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## Universes Colliding: The Constitutional Implications of Arbitral Class Actions

Maureen A. Weston

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# UNIVERSES COLLIDING: THE CONSTITUTIONAL IMPLICATIONS OF ARBITRAL CLASS ACTIONS

MAUREEN A. WESTON\*

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## INTRODUCTION

Despite perceived shortcomings and criticisms of misuse, class actions are an important procedural joinder device in our public justice system for bringing claims on behalf of a large number of individuals when it may be economically unfeasible to assert claims individually.<sup>1</sup> In the employment context for example, judicial class actions have served as an essential procedural vehicle to address a pattern of civil rights violations. Class actions are also vital in the consumer arena to address relatively small yet widespread illegal and unfair business practices that would “go unremedied if each litigant had to fight alone.”<sup>2</sup> In a litigated class action, the court plays a critical role in administering and presiding over the proceeding to ensure fairness and to protect the due process rights of those class members not participating in the case.<sup>3</sup> The elaborate procedural steps in such representative litigation—fairness oversight, notice, adequacy of representation, and judicial involvement in class certification—reflect important constitutional due process protections.<sup>4</sup> Increasingly, however, recourse to the public judicial system is being displaced by a trend in corporate America to require the submission of disputes to private arbitration rather than to courts of law via predispute arbitration provisions in a range of contracts involving consumer, employment, health care, and

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1. See, e.g., *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (“The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.”).

2. ROBERT H. KLONOFF & EDWARD K.M. BILICH, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 6 (2000) (noting that courts and commentators recognize that class actions allow “those who are less powerful to band together—using lawyers as their champions”).

3. See *infra* Part I.A. Federal Rule of Civil Procedure 23(a) allocates important responsibilities to the court to ensure that requirements of class numerosity, question commonality, claims typicality, and adequacy of representation are satisfied. In addition, critical judicial responsibilities in class litigation include: (1) determining whether to certify a class; (2) overseeing notice; and (3) making fairness decisions in approving settlements. FED. R. CIV. P. 23(c)-(e).

4. See *infra* Part I.A; see also Linda S. Mullenix, *Can an Arbitrator Oversee Classwide Relief? Seventh Circuit Rejects Plaintiffs on Classwide Arbitration*, NAT'L L.J., Aug. 26, 2002, at B8.

business transactions.<sup>5</sup> Arbitration is a private form of dispute resolution whereby contracting parties have presumably consented to a binding resolution of their disputes by a private arbitrator. Under a typically broad arbitration clause, arbitrators are empowered to decide all disputes between (or among) the parties, including contractual and statutory claims. Arbitral awards are subject to extremely limited review.<sup>6</sup>

The private arbitration process has been lauded as efficient, flexible, and cost-effective, yet criticized as “an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law.”<sup>7</sup> Despite an initial judicial hostility to arbitration,<sup>8</sup> the United States Supreme Court has, since the 1980s, consistently recognized a “national policy favoring arbitration” and relied on the Federal Arbitration Act (FAA) to uphold enforcement of these contracts.<sup>9</sup> Individuals subject to such

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5. The recently enacted Class Action Fairness Act of 2005 (CAFA) further restricts judicial class actions by prohibiting litigants from filing judicial class actions involving national claims in state courts. See Pub. L. No. 109-2, § 4, 119 Stat. 4, 9-12 (2005).

6. See, e.g., *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942-44 (1995) (stating that once parties agree to arbitrate, courts must defer to an arbitrator's decision on the arbitrability of claims); *Moncharsh v. Heily & Blase*, 832 P.2d 899, 903 (Cal. 1992) (espousing the general view favoring the binding finality of arbitral awards); see also *Federal Arbitration Act of 1925*, 9 U.S.C. § 10 (2000) (allowing federal courts to vacate arbitral awards if procured by corruption, fraud, partiality, or other types of misconduct).

7. *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986); see also David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 38 (“Arbitration is ‘despotic decisionmaking’ in the sense that the governing law makes arbitrator's decisions virtually unreviewable while accepting procedural and substantive results that would be considered unfair in a judicial setting.”).

8. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (explaining that the Federal Arbitration Act's “purpose was to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts”); cf. *Wilko v. Swan*, 346 U.S. 427, 437-38 (1953) (refusing to enforce a predispute agreement to arbitrate Securities Act claims because of doubts that statutory rights could be effectively enforced in arbitration), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

9. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (discussing FAA, 9 U.S.C. § 2 (2000)); 9 U.S.C. § 2 (“A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding that the FAA's “[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements,

mandatory arbitration provisions have frequently challenged these provisions as contracts of adhesion, procured by unequal bargaining power and inconsistent with statutory intent and public policy.<sup>10</sup> These individuals are, however, generally deemed to have waived their right to a judicial forum.<sup>11</sup> In upholding compulsory arbitration, the Supreme Court has stated that only the forum is changed, from judicial to arbitral, but the ability to vindicate substantive rights cannot be impaired.<sup>12</sup> Yet, considering the arbitral forum's insulation from the public judicial purview, proving that one's substantive rights are unlawfully impaired in arbitration is difficult.<sup>13</sup> Consequently, employees or consumers asserting claims against corporate entities arising under not only contract law but also state or federal statutory law must submit adjudication of these rights to arbitration.

An essential characteristic of arbitration is the parties' perceived freedom to agree to resolve their dispute outside of the constraints of the public judicial system.<sup>14</sup> Notably, however, the public judicial

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notwithstanding any state substantive or procedural policies to the contrary").

10. See, e.g., *Gilmer*, 500 U.S. at 30-33 (rejecting appellant's numerous arguments asking the Court to refuse to enforce an arbitration agreement).

11. See, e.g., *id.* at 26; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting that class action claimants must show that Congress intended to preclude a waiver of judicial remedies for the statutory claims at issue).

12. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see also *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (holding that the EEOC's "substantive statutory prerogative ... to enforce[] claims" could not be waived by an "employee's agreement to submit his claims to an arbitral forum").

13. In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), the Supreme Court held that an arbitration agreement that is silent as to who is responsible for arbitration costs is still enforceable, despite the risk that it may subject a plaintiff to substantial costs. *Id.* at 90-92. The Court acknowledged that excessive arbitration costs could jeopardize substantive rights by effectively precluding a poor consumer's resort to arbitration, but the Court imposed a high standard upon the consumer to demonstrate evidence of inability to pay. *Id.* at 91-92. Until then, the plaintiff's risk that she "will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

14. Considering the perceived efficiency of operating outside such constraints, the magnitude of litigation over arbitration is ironic. One court observed that "cries for court interference in the arbitration process are relatively common; so much so that cases submitted to arbitration often result in satellite litigation in the court system." *Vestax Sec. Corp. v. Desmond*, 919 F. Supp. 1061, 1071 (E.D. Mich. 1995); see also Quinton F. Seamons, *Does Securities Arbitration Go On Forever? Eligibility and Statutes of Limitations*, INSIGHTS, May 1994, at 17 ("[A]rbitration is becoming the litigation battlefield that it was intended to avoid.").

system has become significantly involved in arbitral disputes, and federal and state statutes provide substantial support for enforcing arbitration contracts. The FAA authorizes judicial involvement in arbitration by requiring a court to enforce agreements to arbitrate.<sup>15</sup> The FAA also authorizes a court to stay litigation pending arbitration, to appoint an arbitrator, and to confirm an arbitration award.<sup>16</sup> Although the FAA provides for extensive judicial support for private arbitration, and the law typically accords arbitrators immunity comparable to public judges, an arbitrator is not considered a state actor within the meaning of constitutional jurisprudence, and arbitration typically need not afford parties the due process otherwise guaranteed in a court of law.<sup>17</sup>

Important questions arise, however, when the seemingly distinct processes of class actions and arbitration intersect or merge, or perhaps become altogether subsumed by each other. For example, do the boilerplate contractual arbitration provisions constitute a waiver of rights to proceed collectively, or to constitutional due process, in a class arbitration setting? Both courts and arbitrators are increasingly asked to determine the impact of predispute arbitration contracts on the ability of individuals subject to these contracts to sue, not only on their own behalf, but on behalf of an entire class of similarly situated individuals—that is, to pursue a class action lawsuit—either in court or in arbitration. Cases involving mandatory arbitration contract provisions and class actions generally raise one of three issues: First, do arbitration agreements that are silent on the issue of class actions bar the filing

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15. 9 U.S.C. § 4 (2000) (providing that a party “may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement”). The court may summarily try the issue unless the moving party requests a jury trial, in which case the court must refer the issue of arbitrability to a jury in the manner provided by the Federal Rules of Civil Procedure. *Id.*

16. 9 U.S.C. §§ 3, 5, 10 (2000).

17. See *infra* Part II.B. Prominent organizations, such as the American Arbitration Association (AAA), have promulgated due process protocols to address particular procedural fairness concerns in arbitrations involving parties of disparate bargaining power, such as in consumer and employment arbitrations. See, e.g., AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL (1998), available at <http://www.adr.org/sp.asp?id=22019>; AM. ARBITRATION ASS’N, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), available at <http://www.adr.org/sp.asp?id=22078>. These protocols do not have the force of law, but they are recommended practices.



of a class action in court or in arbitration? Second, are arbitration agreements that expressly bar class actions illegal under state unconscionability law, inconsistent with other federal protective statutes, or outright permissible under the FAA?<sup>18</sup> The third issue involves the class arbitration process itself: what can or must the process entail—particularly the effect on absent, nonparticipatory class members—and what are the respective roles of the court and the arbitrator?

For example, the case before the U.S. Supreme Court in *Green Tree Financial Corp v. Bazzle*<sup>19</sup> raised but failed to adequately address these concerns about class actions and arbitration. The *Bazzle* decision was a consolidation of two separate lawsuits—the *Bazzle* case, which involved home-improvement loans, and *Lackey v. Green Tree Financial Corp.*,<sup>20</sup> which involved mobile home refinancing—filed in state court by individuals seeking class action status and statutory damages on the basis that Green Tree had failed to make certain required disclosures in loan agreements as mandated by South Carolina law.<sup>21</sup> In both cases, Green Tree sought to compel arbitration of individual claims because the loan agreements required the parties to submit all disputes to mandatory arbitration.<sup>22</sup> Prior to granting the motion to compel arbitration in *Bazzle*, the trial court had certified the class of plaintiffs and then ordered the parties to class arbitration.<sup>23</sup> The arbitrator, in turn, administered the class action and awarded the class more than \$10.9 million in statutory damages, plus attorneys' fees.<sup>24</sup> In *Lackey*, the trial court simply granted the motion to compel arbitration and the same arbitrator conducted all aspects of the class action within the arbitration, including class certification, notice, and a hearing on the merits, and awarded the class \$9.2 million in statutory

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18. Another question that could arise is whether an express provision requiring that class actions be brought in private arbitrations would be enforceable. Few contracts contain such a provision.

19. 539 U.S. 444, 447 (2003).

20. 498 S.E.2d 898 (S.C. Ct. App. 1998).

21. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 352-54 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

22. *Bazzle*, 539 U.S. at 448-49.

23. *Id.* at 449.

24. *Id.*

damages in addition to attorneys' fees.<sup>25</sup> The trial court subsequently confirmed both class arbitral awards.<sup>26</sup> On appeal to the South Carolina Supreme Court, Green Tree argued that because the contract was silent as to the availability of proceeding as a class action either in court or in arbitration, the order for class arbitration was erroneous.<sup>27</sup> In affirming the arbitral class awards, however, the supreme court reasoned that because the contract did not expressly preclude class proceedings, the efficiency aspects of a class action were consistent with arbitration policy.<sup>28</sup> Accordingly, the court held that the case could proceed as a class action in arbitration because the operative state law, the state consumer protection code, allowed claims to be brought in a class action.<sup>29</sup>

As the *Bazze* case proceeded to the U.S. Supreme Court, it raised the issue of whether the FAA permits a court to impose class action procedures when an arbitration agreement is silent on the issue regarding class arbitration, but state law otherwise permits class relief. Interestingly, in resisting class arbitration,<sup>30</sup> the defendant

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25. *Id.*

26. *Id.*

27. *Id.* at 447-48. The arbitration clause read:

ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.* This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1.... THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN).... The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

*Id.* at 448 (omissions in original).

