

CHAPTER 2

DAVID FELLER MEMORIAL LECTURE: DEALING WITH HOT BATTLES IN THE PUBLIC SECTOR: ANY LESSONS FOR WORKPLACE DISPUTE RESOLUTION?

I. MICHAEL HEYMAN*

It's a great pleasure to be named the David Feller Memorial Speaker. David was a joy to have as a colleague at Boalt Hall at Berkeley. He came late to academia after a highly successful practice, but nevertheless had to prove his mettle before getting tenure. He did that magnificently while becoming both a great friend and an important mentor to all of us on the faculty.

I've run a number of institutions, and Walter Gershenfeld suggested that I focus this talk on dispute resolution. Thus, the title of the talk. I'm not sure that the disputes I describe provide useful lessons for workplace dispute resolution, but I had a lot of enjoyment reacquainting myself with past battles.

In all of my roles prior to becoming a public CEO, I had neither experiential nor educational preparation for dispute resolution. And my post-law school career, before teaching, was two-thirds dealing with evaluation of appellate briefs and arguments. These can be instructional in many regards, but not particularly useful for resolution of heated disputes. The procedures are formal, the mode of argumentation highly structured, and emotion is kept carefully at bay.

Alaska and the Native Claims Settlement Act

But, I did have a bit of arbitration experience in Alaska. The Native Claims Settlement Act adopted by Congress in the early 1970s divided Alaska into 12 areas and gave native peoples in each considerable use and occupational rights. The Act provided for arbitration where a native organization disputed boundary lines

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established by the Secretary of Interior. There were to be three arbitrators—one appointed by each side, the third to be a neutral, agreed upon by the other two. They chose David Feller. He was already occupied, however, and, for reasons I forget, he suggested me. The central issue was a tough one. It involved whether a particular village should be in the territory of one or the other native corporation, each representing different tribes of Athabascan Indians. Native corporations under the Act acquired not only land but a portion of a generous fund to compensate for past takings. The fund was to be split on a per capita basis. This controversy involved around \$3 million.

In the end I was essentially being asked to define a boundary line on the basis of ancestral identities and ill-defined records of use over a long period of time. The Asian ancestors of the contenders came across the Bering corridor during the last ice age. Thus, the ancestors of the parties probably had been around the territory since circa 9000 BC. This was no Johnnie-come-lately boundary dispute similar to the one between Poland and Germany.

The evidence presented was fairly even in weight, although each side, of course, had weaknesses. I had the good fortune, however, to chat with David about my quandary. His musings were very enlightening—they had nothing to do with the merits, but a lot to do with the process. Two days later, before what was to be the final day of proceedings, I took advantage of Dave's analysis. I sat down separately with each of my co-arbitrators and told each what I tentatively found was the principal weakness in his case and suggested that these be addressed the next day. The next morning the parties announced that they had settled.

Three Confrontations at Berkeley

I did this arbitration just before taking my first major administrative job in 1974—the Vice Chancellor at UC Berkeley (called Provost in most places). It taught me a lot about orchestrated compromise and trying to get contending parties to see the wisdom of embracing a less-than-perfect solution.

Berkeley, of course, has a special reputation as the locus of student activism that frequently results in demonstrations and disruptions. Much of the reputation is based on events in the mid-1960s and early 1970s. While Berkeley was the first large campus to host significant protests, it hardly deserves the special congratulations or condemnations that it has received—the conflagrations

occurred nationwide and in some cases with more disastrous results (e.g., Columbia and Wisconsin). I'm convinced that the nation treated Berkeley events as seminal because they were highlighted on the TV news largely because of California's salubrious climate and the proximity of tourist-friendly San Francisco. Eastern TV personalities flocked to the west from November–April for obvious weather-related reasons. I had three principal personal engagements with disruptions—two in the 1960s (as a faculty member) and one in the 1980s when I was Chancellor. I learned a major lesson from each.

Inadequacies in the Judicial Model

In 1965 I chaired a special faculty committee that UC President Clark Kerr created as one of the conditions of a temporary truce he negotiated with dissident students. The committee was to review the original acts of civil disobedience carried on by students in 1964 protesting newly adopted rules to limit political activity on the campus. The students had been harshly punished. My committee was largely made up of prominent faculty elders. I was relatively young, but as the sole law faculty member, I was made chair. Our hearings were more judicial than administrative, with the Dean of Students the prosecutor and the students represented by an ACLU lawyer. At its conclusion I wrote an opinion for a unanimous committee. The committee was highly critical of how the university had proceeded in adopting and enforcing the new rules and recommended that suspensions already served were more than sufficient punishment for the transgressions.

