part." *Edmonson* provides an even more compelling example. There, the Court found state action in a private attorney's exercise of a peremptory challenge—a choice so private that the attorney need not even disclose a reason for it unless challenged on constitutional grounds. This is not to suggest that these cases have overruled *Moose Lodge* sub silentio. To the contrary, they have simply sharpened its meaning: *Moose Lodge* addresses the degree of proximity between the governmental regulation and the private conduct necessary for a finding of state action, not whether the act of government, as a definitional matter, compels private conduct or merely authorizes it.

Moreover, at a structural level, unlike the State Liquor Control Board's action in *Moose Lodge,* contractual ADR such as those found in the arbitration context statutes play a definitive role in establishing and enforcing the validity of such agreements. Indeed, their very purpose is to make ADR agreements irrevocable by the parties and enforceable by the public courts. As the history of contracted arbitration makes clear, it is not the ability of private parties to agree to a particular form of dispute resolution that is being sanctioned by the statute. Indeed, parties have every right to make such choices and to proceed to the arbitration accordingly. Rather, the statutes address the situation in which one party to the dispute does not want to honor the agreement to arbitrate, or does not want to comply with the arbitration award, as well as situations in which the parties simply want their award formalized with state enforcement power. It is in these cases that the statute alters the legal relations between the parties, authorizing the public courts to enforce the initial agreement, if it is otherwise valid under ordinary principles of contract law, and to enforce the subsequent award as well.

At a more fundamental level, the *Moose Lodge* argument is really one of consent. It boils down to this: since a contractual ADR agreement is voluntary, it cannot amount to action of the state, and the

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184. Chief Justice Rehnquist's more extreme views on state action have been rejected by the Court. He was left to join Justice Powell's dissent in *Lugar,* where Powell argued that the participation of government actors with private actors must rise to the level of a conspiracy to violate constitutional rights in order to constitute state action on a nexus rationale. *See Lugar,* 457 U.S. at 953-56. Similarly, he joined Justice O'Connor's dissent in *Edmonson,* which took a similarly narrow view of the degree of government involvement necessary to convert private conduct into state action. *See Edmonson,* 500 U.S. at 631.

185. *Moose Lodge,* 407 U.S. at 175.


Constitution cannot possibly be offended when, for example, an arbitration participant is deprived of due process. After all, private parties have the right to contract and to have the courts enforce the terms of that contract.\textsuperscript{188}

Clearly, questions over voluntariness can be deeply philosophical.\textsuperscript{189} They strike at the heart of the tension between personal autonomy as expressed in the freedom of contract and the needs of a society that depends on "the concept of ordered liberty."\textsuperscript{189} However, voluntariness has no role in the determination of state action. Instead, the state action analysis quite properly asks a very different question: To what degree does private conduct either become so entangled with the action of the state, or assume a function traditionally performed exclusively by the state, that such conduct should be deemed attributable to the state for constitutional purposes? While surely convenient, permitting voluntariness to decide the state action question would simply assume away the constitutional problem by ignoring the coercive environment in which contractual ADR operates,\textsuperscript{191} including the pervasive presence of such provisions in standard form contracts and in agreements between parties of unequal bargaining position.\textsuperscript{192}

This is not to say that the question of voluntariness has no place whatsoever in the assessment of an agreement to submit to ADR. As with any other contract provision, the proper place for considering questions of voluntariness is in the determination of whether there was in fact assent to use the alternative dispute resolution method. Such an approach is textually consistent with the savings clauses of the FAA and the state statutory schemes, which expressly condition the validity of arbitration agreements on the absence of traditional contractual defenses

\textsuperscript{188} This appears to be the underlying basis for most of the judicial decisions that have summarily refused to find state action in ADR. See cases cited supra note 39.


\textsuperscript{190} Palko v. Connecticut, 302 U.S. 319, 325 (1937). Carrington and Haagan suggest that the court's recently renewed embrace of contract rights is one explanation for its strong support of contractual arbitration. See supra note 18, at 334.

\textsuperscript{191} See, e.g., Alfred W. Blumrosen, Exploring Voluntary Arbitration of Individual Employment Disputes, 16 U. MICH. J.L. REFORM, 249, 254-55 (1983); see also supra text accompanying note 58.

\textsuperscript{192} See e.g., Edwin Patterson, The Delivery of a Life-Insurance Policy, 33 HARV. L REV. 198, 222 (1919); Todd D. Rakoff, Contracts of Adhesion: An Essay of Reconstructionism, 96 HARV. L REV. 1174, 1178 (1983).
to their enforcement\textsuperscript{193} and provide for judicial determination of such questions.\textsuperscript{194}

Despite the apparent clarity of such statutory language, the U.S. Supreme Court muddied the arbitration waters in \textit{Prima Paint Corp. v. Flood & Conklin Manufacturing Co.}\textsuperscript{195} when it held that federal courts are barred from hearing consent-based challenges to broad arbitration agreements if the challenge goes to the substance of the entire contract.\textsuperscript{196} The decision articulating what has come to be known as the "separability doctrine" has generated confusion and severe criticism, in part because it is virtually impossible in many cases to disentangle disputes over the agreement to arbitrate from the underlying contractual dispute. After all, it was the failure of performance under the contract that led to the dispute, not the existence of the arbitration provision.\textsuperscript{197} Nonetheless, \textit{Prima Paint} has caused many, if not most, consent-based "arbitrability" claims under the FAA to be decided by arbitrators.

More recently, however, in \textit{First Options of Chicago, Inc. v. Kaplan},\textsuperscript{198} the Court seemed to return to a more straightforward reading of the FAA's statutory language, when it unanimously agreed that courts, not arbitrators, are to use state-law principles of contract in deciding whether the parties agreed to arbitrate a dispute's merits—a decision that remarkably does not even cite to \textit{Prima Paint}.\textsuperscript{199} The impact of \textit{First Options} on \textit{Prima Paint} is as unclear as it is important, and a detailed analysis of that question is beyond the scope of this Article. However, regardless of whether the trier of fact is a court or an arbitrator, questions over voluntariness are ones of fact that go to the issue of whether there was an agreement to commit to an ADR procedure, not to the issue of whether state action is present in the enforcement of such an agreement.

In sum, court-related ADR may have its source in state authority because it is the product of direct legislative or judicial fiat that removes

\begin{footnotes}
\item[193] See 9 U.S.C. § 2 (1994) (stating that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").
\item[194] See id. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration...is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement...If the making of the arbitration agreement...be in issue, the court shall proceed summarily to the trial thereof.").
\item[195] 388 U.S. 395 (1967).
\item[196] See id. at 402. ("[A]rbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and...where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.").
\item[197] For an analysis and criticism of \textit{Prima Paint}, see 2 MacNeil et al., supra note 3, § 15.3, at 15:24-15:49. For a call to overrule the case, see Ware, supra note 58, at 76-88.
\item[199] See id. at 1924.
\end{footnotes}
the private choice of proceeding to trial. Contractually enforced arbitration, for example, has its source in state authority by virtue of the statutory schemes providing for the specific performance of those contractual provisions. While questions of voluntariness are important, they address the factual issue of whether there was an agreement between the parties to use an alternative procedure, not whether such hearings are fairly attributable to the state. It is to that question of attribution that we now turn.