28. *Bazze v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360-61 (S.C. 2002), *vacated*, 539 U.S. 444 (2003). The court adopted the reasoning of the California Supreme Court in *Keating v. Superior Court of Alameda County*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom. Southland v. Keating*, 465 U.S. 1 (1984).

29. *Bazze*, 569 S.E.2d at 360-61.

30. Ironically, the corporate party, which typically seeks to enforce arbitration as to individuals, resisted arbitration pursued by individuals on a class basis. Amicus briefs filed in *Bazze* showed the irony. Consumer advocates argued in favor of arbitration, apparently conceding that arbitration was the only alternative for class claims, while the corporate entities argued against arbitration, pronouncing the risks and arbitrariness of one arbitrator's power in a class case. Consumer-friendly organizations such as the AARP, the Lawyers'

lending company, Green Tree, argued that such a process would jeopardize the due process rights of unnamed and nonparticipating class members and that the arbitrator lacked authority to resolve the rights of unnamed third parties.<sup>31</sup> At the same time, commentators questioned whether an arbitrator is qualified to administer a class action and warned that the arbitration contract could be used to eliminate class actions altogether through express bans.<sup>32</sup>

The *Bazze* Court did not address many of the questions raised by the phenomenon of private arbitrators adjudicating class actions. The plurality only held that the arbitrator, not the court, should decide the initial question of whether the contract, albeit silent, permits or forbids class action arbitration.<sup>33</sup>

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Committee for Civil Rights Under Law, the NAACP, the National Asian Pacific American Legal Consortium, the National Partnership for Women & Families, Women Employed, the National Association of Consumer Advocates, and Trial Lawyers for Public Justice filed amicus briefs supporting respondent consumers. Corporate and free-market-oriented organizations such as banking associations, the U.S. Chamber of Commerce, Equal Employment Advisory Council, DIRECTV, Inc., National Council of Chain Restaurants, New England Legal Foundation, Verizon Wireless, and the Washington Legal Foundation filed amicus briefs supporting Green Tree.

31. Green Tree argued the due process rights of absentee class members could only be protected through individual arbitration. Transcript of Oral Argument at \*15, \*28-29, *Bazze*, 539 U.S. 444 (No. 02-634), 2003 U.S. TRANS LEXIS 38. Seemingly, corporate concern for due process in class arbitration provides an argument to defeat the practice by separating claimants and requiring the unlikely assertion of individual claims.

32. To avoid risks of ambiguity in interpretation and of class actions, more companies have rewritten their contracts to contain explicit bans on class actions both in court and in arbitration, raising another important question of whether arbitration contracts can be written to eliminate class actions altogether. The courts are divided as to whether these express bans on judicial or arbitral class actions are unconscionable by state law contract standards and, therefore, unenforceable, or whether the FAA's mandate to enforce arbitration agreements "as they are written" preempts state laws. See, e.g., Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 75-79; see also *infra* note 42.

33. *Bazze*, 539 U.S. at 447. The Court split 4-1-3-1. *Id.* at 446. Four Justices concluded that whether the contracts forbid class arbitration is a disputed issue of contract interpretation and that it must be decided by an arbitrator. *Id.* at 453-54. Justice Stevens concurred in the judgment, although he would have preferred to affirm the South Carolina decision. *Id.* at 455 (Stevens, J., concurring). In dissent, Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, concluded that a court should decide whether the arbitration contract permitted class arbitration and that the FAA preempted the state law. *Id.* at 455-59 (Rehnquist, C.J., dissenting). Justice Thomas wrote a separate dissenting opinion, reiterating that the FAA does not apply in state court proceedings. *Id.* at 460 (Thomas, J., dissenting). See also Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree*

Following *Bazzle*, arbitrators are empowered to determine the meaning of a silent or ambiguous arbitration provision and thus to rule that class actions may be maintained in arbitration.<sup>34</sup> Although the notion of class actions in arbitration appears, at first blush, diametrically opposed—like universes colliding—the Court implicitly endorsed the concept. While indicating that class actions in arbitration are permissible under the FAA,<sup>35</sup> the Court offered little guidance on how this process should be structured, what particular standards or procedures apply, if any, and whether a public court should maintain any level of involvement because of the representative nature of the actions.

The two different paths employed by the administrator toward administering class arbitrations prior to the Court's *Bazzle* decision illustrate the potential for the lack of uniformity, the ill-defined roles for the court and the arbitrator, and the unclear due process rights of absent members in a class arbitration.

The process of class arbitration raises important questions requiring a legal determination of the requisite procedural protections for nonparticipatory members in class arbitration. In a judicial class action, the court is extensively involved throughout the process. A fundamental precept of constitutional due process is that a party cannot be bound by a judgment to which he or she was not a party.<sup>36</sup> An exception to this rule is a litigated class action, where absent class members who have not opted out are bound by a class

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Financial Corp. v. Bazzle, 41 CAL. W. L. REV. 1, 18 (2004) (describing the effect of *Bazzle* and contending that *Bazzle* failed to establish binding precedent on the class arbitrability issue).

34. After the Supreme Court's decision ordering the arbitrator to decide the question of contract interpretation, the arbitrator ruled on remand that the contracts did not preclude class arbitration and reinstated the awards. Scott L. Nelson, *Bazzle, Class Actions, and Arbitration: An Unfinished Story*, 15 A.B.A. SEC. LITIG. CLASS ACTIONS & DERIVATIVE SUITS 8 (2005). The presumption in favor of arbitration, as well as the economic self-interest of the arbitrator, suggests that arbitrators are likely to construe such provisions similarly.

35. See *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) ("[T]he FAA does not prohibit parties from choosing to proceed on a class-wide basis.")

36. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (noting that it is "our deep-rooted historic tradition that everyone should have his own day in court" (internal quotation marks omitted)); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Pennoyer v. Neff*, 95 U.S. 714, 725-26, 728-29 (1877) (stating that judgments against nonresidents without personal service risk fraud and oppression).

judgment or settlement, provided that constitutional standards of notice and adequate representation are satisfied. Notice and adequacy of representation thus serve as a proxy for due process to bind absent members in a judicial class action.<sup>37</sup> Court rules set forth an elaborate procedure designed to ensure due process. These rules specifically entrust the presiding judge with the duty to ensure compliance with these constitutional strictures.<sup>38</sup> Class arbitration lacks similar guarantees that nonparticipating members' rights will be fairly protected.

How, then, should courts handle subsequent objections to arbitral decisions by absent class members? An arbitral award generally cannot bind a nonparty to the arbitration contract; however, the question of whether nonparticipatory class members' rights may be foreclosed in a private class arbitration is not entirely clear.<sup>39</sup>

The limited judicial scrutiny accorded arbitral awards raises a critical question of whether members of a class arbitration are or should be entitled to due process protections, and, if so, how that may be assured in the private arbitral context. When government action is involved in the adjudication of an individual's claim, the U.S. Constitution requires due process of law.<sup>40</sup> Arbitration is by definition a process whereby parties have agreed to adjudicate claims privately and thus to forgo the public judicial process. Notwithstanding, do disputing parties, in particular nonparticipating members, also forgo methods and procedures created to protect their constitutional rights? Presumably, an agreement to arbitrate is not necessarily consent to forgo due process rights—"it merely

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37. See *Hansberry*, 311 U.S. at 40 (holding that a class member whose interests were not adequately represented is not bound by the results of class adjudication).

38. See, for example, Federal Rule of Civil Procedure 23, and state counterparts. Federal judicial decisions regarding certification are immediately appealable. FED. R. CIV. P. 23(f).

39. See, e.g., *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (ruling that the EEOC was not bound by an employee's arbitration obligation); *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 294 (3d Cir. 2004) (recognizing that a nonsignatory may be bound to arbitrate only under the theories of third-party beneficiary, agency, or equitable estoppel); *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir. 2004) (holding a nonsignatory may be bound to an arbitration agreement under five limited theories: incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel).

40. The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

provides an alternative forum for the adjudication of such rights.”<sup>41</sup> Accordingly, do the basic due process protections that apply in a judicial class action, such as the protective role of the court and provisions for certification, notice, and adequate representation, apply equally in class arbitration?

No statute, state or federal, prescribes the rules or procedures for class arbitrations to ensure that the process is uniform, fair, or efficient. Moreover, whether any level of court involvement is required—or even permissible—is an open question. The FAA calls for judicial involvement to enforce arbitration agreements and awards; it does not address the judicial role in the class arbitral setting. Yet may or must courts be involved in arbitral class actions? Where courts are sought to participate in aspects of arbitral class actions, does such selective judicial involvement in the class arbitration process trigger constitutional protections? Specifically, does the court’s role in assisting the arbitrator in administering aspects of the arbitral class proceeding mean that there is now state action in class arbitration? If so, does class arbitration have to satisfy requirements whereby absent members are entitled to a similar level of due process or judicial oversight? Are there due process or other constitutional, policy, or simply practical considerations for ensuring that a public judge, rather than a private arbitrator, conducts certain aspects of a class action, even in arbitration? Or may the entire process be conducted in private? May a class arbitration process avoid due process scrutiny altogether by intentionally eschewing any court involvement?

Boldly assuming the strike of a pen via an express ban on arbitral class actions cannot be used to eviscerate class action recourse altogether,<sup>42</sup> this Article focuses on the process of class arbitration

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41. *Choice v. Option One Mortgage Corp.*, No. Civ. A. 02-6626, 2003 WL 22097455, at \*8 (E.D. Pa. May 13, 2003) (order granting motion to stay arbitration).

42. Courts are divided on the validity of class action waivers in arbitration agreements. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175-76 (9th Cir. 2003) (holding that an employee contract barring arbitral class actions is “patently one-sided” and unconscionable); *Bazzele v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360 & n.21 (S.C. 2002) (stating that interpreting contract silence as a ban on class actions in arbitration allows the drafting party to “effectively prevent class actions against it without having to say it was doing so in the agreement,” and that an express ban on classwide arbitrations “undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract”), *vacated*, 539 U.S. 444 (2003).

itself, exploring the role of the court in the varied approaches to administering class arbitration, as well as the constitutional, policy, and practical implications of arbitral class actions.<sup>43</sup> Part I provides an overview of judicial class actions, noting in particular the critical role accorded to the court in protecting the rights of unnamed parties. It also compares the varied approaches to administering classwide arbitration in California, under the AAA rules, and the "court-free" approach, as used in *Lackey*.

Part II analyzes the constitutional implications of class arbitrations by first exploring the arguments for whether state action exists in participatory arbitration. Although acknowledging the tepid judicial reception to constitutional claims due to limited state action in participatory arbitration, this Part asserts that the distinct characteristics of class arbitration present a strong case for finding state action and for ensuring due process protections for nonparticipating parties.

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Under a successful ban on arbitral class actions, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief, and the drafting party, with no check on its abuses of the law. See Sternlight & Jensen, *supra* note 32, at 77-92 (recounting courts' use of unconscionability to strike down express bans on arbitral class actions and proposing, as a matter of policy, that Congress prohibit companies from using arbitration clauses to preclude class actions). But cf. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004) (reasoning that class action waivers are not unconscionable when the state's unfair trade practices law does not permit judicial class actions but allows the state attorney general to sue on behalf of the state or consumers); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002) (holding that class action waivers are not unconscionable when the possibility of recovering attorneys' fees exists).

The Reporter's notes to a draft of section ten of the recently revised Uniform Arbitration Act indicate that to protect consumers' rights, a court may appropriately refuse to enforce an express ban on arbitral class actions if the relative cost of arbitrating or securing legal representation is cost prohibitive. UNIF. ARBITRATION ACT § 10 cmt. 3, ¶ 4 (Tentative Draft No. 7, 2000) (citing Christopher R. Drahozal, *Unfair Arbitration Clauses* 41 (1999) (unpublished manuscript, later published at 2001 U. ILL. L. REV. 695)). The final comments omitted this statement, however, stating that "[s]ection 10 is not intended to address the issue as to the validity of arbitration clauses in the context of class-wide disputes." UNIF. ARBITRATION ACT § 10 cmt. 3, ¶ 3 (2000), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.pdf>.

43. A specific focus is whether due process must be accorded to class members in this typically private adjudicatory process in which a judge approves or makes initial decisions regarding certification, notice, and fairness yet otherwise delegates substantive adjudication matters to a private arbitrator, or whether due process standards apply under an approach where the arbitrator conducts all aspects of the class arbitration.