There was nothing incorrect about the opinion given the judicial model we adopted, which was consistent with our charter. And had our recommendations been adopted with grace and the new rules rescinded, then the protests might have ended. But neither I, nor my colleagues, ever gave a thought to the obstacles to this resolution given the entrenched positions of many Regents and the polar opposite views of the Berkeley Chancellor and President Clark Kerr.

In retrospect, the judicial model was quite inappropriate. What might have worked (although this is questionable given the quite rigid ideas of authority entertained by a number of important campus administrators) was a faculty committee trying to negotiate a resolution that would recognize the impropriety of the new rules,

the principled role of most of the protestors, and the misplaced good faith of the administration.

So my take-away lesson, which is no news to you, is that form can impede dispute resolution and the lawyer/judicial model can be a major impediment to compromise in many situations.

Intervention with Clout

Interestingly, I had another chance to reflect on this a few years later. We had both a new Chancellor and a new President, but still a split Board of Regents (with the more conservative members led by the new Governor, Ronald Reagan). Our Chancellor, a splendid man named Roger Heyns, was in Washington when protesting students, for reasons I no longer remember, organized a sit-in in the Student Union. After patiently giving the protestors ample opportunity to leave, the Executive Vice Chancellor had those who stayed arrested and removed from the building. We had a replay, to an extent, of the 1964–65 protests (similar to those that followed the earlier sit-in in the major campus administrative building in 1964).

I was then the Chairman of the Academic Senate Policy Committee, the closest entity the faculty had to an Executive Committee. A special meeting of the Academic Senate was called by petition of a number of faculty members opposed to the administration's actions. My committee met, and I was charged with the obligation to negotiate an appropriate resolution for Senate consideration that would end the protests but give support to the Chancellor who was very well liked and respected by all the committee members.

So I began a process akin to a mediation—although I knew at the outset generally where I wanted to come out. Considerable conversations with leaders of the right, the left, and the political center of the faculty produced a general consensus: the Senate would be asked to confirm our support of the Chancellor, but simultaneously ask him to drop criminal and administrative charges against the students.

The day before the faculty meeting I was called by representatives of Chancellor Heyns and then the Chancellor himself saying that it was not possible to drop the charges. I said that was up to him, but I could assure him that the Resolution as written would result in an overwhelming vote of support and approval for him. He said that he might move to delete the request to drop the

charges. I said that the making of such a motion would split the faculty and seriously reduce the numbers giving him a vote of confidence.

Over 1,200 faculty attended the next day's meeting. The Chancellor did not seek to amend. Such an amendment was later proposed by a faculty member, but soundly rejected. The final count gave the Chancellor a vote of confidence by more than 90 percent. That's what the media carried, it strengthened Chancellor Heyns' status on and off campus and, as far as I can remember, nobody then or later talked about the charges against the students. My guess is that they were never prosecuted (the DA knew full well that it was impossible to get a guilty verdict in Berkeley on trespass charges). Each student eventually received a letter of censure from the campus for participating in a rule violation.

The take-home lesson? Intervention by a third-party with a bit of clout and with knowledge of the institution and an educated sense of what's possible and positive is a lot more workable than an isolated act of a faculty committee sitting in judgment.

The Divestment Crisis

My final UC Berkeley example could fill a volume. It occurred when I was Chancellor, and protests went on for well over a year and involved most prominently the demands that the University divest its portfolio of stock of any corporation doing business in South Africa. But in typical contemporary style, proponents of other issues joined in. This, of course, is the story of a war, not a single encounter.

As you will recall, divestment was a hot campus issue in the 1980s. Opposition to apartheid was shared by a large number of students. In their view the colleges they attended complicitly supported apartheid by profiting from business in South Africa. Thus, there was a nexus between the evil and the institutions most closely at hand.

During the upsets of the 1960s, demonstrations at UC Berkeley were centered in a large plaza near the entrance of the campus between the major administrative building (Sproul Hall) and the Student Union. The major form of confrontation consisted of sit-ins in nearby buildings, and normally were preceded by organizing speeches in the plaza. The major anti-apartheid demonstration of 1985 occurred in the plaza, on the steps of Sproul Hall. It started as a vigil and quickly morphed into a sleep-in on the steps that lasted 43 days.

This was a very clever tactic. Although arguably a violation of campus time, place, and manner rules governing demonstrations (ones that originated in the 1960s), violation was not clear. And less clear was whether the sleep-in constituted a criminal trespass. The tactic was also clever because it invited wide participation of tangible and reportable behavior that generated media coverage and enraged conservative alumni, regents, and faculty. It was also unsightly; arguably unhealthy and unsafe; attracted many of the nonstudent population of the campus area, some of whom were provocateurs; and troubled the staff who continued to work in the building. It also troubled me. I decided to clear the steps after a weekend that attracted nearly 200 sleepers.