2. Attribution of Private Conduct to the State: ADR Neutrals as State Actors

The second prong of the Lugar-Edmonson analysis tests "whether the private party charged with the deprivation can be described as a state actor," and incorporates many different aspects of the Court's historical treatment of the state action question.

Edmonson amplified Lugar by stressing three factors that must be considered in answering the attribution question: (1) "the extent to which the actor relies on governmental assistance and benefits," (2) "whether the actor is performing a traditional governmental function," and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." As will be seen below, the first two considerations effectively recast the Court's historical public nexus and public function approaches, while the third wisely forces the state action proponent to confront the broader policy considerations at stake. To further analytical congruity, I will address them in an order slightly different than the Court's, beginning with the public function aspect before moving on to the reliance (entanglement) and aggravation (policy) factors.

a. Performance of a Traditional Government Function

The earliest cases in the modern era of state action recognize that state action will be found when private actors perform a traditional public function. The classic, and easiest, case is Marsh v. Alabama, in which the court held that Chickasaw, Alabama, a "company town" wholly owned by a corporation could not prohibit a Jehovah's Witness from passing out religious literature near the local post office.

Were Chickasaw like any other city, there would have been no state action question; Marsh's leafleting plainly would have been First Amendment activity protected against government suppression.

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203. See id. at 506-08.
However, Chicasaw was wholly owned by the Gulf Shipbuilding Corporation. Its lone policeman, a deputy Mobile County Sheriff, asked Marsh to stop distributing the literature, and when she refused, arrested her under an Alabama statute making it a crime to remain on the premises of another after having been asked to leave.

Justice Hugo Black reversed the conviction, saying Chicasaw couldn't prohibit her protected First Amendment activity because it was "a town," which "has all the characteristics of any other American town" and which therefore exercised a "public function." Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. From that baseline, the analysis becomes more complex, in part because the Court has never been able to delineate just what a public function is. Indeed, the task may be beyond the possibility of broad-based consensus.

Given the contemporary view that ADR hearings are private matters, the argument can be made that the resolution of disputes is hardly a public function. After all, disputes are resolved every day, without resort to the public courts or to any of the statutorily authorized means of ADR, through personal negotiations and wholly private interventions by friends, family members, professional colleagues, and others. Thus, the argument goes, because these negotiations and interventions are the functional equivalents of arbitrations, mediations, or other informal ADR processes, ADR is most certainly not a traditional government function.

At first blush, the manner in which the Supreme Court has chosen to rein in the public function concept would appear to lend some support to this argument. One of the Court's principal limitations has been the requirement of exclusivity—that is, a function must be traditionally performed exclusively by the government in order for its performance by private parties to be deemed attributable to the state under a public function rationale. Thus, in *Jackson v. Metropolitan Edison Co.*, the

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204. See id. at 502.
205. See id. at 503-04.
206. Id. at 502.
207. Id. at 506.
208. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1128-49 (1980) (arguing that the private/public distinction cannot justify the longstanding refusal to grant real power to cities); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (1982) (using the public/private distinction to illustrate the sequence of stages by which a distinction loses its clarity).
209. For the seminal argument that traditional litigation and its formal alternatives are the exception rather than the rule for dispute resolution, see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).
Court refused to find a utility's provision of electric services to be a public function, even though the utility had allegedly been granted a government monopoly, because that provision is not a function "traditionally exclusively reserved to the State." Wrote then-Justice Rehnquist,

If we were dealing with the exercise by [the utility company] of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State.211

Because the provision of utility services was not a traditionally exclusive public function, held the Court, the challengers had no constitutional ground upon which to complain that the summary termination of services without notice or a hearing violated their rights to procedural due process.

Any comparison between the resolution of disputes and the provision of electric services, however, miscomprehends the nature of the function that can be performed in ADR. An ADR process, like arbitration, often involves not only the mere resolution of disputes but, as witnessed by the history of the ouster doctrine, the statutory reforms, and the impact of court rulings on the growth of modern ADR, the state-enforced resolution of disputes. It is this element of state enforcement that distinguishes matters of constitutional moment from those of purely private concern.212 The binding resolution of disputes is, of course, a traditionally exclusive public function. Indeed, it is difficult to contemplate a function traditionally more exclusive than what the second Justice John Marshall Harlan described in Boddie v. Connecticut as "the State's monopoly over techniques for binding conflict resolution."213

This dynamic may be seen most vividly in the arbitration context, in which the third-party neutral, like a trial judge, actually decides the case. As a historical matter, it was the need to draw on that "monopoly" that led the commercial and institutional interests seeking to advance arbitration at the turn of the twentieth century to lobby the states and the federal government to adopt legislation authorizing alternative forms of dispute resolution. It was the courts, and only the

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211. Id. at 352-53.
212. For forceful arguments that arbitration, the central component of ADR, has been merely a spoke in the wheel of the larger formal legal system since colonial times, see Auerbach, supra note 85, at 19-46; Mann, supra note 86, at 468-81.
213. 401 U.S. 371, 375 (1971). It can be argued that Boddie was context-specific because its divorce context is state-exclusive. However, the Court has never so limited its application of Boddie, and the tenor of Justice Harlan's words resonates much deeper. See infra note 284 and accompanying text.
courts, that had (and still have) the exclusive power to issue decisions that would be enforced by the state.\textsuperscript{214} Arbitration needs that sovereign muscle to exercise any claim to credibility and authority among private parties.

That arbitration is performing a traditionally exclusive government function can be seen through the much stronger analogy to the \textit{White Primary Cases}, a series of cases from Texas that found the administration of election primaries by private clubs to be a public function.\textsuperscript{215} These cases stemmed from the claims of African Americans in Texas that they were being improperly excluded from meaningful participation in this important aspect of democracy and sovereignty.

Two of the cases provide particular insight into the ADR problem. In the first, \textit{Smith v. Allwright},\textsuperscript{216} the Court held that its holding in \textit{United States v. Classic}—that constitutional standards apply to primaries as well as general elections\textsuperscript{217}—rendered white primaries established by state convention unconstitutional under the Fifteenth Amendment. Addressing the state action issue, the \textit{Allwright} court noted the importance of elections in a constitutional democracy.\textsuperscript{218} It then detailed the state’s role in regulating the administration of elections by “direct[ing] the selection of all party officers,” by requiring the election of the county officers of a party, by providing the standards for conducting primary elections, and by giving state courts exclusive original jurisdiction over contested elections and mandamus proceedings to compel party officers to perform their statutory duties.\textsuperscript{219} Summing up its state action analysis, the Court said:

\begin{quote}
[T]he recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is a delegation of a state function that may make the party’s action the action of the state. . . . The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. . . .
\end{quote}

\textsuperscript{214} Administrative agencies, of course, also have such power when they act in an adjudicatory role. See \textit{Davis, supra} note 45, at 377-97.