In positing due process principles applicable in class arbitration, as a matter of law or practical necessity, Part III identifies minimal procedural protections necessary in classwide arbitration and considers the respective roles of the court and the arbitrator.

This Article concludes that the legislative rules, such as Rule 23, which require significant and ongoing judicial supervision of all aspects of the class action, including approval of class certification and settlements, are rooted in important constitutional protections. The risk that arbitral class actions may proceed with no procedural assurances impermissibly threatens notions of fundamental fairness. Therefore, complete delegation of such important functions to a private arbitral forum is improper. Selective use of the judicial system, through the hybrid approaches, meaningfully invokes the state and triggers due process obligations. Although the hybrid approaches may appear inefficient because of court involvement, these approaches better balance the arbitration obligation with the need to ensure at least minimal process options for affected parties. More problematic, however, is the completely “court-free” approach. By eschewing court involvement, this approach potentially eliminates any obligation to provide procedural protections for absent class members. By law or necessity, the unique characteristics of class arbitration mandate a minimal level of judicial procedural protection. This Article proposes that such protection be codified by federal law or broader individual state constitutional or statutory due process protections.

#### I. REPRESENTATIVE LITIGATION: JUDICIAL AND ARBITRAL CLASS ACTIONS

The standards and process for maintaining a judicial class action are expressly set forth in Rule 23 of the Federal Rules of Civil Procedure, state counterparts, and an extensive body of case law. It is established that the court plays a significant role in the management and adjudication of a judicial class action, with an overriding purpose of protecting the rights of absent class members. In an arbitral class action, the roles of the court, arbitrator, and class representatives, and the rights of unnamed class members, are undefined and left to an ad hoc determination by the arbitrator or



provider. Even a single arbitrator may follow a different procedure. For example, the same arbitrator served in both *Bazzle* and *Lackey*, yet the court certified the *Bazzle* class while the arbitrator certified the *Lackey* class.<sup>44</sup> In order to assess the adequacy of the current scheme for protecting the rights of nonparticipatory class arbitrants, or lack thereof, this Part first examines the underlying policies and procedural protections prescribed for judicial class actions, and then contrasts the various approaches used in arbitral class actions.

### *A. Judicial Class Actions and Rule 23*

A class action is a procedural joinder device that permits one or more persons to initiate a lawsuit as a representative of all those similarly situated. Prior consent or organization from other members is not required. Class action lawsuits have certainly generated criticism, deemed at times lawyer-driven or a form of "legalized blackmail."<sup>45</sup> Yet, this procedural device is also considered a "powerful and pervasive instrument[] of social change."<sup>46</sup> The purpose behind the class suit is to enable redress for large-scale yet "negative value" claims, such as those that are widespread but too small in value to litigate individually and which therefore must

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44. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 449 (2003).

45. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (calling class actions "judicial blackmail" when they create "insurmountable pressure" on defendants to settle); ABA Section of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 198-99 (1986) (acknowledging that "[c]ries of 'legalized blackmail' ... while not infrequently overstated, reflect important concerns").

46. KLONOFF & BILICH, *supra* note 2, at 1.

proceed as a class action or not at all.<sup>47</sup> As earlier commentators on class actions noted:

Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.<sup>48</sup>

Throughout all stages of a judicial class action, the court is charged with critical responsibilities for administering and presiding over the proceeding.<sup>49</sup> Because the effect of a class action judgment or settlement is to resolve the rights of all members of the class and thus to foreclose further remedy for class members, absent members of the class are entitled to constitutional protection under the Due

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47. See *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948) (“[T]he class action was an invention of equity mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.” (citation omitted)). English common law courts recognized the importance of and provided for a form of class action when related interests were involved. The English Court of Chancery enacted the “bill of peace,” which enabled a court of equity to hear cases brought by or against representatives of a group if it met certain requirements. See 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1751 (3d ed. 2005). The English bill of peace evolved into the modern American class action. *Id.*; see also *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 951 (E.D. Tex. 2000) (providing a brief history of the class action in the United States and concluding “[i]t is now apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people” (quoting 3 HERBERT B. NEWBERG & ALVA CONTE, *NEWBERG ON CLASS ACTIONS* § 1.09 (3d ed. 1992))).

48. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

49. See *Knisley v. Network Assocs.*, 312 F.3d 1123, 1125 (9th Cir. 2002) (noting that because of the danger class counsel might tacitly collude with the defendants, the Federal Rules require judicial oversight of class action settlements and attorneys’ fees); *Shaw*, 91 F. Supp. 2d at 951 (stating that “class actions are complex mechanisms that require exceptional lawyers and considerable judicial oversight”); ABA Section of Litig., *supra* note 45, at 199 (quelling Rule 23 criticism by ensuring such concerns are mitigated “by judicial oversight and discerning application of procedural mechanisms already in place and designed to eliminate ... abuses of the litigation process”).

Process Clause. This protection includes, at a minimum: notice, a meaningful opportunity to participate, and adequate representation.<sup>50</sup> Rule 23 provisions reflect these constitutional requirements, and the court's role is critical in safeguarding the due process rights of absent class members.<sup>51</sup> The court is charged with certifying the class, determining adequacy of representation, overseeing notice, managing the class action, and determining the fairness of any settlement of the claim.<sup>52</sup> In other words, significant judicial involvement in a class action serves the function of protecting absent class members' rights.

### 1. Certification "*Death Knell*" and Adequacy of Representation

Pursuant to Rule 23(c)(1), a court must determine whether to grant or deny class certification "at an early practicable time" after the commencement of the action.<sup>53</sup> The court's decision is critical in the adjudication process for it often affects whether the case proceeds. This decision has been described as the "death knell" of a litigation because denial of class status may cause individual plaintiffs to abandon small yet widespread claims, while certification may create extreme pressure on defendants to settle.<sup>54</sup>

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50. See *Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (holding that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard"); *Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (holding that due process requires named class representatives to have "identical" interests to those of absent class members "so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation").

51. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (holding that if the forum state wishes to bind an absent class member, "it must provide minimal procedural due process protection"); *Hansberry*, 311 U.S. at 45 (holding that absent parties would not be bound by a judgment unless the substantial interests of the selected representatives are the same as those whom they are deemed to represent); cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974) (holding that an "unambiguous requirement" of Rule 23 is that "individual notice must be provided to those class members who are identifiable through reasonable effort").

52. See FED. R. CIV. P. 23(c)-(e), (g).

53. FED. R. CIV. P. 23(c)(1)(A).

54. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 & n.2 (3d Cir. 2001) (noting the effective "death knell" impact of the certification decision provided the rationale for adding Rule 23(f), permitting interlocutory review of certification decisions in judicial class actions).

The ripple effect of the certification decision also encompasses other important issues, such as the structure and stakes of the litigation, the identity of parties, the conduct of discovery,

In this certification ruling, the court determines whether the prerequisites for a judicial class action are satisfied as set forth in Rule 23. Specifically, the court determines whether

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>55</sup>

The court's responsibility to determine that both the lawyer and the representative parties adequately represent the class is rooted in safeguarding the due process rights of absent class members.<sup>56</sup> Judgments in a class action are an exception to the general rule that one cannot be bound by a judgment to which he or she was not designated as a party.<sup>57</sup> A class judgment binds all members of the class who have not opted out as long as the party's interests and rights were adequately represented in the proceedings.<sup>58</sup> Thus, adequacy of representation is a proxy for absent members' due process.

When a class satisfies these prerequisites, the court must designate the class under one of three categories in Rule 23(b). Rule 23(b)(1) provides for class designation when separate actions risk establishing inconsistent decisions and incompatible standards of conduct for defendants or impairing the interests of class members who are not parties to the lawsuit.<sup>59</sup> Rule 23(b)(2) operates when plaintiffs seek primarily injunctive or declaratory relief,<sup>60</sup> such as in

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the procedure for motion practice, the application of alternative dispute resolution procedures, and the approach to settlement negotiations. See *MANUAL FOR COMPLEX LITIGATION (THIRD)* § 30.1 (1995).

55. FED. R. CIV. P. 23(a).

56. See *Hansberry*, 311 U.S. at 45.

57. See *Pennoy v. Neff*, 95 U.S. 714, 726-27 (1877) (discussing the general rule that in personam judgments are void unless service of process is provided).

58. See *Hansberry*, 311 U.S. at 42-43.

59. FED. R. CIV. P. 23(b)(1). Examples of classes certified under Rule 23(b)(1) include "limited fund" situations where numerous claimants seek to collect on claims that exceed insurance coverage and citizen suits against a municipality to issue or not issue bonds.

60. FED. R. CIV. P. 23(b)(2) (allowing a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class

civil rights cases.<sup>61</sup> Most suits fall under Rule 23(b)(3), where plaintiffs primarily seek monetary damages and “the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>62</sup>

## 2. Notice

Notice and the opportunity to be heard are fundamental to the constitutional guarantee of procedural due process.<sup>63</sup> The manner of notice is also important; for example, mere publication is generally insufficient. Rule 23 incorporates the constitutional notice standard and specifically requires the court to direct individual notice to class members in all cases seeking primarily monetary relief.<sup>64</sup> The notice must advise each member (1) of the nature of the action, including claims, issues, or defenses; (2) of the definition of the certified class; (3) of the opportunity to “opt out” and the binding effect of exercising this option; and (4) that the class member has the option of entering an appearance through counsel.<sup>65</sup> The Supreme Court has held that the representative plaintiff must initially pay for such notice, even when the cost of providing individual notice is prohibitively high and the inability to bear the costs would end the suit.<sup>66</sup>

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as a whole”).

61. See FED. R. CIV. P. 23 (Advisory Committee Notes to 1966 amendments).

62. FED. R. CIV. P. 23(b)(3). Small claims and mass tort actions are examples of typical 23(b)(3) classes.

63. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

64. FED. R. CIV. P. 23(c)(2)(B) (“[T]he court must direct to the class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”); see also *Mullane*, 339 U.S. at 314 (stating that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

65. FED. R. CIV. P. 23(c)(2)(B).

66. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974) (“There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.”).

### 3. Judicial Oversight, Management, and "Fairness" Decisions

The court plays an active and substantive role in all stages of a judicial class action.<sup>67</sup> Rule 23 directs the presiding court to oversee and manage class action proceedings "for the protection of the members of the class or otherwise for the fair conduct of the action."<sup>68</sup> Judicial involvement in class action lawsuits ranges from providing minimal guidance to more extensive and hands-on participation. These tasks may include the judge taking initiative in shaping the suit, establishing strict timelines for litigation, working with magistrates, devising expert panels to facilitate discovery, directing pretrial scheduling, and engaging in fact-finding, while promoting settlement throughout the process.<sup>69</sup>

Unlike individual party litigation, which may be settled without judicial approval, judges are responsible for scrutinizing the "fairness" of a class settlement.<sup>70</sup> The intricate role of the court in judicial class actions is rooted in protecting the due process rights of all class members. These codified guidelines and an extensive arsenal of case precedent equip judges and parties to deal with the complexities inherent in class action lawsuits, to avoid abuse or collusion, and thus to protect the interests of every class member.<sup>71</sup>

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67. See MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.13 (1995) (describing effective judicial management responsibilities).

68. FED. R. CIV. P. 23(d).

69. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2012-33 (1997) (describing Judge Weinstein's involvement in managing class actions as an example of how influential and controlling the court may be in class action litigation).

70. See FED. R. CIV. P. 23(e).

71. Another method of protecting litigants' rights in the court system is the availability of appellate review. Parties have two options for appeal: interlocutory appellate review and appeal from a final judgment. Parties have three options for invoking interlocutory appellate review: Rule 23(f) (appeals from orders on class certification), 28 U.S.C. § 1292(b) (2000) (interlocutory appeals), and 28 U.S.C. § 1651 (2000) (petitions for mandamus). These three methods of appeal allow parties, upon approval of the appellate court, to request review of the district judge's application of Rule 23. The availability of immediate review of important class action decisions serves as another method of safeguarding the rights and interests of the parties involved. Interlocutory appeals are granted upon the discretion of the court of appeals. 28 U.S.C. § 1292(b) (2002). Even if this request for immediate review is denied, dissatisfied parties still have an opportunity to be heard by appealing the final judgment. Courts are divided as to whether unnamed individual class members (who have not intervened) can seek appeal. See *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1059-61 (6th Cir. 1994).