Clearance occurred in the early morning of the Tuesday following the weekend. The police action was largely peaceful and utterly unsuccessful. Many of the participants returned the next day and their number grew. Parenthetically, the university folks in student affairs primarily responsible for dealing directly with these matters patiently sought to come to reasonable agreements with the demonstrators over the most troublesome aspects of the sleep-in. This was unsuccessful. There were no identified leaders with whom to negotiate. They were told the group acted only by consensus.

The campus was in a very difficult position. The Chancellor was powerless to provide any solution to the basic demands of divestment. This was up to the Regents and the UC system President. The Berkeley courts dismissed trespass charges (our only basis for dealing with nonstudents), and the student conduct procedures, largely created during the earlier era of protests, were highly legalized and did not provide for expeditious action without the consent of charged students. Our principal palliative was seeking a forum for students to air their views to university authorities. This occurred later in April when 7,000 people attended a highly charged, but peaceful, session in the basketball arena that was addressed rather courageously by the UC President who argued against divestment and a few liberal regents who foresaw little hope for a majority vote to divest among regents. The forum did not settle any issues satisfactorily because the protestors and the sleep-in continued, but began to get uglier. One outsider attempted to immolate himself; others, again outsiders, provoked occasional fights with police.

The major event that preceded the end of the occupation of the steps in May was a scheduled meeting of the Regents on the Berkeley campus. It drew a large number of protesting students

from around the whole system. We responded with a large number of police under mutual aid arrangements. There were attempts by the more radical campus groups to organize a blockade and physically confront the Regents, but this fizzled. The general mood of the crowd was against violence, especially given the large police presence. Two days later, at the end of the semester, the dwindling number of protestors on the steps left and summer break began.

Then came the next term that commenced in mid-August. The campus was better organized for protest than previously, which was useful as the protest movement renewed its activities starting immediately at the beginning of the new term and escalated through December. Other issues (and groups) joined those primarily interested in divestment. And the President's headquarters, adjacent to the campus, also became a locus for demonstrations. There were attempts to renew occupation of the steps, but this did not materialize. Similarly, there was a brief sit-in in the administration building, but this ended peacefully. Those who were more violence prone were apparently more involved in the protests at University Hall, the system's office, because that was the locus of trashing, graffiti, and violence.

Problems did not arise on the Berkeley campus until April 1, but they were quite serious. As many of you will remember, shanties began to be constructed at campuses around the country as vivid symbols of apartheid in South Africa. In most instances, agreements were reached as to number and location, and the protest leaders were amenable to discussion and negotiation with campus officials. In Berkeley, this could well have occurred if leaders who felt responsible for the health of the institution as well as for the success of protest to bring about results were enabled to negotiate by the protestors. Elected student leaders would likely serve this role, but, at least at Berkeley, they were largely spectators with protest leaders coming from smaller groups with very limited agendas. And, in the Bay Area at the time, any protest that gained traction produced outsiders whose agenda disregarded institutional health and welfare completely. They seemed devoted to trying to manipulate demonstrations primarily to confront authority. I later decided it wasn't paranoia to conclude that there are a small number of skillful provocateurs in the Bay Area who delight in causing trouble.

Whatever the mixture, as shanties symbolic of oppression appeared elsewhere, a large number of them appeared at Berkeley on March 31 (about a year after the beginning of the sleep-in) and

were moved in the late afternoon to blockade the front entrances of the Chancellor's building as a focal point of demonstration. An initial crowd of nearly 500 people accompanied the shanties. It dwindled to approximately 150 later that night, many of whom were not students and were seeking confrontations. The campus fire marshal required the building to be emptied because of fire danger from the shanties. The crowd shouted down campus staff and refused to discuss anything except their demands.

The upshot of all of this was a pitched war between police and demonstrators when the shanties were removed that night and a large number of demonstrators, most of whom were not students, were arrested. But this battle was not the end of the affair. The next morning demonstrators surrounded the Chancellor's building. By this time mutual aid had produced a large number of police. Eventually, blockaders moved when it became evident that the augmented police force would clear the building in compliance with a temporary restraining order issued by a Superior Court judge in Oakland. That was the end of violence. More peaceful demonstrations followed and then the term ended.

Ironically, the divestment issue disappeared at the subsequent July meeting of the Regents when Governor Dukemejian (a conservative Republican, no less) supported divestment and convinced the many Regents whom he had appointed to vote for divestment. Wouldst that he had acted earlier.