\textsuperscript{215} The \textit{White Primary Cases} were decided before the Court’s decision in \textit{Jackson} formally introduced the concept of an exclusivity limitation. However, the Court has never disavowed these cases on that ground, and it continues to cite them approvingly in state action and other cases, including \textit{Jackson}. See, e.g., \textit{Jackson}, 419 U.S. at 352; \textit{Bush v. Vera}, 116 S. Ct. 1941, 1962 (1996); \textit{Georgia v. McCollum}, 505 U.S. 42, 53 (1992); \textit{Edmonson v. Leesville Concrete Co.}, 500 U.S. 614, 621 (1991); \textit{Lugar v. Edmondson Oil Co.}, 457 U.S. 922, 928 (1982); \textit{City of Mobile v. Bolden}, 446 U.S. 55, 63-64 (1980); \textit{Flagg Bros. v. Brooks}, 436 U.S. 149, 158 (1978).

\textsuperscript{216} 321 U.S. 649 (1944).

\textsuperscript{217} See \textit{United States v. Classic}, 313 U.S. 299, 316-17 (1941).

\textsuperscript{218} See \textit{Allwright}, 321 U.S. at 664.

\textsuperscript{219} See \textit{id.} at 662-63.
The privilege of membership in a party may be . . . no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.\(^{220}\)

The significance of this delegation was dispositive in another *White Primary Case, Terry v. Adams*,\(^{221}\) which involved an even more extreme form of election delegation—the use of what can be understood as a private, all-white primary preceding the public primary and general election. This private primary was conducted by the Jaybird Democratic Association, a “self-governing voluntary club” of white Democrats.\(^{222}\) The Jaybirds conducted the primary according to rules laid out by state statute, but did not permit African Americans to vote.\(^{223}\) While there was no legal compulsion for elective candidates to enter the Jaybird primaries or for the winners of the Jaybird primaries to run in the general election, this had always been the case since the party’s founding in 1889. It was generally understood that the Jaybird primary winner would run unopposed in both the Democratic primary and the general election.\(^{224}\)

Eight Justices agreed that this “three-step” elective system violated the Fifteenth Amendment’s specific protection of black voting rights.\(^{225}\) Rejecting the Association’s claim that the Amendment did not apply to it because it was a private club, Justice Black, in a plurality opinion, found the club to be a state actor by virtue of its performing a traditional public function.

It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.\(^{226}\)

In a concurring opinion advancing a separate delegation theory, Justices Tom C. Clark, Stanley F. Reed, and Robert H. Jackson agreed that *Smith v. Allwright* had established the rule that “‘any part of the machinery for choosing [election] officials’ becomes subject to the

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\(^{220}\) *Id.* at 660, 663-65.

\(^{221}\) 345 U.S. 461 (1953).

\(^{222}\) *Id.* at 463.

\(^{223}\) *See id.* at 469.

\(^{224}\) *See id.* at 463.

\(^{225}\) *See id.* at 484. Only Justice Sherman Minton dissented, finding no state action whatsoever arising from the Jaybird Primary. *See id.* at 484-94.

\(^{226}\) *Id.* at 469.
Constitution's restraints," and found the Association to be a state actor as an "auxiliary" of the local Democratic Party. Justice Felix Frankfurter's concurring opinion found the private discrimination to be "clothed with the authority of the state" because of the "comprehensive scheme of regulation of political primaries" and the role of county election officials as "participants in the scheme." In this way, Frankfurter concluded, citing Justice Holmes, the public and private actors "are bound together as the parts of a single plan. The plan may make the parts unlawful."

An important teaching of the White Primary Cases is that state action may be found under a public function rationale when a comprehensive state statutory scheme delegates or duplicates what Jackson would later describe as a traditionally exclusive public function. This is especially true when the scheme is enforced with the assistance of state servants in such a way as to permit the denial of a core constitutional right, particularly when that right relates to the exercise of democracy. In the White Primary Cases, that right was the Fifteenth Amendment right of African Americans to vote. Some have suggested that this "special context" may explain the results. The language and tenor of the Court's reasoning in the cases, however, belies such a limitation. It suggests instead that the Court's central concern is with the use of government power, and its imprimatur, to further a deprivation of fundamental constitutional rights. For this reason, the Court has continued to cite these cases for this proposition in a broad range of non-voter state action cases, including cases concerned with creditor remedies232 and with peremptory challenges. Indeed, in Edmonson, Justice Kennedy suggested that a state-created scheme that

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227. Id. at 481.
228. See id. at 483-84.
229. Id. at 475-76.
230. Id. at 476 (citing Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).
231. See, e.g., Gunther, supra note 145, at 898-99.
232. Any reliance on the fact that Terry was decided on Fifteenth Amendment grounds for purposes of this limitation would be wholly misleading. Allwright and Terry should be understood as simply taking a more direct route to the source of constitutional protections for voting and election rights than had earlier Fourteenth Amendment cases such as Nixon v. Herndon, 273 U.S. 536 (1927), and Nixon v. Condon, 286 U.S. 73 (1932). Such an understanding is reinforced by the fact that neither Allwright nor Terry sought to distinguish the earlier cases in this regard.
233. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-29 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978). In this regard, note too Justice White's remarkable concession in Lugar that the various state action tests may be "simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court" in such cases. Lugar, 457 U.S. at 939.
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operates to deprive important constitutional rights may be more constitutionally problematic in the judicial context than in the elective context. We need not go that far here, however, for if we are to adhere to the belief that the courts are a coequal department of our constitutional order, such deprivations merit no less constitutional concern in the judicial context than in the elective context.

As should by now be apparent, the analogy between the elective function in the White Primary Cases and the judicial function in arbitration is particularly strong. Both functions are expressly provided for in the Constitution, and both are central to the maintenance of a democracy. While elections ensure representation, the judicial function ensures a continuing commitment to the rule of law in a constitutional democracy that ultimately depends on that commitment for its very existence. Also, both functions are delegated to private parties pursuant to statutory schemes expressly authorizing such delegations. Indeed, the entanglement between public actors and private parties created by the arbitration statutes is as great, if not greater, than in the White Primary Cases.

In short, the function that private ADR providers perform can be the traditionally exclusive public function of resolving disputes in a judicially enforceable manner, as we have seen in the arbitration context. As with the elective function, the statutory delegation of the judicial function to private parties in such cases transforms the conduct of those private parties into state action. To paraphrase one of the White Primary Cases, "the recognition of the place of [private neutrals] in the [dispute resolution] scheme makes clear that state delegation to a party of the power to [perform that function] is delegation of a state function that may make the party's action the action of the State."

b. Extent of Government Assistance and Benefits

This consideration effectively updates the court's historical public nexus approach, in which a court "sift[s] facts and weigh[s] circumstances" to determine whether the relationship between the government's action and the complained-of private conduct is sufficiently close to attribute that conduct to the state. The traditional starting

235. See Edmonson, 500 U.S. at 628.

236. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803) ("[I]t is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.").

237. See U.S. CONSTR. art. I (providing for the election and power of legislators); U.S. CONSTR. art. III (providing for an independent judiciary); U.S. CONSTR. amend. XV (barring abridgment of the right to vote on account of race, color, or previous condition of servitude); U.S. CONSTR. amend. XIX (barring abridgment of the right to vote on account of gender).


point in the nexus analysis is Shelley v. Kraemer, the landmark decision holding that judicial enforcement of racially restrictive covenants is enough, by itself, to constitute state action sufficient to invalidate the covenants on equal protection grounds. The Court has not extended this rationale materially beyond Shelley, and for good reason; its unimpeded logical extension would improperly constitutionalize the law of contract.