### B. Arbitral Class Actions

A classwide arbitration may proceed by party consent, pursuant to an arbitrator's ruling that the contract permits such a proceeding, or by judicial enforcement of the arbitrator's determination.<sup>72</sup> But how a class arbitration is to be conducted, in particular the respective roles of the court and arbitrator, or the application and interplay between traditional procedural requirements for class actions regarding class certification, notice, or settlement approval, is not defined in the FAA or by statute and is largely left to the ad hoc determination of the arbitrator or provider.<sup>73</sup> The relationship between the arbitrator and the trial judge is not defined and can vary on a case-by-case basis, as exemplified in the contrasting approaches taken by the same arbitrator in *Bazzle* and *Lackey*.<sup>74</sup> In both cases, however, the court played a supervisory role—including hearing the claims initially, appointing an arbitrator, and confirming the settlement award.<sup>75</sup> Interestingly, the Supreme Court did not comment on the different approaches to class certification—by a court in *Bazzle*, by an arbitrator in *Lackey*—or on the differences in overseeing notice and issuing a final award.<sup>76</sup> The Court neither

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72. See 9 U.S.C. § 2 (2000) (requiring judicial enforcement of agreements to arbitrate); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) ("Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.").

73. Neither the FAA, 9 U.S.C. §§ 1-16 (2000), nor the Uniform Arbitration Act, 7 U.L.A. §§ 1-25 (1997), sets forth the procedures to be followed in an arbitration, let alone a class arbitration. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 16 (2000). Although parties have autonomy to design arbitration procedures by express agreement, arbitration contracts typically incorporate the procedural rules of a provider organization. Absent express rules governing the arbitration proceedings, the arbitrator has broad discretion to manage the arbitration process. See UNIF. ARBITRATION ACT § 15(a) (providing for arbitral discretion to manage the arbitration process); *id.* cmt. 1 (noting the provision is subject to the parties' agreement); DOMKE ON COMMERCIAL ARBITRATION § 29:7 (West 3d ed. 2003) ("The form of the arbitration proceedings depends essentially upon the agreement of the parties .... [t]he parties have good reason to refer to the arbitration rules of an administering agency which will provide for the proper conduct of the proceedings."); see also *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 267-68 (2d Cir. 1999) (unless agreed to by the parties, the Federal Rules of Civil Procedure do not apply in proceedings held by an arbitrator). Because arbitral proceedings are conducted in private, there is no public record of the arbitral proceedings.

74. *Bazzle*, 539 U.S. at 449; see *supra* text accompanying notes 19-25.

75. *Bazzle*, 539 U.S. at 449.

76. See *id.* at 449-50.

addressed the question of whether a court must have some involvement in private arbitral class actions nor provided any guidance on the process.

*1. Assumptions that Class Arbitration Should Mirror Judicial Class Actions*

Class arbitration is not an entirely new phenomenon; it has been used in California since the early 1980s. Uniform rules for its administration have not been promulgated, however. In *Keating v. Superior Court*, the California Supreme Court was one of the first courts to contemplate class arbitration as a procedure that could give effect both to the parties' obligation to arbitrate disputes per an adhesion contract and also to effectuate the policies for collective action.<sup>77</sup> Acknowledging the novelty of ordering the parties to such a procedure, the court reasoned that a judge must maintain a critical role in classwide arbitration, stating that "[w]ithout a doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration, ideally a complete proceeding, without resort to court facilities."<sup>78</sup> *Keating* identified a continued role for the trial court in classwide arbitration:

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77. *Keating v. Superior Court*, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd on other grounds sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984). On appeal, the U.S. Supreme Court reviewed the class action brought in state court and held that the plaintiff's claims were subject to arbitration under the FAA, which preempted a state law requiring judicial resolution of state law claims asserted in a class action by franchisees against a franchisor. *Keating*, 465 U.S. at 16-17. The Court did not discuss class arbitration or the California Supreme Court's comments on the process, yet it implicitly acknowledged that class actions could be brought in arbitration. *See id.* at 7-9. The *Keating* holding has resulted in increased permission of arbitral class actions.

78. *Keating*, 645 P.2d at 1209 (citations omitted). The court reasoned that [i]f the alternative in a case of this sort is to force hundreds of individual [parties] each to litigate its cause ... in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.

*Id.*; *see also* *Bazze v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360 (S.C. 2002) (permitting classwide arbitration on independent state grounds), *vacated*, 539 U.S. 444 (2003).



The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of *external supervision* in order to *safeguard the rights of absent class members* to adequate representation and in the event of dismissal or settlement. A good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay.<sup>79</sup>

Other courts have made similar statements, concluding generally that a court must certify the class, ensure that proper notice is provided, approve any proposed settlement, handle possible conflicts, and even oversee discovery.<sup>80</sup> The few judicial decisions contemplating arbitral class proceedings have assumed a continuing judicial role in class arbitration to monitor the due process rights of the class throughout the arbitration procedure, yet they rarely articulate that such a role is required by specific federal or state law. One state appellate court averred, "A court must supervise a classwide arbitration in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement."<sup>81</sup> The plurality in *Bazzle*, however, held that the arbitrator, not the court, should decide whether a case may proceed as a class action.<sup>82</sup> The logical extension of the Court's reasoning is that a court's only role in class action arbitrations is determining

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79. *Keating*, 645 P.2d at 1209 (emphasis added).

80. See, e.g., *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991); Sternlight, *supra* note 73, at 40-42. Professor Sternlight obtained information regarding the role of the courts in hybrid arbitral class actions by conducting interviews with attorneys who participated in the proceedings. *Id.* at 40 n.148. She found that

[i]n every class action arbitration as to which [she] was able to obtain information, it was the court that decided whether the matter could proceed as a class action, defined the class, and approved the notice to the class. In the instances in which the suits settled, the court approved the settlement. In several cases, the court assumed even more responsibilities, such as resolving all discovery issues and motions leading up to the point of trial.

*Id.* at 40-42 (footnotes omitted).

81. *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 321 (Cal. Ct. App. 1986) (internal quotation marks omitted). The *Izzi* court noted that public policy favors both class actions and arbitrations as "valuable procedures for expediting dispute resolution and ameliorating the burdens of formal litigation." *Id.* at 320.

82. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453-54 (2003).

whether the parties have formed a valid contract, leaving all other issues, including further contract interpretation, class certification, and case management and adjudication to the arbitrator.<sup>83</sup>

## 2. Approaches to Administering Arbitral Class Actions

Although there is no uniform procedure for class arbitrations, the following three approaches have been advanced. Currently, three varied approaches are used: First, California courts have endorsed a hybrid court-administration approach whereby a court retains responsibility for certification, notice, and fairness approval, while a private arbitrator adjudicates the merits of the class case.<sup>84</sup> Second, the American Arbitration Association (AAA) has adopted a modified hybrid approach in its Supplementary Rules for Class Administration, promulgated in response to the *Bazzle* decision.<sup>85</sup> These rules incorporate many of the standards under Federal Rule of Civil Procedure 23 and appear to provide for substantial interaction between the courts and the arbitrator. For example, the AAA rules provide parties the option to seek judicial confirmation of arbitral rulings on class certification, notice, and settlement

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83. See, e.g., *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003) (reversing the district court's certification of a class for arbitration because the arbitrators were to decide whether class arbitration was available or forbidden); *In re Wood*, 140 S.W.3d 367, 369 (Tex. 2004) (holding that an arbitrator, not a court, should rule on class certification issues when the contracts at issue committed all disputes arising out of the agreement to the arbitrator); see also Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 304, 353-54 (2004) (contending that *Bazzle* and the expansive scope of federal arbitration law has effectively discredited the hybrid model ["no longer legally viable"] and requires full arbitral involvement in all aspects of the class arbitration as in the pure arbitral approach used in *Lackey*).

84. Since *Keating*, California, Pennsylvania, and South Carolina have permitted class arbitrations. See *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779, 785 (Cal. Ct. App. 1998) ("Under California decisional authority, class wide arbitration is permissible."); *Dickler*, 596 A.2d at 867 (holding that "[f]airness mandates ... that the Dickler Group, bound by adhesion form contracts to arbitration agreements, be able to protect their interests by proceeding as a class through arbitration"); *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360-61 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

85. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 4-6, 8, available at <http://www.adr.org/sp.asp?id=21936>; see also Am. Arbitration Ass'n, Policy on Class Arbitration (July 14, 2005) [hereinafter AAA Class Policy], available at <http://www.adr.org/sp.asp?id=25967> (describing AAA's policy of not administering class arbitrations without a court order when the enforcing contract expressly bans arbitral class actions).

approval.<sup>86</sup> Third, an alternative approach to class arbitration administration, like that used in the *Lackey* arbitration, is essentially "court free," where the arbitrator administers all aspects of the class arbitration.<sup>87</sup>

*a. The California Hybrid Judicial-Administration Model*

California has recognized the classwide arbitration procedure since the state supreme court's decision in *Keating v. Superior Court*.<sup>88</sup> Class arbitrations in California have operated under a hybrid process in which the judge continues to conduct key aspects of the class action reflected in Rule 23. In this hybrid "judicial-administration" model, the court determines initial class certification, adequacy of representation, and proper notice to all class members, and reviews any settlement or dismissal of the action. Other courts ordering classwide arbitration have followed a similar hybrid process, retaining jurisdiction to determine certification and notice while leaving determination of the merits to the arbitration panel.<sup>89</sup>

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86. See AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 12 (stating that the AAA will comply with any court order directed to the parties or the conduct of the arbitration).

87. In February 2005, Judicial Arbitration and Mediation Services, Inc. (JAMS) announced its class action procedures, which provide for no judicial oversight of class arbitration. See JAMS, CLASS ACTION P., available at [http://www.jamsadr.com/rules/class\\_action.asp](http://www.jamsadr.com/rules/class_action.asp).

88. 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984); see *supra* notes 77-78 and accompanying text.

89. See, e.g., *Keating v. Superior Court*, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980), *overruled by* 645 P.2d 1192 (Cal. 1982); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (ordering trial court to make initial class certification determination, ensure proper notice, review any proposed class settlement, and to supervise any potential conflicts among the class representatives concerning the selection of arbitrators); see also Mullenix, *supra* note 4 ("When courts have ordered classwide arbitration ... the courts have retained responsibility for deciding all major class action decisions. Hence classwide arbitrations resemble a 'hybrid' amalgam procedure of class action requirements and arbitration techniques."); Daniel R. Waltcher, Note, *Classwide Arbitration and 10b-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 CORNELL L. REV. 380, 403-05 (1989) (advocating initial court certification of an arbitral class then sending case to arbitration); Note, *Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787, 814 (1981).

*b. The AAA Option for Judicial Confirmation Approach*

Following the *Bazzle* decision, the AAA released its Supplementary Rules concerning class arbitrations.<sup>90</sup> The AAA is the first of few providers to attempt to set forth guidelines in administering arbitral class actions. The AAA has structured a modified hybrid process for administering class arbitrations, whereby the arbitrator is responsible for all aspects of the class arbitration but parties have the option to seek judicial review of arbitral decisions regarding clause construction and class certification.<sup>91</sup> The AAA policy states that it will not administer class arbitration where the underlying agreement prohibits class claims, consolidation, or joinder, unless the parties are under a court order.<sup>92</sup> The AAA will administer class arbitration where the parties' agreement provides for arbitration and either expressly permits or is silent with respect to class claims.<sup>93</sup> Unlike most arbitrations, which are confidential, the rules also provide for public disclosure of class arbitration hearings and filings.<sup>94</sup> The AAA also maintains a case docket on its website that details key information about the case.<sup>95</sup>

The AAA policy essentially sets forth a three-step process. In step one, the arbitrator makes the initial determination, in accordance with *Bazzle*, of whether the arbitration clause permits a class action and enters a "Clause Construction Award."<sup>96</sup> The rules then provide for a thirty-day stay of arbitral proceedings to permit either party to seek judicial relief to confirm or vacate the Clause Construction

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90. See AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 1-12.

91. *Id.*

92. AAA Class Policy, *supra* note 85. Initially, JAMS also refused to administer contracts that expressly banned class actions, but it reversed this policy in response to criticism by corporate clients. See Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2005), available at [http://www.jamsadr.com/press/show\\_release.asp?id=198](http://www.jamsadr.com/press/show_release.asp?id=198).

93. AAA Class Policy, *supra* note 85, at Rule 9(a) (noting that it made the decision in response to the *Bazzle* decision).

94. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 9(a) ("The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations.").

95. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 9(b). The class arbitration docket will contain "(1) a copy of the demand for arbitration; (2) the identities of the parties; (3) the names and contact information of counsel for each party; (4) a list of awards made in the arbitration by the arbitrator; and (5) the date, time and place of any scheduled hearings." *Id.*

96. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 3.

Award.<sup>97</sup> Once this time period has run without a challenge to the award, or once a challenge has been denied by the court, the arbitrator proceeds with the class action arbitration.<sup>98</sup>

In step two, the arbitrator determines whether to certify the proposed class. In contrast to the California model in which a public judge certifies the class, under the AAA rules, the arbitrator is the sole certifying authority. In this assessment, the arbitrator is to follow criteria that parallel Rule 23 of the Federal Rules of Civil Procedure for numerosity, commonality of questions of law and fact, typicality of representative claims, and adequacy of representation.<sup>99</sup> The AAA rules add a requirement that the arbitrator find "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members."<sup>100</sup> The arbitrator also determines whether class arbitration is manageable and maintainable by investigating whether questions of law or fact common to the class predominate over any questions facing individual members.<sup>101</sup> Upon deciding whether a class can be maintained in arbitration, the arbitrator submits what is known as the "Class Determination Award."<sup>102</sup> An award certifying a class arbitration must "define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses," in addition to stating "when and how members of the class may be excluded from the class arbitration."<sup>103</sup> Again, the AAA rules provide for a thirty-day stay of all proceedings following the issuance of the Class Determination Award to permit any party to seek judicial review to confirm or vacate the Class Determination Award.<sup>104</sup>

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97. *Id.*

98. *Id.*

99. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 4(a)(1)-(5) (mirroring FED. R. CIV. P. 23(a)).

100. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 4(a)(6).

101. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 4(b) (mirroring FED. R. CIV. P. 23(b)(3)).

102. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 5(a).

103. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 5(b)-(c) (mirroring FED. R. CIV. P. 23(c)(1)(B)).

104. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 5(d).

After certification, the arbitrator issues a "Notice of Class Determination," which directs that class members be provided the "best notice practicable under the circumstances."<sup>105</sup> This notice is required for "all members who can be identified through reasonable effort"<sup>106</sup> and must describe

(1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings; (5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; (6) the binding effect of a class judgment on class members; (7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and (8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket ....<sup>107</sup>

Following notice, the class action arbitration proceeds to the "trial-type" stage where the arbitrator hears the evidence and arguments of both parties. The arbitrator then renders a "Final Award" on the merits that "shall be reasoned and shall define the class with specificity."<sup>108</sup> The arbitrator must approve any settlement, voluntary dismissal, or compromise of arbitral class claims and conduct a hearing to determine the fairness of such disposition.<sup>109</sup> The arbitrator also rules on requests for exclusion and objections to settlement.<sup>110</sup> Presumably, then, all class members who have not opted out are bound by the class arbitration ruling.

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105. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 6(a).

106. *Id.*

107. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 6(b) (mirroring FED. R. CIV. P. 23(c)).

108. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 7.

109. AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 8.

110. *See* AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 8(c) ("The arbitrator may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."); *see also* AM. ARBITRATION ASS'N SUPP. R. FOR CLASS ARBITRATIONS 8(d) ("Any class member may object to a proposed settlement ... that requires approval .... Such an objection may be withdrawn only with the approval of the arbitrator.").

The AAA does not purport to ensure that the constitutional or substantive rights of the parties involved will be upheld. Neither does it maintain that justice will be carried out. Yet, the AAA rules do reflect consideration for the implicit due process concerns of nonparticipating class members.<sup>111</sup>

*c. Lackey Style: Arbitrator Does It All/No Judicial Involvement*

Another approach to administering class arbitration is to simply have no judicial involvement, as in *Lackey*, where the arbitrator conducted all aspects of the arbitration, including certification, notice, and final award.<sup>112</sup> A completely "court-free" approach is perhaps most consistent with generally conceived notions of private arbitration. And even though the Supreme Court did not address the propriety of a complete, privately conducted class arbitration, practical and policy concerns compel thought on the wisdom of entrusting arbitrators with protecting all class members, considering varying levels of arbitral expertise, a complicated procedural process, and the lack of judicial supervision or opportunity for meaningful appeal. For example, the court-free approach may be construed as a desirable means to avoid judicial scrutiny and accountability for providing procedural fairness in class arbitration altogether. JAMS, the nation's largest for-profit provider of alternative dispute resolution, promulgated procedures that require the arbitrator to conduct all aspects of the class proceedings and to determine clause construction and class certification as partial final awards subject to immediate court review.<sup>113</sup> The JAMS class rules also require the arbitrator to approve any settlement of class claims as well as to direct notice to affected class members, but, unlike the AAA class rules, do not provide for judicial review.<sup>114</sup>

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111. The AAA rules were evaluated and supported by the court in *Bess v. DirecTV, Inc.*, 815 N.E.2d 455 (Ill. App. Ct. 2004), which followed *Bazze* and held that the arbitrator must decide whether "the applicable arbitration clause permits the arbitration to proceed on behalf of ... a class" and "whether class arbitration is the best method to resolve the case." *Bess*, 815 N.E.2d at 460 (omission in original) (citations omitted).

112. See *supra* note 24 and accompanying text.

113. JAMS R. CLASS ACTION P. 2-3.

114. JAMS R. CLASS ACTION P. 2-6.

### 3. Analysis of the Various Approaches

The court in a judicial class action is entrusted with protecting the due process rights of absent class members, as well as ensuring the fundamental fairness of the class proceeding and its ultimate disposition. Both the California judicial-administration model and the AAA option for judicial confirmation of class procedural rulings reflect an implicit recognition for absent members' procedural protections by some mechanism for continued judicial oversight. Yet neither has acknowledged explicitly that judicial involvement in class arbitration is required or even permitted by a particular constitutional, statutory, or common law authority.<sup>115</sup> As a practical matter, the hybrid approaches represent the worst of both systems. In *Keating*, Justice Richardson critiqued the hybrid procedure as cumbersome and "fundamentally contrary to the purpose of arbitration and to the public policy encouraging arbitration."<sup>116</sup> He noted that arbitrators are often not legally trained and do not write opinions and that the rules of evidence and procedure are inapplicable.<sup>117</sup> As a result, meaningful judicial review is unavailable.<sup>118</sup> When the court handles all of these aspects of the class claim, it raises questions as to what is left for the arbitrator and whether the extensive involvement of the court defeats the goal of efficiency in arbitral class actions.<sup>119</sup> Indeed, the coordination between the judge and the arbitrator in a hybrid approach seems unwieldy and confusing.

Another concern is the propriety of this selective use of the judicial system.<sup>120</sup> For example, how can federal courts assume jurisdiction of a case for purposes of Rule 23 and supervise aspects of the class action, including notice and certification, and then send

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115. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 370 F. Supp. 2d 1135 (D. Kan. 2005) (holding that the district court lacked authority to interfere with arbitration proceedings to make interlocutory rulings regarding case manager's (AAA) decision to process case as a class arbitration; allowing court review only upon final arbitral award), *aff'd sub nom. In re Universal Serv. Fund. Tel. Billing Practice Litig. v. Sprint Commc'ns Co.*, 428 F.3d 940 (10th Cir. 2005).

116. *Keating v. Superior Court*, 645 P.2d 1192, 1217 (Cal. 1982) (Richardson, J., dissenting in part), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

117. *Id.* at 1215.

118. *See id.* at 1215-18.

119. *See id.* at 1217-18.

120. *See infra* Part III.



the case to a private, binding arbitral forum? The provisions of Rule 23 require judicial approval of class settlements and public notice as well as ongoing judicial supervision of all aspects of the class action; yet the hybrid approaches delegate important decisions in the case, including the underlying trial and determination on the merits, to a private arbitral forum. On the other hand, the "court-free" approach is perhaps even more problematic, by eliminating any court involvement and accountability for process integrity and fairness for all class members.

Under either approach, parties may seek judicial enforcement of class arbitral awards. Does this ultimate option for judicial enforcement obligate the court or legislature, which provides for judicial enforcement through the FAA, to ensure the class award is a product of fundamental fairness? The following Part examines whether class arbitration, under either the hybrid or judge-free approach, must comport with constitutional standards for due process.

## II. CONSTITUTIONAL IMPLICATIONS OF ARBITRAL CLASS ACTIONS

### *A. Due Process and Arbitration: Are Class Arbitrants Entitled to Due Process?*

Constitutional guarantees apply to litigants in state and federal courts and in situations where "state action" is involved, but not to the activities of private actors.<sup>121</sup> Although a "representative" form of litigation, judicial class actions must provide all class members due process of law.<sup>122</sup> In class actions seeking monetary damages, this process is met through the notice, opportunity for a hearing,

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121. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however ... wrongful."); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883) ("The wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong, or a crime of that individual.").

122. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

and adequacy of representation requirements, which are overseen by the court. A variety of other protections enumerated in procedure, evidentiary, trial, and appellate codes also apply in judicial proceedings.

By contrast, parties in arbitration are deemed to have waived rights to a judicial forum and presumably some, but not necessarily all, attendant procedural protections.<sup>123</sup> In theory, the arbitration process is as agreed to by the parties. As a practical matter, parties submit to the notion of arbitration incident to a primary transaction and in advance of a dispute, which they presumably expect not to occur or else they would not enter the transaction. The details of what that arbitration process will entail are not generally agreed to in advance, and then are subject to the varied practice of the arbitrator or provider organization.

The Fifth and Fourteenth Amendments are applicable to federal and state governments, respectively, and provide that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.”<sup>124</sup> A cause of action is a species of property within the meaning of the Due Process Clause.<sup>125</sup> The FAA permits a party to seek judicial confirmation of an arbitral award in the form of a judgment, which then “may be enforced as if it had been rendered in an action in the court in which it is entered.”<sup>126</sup> Although a court may vacate or modify awards under specific circumstances,<sup>127</sup> it does not review the merits of the underlying award or whether due

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123. See *supra* note 11 and accompanying text; see also *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972) (detailing issues relevant in determining whether due process rights have been waived); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167.

124. U.S. CONST. amend. XIV; see also *id.* amend V.

125. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

126. 9 U.S.C. § 13 (2000).

127. The grounds for vacating an arbitral decision are extremely limited. See, e.g., 9 U.S.C. § 10(a)(1)-(4) (2000) (authorizing judges to vacate an arbitral award if “procured by corruption, fraud, or undue means;” or there is “evident partiality or corruption;” or “misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;” or when “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”); 9 U.S.C. § 11 (2000) (authorizing judges to modify an arbitral award for “evident material miscalculation of figures”); see also Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 112-16 (1992) (recognizing that FAA provisions for vacatur of awards procured by undue means and arbitral bias provide a modicum of process protections).

process was accorded to parties in the arbitration. Interestingly, that an award did not comport with due process is not grounds for vacatur under the FAA. By contrast, an international or nondomestic arbitral award not in compliance with due process is a ground for declining enforcement under the New York Convention.<sup>128</sup> Thus, an award in a class arbitration may be enforced as a judgment and the rights of all class members foreclosed by doctrines of claim preclusion or res judicata.<sup>129</sup>

A question of increasing concern is whether parties to an arbitration are entitled to a minimal level of due process in the arbitral adjudication of their rights.<sup>130</sup> For example, parties to an arbitration have challenged arbitral awards in court on the grounds that the arbitrator or process denied them constitutional rights to due process, a jury trial, or an Article III forum.<sup>131</sup> Yet constitutional requirements for due process apply to arbitral proceedings only if such a process constitutes state action.<sup>132</sup> Absent such a finding, the arbitral proceeding remains an entirely private action that presumably invokes no constitutional protections, even if it were found to violate the most core values of due process.<sup>133</sup> As discussed more

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128. 9 U.S.C. § 201 (2000) (adopting the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (commonly known as the New York Convention), available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc> (providing that "[r]ecognition and enforcement of the award may be refused ... [upon proof that t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case ....")); see also, e.g., *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992) ("We have recognized that the defense provided for in Article V(1)(b) essentially sanctions the application of the forum state's standards of due process, and that due process rights are entitled to full force under the Convention as defenses to enforcement." (internal quotation marks omitted) (citation omitted)).

129. See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 50 (2003); Thurston K. Cromwell, Note, *Arbitration and Its Collateral Estoppel Effect on Third Parties*, 2000 J. DISP. RESOL. 425, 428.