Reflecting on the Student Protests

Reflecting on this experience underscores the difficulties of administering a large, public institution where so many are young and liberal in their views. I applaud the young who chafe at inequalities and want greater sharing of wealth, political power, and freedom of action. Many (if not most) unfortunately will jettison many of these values as life proceeds. Better that they have the opportunity to experience the other side before the contraction of horizons sets in and a high-paying career with all the connected amenities shuts out broader views.

But such a constituency can cause real headaches for leaders of educational institutions who are seeking to protect and enhance its basic missions: teaching, research, and service, not to speak of raising the vast resources from public and private sources necessary to carry on its missions.

Student protests involving serious matters of public policy are a natural outcome of the propensities of many of the young un-

leashed by changes of perception in authority relationships that flowed from the 1960s. "Question authority" is still a meaningful motto to many university students. When the protests involve campus issues within the authority of presidents and faculty, as was largely true in the 1960s, deft campus leadership can minimize the probabilities of violence, paralysis, and outside intervention. The initial problems at Berkeley in the 1960s were largely due to an obdurate administration that couldn't conceive of the lasting nature of student disobedience. Deftness depends on intelligent anticipation of problems, a willingness to negotiate, prior notice, and, where possible, an open process for considering objections to intended administrative positions.

Once serious actions of protest begin, however, handling them is very dicey. If the administration refuses to accommodate change, it faces the possibility of escalation of means and intensity of protest, especially if the cause is important to many. On the other hand, if accommodations are made, the administration is open to anger by outsiders and those internally who disagree with what they see as "caving in" and retreat. One reason I ordered the steps to be cleared and the arrest of those who refused to leave, even though I doubted this would offer a permanent solution, was to assure our critics that we were exercising authority to the extent that we could.

A perennial problem is possible police reaction to disorder. What might be conceived as police violence can become the centerpiece of protest. Most campus police understand this dilemma and are quite patient and nonreactive to taunt. But, if they are overwhelmed by numbers and reasonably fearful of acts of violence directed at them or important campus property, their reactions can be imprudent. The behavior of outside police from cities and counties summoned under mutual aid agreements is much more problematic. However, my experience is that where violence is probable, especially from outsiders, large numbers of police can be the best guard against its exercise. But you can call on such aid only sparingly. And, unfortunately, it's often hard to predict when a protest might get out of hand. Our "intelligence" sources are rarely reliable.

The problem underlying our one-year war was that the campus had very little to contribute to amelioration other than arranging for public fora on the issue of divestment. Divestment was a highly politicized decision for the system president and the Regents. Moreover, the time scale driving their decision making was not attuned to Berkeley's concerns and needs. The protestors' pas-

sions and the system's delays only exacerbated the intensity of protest.

The Display of the Enola Gay

Now I turn to the most controversial dispute I ever had to handle. This was at the Smithsonian and involved the display of the Enola Gay, the plane piloted by Colonel Tibbets that dropped the first atomic bomb on Hiroshima. The director and curators of the Air and Space Museum planned a lengthy exhibition, as part of the Smithsonian's activities commemorating the 50th Anniversary of the end of World War II. The originally planned exhibition started chronologically in 1945, presented relics and graphics of the devastation wrought, and could be taken as seriously undermining the morality of using the bomb to end the war. It did this by presenting materials that suggested that Japan was ready to surrender without its use, that an invasion, if necessary, would have resulted in many fewer American casualties than many later assumed, and that one major motivation for its use was to deter Soviet occupation of new Asian territories and to warn the Soviets of our possession of an ultimate weapon that could be used against them. These were positions that had been developed by a number of younger historians (characterized derisively by traditionalists as "revisionists") who asserted that President Truman's decision was singularly immoral.

Storm clouds over the planned exhibit gathered during the summer of 1994 and exploded around the time I took office as Secretary that September. The controversy started when the *Air Force Journal* reviewed the tentative script and printed a criticism that questioned the accuracy of the script, the good faith of the curators, and the loyalty of the Smithsonian and its officers to its mission as the preeminent national museum. The national press carried the story and the characterizations without further investigation, numerous veterans groups joined the fray, and Congress, of course, began to level serious charges against the Institution.

A note about my role. I had been a regent of the Smithsonian since 1991 and in 1994 I chaired its nominating committee for new regents. When my predecessor announced his intended resignation in late 1993, the board asked me to chair a five-person selection committee for the new Secretary. After looking at a number of candidates, my colleagues ganged up on me to take the job. I seriously resisted: 10 years as chancellor at Cal had been

enough. But they assured me that serenity beckoned, that the Smithsonian was a cherished institution free of divisive politics and partisan attack, that kids loved the pandas [we really have a zoo?], that my mother would have been proud, and that this was a wonderful “last hurrah.”