One of the central concepts the Court has used to restrain Shelley is the principle that mere approval, encouragement, or authorization of private conduct is insufficient to establish state action. For example, the Court has used this principle as a basis for refusing to find the comprehensive regulation of a utility to be sufficient to create state action, for refusing to find that a state liquor licensing scheme established governmental action sufficient to find constitutional transgression in a private club's racial discrimination, and for refusing to classify as state actors private institutions that receive government funds.

Instead, the Court has consistently looked at the extent to which actual participation by the state and its officials or servants is used to further private conduct that would be unconstitutional if committed directly by the state. Thus, the Court has found state action in the refusal to serve African Americans by a private restaurant located in a public services building and under lease to the government, found state action when government clerks executed procedures for private levies in the creditors' rights cases, and found state action in judicial execution of racially discriminatory peremptory challenges.

240. 334 U.S. 1 (1948).
241. See id. at 14-18.
242. At least one court has expressly cited this consideration as a basis for rejecting a constitutional claim arising out of a contractual ADR agreement. See Sportastiks, Inc. v. Beltz, No. 88-C-9293, 1989 WL 26825, at *4 (N.D. Ill. Mar. 22, 1989). Some scholars have argued this is entirely appropriate. See, e.g., Horowitz, supra note 153. For more on Shelley, see infra Part II(B)(2)(c)
243. But see Reitman v. Mulkey, 387 U.S. 369 (1967) (accepting the holding of the California Supreme Court that a popular initiative amending the state's Constitution to permit "absolute discretion" of a property owner in the sale, lease, or rental of real property would impermissibly encourage and significantly involve the state in private racial discrimination).
247. For an outlier case, however, see Evans v. Abney, 396 U.S. 435 (1970) (holding that the application by a state court of its normal principles of will construction, which resulted in the reversion to a testator's heirs of property that had been dedicated to a city as a whites-only park, did not constitute state action).
249. See supra notes 170-174 and accompanying text.
The Court's treatment of this factor in *Edmonson* is particularly instructive. The Court explained its meaning by reference to a relatively obscure case, *Tulsa Professional Collection Services v. Pope.*\(^\text{251}\) *Tulsa* addressed the constitutionality of a nonclaim provision of the Oklahoma Probate Code requiring creditors to file claims against an estate within two months of the published notice that probate proceedings had begun. The threshold question was whether there was sufficient state action to trigger the protection of the Fourteenth Amendment's Due Process Clause on behalf of creditors who failed to meet the filing deadlines. The Court rejected an argument that the provision was simply a self-executing statute of limitations, and instead found "significant state action" because the probate court was "intimately involved throughout [the procedure], and without that involvement the time bar is never activated."\(^\text{252}\) This intimate involvement included the commencement of the probate proceeding, the appointment of the executor to publish the notice, and the filing with the court of copies of the notice and affidavit of publication.\(^\text{253}\)

Applying the "government assistance" consideration in the *Edmonson* peremptory challenge case, the Court noted that "without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist."\(^\text{254}\) The Court went on to analyze the involvement of the trial court in the exercise of a peremptory challenge, including the statutory processes governing the summoning and qualification of jurors, the trial court's "substantial control" over voir dire, and, of course, the approval or rejection of peremptory challenges.\(^\text{255}\)

Regardless of whether the route into arbitration is court-related or contractual, the involvement of the state is at least as intimate in an arbitration proceeding as it is in Oklahoma's probate nonclaim provision or in the federal peremptory challenge scheme.\(^\text{256}\) In fact, the relationship between government power and the actions in question is much tighter in the arbitration setting.

Consider, for example, an arbitration conducted pursuant to California's court-related arbitration statute, which provides that "all at-issue civil actions . . . shall be submitted to arbitration, by the presiding


\(^{252}\) Id. at 487.

\(^{253}\) See id.

\(^{254}\) *Edmonson*, 500 U.S. at 622.

\(^{255}\) See id. at 623-24.

\(^{256}\) If one were to look at the *White Primary Cases* as entanglement cases, one would readily find a greater nexus in the entwining of public courts and private arbitration in state-forced dispute resolution than in the statutory delegations of the electoral function in the *White Primary Cases*. 
judge or the judge designated, ... if the amount in controversy in the opinion of the court will not exceed fifty thousand dollars ($50,000) for each plaintiff.\textsuperscript{227} In such a case, the trial court receives the initial claim, makes the determination of the likely value of the case (an unappealable determination\textsuperscript{228}), and then orders the case transferred to arbitration.\textsuperscript{229} Moreover, the court retains continuing jurisdiction, since the California statute provides for de novo review of the arbitration award\textsuperscript{230} as well as the power to correct, modify, or vacate the award altogether.\textsuperscript{231} If the parties choose not to seek de novo review, the statute authorizes the court to receive the award and to confirm it as a judgment of the court.\textsuperscript{232} Finally, the statute even provides that the administrative costs of the arbitration will be paid for by the county in which it takes place, including the proportional share of the arbitrator's fees, if a party cannot afford it.\textsuperscript{233}

The court has a similarly intimate involvement in contractual arbitration, even beyond its statutory authorization to enforce arbitration agreements. Typically,\textsuperscript{234} the court will receive either a litigant's formal complaint followed by a responsive motion to compel arbitration, or a motion to compel arbitration in cases where one disputing party simply refuses to comply with the terms of the contract without court intervention. In either situation, it is the trial court that must decide whether to compel arbitration and that must determine the legitimacy of any contract-based defense to the validity of the agreement to arbitrate.\textsuperscript{235} Further, the statutory scheme provides for the court to retain an active supervisory role even after the case has been ordered to arbitration; it authorizes the trial court to correct, modify, or vacate an arbitration award.\textsuperscript{236} Perhaps most significantly, the statute authorizes the court to confirm the award as a judgment,\textsuperscript{237} thus making it available for enforcement as any other judgment, with the full panoply of vehicles available for enforcement, including garnishment and attachment.\textsuperscript{238}

Finally, in both the court-related and contractual arbitration situations, the additional benefits conferred upon the ADR providers are

\textsuperscript{227} CAL. CIV. PROC. CODE § 1141.11(a) (Deering Supp. 1995) (emphasis added).
\textsuperscript{228} See id.
\textsuperscript{229} See id. § 1141.16(a).
\textsuperscript{230} See id. § 1141.20.
\textsuperscript{231} See id. § 1141.22 (Deering 1981).
\textsuperscript{232} See id. § 1141.23 (Deering Supp. 1995).
\textsuperscript{233} See id. § 1141.28.
\textsuperscript{234} I am speaking here of the typical situation in which at least one of the parties objects to the procedure.
\textsuperscript{235} See CAL. CIV. PROC. CODE § 1281.2 (West 1982).
\textsuperscript{236} See id. §§ 1284-1286.8 (West 1982 & Supp. 1996).
\textsuperscript{237} See id. § 1286 (West 1982).
\textsuperscript{238} See generally id. §§ 481.010-493.060 (West 1982 & Supp. 1996).
substantial. They are statutorily vested with broad judicial powers to administer depositions and discovery, including subpoena and sanction powers. They also receive the same “judicial” immunity from civil liability that is reserved exclusively for the states’ own constitutionally authorized judiciary.