130. Some arbitration providers have developed and voluntarily adopted various due process protocols; however, these protocols do not have the force of law. For examples of due process protocols adopted by various organizations, see American Arbitration Association Rules and Procedures, <http://www.adr.org/Protocols> (last visited Mar. 13, 2006).

131. See, e.g., *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1466, 1468-69 (N.D. Ill. 1997).

132. See *infra* Part II.B.

133. See *infra* Part II.B.

fully below, few courts have been willing to hold that a private participatory arbitration proceeding constitutes state action.<sup>134</sup> However, class arbitration proceedings are significantly different, particularly in the hybrid approaches, and due process scrutiny is perhaps warranted. The following Part examines the application of constitutional due process in contractual participatory arbitration and in the context of class arbitration.

### *B. The State Action Requirement: Is Arbitration State Action?*

Although the Fifth and Fourteenth Amendments specifically apply to the state, a private entity may be held accountable to constitutional standards if its actions are “fairly attributable” to the state.<sup>135</sup> The traditional jurisprudential test for holding a private entity to constitutional standards requires a finding of “state action.”<sup>136</sup>

#### *1. Defining State Action*

The Constitution holds governmental bodies accountable for protecting individual rights and liberties. By contrast, no constitutional action may be maintained against purely private parties. Under the state action doctrine, however, when a private person or entity acts on behalf of the state, or is so entwined with the state in particular conduct, that ostensibly private activity constitutes state action invoking constitutional protection.<sup>137</sup> The “[s]tate action doctrine remains the primary tool courts use to ensure that private actors do not wield government power outside of constitutional constraints.”<sup>138</sup>

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134. See *infra* Part II.C.3.

135. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

136. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (noting the due process clause affords “no shield, no matter how unfair that conduct may be,” against private conduct as distinguished from state action).

137. See Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1163 (2004). The purpose of the state action doctrine is to “assure[] the maintenance of the public/private dichotomy that lies at the very heart of liberal democratic theory.” *Id.*

138. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1410 (2003).

## 2. The Two-Part Test

Precisely identifying when seemingly private conduct rises to the level of state action is often uncertain.<sup>139</sup> In recent years, the Supreme Court has employed a two-part analytical framework for assessing when private conduct may be deemed state action.<sup>140</sup> First, has "the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority"?<sup>141</sup> Second, can the private party charged with the deprivation fairly be described as a state actor?<sup>142</sup>

The first prong is generally satisfied where a private party acted "with the knowledge of and pursuant to" a state or federal statute.<sup>143</sup> Although statutes encouraging or supporting private conduct can represent state action,<sup>144</sup> *Lugar* emphasized that private conduct

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139. See Cole & Spitko, *supra* note 137, at 1165 & n.77 (noting several authorities agreeing that the state action doctrine is controversial and a conceptual disaster); Metzger, *supra* note 138, at 1414 ("[T]he line of division separating state and private action remains far from straight.").

140. This test was first expressed in *Lugar*, 457 U.S. at 937, in which the Court found state action where a Virginia statutory prejudgment attachment procedure permitted a creditor to attach a debtor's property if a creditor believed that a debtor would dispose of the property to defeat the creditor, and repeated in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991), in which the Court found state action when a private attorney exercised use of peremptory challenges.

141. *Edmonson*, 500 U.S. at 620.

142. *Id.*

143. *Lugar*, 457 U.S. at 931 n.14 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970)); see also *infra* Part II.C.2.a.

144. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding state action where private restaurant discriminated on the basis of race because the State leased the premise to the private enterprise and thereby had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity"); see also Jeffrey L. Fisher, *State Action and the Enforcement of Compulsory Arbitration Agreements Against Employment Discrimination Claims*, 18 HOFSTRA LAB. & EMP. L.J. 289, 292 n.15, 293 (2000). Fisher cites three early cases that held that the state action doctrine was violated: *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967); *Nixon v. Condon*, 286 U.S. 73, 76 (1932); and *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 162 (1914). The *Nixon* Court concluded that "a statute empowering the executive committee of a political party to prescribe the qualifications of its members constituted state action because it gave the party the legal authority, which it may not have had previously, to bar African Americans from voting in primaries." Fisher, *supra*, at 292 n.15. In *McCabe*, "a statute that authorized carriers to provide railroad cars for Whites but not for African Americans constituted state action because carriers refusing to serve African Americans would be 'acting in the matter under the authority of state law.'" *Id.* The *Reitman* Court affirmed a decision of the California Supreme Court holding invalid a state constitutional

pursuant to a statute, without more, is not enough to characterize a private party as a "state actor" for purposes of the Due Process Clause.<sup>145</sup> Rather, "something more" is required to convert a private party into a state actor.<sup>146</sup> Thus, the second step, the state actor inquiry, contemplates whether "there is a sufficiently close nexus between the State and the challenged action."<sup>147</sup> With this framework, the following considers whether class arbitration may constitute state action and thus invoke due process protections, beginning with an examination of how the question has been addressed in the context of participatory arbitration.<sup>148</sup>

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amendment that allowed private individuals to discriminate on the basis of race when selling or renting property. *Reitman*, 387 U.S. at 375-76. The amendment constituted state action because it "changed the situation from one in which discrimination was restricted [under state law] to one wherein it [was] encouraged." *Id.* at 375 (internal quotation mark omitted); see *Fisher*, *supra*, at 292-93. But see *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 177 (1972) (finding no state action where the state's grant of a liquor license to a racially discriminating private club was too remote a relationship); *Evans v. Abney*, 396 U.S. 435, 444 (1970) (finding no state action where the state inherited property from private persons and allowed the heirs to convert the property into a whites-only park in accordance with the will).

145. See *Lugar*, 457 U.S. at 939.

146. *Id.* The *Lugar* Court listed a number of different tests from past decisions that would be sufficient to convert a private party into a state actor, including the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test. *Id.*

147. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). Metzger notes that the Court in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999), insisted on state involvement in "the specific conduct of which the plaintiff complains" .... "[T]he mere approval or acquiescence of the State" in a private entity's actions do not create state action." Metzger, *supra* note 138, at 1414 (alteration in original) (quoting *Sullivan*, 526 U.S. at 51-52); cf. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290-91 (2001) (finding association a state actor due to the "pervasive entwinement" between school officials and the structure of the association); *Edmonson*, 500 U.S. at 621 (stating that without the government's authorization the defendant "would not have been able to engage in the alleged discriminatory acts"). Metzger observes that *Sullivan* and *Brentwood* take different approaches but concludes that the Court generally takes a narrow view of state action. Metzger, *supra* note 138, at 1414-15.

148. State action is involved in court-connected arbitration programs because the court orders parties to arbitration as a prerequisite to trial. See CAL. CIV. PROC. CODE § 1141.11(a) (West 1982 & Supp. 2005) (requiring all civil cases worth less than \$50,000 to be submitted to arbitration as a condition for trial); Susan Keilitz, *Court Annexed Arbitration*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 36, 37 (Susan Keilitz ed., 1993); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 618-19 (1997). In such cases, however, parties retain their constitutional rights, such as the right to a jury trial and due process, because they have the option to reject an award and proceed to a judicial trial. Keilitz, *supra*, at 38. Therefore, while court-enforced arbitration clearly involves state action, such action in contractual arbitration is less obvious.

*C. Application of State Action Test to Private Contractual (Participatory) Arbitration*

*1. Does Private Contractual Arbitration Constitute State Action?*

Although few courts have addressed the issue, legal scholars have provided thorough analyses of the state action doctrine's application to mandatory contractual arbitration. Yet agreement has not emerged. Professors Richard Reuben and Jean Sternlight have argued that the comprehensive arbitration statutory schemes providing for judicial enforcement of private arbitration agreements, broad arbitral powers to subpoena, sanction, and administer discovery, as well as a private arbitrator's performance of traditional government functions establish the requisite elements of state action.<sup>149</sup> With respect to the application of constitutional norms in arbitrator selection, other academics have concluded that arbitration does not involve state action.<sup>150</sup> The few courts that have addressed the state action question in individual arbitration cases have largely rejected the theory.<sup>151</sup> To date, however, no reported decision has addressed the issue of state action in a classwide arbitration where, by its very nature, the rights of nonparticipatory absent class members are decided and extinguished, and a court may or may not be involved in decisions designed to protect the due process rights of all class members. The prospect of state action

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149. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 997-99, 1004-06 (2000) [hereinafter Reuben, *Constitutional Gravity*]; Reuben, *supra* note 148, at 613-41; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 40-47 (1997); see Brunet, *supra* note 128, at 112-13; Fisher, *supra* note 145, at 292. But see Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583, 608-14 (1995) (suggesting that the "pervasive federal scheme regulating labor relations suggests that labor arbitration has more characteristics of state action than does commercial arbitration").

150. See Cole & Spitko, *supra* note 137, at 1195; Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 559-67 (1994).

151. Cole & Spitko, *supra* note 137, at 1161 ("Every federal court considering the question [of whether judicial enforcement of arbitration agreements rises to the level of state action] has concluded that there is no state action present in contractual arbitration."); see also *infra* Part II.C.3.

under the hybrid approach to classwide arbitration appears more pronounced.

## 2. *Arguments in Favor of Finding Arbitration as State Action*

Courts and legal scholars disagree on the question of whether state action is present in private contractual (participatory) arbitration, particularly when courts enforce arbitration agreements and awards.<sup>152</sup> Professors Reuben<sup>153</sup> and Sternlight<sup>154</sup> have applied the state action legal tests to private contractual arbitration and contend that sufficient elements of state action exist in private individual arbitration.

### a. *Arbitration's Source in State Authority*

With respect to the first element of the state action test,<sup>155</sup> Professor Reuben finds sufficient that "[c]ontractually enforced arbitration ... has its source in state authority by virtue of the statutory schemes providing for the specific performance of those

152. See Cole & Spitko, *supra* note 137, at 1163 (noting commentators' arguments for state action in arbitration, but suggesting that the Supreme Court will find no state action).

153. See Reuben, *Constitutional Gravity*, *supra* note 149, at 989-1017; Reuben, *supra* note 148, at 609 (contending that private contractual arbitration can rise to the level of state action because "[t]he state has established the structure through which such hearings are often compelled and legally binding ... through ... 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").

154. See Sternlight, *supra* note 149, at 40-46 (asserting "state action" because (1) courts use a "preference" for arbitration to interpret contracts, and (2) the courts' role in compelling arbitration and in confirming and enforcing arbitration awards is integral to the process). Sternlight also asserts

that the Supreme Court engaged in state action when it interpreted the FAA to require courts to favor arbitration over litigation by interpreting ambiguous contracts to state a preference for arbitration rather than litigation. Because it is not clear (by definition of ambiguity) that the parties wanted arbitration, the state's preference to compel it is, in essence, state action.... Similarly, the U.S. Supreme Court engaged in state action when it held that the favoritism due arbitration required that defenses to the arbitration contract (such as waiver or delay) should be interpreted narrowly.

*Id.* at 44-45 (footnotes omitted); see also Fisher, *supra* note 145, at 298 (arguing that compulsory arbitration pursuant to a statute constitutes state action).

155. See *supra* Part II.B.2. The first inquiry in determining state action is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).



contractual provisions.”<sup>156</sup> The Supreme Court has found the first element satisfied when a private actor conducts business by means of statutory or judicial authority.<sup>157</sup> For example, in *Lugar v. Edmondson Oil Co.*, the Court ruled that state action existed when a Virginia statutory procedure allowed creditors to attach a debtor’s property if the creditor believed that the debtor would dispose of the property in an attempt to avoid creditors.<sup>158</sup> Finding that this “procedural scheme created by the statute obviously is the product of state action,” the Court concluded that use of this statutory mechanism by private parties had its source in state authority.<sup>159</sup>

In arguing that the FAA and related state arbitration statutes satisfy the state actor test, Professor Reuben notes that California’s statutory scheme authorizes private parties to obtain judicial enforcement of arbitration agreements and awards and “for the court to retain an active supervisory role even after the case has been ordered to arbitration ... [by authorizing] the trial court to correct, modify, or vacate an arbitration award.”<sup>160</sup> Moreover, Reuben states:

Perhaps most significantly, the statute authorizes the court to confirm the award as a judgment, thus making it available for enforcement as any other judgment, with the full panoply of vehicles available for enforcement, including garnishment and attachment.