Actually, I hadn’t realized how little I knew and how sheltered regents were from current controversies. The regents then met three times a year in short meetings with most of the time devoted to a host of show-and-tell presentations (not unlike private corporate boards of the time). For instance, we had never been told about the planned Enola Gay exhibition, and I had no forewarning when I accepted the job. (So much for due diligence on my part.) I also didn’t know about a number of other matters.

Most relevantly, I was unaware of the intensity of anger felt by a number of Republicans on the Hill toward the Smithsonian, with Senator Stevens being a good example. We had been sheltered in these regards by the friendly Democratic chairs of the appropriation committees in both Houses. Part of the anger was based on the perception that no one was in charge. That was an accusation familiar to me. California legislators often say the same about university chancellors (it’s endemic to academic institutions where program largely results from decentralized decisions by faculty). And the country, of course, was in the midst of the culture wars—remember the trials and tribulations of the NEA and NEH. The Smithsonian had had a few run-ins, too.

In any event, I took the job, and then everything hit the fan. In early November the Republicans took over both Houses, and a new set of committee chairs took over. Generally, they were highly suspicious of both the Smithsonian and the new Secretary. (Who is this obvious liberal from ungodly Berkeley presiding over unpatriotic exhibits?) Two factors blunted much of that criticism. First, Newt Gingrich loved dinosaurs, and we had a bunch. Second, it became known on the Hill that I was a former Marine. Stereotype fought stereotype; the latter one at least gave me a leg up.

But none of this solved the Enola Gay problem. The opponents of the planned exhibition had the momentum. They had defined the issue. Smithsonian attempts to deal with the charges were ineffective. Statements by museum spokespeople were too nuanced to gain traction. We could hardly get the media and the public to understand that no exhibit had yet been mounted and that the script was not final and was still being edited. In fact, as is often the case, major changes were occurring. For instance, a

detailed look at the war in the Pacific from Pearl Harbor on was being prepared. Moreover, the exhibit was being shortened and post-war civil defense materials relating to protection against nuclear attack jettisoned. But we failed to get anyone's attention to these and other changes.

The undersecretary and I brooded about how to go forward. We concluded that the external pressures, especially from Congress, required that we do more than revise in a vacuum and await public evaluation until an exhibit was mounted in mid-1995. Two factors supported this conclusion: first, outside critics, especially various veterans groups, would keep up the drumbeat of opposition and further exacerbate the deterioration of the Institution's reputation; second, opponents of the exhibition as originally conceived within the family of the Air and Space Museum could not be trusted to maintain silence, but would continue to characterize negatively whatever was being revised.

Nevertheless, the director of the museum and I would continue to be available to discuss privately and publicly what was occurring.

Finally, we decided that we should sit down with our largest and most influential critic, the American Legion, and review the emerging final script line-by-line so long as we believed that the Legion would undertake such a review in good faith. We talked with the then commander and important staff, concluded that there could be a dispassionate review, and felt somewhat confident that in the end the Legion would at least withdraw its opposition even though it might not agree with all the statements in the script. So a review commenced with the Smithsonian represented by the undersecretary and the museum director, and the Legion by highly placed staff.

Our optimism proved to be misplaced. I'll never know exactly why the Legion withdrew from the arrangement. Unfortunately, the museum director, unwisely in my view, simply informed the Legion and representatives by letter that the script would contain a conclusion on a matter that had been highly contested, without further discussion. (This involved the estimate of American casualties should an invasion of the south island, Kyushu, be undertaken. Ironically, post-war information indicated that the Japanese had concentrated many more troops and airplanes on Kyushu than American intelligence apparently had discovered. An invasion would have been very costly.)

The manner in which the Legion announced its withdrawal and its adamant opposition to the exhibition left even more to be

regretted. As soon as I was informed of the museum director's letter, I asked for a meeting with Legion officials to discuss the particular matter at issue and to seek to assure continued cooperation. The officials appeared at the scheduled time, but not to discuss the impasse. Rather they simply announced to us, without prior notice, that they had decided to break off relations with the Smithsonian and had vividly communicated their position to Congress just prior to our meeting.

Thus, our strategy failed. This was especially vexing given the efforts expended for two months by Smithsonian and Legion staff to create a script that the Legion might not support, but would not attack. My guess is that political leaders of the Legion concluded that it was in their interest to condemn the Smithsonian and that they were looking for a pretext to withdraw from their agreement to co-review a revised script.