In short, the mandatory statutory schemes that allocate the roles of the private ADR providers and the public courts toward the single end of state-enforced dispute resolution can establish an inseverable and indispensable nexus between the seemingly private actors and their governmental partners. This relationship represents an extremely high level of government assistance and benefits for otherwise seemingly private conduct. As such, the “private use of the [procedure] with the help of state officials constitutes state action.”

c. A Transitional Comment on Shelley v. Kraemer

So understood, the argument that arbitration is state action is much more than a call for an extension of Shelley v. Kraemer. The very suggestion both underappreciates the profound nature of the nexus between public courts and private arbitration and misunderstands the current Court’s apparent view of Shelley. Indeed, the foregoing public function and nexus analyses stand alone quite capably without reliance on mere contractual enforcement as a source of state action, and there is no need to extend Shelley to find state action in modern contractual arbitration. In fact, the differences in the factual situations between Shelley and contractual arbitration make it analytically inappropriate in key respects. In Shelley, there was no suggestion of a delegation of a traditionally exclusive public function. By contrast, contractual arbitration is erected on the foundation of a statutory delegation of the traditionally exclusive public function of binding dispute resolution. Similarly, there was no demonstration in Shelley of an entanglement beyond mere judicial enforcement of the racially restrictive covenants. As we have seen, the dramatic intertwining of public and private actors in contractual arbitration pervades the entire seemingly private process, including but (unlike Shelley) not limited to the mere stage of enforcement.

This is not to disavow Shelley as wholly fact-specific. To the contrary, the Court continues to rely on that decision, but for a far more

269. See id. §§ 1283, 1283.05 (West 1982).
270. See id. §§ 1283.05, 1283.1.
271. See id. § 1282.6 (West Supp. 1996).
272. See id. § 1283.05 (West 1982). For a discussion of the broad array of sanctions to which mandatory ADR participants may be subject, see Katz, supra note 42, at 37-41.
limited proposition than the unacceptable contention that the enforce-
ment of a contractual provision, by itself, creates state action. Instead,
the Court now cites Shelley for the proposition that judicial actions, in-
cluding the enforcement of private choices, bear special but not disposi-
tive consideration in weighing state action because of the place of the
courts in our constitutional democracy. As Justice Anthony M. Ken-
nedy said for the Court in the Edmonson peremptory challenge case,

By enforcing a discriminatory peremptory challenge, the court
"has not only made itself a party to the [biased act], but has
elected to place its power, property and prestige behind the
[alleged] discrimination." In so doing, the government has
"create[d] the legal framework governing the [challenged] con-
duct," and in a significant way has involved itself with invidious
discrimination.275

In this quoted language, the Court recognizes not that mere judicial
enforcement converts private conduct into state action, but rather that
direct judicial participation in private conduct that would offend the
Constitution if committed directly by the government "aggravates" the
injury in a unique way. The social concerns about the racism inherent
in the restrictive covenants at issue in Shelley were no doubt significant
in the Court's consideration of the state action issue. These concerns
reflect our nation's historical struggle with the racial discrimination that
led to its only civil war and several constitutional amendments.276 Still,
such fundamental concerns alone would not justify the result in
Shelley—purely private racial discrimination is perfectly acceptable
from a constitutional perspective. One of the virtues of our democracy
is its ability to countenance offending viewpoints,277 including the indi-
vidual right to adopt and act upon racist views.278 Instead, what was dis-
positive in Shelley was the direct participation of the courts in

275. Edmonson, 500 U.S. at 624 (alterations in original) (emphasis added) (citations omitted).
276. See U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as
punishment for crime whereof the party shall have been duly convicted, shall exist in the United
States, or any place subject to their jurisdiction."); U.S. CONST. amend. XIV; U.S. Const. amend.
XV.
277. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (recognizing the First Amendment right of
political protesters to burn the American flag); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978)
(recognizing the First Amendment rights of Nazis to march through Skokie, Ill., a community with
a large Jewish population, including many survivors of Nazi persecution).
278. Professor Gunther notes as much in discussing the civil rights "sit-in" cases of the 1960s, in
which the Court did not rely on Shelley in setting aside criminal trespassing convictions; in these
cases, the Court found state action in the official segregation policies underlying the use of state
trespass laws to expel civil rights protesters from private restaurants and other public places. See
Gunther, supra note 145, at 882 ("The failure to rely on Shelley suggested that more state
involvement than even-handed enforcement of private biases was necessary to find unconstitutional
state action.") (discussing Peterson v. City of Greenville, 373 U.S. 244 (1963), and Bell v. Maryland,
378 U.S. 226 (1964)).
implementing such views by force of public law, and the impact that such participation would have on public confidence in the courts, the rule of law, and our constitutional scheme. As the Court observed in a pre-\textit{Shelley} case invalidating the exclusion of women from jury service, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 

Such an understanding puts \textit{Shelley} in a much more narrow and accurate light, with an eye toward the broad systemic concerns that serve both to cabin \textit{Shelley} from unwarranted expansion and to recognize the special place that courts and the rule of law hold in our constitutional order. It is small wonder, then, that the final element of the \textit{Lugar-Edmonson} analysis, arguably the only "new" element of the test reiterated by the Court, addresses precisely this concern. It is to that element we now turn.

\textbf{d. Aggravation of the Injury by Incidents of Governmental Authority}

While the government benefits and public function elements of the \textit{Lugar-Edmonson} analysis may be seen as a modern idiom for analytical approaches with long and rich heritages, the aggravation element adds a new dimension by explicitly forcing the consideration of higher policy questions. This should be understood as a limiting principle, similar to traditional exclusivity, that ensures that the application of constitutional force to private actors is occasioned judiciously and is reserved for the most fundamental of concerns. We apply that principle here and demonstrate that the injury in an ADR hearing can be aggravated by the incidents of governmental authority, both as to the individual and to society at large. Arbitration, of course, remains our primary context of consideration.

\begin{itemize}
\item \textbf{279.} Plainly, the government could not constitutionally implement such views itself. This point could suggest an important and inherent limitation on \textit{Shelley} that could mitigate concerns over its potential reach to all contracts. Simply put, \textit{Shelley} cannot be a vehicle with which to raise constitutional questions about contractual activity that would be permissible by the government, precisely because such activity would be permissible and raise no case or controversy for a court to decide. Rather, such questions are raised when the subject matter of the contract is that which the government would be constitutionally barred from pursuing, such as racial discrimination or, in the case of ADR, the deprivation of basic constitutional rights attendant to the benefit of public law. Under this view, the court's reticence to extend \textit{Shelley} is properly reserved for the most egregious of situations.