Finally, in both the court-related and contractual arbitration situations, the additional benefits conferred upon the [arbitra-

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156. Reuben, *supra* note 148, at 619.

157. *See Lugar*, 457 U.S. at 937; Reuben, *supra* note 148, at 613; *see also supra* notes 140-46 and accompanying text.

158. *Lugar*, 457 U.S. at 941.

159. *Id.*

160. Reuben, *supra* note 148, at 628. For example, courts decide whether to compel arbitration. In making this determination, the court must consider the validity of the arbitration provision and any defense to the contract that may be raised under state law. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (finding that under the FAA, the courts—not the arbitrators—have the responsibility to determine if the parties have agreed to arbitrate the merits of the dispute). If the motion is granted, the trial court may stay the litigation while arbitration is pending, supervise the arbitration proceedings, and once an award decision is made, the judge may then confirm, modify, or vacate in his or her discretion. *See* 9 U.S.C. §§ 3, 13 (2000). Once the judge has confirmed or modified the arbitration award, the award becomes an enforceable judgment like any other judgment from the court. *See id.* §§ 2, 13.

tors] are 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.<sup>161</sup>

Proponents of finding state action in arbitration argue that arbitration's source lies in state authority because governmental authority plays an active role in arbitration through the broad statutory and judicial support for arbitration.<sup>162</sup> The FAA's statutory procedure authorizes private arbitrants to adjudicate a party's rights in which he or she has a property interest without a guarantee of due process. In this respect, private arbitration is similar to the statutory repossession laws in *Lugar* and *Fuentes v. Shevin*.<sup>163</sup> In *Fuentes*, the Court held that although the contract provided for summary repossession by the seller upon the buyer's default, it did not amount to an agreement that the creditor could repossess the property without due process to the buyer or to a waiver of the buyer's procedural due process rights.<sup>164</sup> Statutory authorization for judicial enforcement of arbitration awards rendered without due process likens arbitration to *Lugar*'s prejudgment attachment procedure.<sup>165</sup> Is arbitration perhaps akin to the private repo man?

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161. Reuben, *supra* note 148, at 628-29 (footnotes omitted).

162. See, e.g., *id.* at 589, 609-10. The U.S. Supreme Court has emphasized that the FAA represents a national policy favoring arbitration. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (holding that while "the parties' intentions control, [they] are generously construed as to issues of arbitrability"); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (holding that the FAA applies in state as well as federal courts, and that the FAA preempts conflicting state statutes); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (holding that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

163. 407 U.S. 67 (1972).

164. *Id.* at 94-96. Consumers challenged the constitutionality of the Florida and Pennsylvania prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment. *Id.* at 70-72. The Court held the contract provisions for repossession by the seller upon default did not amount to a waiver of buyer's procedural due process rights because they did not contain a prior hearing nor indicate the procedure by which repossession was to be achieved. *Id.* at 94-96.

165. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 & n.21 (1982) (limiting the Court's holding to prejudgment attachment situations but recognizing state action has been found in a variety of different contexts); see also *Fuentes*, 407 U.S. at 92-93 (stating "[t]he replevin of chattels ... may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public

*b. The Arbitrator as a State Actor and State Nexus with Arbitration*

The second inquiry in determining whether state action exists asks whether the private conduct can fairly be described as a state action and focuses on a nexus between the state and challenged action. The "nexus" prong of the test considers whether the action of the private party can be linked to an action of the government sufficient to warrant attribution of the private entity's conduct to the state.<sup>166</sup> Criteria used in this nexus or entanglement determination include considering "(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."<sup>167</sup> In essence, this inquiry asks "whether there is symbiotic interdependence between the government and the private party."<sup>168</sup>

*i. Arbitration's Reliance on Governmental Assistance*

In assessing a nexus with, or reliance upon, governmental assistance, courts consider factors such as the degree to which government servants actively participate in, facilitate, and give effect to private choices, particularly for conduct that would be unconstitutional if the state engaged in it.<sup>169</sup> A public nexus can be

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health," which would justify postponing notice and opportunity for a hearing).

166. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

167. *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (internal quotation marks omitted); *see also Metzger, supra* note 138, at 1412 & n.151 (describing test as "[1] whether the private entity is performing a public or government function; [2] whether the government compelled or significantly encouraged the challenged action; [and 3] whether the government jointly participated in the action").

168. *Metzger, supra* note 138, at 1412.

169. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (finding state action in a private attorney's exercise of peremptory challenges); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); *Lugar*, 457 U.S. at 939; *id.* at 950-51 (Powell, J., dissenting); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *cf. Evans v. Abney*, 396 U.S. 435, 444 (1970) (finding no state action where the state inherited property from private persons and allowed the heirs to convert the property into a whites-only park in accordance with the will).

found where the government regulates, endorses, or financially supports a private actor.<sup>170</sup> For example, in *Burton v. Wilmington Parking Authority*, the Court found the discriminatory actions of a privately run coffee shop to be the actions of the government because the government financed and regulated the physical space of the coffee shop.<sup>171</sup> The Court determined that the financial relationship and appearance of government regulation constituted state action, requiring enforcement of constitutional protections.<sup>172</sup> Following *Burton*, the Court has refined and expanded the analysis of relationship and appearance to include a fact-specific inquiry into the entanglement and “entwinement” of the parties.<sup>173</sup>

FAA provisions supporting arbitration exhibit arbitration’s reliance on governmental assistance. Typically, a litigant files a motion to compel arbitration.<sup>174</sup> Once the court receives motion to compel, the trial court must decide whether or not to compel arbitration.<sup>175</sup> In making this determination, the court must consider the validity of the arbitration provision and any defense to the contract that may be raised.<sup>176</sup> If the motion is granted, the trial court may stay the litigation while arbitration is pending and supervise the arbitration proceedings.<sup>177</sup> Once an award has been decided, the judge may then confirm, modify,<sup>178</sup> or vacate it.<sup>179</sup> As soon as the judge has confirmed or modified the arbitration award, the award becomes an enforceable judicial judgment.<sup>180</sup>

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170. See, e.g., *Edmonson*, 500 U.S. at 621; *Pope*, 485 U.S. at 487; *Burton*, 365 U.S. at 722-24.

171. *Burton*, 365 U.S. at 724.

172. *Id.*

173. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (noting that “no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government”).

174. See 9 U.S.C. §§ 3-4 (2000).

175. *Id.* § 4.

176. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995).

177. See 9 U.S.C. § 3 (2000).

178. *Id.* § 11.

179. *Id.* § 10.

180. *Id.* §§ 2, 9, 13. Under California law, an arbitration award is subject to enforcement through garnishment and attachment. CAL. CIV. PROC. CODE §§ 481.010-493.060 (West 1982 & Supp. 2005).

*ii. Arbitration Performs a Traditional Public Function*

A primary focus of the nexus inquiry also considers whether the private actor performs a traditional governmental function.<sup>181</sup> When the state delegates one of its functions to a private actor, constitutional violations that result from the private actor acting under color of law are deemed to be state action.<sup>182</sup> Proponents of finding state action in arbitration maintain that arbitration performs a function traditionally reserved for the courts—the binding resolution and adjudication of private disputes.<sup>183</sup> Professor Reuben notes that arbitration statutes delegate judge-like authority to arbitrators and arbitration hearings.<sup>184</sup> The FAA turns over cases that ordinarily would have been heard by state and federal courts to arbitration proceedings.<sup>185</sup> Statutes vest arbitrators with broad judicial powers—such as the power to administer depositions, solve discovery issues, order subpoenas, and sanction parties.<sup>186</sup> In addition, the law generally provides arbitrators with immunity similar to that of their judicial counterparts.<sup>187</sup>

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181. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 51 (1992); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

182. See *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (finding state action where a private doctor performed the government's constitutional obligation to provide medical care to prisoners); see also *id.* at 56 n.14 (expressing concern that not finding state action would allow states to avoid constitutional duties simply by contracting out for services).

183. See, e.g., Reuben, *Constitutional Gravity*, *supra* note 149, at 997.

184. See *id.* at 998.

Further analysis of contractual arbitration under a public function theory would suggest that there are two delegations. Legislatures have delegated to arbitrators decisional power over disputing parties that will be enforced by the state, and parties have further contractually agreed both to delegate the power to decide their dispute to an arbitrator and to be bound by that decision. Because of these delegations, a central question for reviewing courts is whether the arbitrator exceeded the scope of his or her authority and therefore acted *ultra vires*.

*Id.* at 998 n.226.

185. Before the FAA was enacted, courts were reluctant to cede adjudicatory authority to arbitrators. Reuben, *supra* note 148, at 599-605. This reluctance to enforce private agreements to arbitrate rendered such agreements essentially ineffective. See *id.* at 601. Professor Reuben argues that judicial interpretation of the FAA and related state arbitration statutes mandate that courts enforce contractual arbitration and essentially remove a case before federal or state court and place it in the hands of private arbitrators. See *id.* at 603-05.

186. See *id.* at 597-98.

187. See *id.* at 597; see also Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 457-60 (2004) (arguing for

Reuben asserts that the judicial function performed in arbitration is analogous to the elective function performed by private political parties in the *White Primary Cases*.<sup>188</sup> He states that “[b]oth functions are expressly provided for in the Constitution, and both are central to the maintenance of a 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.”<sup>189</sup>

Just as the Court found that the election function was a public function because it was embedded in core democratic principles, Reuben argues the role of the judiciary is similarly a public function.<sup>190</sup> Arbitrators, while acting in a judicial capacity, serve the same function that lies at the very center of our democratic system.<sup>191</sup> Arbitration statutes provide a significant nexus between public actors and private parties and such “statutory delegation of the judicial function to private arbitrators ... transforms the conduct of those private adjudicators into state action.”<sup>192</sup> In sum, Reuben

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a standard of qualified immunity for private arbitrators that balances competing policy considerations).

188. See Reuben, *Constitutional Gravity*, *supra* note 149, at 998-99. The *White Primary Cases* are classic examples of the public function doctrine. The Court held that when the state of Texas allowed private political parties to run the primaries and the political parties excluded any racial minorities from taking part in the political process vis-à-vis voting, the political parties were “state actors” because taking control of the primaries and specifically controlling who could vote were public functions. *Id.* at 995-96; see also *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (holding that a white primary was a violation of the Fifteenth Amendment because “[t]he 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”); *Terry v. Adams*, 345 U.S. 461 (1953) (extending *Smith v. Allwright* to all-white pre-primaries, even though no state law governed and no state assistance was provided, because of the powerful influence the pre-primaries had on elections).

189. Reuben, *supra* note 148, at 625; see U.S. CONST. art. I (providing for election and power of legislators); *id.* art. III (providing for an independent judiciary); *id.* amends. XV, XIX (generally barring abridgments of the right to vote).

190. Reuben, *supra* note 148, at 624-25.

191. Under the separation of powers doctrine, the legislative, executive, and judiciary branches of the government each have “specified duties on which neither of the other branches can encroach.” BLACK’S LAW DICTIONARY 1369 (7th ed. 1999). “[T]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.” ROSCOE POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 94 (1957) (quoting Justice Louis Brandeis).

192. See Reuben, *Constitutional Gravity*, *supra* note 149, at 998; *id.* at 954 (advancing “a unitary theory of public justice that is predicated upon the recognition that a significant

contends that "contractual arbitration is erected on the foundation of a statutory delegation of the traditionally exclusive public function of binding dispute resolution."<sup>193</sup>

*iii. Aggravation of Injury by Incidents of Government Authority*

Incidents of governmental authority may further aggravate due process violations sustained in arbitration, causing harm to the individual and to society.<sup>194</sup> In further support of his state action argument, Reuben contends that concomitant to its role of compelling arbitration agreements and enforcing arbitration awards, arbitrating parties may see the court as playing a significant and crucial role in the private process.<sup>195</sup> Disputing parties will see the court "place[] its power, prestige, and imprimatur behind the result [of arbitration (i.e., the award)], regardless of any questions surrounding the fairness of the process or the degree to which the result departs from the public law."<sup>196</sup> He argues that this seeming united front of judges and arbitrators, displayed in full view of the public, implies to the individual that there is no other recourse.<sup>197</sup> The impression of a united front harms the individual if it leads to

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portion of the modern ADR movement is built upon the foundation of state action"). Reuben argues that much of modern ADR may not be private at all in that

the many state and federal statutes, executive orders, and court rules that by necessity have provided the basic architecture for the modern movement have done so by establishing a structure in which public and private actors participate jointly in furthering the goal of binding dispute resolution. Public courts are actively involved in the administration, oversight, and execution of such processes in governmental ADR programs, often compelling or strongly encouraging parties into those programs, often using private neutrals to implement the programs, and often adopting the results of those ADR processes as their own legally binding judgments. The involvement of public courts is similarly woven into the fabric of the many federal and state contractual arbitration statutes that overturned the courts' historic refusal to enforce agreements to arbitrate.