The Legion's action left us in a worse position than we were in before. There seemed no feasible way to communicate the fruits of the ongoing revision process in a manner that others would understand. Given the political complexion of the Congress and the Legion's adamant opposition, we would predictably be battered constantly unless we could put distance between the public's perception of the original script and the exhibition that would be mounted. So, with considerable reluctance, I decided to scrap the "original" exhibition publicly and start the preparation of a new one. This was a very tough decision for obvious reasons. Principally, the action was a surrender to the critics, or surely it would be so perceived, and it involved secretarial interference with the normal prerogatives of curators and museum directors. This was underlined by my taking direct responsibility for the new final product.

Learning from the Enola Gay Experience

I learned quite a lot from this jarring experience. First, when dealing with highly controversial subjects you have to be pro-active in both anticipating public and political opposition and planning how to deal with it. This means that you need a good internal communication system that alerts institutional leaders to dangers ahead, and you need skillful public information staff to advise on how to define the issues at play and influence the ensuing debate. We failed miserably in these regards.

Second, it was a significant error to choose solely the American Legion as the partner in the revision. There were other candidates in the veterans community that we should also have involved. Some would have been more enlightened on the merits and less inclined to take into account the advantages and disadvantages to their organizations of cooperating with the Smithsonian than I believe was true of the Legion. In any event, it was a mistake to put all our eggs in one basket and empower a single organization to decide our fate.

Third, I perceived then, and with much greater understanding later after a long internal process of consultation within the Smithsonian, that the way to handle controversial exhibitions in what is the national museum is to reflect more than one viewpoint and let the audience make up their own minds. (I could give a long lecture about the complexity of this approach, but I do not have the time and you undoubtedly do not have the patience.)

I've enjoyed making this presentation in honor of such a splendid man as David Feller, and I hope that some of the lessons I learned are of relevance to you—an audience devoted so especially to resolving conflict in our often fractious and uncooperative society. I have spoken of these engagements from the perspective of the embattled CEO. I'm going to have to leave it largely to you to decide whether there are lessons to be learned of relevance to your engagements.

CHAPTER 3

INVITED PAPERS

I. OPTIMALITY THEORY AND ITS IMPLICATIONS FOR ARBITRAL PRACTICE

CALVIN WILLIAM SHARPE*

When I told one of my Academy colleagues the title of my paper, *Optimality in Arbitration*, he repeated with a somewhat bemused and quizzical look on his face—*ophthalmology in arbitration?* And while that was funny (or at least intended to be), it did ring quite true in a sense. There is a controversy in arbitration that I will lay out for you, but this paper is at least in part about *seeing* the attributes of disputes and seeing the match between those attributes and dispute resolution procedures. First, the controversy. Then I will discuss optimality, not ophthalmology, and the final part of the paper will focus on what I call optimizing effects.

The Controversy

Generally stated, the controversy is whether privatizing justice through arbitration is appropriate in cases involving statutory claims. More specifically stated, the controversy is whether contracting parties with unequal bargaining power should be bound by predispute agreements to arbitrate statutory claims that might arise during their contractual relationship.

The Federal Arbitration Act (FAA),¹ passed in 1925 made predispute arbitration agreements (agreements entered into in some cases well before the dispute arose) “valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the

*Member, National Academy of Arbitrators, Cleveland, Ohio; John Deaver Brinko-Baker & Hostetler Professor of Law and Director, CISC DR (Center for the Interdisciplinary Study of Conflict & Dispute Resolution), Case School of Law. I dedicate this article to the memory of Tim Heinsz, a mentor who asked me to write and, as always, provided encouragement. I am also grateful for the comments of Ben Aaron, Doug Ray, and Ted St. Antoine on an earlier draft and to Kevin Shebesta for valuable research assistance.

¹9 U.S.C. §§ 1–15 (1925).

revocation of any contract.”² Early anti-reform sentiment made passage of this law difficult in light of a major concern that these predispute agreements permitted businesses to escape public regulation through a kind of one-sidedness in making and performing arbitration agreements.³ It is not surprising that cases presenting the greatest tension for enforcement of arbitration agreements under the FAA involved statutory claims that one party sought to adjudicate in arbitration rather than litigation in court, the forum contemplated by the relevant statute. Permitting arbitration of these claims smacked of insulating businesses from the regulatory policies contained in the statute and undermining the public interest.⁴

In a 1953 case, *Wilko v. Swan*,⁵ involving a purchaser of securities who sued the seller to recover damages under the 1933 Securities Act, the Supreme Court resolved the tension in favor of nonenforcement of the arbitration clause. The court in *Wilko* considered the characteristics of arbitration, particularly the arbitrator’s ability to make awards without explanation and a complete record as well as the narrow scope of judicial review. It then announced that resolving disputes through arbitration would lessen the advantages to buyers under the 1933 Act contrary to an antiwaiver provision of that statute.