\item \textbf{280.} Ballard v. United States, 329 U.S. 187, 195 (1946); \textit{see also} Rose v. Mitchell, 443 U.S. 545, 556 (1979) (holding that racial discrimination in the selection of a grand jury is a sufficient basis for overturning a criminal conviction on habeas corpus review because it "strikes at the fundamental values of our judicial system and our society as a whole").
\end{itemize}
i. Harm to the Individual

The hypotheticals in the Introduction to this Article illustrate some of the economic, dignitary, and other harms to individuals that can be caused by a wayward ADR proceeding. Jane B., of course, lost her life. John A., who was denied a promotion because of his race, was stigmatized and suffered economic losses and blunted social mobility by virtue of his improper disqualification. Such injuries are aggravated by a public court’s participation in and ultimate enforcement of the arbitration award (often in spite of its acknowledgment of the legal correctness of a party’s position), and by the individual’s knowledge that he has no other viable avenue of relief.\textsuperscript{281} As Justice Kennedy observed in \textit{Edmonson},

\begin{quote}
Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.\textsuperscript{282}
\end{quote}

As the hypotheticals suggest, by compelling, overseeing, and ultimately enforcing such decisions, the court is both a direct and indirect participant in the seemingly private process. The court places its power, prestige, and imprimatur behind the result, regardless of any questions surrounding the fairness of the process or the degree to which the result departs from the public law. While it may be true that the hearing is conducted and the decision reached outside the four walls of the public courtroom, it is given effect, meaning, and enforcement in the same public courtroom to which society turns for final and binding resolution of other conflicts.\textsuperscript{283} Once the gavel has been struck on the alternative procedure, the injury is aggravated yet again by the knowledge that there are no other avenues of redress, other than the potentially destructive remedy of self-help.

Beneath Justice Kennedy’s words lies a much deeper concern for the procedural and democratic values that are at the very core of the American experience, and for the meaning of public injustice. As the

\begin{footnotes}
\item[281] Special legislation is always a theoretically available remedy. But any suggestion that it is the appropriate remedy to correct individual injustices serves only to underscore the unique aggravation caused by public law enforcement of harms caused by seemingly private ADR providers.
\item[282] \textit{Edmonson}, 500 U.S. at 628.
\item[283] Professor Richard Abel insightfully observed at the outset of the modern era of ADR that the rise of informal dispute resolution processes would actually expand the power of the state much deeper into private affairs by bringing the coercive power of the state into the domain of purely private dispute resolution. See \textit{The Politics of Informal Justice}, supra note 12, at 270-79.
\end{footnotes}
second Justice Harlan so eloquently observed nearly a quarter of a century ago when describing the meaning and spirit of due process,

At its core, the right to due process reflects a fundamental value in our American constitutional system. . . .

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.284

As we have seen in the arbitration context, by creating a system of ADR that ignores these fundamental guarantees, states can substantially aggravate the injuries to individuals harmed by ADR proceedings.

ii. Harms to Society

Justice Harlan's powerful words suggest how an understanding of ADR as a purely private function might play a role in diminishing American democracy. Political theorists have long focused on the

relationship between public institutions and effective democracy. While most of the research in this area has predictably centered on political institutions, particularly on the reasons for lost confidence and its impact on elective politics, the rule of law and the role of courts deserve no less appreciation. Sadly, however, there has been precious little writing on the subject.6

There is, of course, a substantial literature suggesting that public courts are undemocratic in nature.287 The central argument is that federal judges are not elected and therefore have no legitimate basis for invalidating legislative judgments in a representative democracy. While this Article is hardly the place for a full repudiation of that position,288 it may nonetheless be noted that this view rests, in part, on the all-too-common fallacy of equating democracy with electoral majoritarianism.289 Political scientists have long recognized that electoral majoritarianism is only one factor in a proper definition of democracy. In fact, some have concluded that electoral majoritarianism may not even be the most influential aspect of democracy. Contending that cultural factors drive political institutions and economies, rather than the reverse.290

Although scholars may differ as to the exact definition of democracy,291 nearly all agree on at least two central and interrelated

285. See, e.g., GABRIEL ALMOND & SIDNEY VERBA, THE CIVIC CULTURE (1963) (arguing that cultural factors shape political institutions); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN ITALY (1993) (comparing effective and ineffective regional democratic governments in Italy since the devolution of most powers to regional governments in 1970).


287. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); ELY, supra note 4.

288. For a powerful and persuasive repudiation of the countermajoritarian argument, see Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 628-42 (1993); see also Erwin Chemerinsky, The Supreme Court 1988 Term—Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 46 (1989) (arguing that the Rehnquist Court’s jurisprudence is overly majoritarian).

289. See, e.g., Michael Coppedge & Wolfgang H. Reinicke, Measuring Polyarchy, in ON MEASURING DEMOCRACY: ITS CONSEQUENCES AND CONCOMITANTS 48-50 (Alex Inkeles ed., 1991) (contending that free and fair elections are only one of five essential components of democracy, the others being freedom of expression, freedom of organization, alternative sources of information, and extent of suffrage); Philippe C. Schmitter & Terry Lynn Karl, What Democracy Is . . . and Is Not, in THE GLOBAL RESURGENCE OF DEMOCRACY 39, 42-44 (Larry Diamond & Marc. F. Plattner eds., 1993).

290. See generally ALMOND & VERBA, supra note 285.

291. The conceptual confusion over the meaning of democracy is so serious that scholars have identified nearly 550 “subtypes” of democracy. See David Collier & Steven Levitsky, Democracy “With Adjectives”: Conceptual Innovation in Comparative Research (The Helen Kellogg Institute for International Studies, University of Notre Dame Working Paper No. 230, 1996).
themes: citizen participation in governance and the accountability of government to those citizens. That the United States' constitutional founders contemplated broad citizen involvement in their governance can hardly be argued. Indeed, in rebelling against English autocracy and all its trappings, the colonists insisted on this right of participation in its most dynamic terms. The complex process of selecting democracy as a form of government, of course, was predicated on a fundamental belief in the importance of citizen participation in government. The Federalists were ultimately able to reach a consensus on the appropriateness of a national constitution only by arguing that it was "the people" who were delegating the authority to draft such a document in the first instance.

In the drafting of the Constitution in 1787, this insistence on participation was reflected in a representative legislative body that would enact broadly applicable laws under a theory of consent described by Jean Jacques Rousseau as a "social contract." Later, it was the assurance of civil liberties in the Bill of Rights that persuaded the colonists to ratify the charter, especially the right to participate in the administration of law as jurors in civil and criminal trials. The values supporting civic participation and discourse are also reflected in the First Amendment's protections of speech, press, and religion.

The point here is not to retrace elementary civics. Rather, it is to stress the depth of the value that American law and society have placed on citizen participation, accountability, and other elements of

The seminal elaboration of democracy has been Robert H. Dahl's conception of "polyarchy," which overtly has two dimensions: opposition, which involves organized contestation through regular, free, and fair elections, and participation, the right of virtually all adults to vote and to contest for office. However, a third dimension is embedded within these two: civil liberty, which includes the freedom to speak and publish dissenting views, the freedom to form and join organizations, and the existence of alternative sources of information. So understood, civil liberty reflects a broad social pluralism that makes political opposition and participation truly meaningful. See Larry Diamond, Is the Third Wave of Democratization Over?, J. DEMOCRACY, July 1996, at 20.

Civic participation and accountability are but two of nearly a dozen core values described by Schmitter and Karl. See Schmitter & Karl, supra note 289, at 47-49.