However, beginning in 1985, the Supreme Court reversed this weak commitment to commercial arbitration under the FAA and took a position strongly supportive of the arbitration of statutory claims. Starting this trend was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁶ It upheld a predispute agreement that forced the parties to arbitrate antitrust claims arising out of an international transaction. Next, in 1987, the *Shearson/American Express v. McMahon*⁷ case enforced an agreement to arbitrate the

²Section 2 of the FAA reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

³*See* McNeil, AMERICAN ARBITRATION LAW 47 (1992) (recounting early efforts at reform and resistance to those efforts, noting Julius Cohen’s articulation of concerns about the weaker party, and distinguishing between post- and predispute agreements).

⁴*Id.* at 61–62.

⁵346 U.S. 427 (1953).

⁶473 U.S. 614 (1985).

⁷482 U.S. 220 (1987).

plaintiff's Securities Act and RICO claims. A second *Shearson/American Express* case, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,⁸ decided in 1989, raised a 1933 Securities Act claim and overruled the 1953 *Wilko* decision that had originally announced the Court's hostility to the arbitral adjudication of statutory rights. In these cases decided in the 1980s, the Court proclaimed arbitration fully capable of handling the legal and factual issues that arise under statutes without unduly compromising the substantive rights of the parties. It also expressed confidence in the ability of arbitrators to apply the law and the sufficiency of judicial review (notwithstanding its narrow scope) to ensure the arbitrator's compliance with the relevant statute.

This change of heart by the Court was put to its severest test in *Gilmer v. Interstate/Johnson Lane Corp.*,⁹ decided in 1991. *Gilmer* raised an issue of employment discrimination. The Court had repeatedly ruled on the arbitration of statutory claims in the employment context in three earlier cases, *Alexander v. Gardner-Denver*,¹⁰ *Barrentine v. Arkansas-Best Freight Systems*,¹¹ and *McDonald v. City of West Branch*.¹² Those cases had arisen in the context of collective bargaining agreements that contained arbitration provisions and involved a race discrimination claim under Title VII, a wage claim under the Fair Labor Standards Act (FLSA), and a section 1983 civil rights claim. In each of these cases the plaintiff had lost in arbitration under a collective bargaining agreement and wanted, essentially, a second bite at the apple by filing suit in federal court. In each case the Court had permitted this second bite at the apple (sometimes characterized as one bite at two apples), based on the distinction between statutory and contractual claims and the relatively limited role of the arbitrator. In these cases the Court thought that arbitrators enforcing contracts were different from courts enforcing statutes. Employee contractual rights were thought to be different from employee statutory rights. The arbitrator's task was to effectuate the intent of the parties—to construe the law of shop and not the law of the land. Arbitrators are chosen for their familiarity with industrial relations not public law. Arbitral procedures were informal and did not offer the eviden-

⁸490 U.S. 477 (1989).

⁹500 U.S. 20 (1991).

¹⁰415 U.S. 36 (1974).

¹¹450 U.S. 728 (1981).

¹²466 U.S. 284 (1984).

tiary guarantees that govern civil trials. The Court concluded that the federal courts should consider these claims *de novo*, giving arbitration decisions appropriate weight but not preclusive effect.

In *Gilmer*, the arbitration agreement was not contained in a collective bargaining agreement. Rather, it was contained in a stock exchange application that applied to Robert Gilmer's employment, as he was required to register with the New York Stock Exchange in order to perform his job as a manager of financial services for the company, Interstate Johnson Lane. The company terminated Gilmer at age 62, and he filed a charge with the Equal Employment Opportunity Commission (EEOC) followed by a suit alleging age discrimination under the Age Discrimination in Employment Act (ADEA). Relying on the arbitration agreement and its enforceability under the FAA, the company moved to compel arbitration and the Supreme Court ultimately held that the FAA compelled Gilmer to arbitrate his ADEA claim unless Gilmer could show that Congress in the ADEA intended to preclude the arbitration of ADEA claims or that arbitration was inherently inconsistent with the statutory framework and purposes of the ADEA.

Gilmer was unable to make this showing, and the Court rejected Gilmer's generalized attacks on the adequacy of arbitration procedures as reflected in the problems of arbitral bias, the inadequacy of discovery, the absence of a written opinion, and limitations on the remedial powers of arbitrators and judicial review. The Court in *Gilmer* distinguished the collective bargaining cases, which did not involve an agreement to arbitrate statutory claims and were not decided under the FAA, but did involve a tension between collective representation and individual statutory rights.

Gilmer, of course, represented a potential sea change in the enforcement of statutory rights. The one hitch was that in section 1 of the FAA there was an exemption making the FAA inapplicable to employment contracts of workers in interstate commerce. For 10 years there was uncertainty about whether the exemption should be narrowly or broadly construed. In 2001, the Supreme Court in *Circuit City Stores, Inc. v. Adams*¹³ narrowly interpreted the exemption to apply "only to contracts of employment of transportation workers" rather than workers in interstate commerce broadly construed. Under a broad interpretation, most arbitration agree-

¹³121 S. Ct. 1302 (2001).

ments found in employment contracts would not have been enforceable under the FAA. Under the narrow interpretation adopted by the Supreme Court in *Circuit City*, virtually all arbitration agreements in individual employment contracts are enforceable under the FAA. Moreover, because of the narrow scope of review of arbitration awards, arbitration may be the only forum in which important statutory disputes are adjudicated. The ability of employers under *Gilmer* and *Circuit City* to require employees to sign arbitration agreements as a condition of employment can virtually eliminate access to judicial forums.

In the context of employment arbitration this background allows us to state the controversy more specifically. Is it socially desirable to permit employers to impose mandatory arbitration in disputes involving public rights? However, this question does not apply to only employers and employees; it applies more generally to *big guys* and *little guys* (businesses and consumers as evidenced by arbitration clauses in your credit card agreements, between hospitals and patients, and between investors and stock brokers).¹⁴

Gilmer has led to an outpouring of scholarly commentary.¹⁵ The proponents of mandatory arbitration point to the advantages of arbitration:

¹⁴Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637 (1996).

¹⁵See, e.g., Berger, *Can Employment Law Arbitration Work?*, 61 U. Mo.-Kan. City L. Rev. 693 (1993); Jaffe, *The Arbitration of Statutory Disputes: Procedural and Substantive Considerations*, in *Arbitration 1992: Improving Arbitral and Advocacy Skills*, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 110; Sharpe, *Adjusting the Balance Between Public Rights and Private Process: Gilmer v. Interstate/Johnson Lane Corporation*, in *Arbitration 1992: Improving Arbitral and Advocacy Skills*, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 161; Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. Sch. J. Hum. Rts. 1 (1994); Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635 (1995); Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L.J. 381 (1996); Finkin, *Workers' Contracts*, 17 Berkeley J. Emp. & Lab. L. 282 (1996); Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1 (1996); Levy, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. Rev. 455 (1996); Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 St. Louis U. L.J. 77 (1996); Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996); Van Wesel Stone, *Labor/Employment Law: Mandatory Arbitration of Individual Employment Rights; The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996); Bickner et. al., *Developments in Employment Arbitration*, 52 Disp. Resol. J. 68 (1997); Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344 (1997); Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 2000 Hofstra Lab. & Emp L.J. 253 (2000); Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 Brandeis L.J. 779 (2003); Nolan, *Employment Arbitration After Circuit City*, 41 Brandeis L.J. 853 (2003).

- (1) low cost—features like simplified procedures, absence of discovery, and absence of appeal reduce costs;
- (2) speed—simplified procedures, absence of discovery, and absence of appeal, along with reduced delay for trial dates also add speed;
- (3) procedural informality—procedure is determined by the parties and can be made simple and informal;
- (4) privacy of the proceeding—parties may shield the proceeding from public scrutiny;
- (5) finality of the decision—parties make the award final and binding; and
- (6) expertise of the factfinder—because the factfinder is party-selected and not court imposed, the parties may improve accuracy by selecting an expert.

Many proponents regard the cost factor as the most important.¹⁶ They argue that it affords access to the adjudication of statutory rights that would not otherwise exist in many cases.¹⁷ Proponents also support predispute arbitration arrangements, noting the employer's incentive to avoid arbitration where claimants seek arbitration after the dispute crystallizes.¹⁸

The arguments of opponents focus on fairness. Can the bargaining that led to the mandatory arbitration be fair?¹⁹ Can the procedures of mandatory arbitration be fair?²⁰ Is the outcome of mandatory arbitration fair?²¹ Perhaps the most influential critique preceded *Gilmer* and was not limited to arbitration; rather, it took on the entire alternative dispute resolution (ADR) movement. In a 1984 Yale Law Review article entitled *Against Settlement*,²² Professor Owen Fiss argued that settlement is inappropriate in the majority of cases for four reasons. First, the agreement may reflect

¹⁶See *infra* notes 55–60 and accompanying text.

¹⁷See *infra* notes 61–62 and accompanying text.

¹⁸But see Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 117 (2003) (supporting predispute arbitration agreements but decrying the mandatory component).

¹⁹See, e.g., Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights; The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

²⁰See, e.g., Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996) (arguing that employers attempt to minimize payouts through the structuring of the arbitration).

²¹See, e.g., Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) (comparing arbitration and litigation outcomes).

²²Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).