While the notion of "taxation without representation" provides only a starting point for a discussion of the factors leading to the American revolution, it is, in this regard, a telling starting point nonetheless.


democracy. An understanding of ADR as purely private can contradict these values, thereby threatening to undermine American democracy by eroding public confidence, its foundation. As Chief Justice John Marshall recognized nearly 200 years ago in *Marbury v. Madison*,

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .

The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

The procedural values identified by Professor Jerry Mashaw provide a good standard against which to measure how arbitration as an ADR process comports with these elements of democracy. Central to procedural fairness, he contends, is the independence of the neutral and equality of treatment in the proceedings. The public law system safeguards these values through educational and licensing requirements for public judges, a public selection process, procedures for disciplining

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298. On the importance of public trust and confidence in public institutions, see Putnam, *supra* note 285, at 170 (observing that "[i]n the civic regions of Italy . . . social trust has long been a key ingredient in the ethos that has sustained economic dynamism and government performance").

299. 5 U.S. (1 Cranch) 137 (1803).

300. Id. at 163.


302. See id. at 899-901.

303. The overwhelming majority of state and federal judges achieve their positions after having attended law school, passed a practice certification examination (often called "the bar"), and spent a period of time practicing law. It should be noted, though, that some states do not require the passage of a bar examination, and some state judges do not have legal backgrounds. See Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* (1986). All states that require the passage of a bar examination require the completion, or near completion, of a certified law school as a condition for taking the examination. Moreover, it also bears relevance that it would be unethical for a lawyer to accept representation in a matter in which he or she was not competent, or could not become competent upon reasonable research. See Model Rules of Professional Conduct Rule 1.1 (1995); Model Code of Professional Responsibility DR 6-101, EC 6-3 (1969).

304. The vast majority of state court trial and appellate judgeships are filled by popular election. See David B. Gottman et al., Nat’l Ctr. for State Courts, *State Court Organization* (1993). While federal judicial seats are filled by appointment, such appointments are subject to the advice and consent of the Senate and, therefore, to representative controls. See U.S. Const. art II, § 2, cl. 2. The failed nomination of Robert Bork demonstrates just how strong these controls can be, at least when the appointment is to the Supreme Court. See Ethan A. Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989).
or removing judges in certain circumstances, and a constitutional basis, in the form of due process, for invalidating judgments made by biased tribunals.

This is not the case, however, with arbitration. For example, the overwhelming majority of states have no minimum qualification, competency, or disciplinary requirements for arbitrators. In most states, barbers and taxidermists are subject to far greater regulation than arbitrators. While it is true that arbitrator bias provides what may well be the central basis for overturning an arbitrator's award, the standard is extraordinarily high—it requires proof of actual bias against a party in the case, rather than a mere appearance of impropriety. As a result, the vacatur of an arbitration award on this ground is rare.

As the introductory hypotheticals and examples demonstrate, questions over qualifications and bias are not mere theoretical possibilities. A recent American Bar Association Journal poll of a sampling of ABA members found that more than seventy percent of respondents were concerned about the basic qualifications and neutrality of arbitrators and mediators. Empirical research is just getting underway, but even now it is beginning to suggest that such concerns are well-founded. A recent study of non-union employment cases heard by American Arbitration Association arbitrators indicates a substantial bias among them in favor of repeat players, due in part to the superior information institutional players possess about the backgrounds of ADR providers, as well


306. Formal requirements for the qualifications of arbitrators are rare, although some states require arbitrators to take an oath of fairness and impartiality as a condition of their appointment. See 3 MACNEIL ET AL., supra note 3, §§ 27.2.1, 27.4. The same holds true for mediators. See Reuben, Peacemaker, supra note 9, at 60 ("Only a small handful—Florida, New Jersey and Hawaii—have adopted qualifications requirements for mediators.").

307. Under the Federal Arbitration Act, an arbitration award may be vacated "[w]here there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(b) (1994). State laws are similar. See, e.g., CAL. CIV. PROC. CODE §1286.2 (West 1982); Luster v. Collins, 19 Cal. Rptr. 2d 215, 219 (Cal. Ct. App. 1993) ("To support a claim of bias, a party must demonstrate the arbitrator had an interest in the subject matter of the arbitration or a preexisting business or social relationship with one of the parties which would color the arbitrator's judgment."); 3 MACNEIL ET AL., supra note 3, § 28.2; 4 id. §40.1. The UAA contains similar language in Section 12. See COLAGIOVANNI & HARTMANN, supra note 59, at 16.

308. See Reuben, Peacemaker, supra note 9, at 58.
as commercial pressures on those providers.\textsuperscript{309} Similarly, a 1994 General Accounting Office study found that eighty-nine percent of all arbitrators who hear securities-related complaints, ranging from fraud allegations to sexual harassment, are white males with an average age of sixty, many of whom spent their professional careers in the brokerage industry.\textsuperscript{310} It is obvious that this information could be troubling to the race discrimination plaintiff in our hypothetical, given that subtle heuristics, such as cultural and professional biases, affect judgment.\textsuperscript{311}

This troubling aspect of ADR is only exacerbated by the absence of even the most basic procedural safeguards, such as the right to counsel\textsuperscript{312} and the right to present evidence on one's behalf.\textsuperscript{313} Public hearings are typically held at a neutral public site, which is one nuance of formality that, some have contended, goes a long way toward ensuring procedural fairness.\textsuperscript{314} By contrast, private arbitrations, mediations, and other alternative procedures are often held wherever space can be found, and can easily take place in the conference room of a law firm known for advocating one side of an issue.\textsuperscript{315}

Procedural values also further a sense of rationality and predictability in the law, ensuring that the rules governing a conflict will be applied accurately and in a way capable of guiding future individual and

\textsuperscript{309} See Bingham, supra note 17, at 17-18.


\textsuperscript{311} For what is probably the most comprehensive compilation of research on the psychological, economic, social, and other dimensions of conflict and negotiation, see \textsc{Kenneth J. Arrow et al.}, \textit{Barriers to Conflict Resolution} (1995); see also \textsc{Plous}, supra note 141.

\textsuperscript{312} The existence of the right to counsel of one's choice in civil cases, although not to appointed counsel, has always been assumed in American law. \textsc{See Note}, \textit{The Right to Counsel in Civil Litigation}, 66 Colum. L. Rev. 1322, 1327 (1966). In stark contrast to the right to counsel in criminal cases, however, there is little authority on the subject. For an historical explanation, see \textsc{William Merritt Beaney}, \textit{The Right to Counsel in American Courts} 8-9 (1955); Michael P. Malloy, \textit{Economic Sanctions and the Retention of Counsel}, 9 Admin. L.J. Am. U. 515, 581 n.281 (1995). For an argument that the right to court access through the right to counsel in civil cases is derived from the due process clause, see Jeffrey R. Pankranz, Comment, \textit{Neutral Principles and the Right to Neutral Access to Courts}, 67 Ind. L.J. 1091, 1099-1108 (1992).

\textsuperscript{313} While it has not issued a ruling directly on point, the United States Supreme Court has implied in its criminal decisions that the right to counsel in civil cases is implicit in the concept of Fifth Amendment due process. \textsc{See, e.g.}, Powell v. Alabama, 287 U.S. 45, 69 (1932); Cooke v. United States, 267 U.S. 517, 537 (1925). For lower court decisions, see \textit{American Airways Charters Inc. v. Regan}, 746 F.2d 865, 873-74 (D.C. Cir. 1984); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1117-18 (5th Cir. 1980).

\textsuperscript{314} It is easy to shrug off issues regarding the presentation of evidence as limited to arbitration, which is essentially an adjudicatory procedure. But these issues can also arise in mediation, where one of the parties is essentially silenced by a biased or rushed mediator. \textit{Cf.} Grillo, supra note 19, at 1572-81 (discussing women and mediation).

\textsuperscript{315} See Delgado et al., supra note 20, at 1387-89 (arguing that formality and adversarial procedures counteract bias among legal decision makers).

\textsuperscript{315} See Telephone Interview with Jeffrey Liddle, Attorney, supra note 34 (observing that SEC arbitrations are frequently held in law offices of firms that represent securities brokerages).
societal behavior. Not so in arbitration, or other areas of ADR. The processes are removed from public witness, negating any possibility the dispute's resolution will have any public educational or deterrent value. More importantly perhaps, there is no mechanism for ensuring that society's laws are accurately administered. To the contrary, one of the ironies of contemporary ADR is that it can result in the removal by the state of the availability of public law to redress a party's harms, either substantively or procedurally, even though the provision of a remedy for a given harm may be precisely the law's intent.

Our introductory hypothetical involving John A.'s racial discrimination case helps illustrate the point. At the risk of oversimplification, the process of public law is straightforward and familiar: pursuant to our constitutional scheme of representative democracy, Congress passes laws that provide vehicles for plaintiffs who believe they have been discriminated against to bring actions when an employer's conduct comes within the ambit of the statutes, as well as defenses to protect employers from abuse. Plaintiffs like John bring those claims and employers like John's defend against them. Trial judges make decisions on various statutory, evidentiary, and procedural matters, and ultimately one side wins and the other side loses. An appeal can then be filed by the losing party. If a party feels the appellate court erred, he or she may seek high court review. If the high court accepts review and affirms, the legislature is again free to correct the error. It is through this process of review that our system provides a mechanism for self-correction, attempting at the very least to ensure the accuracy of the trial court's application of the rules of law.

With ADR, however, no such safeguards exist. As noted above, neither arbitration nor mediation requires the use of public law in the resolution of the dispute. Therefore, arguments regarding misapplication or outright repudiation of the law must necessarily fail in challenges to ADR results, as the law does not provide a basis for substantive review of those results. The net effect is that the very law that citizens have agreed will govern their lives ultimately has little bearing on how their disputes are resolved in ADR. The social contract supporting our constitutional order has been breached, and the democratic process that allowed for the creation and the application of the rule of law subverted, by order of the court.

The problems associated with the lack of procedural safeguards can only be expected to increase as the critical mass of individual injustices in ADR continues to coalesce and become more institutionalized. The effect could well lead to a diminution of democracy itself. In his

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316. See, e.g., Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1992) (finding that an arbitration award is not subject to judicial review even though there is an error of law on its face).
landmark work on democracy, as practiced in the largely autonomous Italian regional governments since 1970, Harvard political scientist Robert Putnam concluded, among other things, that civic culture and social capital were far more effective than positive law, political institutions, and economic factors in generating effective democracy.\textsuperscript{317} Successful regional governments, he found, were marked by a civic culture that broadly encouraged cooperation and reciprocation among its citizenry at all levels of national life, from social to political to economic and beyond.\textsuperscript{318} Drawing on modern game theory, Putnam suggested that such cooperation leads to a constantly deepening sense of trust and order, both horizontally among the citizenry and vertically between the citizenry and its governmental and national institutions.\textsuperscript{319} He concluded that social capital is more powerful and effective than positive law or economics in ordering human affairs, and is the very engine that drives effective democracy. Stoke this social capital and democracy will flourish; starve it and democracy will hollow.

The rule of law is inarguably one of the central tenets of governmental institutions in a democratic regime. It provides the stability and order that permits electoral and other institutions to operate without chaos or arbitrariness. Yet, it depends on the very kind of voluntary compliance and cooperation that Putnam found so important to the success of effective regional democracies in Italy—the belief and trust among the public that we should obey the law because others will do so as well. In many ways, the procedural values described above are intended to facilitate the trust and cooperation that provide the basis for this nation's social capital and commitment to a rule of law. To the extent that they are not accounted for in ADR, America's social capital may decline and the effectiveness of our democracy may be diminished. One need look no farther than the 1991 Los Angeles riots, which followed the acquittal of four officers charged with using unlawful force against motorist Rodney King, to see how quickly order can turn into chaos and destruction when society's desire to accept the rule of law breaks down.\textsuperscript{320}

Justice Kennedy's concerns for these procedural and democratic values led the Court to find state action in the administration of peremptory challenges in a private civil action, as the private injury was aggravated by the incidents of governmental authority.\textsuperscript{321} The aggravation

\textsuperscript{317} See Putnam, supra note 285, at 165-85.
\textsuperscript{318} See id.
\textsuperscript{319} See id.
of injury in the ADR context is certainly no less than in the peremptory challenge context. As we have seen, it is actually much greater.

CONCLUSION

In an insightful work delivered at the outset of the modern ADR movement, Professor Richard Abel contended that ADR would actually expand the role of the state into the realm of private dispute resolution.\footnote{322. See 1 Polities of Informal Justice, supra note 12, at 270-79.} More recently, scholars have recognized that ADR has been "co-opted" by public law\footnote{323. Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR," 19 Fla. St. U. L. Rev. 1, 13-16 (1991).} such that it has "become a part of the judicial process and no longer stands apart from it,"\footnote{324. Judith Resnik, Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication, 10 Ohio St. J. On Disp. Resol. 211, 235 (1995).} or that dispute resolution is moving toward a "process pluralism."\footnote{325. Marc Galanter & John Lande, Private Courts and Public Authority, 12 Stud. In L. Pol. & Soc'y 393 (1992).} The time has come to acknowledge this reality and to recognize in constitutional terms what law and history seem to oblige: court-related and contractually compelled ADR can be state action for constitutional purposes, as we have seen, seems most clear with arbitration. At some level, this reality must trigger the assurance of constitutional protections in ADR hearings.

This need not mean that court-related and contractual ADR is somehow invalid; public policy strongly favors its use, and its proper growth should be strongly encouraged. What it does mean, however, is that the arrival of ADR should be recognized as an expansion of public justice, rather than the establishment of a private alternative to public justice. This is the basis of ADR's claim to legitimacy and, indeed, brings the modern movement back to its origins. In a speech given in 1976, Professor Frank E.A. Sander called for what later came to be known as a "multi-door courthouse," in which disputes would be routed to litigation, arbitration, mediation, or whatever other kind of dispute resolution technique was found to be most appropriate.\footnote{326. See Sander, supra note 41, at 65.} It is to this understanding that we must return in order to further the legitimate goals and development of ADR as a part of our larger system of public justice, and the democracy it serves.