*Id.* at 955. Reuben urges that constitutional norms could and should be incorporated into our current ADR structure. *See id.* at 954-55.

193. Reuben, *supra* note 148, at 629.

194. *See id.* at 632-33.

195. *Id.* at 632.

196. *Id.*

197. *See id.*

such a belief.<sup>198</sup> If the individual fails to bring a case, this harms society because such grievances go unredressed. The united front, therefore, brings higher public policy considerations into focus.

The potential harm caused by the lack of mechanisms ensuring arbitrator qualification and neutrality is compounded by the lack of procedural safeguards. For example, arbitrators are not required to inform parties of their rationale for granting or denying a claim and, therefore, do not draft lengthy opinions summarizing their legal and factual conclusions.<sup>199</sup> This makes the process of judicial review more difficult, if not impossible. Additionally, judicial review is constrained by the FAA, which prohibits courts from inspecting and overturning arbitral awards except in cases of “manifest disregard of the law.”<sup>200</sup> Because of these differences between the courts and arbitration, the deprivation of rights causes unique injury to those individuals affected. The harm suffered is a loss of the benefits of constitutional due process.<sup>201</sup>

### *3. Most Courts Reject State Action Theory for Participatory Arbitration*

Despite cogent arguments that extensive judicial and statutory support of contractual arbitration can constitute state action, most courts have rejected constitutional challenges raised by participants

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198. *See id.*

199. Section 13(b) of the FAA requires the arbitration award to be filed with the court clerk, implying that some writing is mandatory. *See* 9 U.S.C. § 13(b) (2000). However, all that needs to be written is whether a party has been granted or denied relief, and if granted, what relief was awarded. *See* *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”); Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 522 (1960).

200. *See* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); 9 U.S.C. § 10 (2000).

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By compelling, overseeing, and ultimately enforcing such decisions, the trial court is both a direct and an indirect participant in the seemingly private process of arbitration.... While it may be true that the hearing is conducted and the decision reached outside the four walls of the public courtroom, that hearing is conducted in the shadow of the courthouse, and its result is given effect, meaning, and enforcement in the same public courtroom to which society turns for final and binding resolution of other conflicts.

Reuben, *Constitutional Gravity*, *supra* note 149, at 1010.



to a private arbitration primarily for two reasons.<sup>202</sup> First, courts have, under a contract theory, concluded that parties to contractual arbitration have waived constitutional rights in opting for a private arbitral proceeding.<sup>203</sup> For example, in *Koveleskie v. SBC Capital Markets, Inc.*, the court rejected the plaintiff's claims that compulsory securities industry arbitration under federally compelled procedures violated her rights under Article III, the Seventh Amendment, and the Fifth Amendment, regardless of the presence of state action, because she waived such rights by consenting to arbitration through her broker-registration contract.<sup>204</sup> Critics of the contractual waiver theory argue that predispute arbitration contracts typically are silent regarding constitutional rights and that any such waiver is not truly consensual, voluntary, or knowing.<sup>205</sup>

*a. Governmental Authorization Is Not Entanglement*

The basis for most judicial conclusions that private contractual arbitration lacks the requisite state action is that contractual arbitration is a matter of private contract, however adhesive, and involves private parties and a private arbitrator in a private process.<sup>206</sup> Courts have held a government statute that provides the

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202. See Brunet, *supra* note 128, at 109 (acknowledging that "[a]ny contention that constitutional rights exist in arbitration runs the risk of summary rejection because of the absence of state action").

203. See *id.* at 102 (noting that parties to an arbitration contract "expressly agree to a procedure with minimal legal rights").

204. 167 F.3d 361, 368-69 (7th Cir. 1999).

205. See, e.g., Brunet, *supra* note 128, at 102-04 (advising that "[c]ourts should be reluctant to enforce automatically a superficially consensual arbitration clause without" careful examination of consent); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 669-71, 678-79 (2001).

206. See Cole & Spitko, *supra* note 137, at 1161 & n.68 ("Every federal court considering the question has concluded that there is no state action present in contractual arbitration."); see also *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999) (rejecting plaintiff's constitutional claims that the application or enforcement of the mandatory arbitration clause in securities employment requires her to forfeit her constitutional rights to due process, a jury trial, and an Article III judicial forum). The Second Circuit explained:

NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee. Moreover, the fact that a business entity is subject to "extensive and

legal authority for courts to enforce arbitral agreements or awards does not itself constitute state action or create a nexus between the government and private actors in arbitration.<sup>207</sup> Aside from a narrow application in *Shelley v. Kraemer*, which held that judicial enforcement of a private, racially restrictive covenant constituted state action,<sup>208</sup> courts have refused to extend a finding of state action based on judicial enforcement of a private contract because such a holding could otherwise transform all judicial enforcement of

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detailed" state regulation does not convert that organization's actions into those of the state.

*Id.*; see also *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1190-92 (11th Cir. 1995) (affirming district court's confirmation of arbitrator's award of punitive damages and rejecting defendant's due process claim because arbitration proceeding did not constitute state action); *FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (noting that "the arbitration involved ... was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress ... has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim"); *Elmore v. Chi. & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (holding that "the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint"); *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 138 (S.D.N.Y. 1999) (following the Second Circuit's *Desiderio* ruling that Title VII does not preclude mandatory arbitration and holding that although the NASD "straddle[s] the border between the private and public realms," it remains a private actor under the state action doctrine); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1465-66 (N.D. Ill. 1997) (holding that a privately mandated arbitration did not amount to state action because it could not be "fairly attributed" to the government, even though the Securities and Exchange Commission (SEC) permitted stock exchanges to create their own registration and arbitration rules for associated individuals, thus, the deprivation of rights to a jury trial and to an Article III judicial forum was not a due process violation); *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers Local Union 42 v. Absolute Envtl. Servs., Inc.*, 814 F. Supp. 392, 402-03 (D. Del. 1993) (finding no state action in "arbitration proceedings pursuant to a collective bargaining agreement between private parties"); *Austern v. Chi. Bd. Options Exch., Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (holding that the conduct of an arbitration panel "did not in any way constitute state action"), *aff'd*, 898 F.2d 882 (2d Cir. 1990).

207. See, e.g., *Davis*, 59 F.3d at 1191 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *Elmore*, 782 F.2d at 96-97 (finding no state action in arbitration mandated by the Federal Railway Labor Act because of the federal policy of minimizing judicial intervention in railroad industry labor disputes); see also *Reuben*, *supra* note 148, at 615-17 (countering but acknowledging arguments that no state action is implicated when "contractual arbitration statutes merely authorize private parties to resolve disputes in a particular way").

208. See *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948) (concluding that judicial enforcement of a racially restrictive covenant is not permitted because it would, in effect, be enforcing an unconstitutional race-based classification). *Shelley* has been cited for the proposition that state action results when the government enforces the actions or contracts involving private individuals; however, its application has been limited to racial contexts.

private contracts into state action.<sup>209</sup> Professors Cole and Spitko, for example, also criticize the argument that a national pro-arbitration policy provides a sufficient nexus for state action in arbitration, concluding “[i]t would be dangerous precedent to state that every time a court or other governmental actor announces a federal policy, state action exists when a private party attempts to carry out that policy.”<sup>210</sup> Courts have also rejected the argument that state action results from judicial action confirming an arbitral award into a “court order, violation of which could be punished by contempt.”<sup>211</sup>

*b. Dispute Resolution Is Not an Exclusive Public Function*

The argument that arbitration constitutes state action under the second prong, requiring a showing of public function or state actor, has also failed in the courts.<sup>212</sup> Although a private arbitrator may

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209. See *Davis*, 59 F.3d at 1192 (stating that courts have limited *Shelley* to the racial discrimination context); Cole & Spitko, *supra* note 139, at 1193; Rueben, *supra* note 148, at 626.

210. Cole & Spitko, *supra* note 137, at 1189-91.

211. *Id.* at 1192-93; cf. *MedvalUSA Health Programs v. Memberworks, Inc.*, 2003 Conn. Super. LEXIS 1633, at \*13-14 n.5 (Conn. Super. Ct. May 22, 2003), *aff'd*, 872 A.2d 423, 429-30, 434-35 (Conn. 2005), *cert. denied*, 2005 U.S. LEXIS 7665 (Oct. 17, 2005). “While it is not greatly disputed that the arbitral process itself does not constitute state action, there is some disagreement as to whether the judicial proceeding confirming or vacating the arbitration award implicates state action.” *Id.* (citing *Davis*, 59 F.3d at 1192; *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 269-70 (N.Y. App. Div. 2003) (holding it unnecessary to apply constitutional due process to judicial confirmation of an arbitral award of punitive damages because such appeals can be based on arbitrariness and irrationality under the FAA)). Other courts have applied a “limited degree of state action” to confirming arbitration awards. See *id.* (citing *Rifkind & Sterling, Inc. v. Rifkind*, 33 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 1994)). Some courts sidestep the issue but recognize the “potential dichotomy between the arbitral and judicial proceedings.” *Id.* (citing *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 138-39 (6th Cir. 1996); *Commonwealth Assocs. v. Letsos*, 40 F. Supp. 2d 170, 177 n.37 (S.D.N.Y. 1999)). In summary, the *MedvalUSA* court concluded that “[w]hile these divergent views provide interesting fodder for law review articles and footnotes in judicial opinions, the weight of authority at the present time is consistent with the view in *Sawtelle v. Wadell & Reed, Inc.*, that neither the arbitral process itself nor the confirmation proceeding involve state action.” *Id.* (emphasis added) (citation omitted).

212. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-77 (1972) (granting of a state liquor license to a racially exclusive private club did not constitute state action). Professor Reuben counters the argument that “contractual arbitration statutes merely authorize private parties to resolve disputes in a particular way.” Reuben, *supra* note 148, at 615. He acknowledges that “[i]n the ADR context, the argument against the existence of state action would be that actions of the ADR neutral that raise constitutional problems could be no more attributed to the state than could the Moose Lodge’s decision to discriminate on the basis of

receive immunity protections similar to those accorded a state or federal judge, a private arbitrator is not considered a "state actor" for purposes of state action. Moreover, although binding dispute resolution, such as arbitration, is a traditional government function,<sup>213</sup> it is not considered an *exclusive* government function, because arbitration has served as a form of binding dispute resolution for centuries, even without court involvement.<sup>214</sup> Professors Cole and Spitko acknowledge merit in the argument for finding state action in arbitration under a public function doctrine, but they contend that the availability of judicial enforcement of arbitration agreements or awards "does not transform binding dispute resolution into a public function."<sup>215</sup> For similar reasons, the court in *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.* held that a privately mandated arbitration, which deprived a plaintiff of a right to a jury trial, an Article III judicial forum, or due process protections afforded by the Fifth Amendment, was not an assumption of traditional government functions when adjudicating discrimination claims and did not transform a private actor into a state actor.<sup>216</sup> Because the parties, not the government, delegate authority to the arbitrator to resolve the dispute, arbitration is different from the governmental delegation of running elections or education.<sup>217</sup>

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race." *Id.* However, the *Lugar* 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." *Id.* at 616 (internal quotation marks omitted). He adds that *Edmondson*, which found state action in a private attorney's exercise of a peremptory challenge, "provides an even more compelling example." *Id.*

213. See Reuben, *supra* note 148, at 621 (stating that "the state-enforced resolution of disputes ... distinguishes matters of constitutional moment from those of purely private concern").

214. See Cole & Spitko, *supra* note 137, at 1194-95. But see Reuben, *supra* note 148, at 621 ("The binding resolution of disputes is, of course, a traditionally exclusive public function.").

215. See Cole & Spitko, *supra* note 137, at 1195.

216. 957 F. Supp. 1460, 1466, 1468-69 (N.D. Ill. 1997); see also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160-61 (1978) (rejecting the argument that the state had delegated the "public function" of dispute resolution to a private actor); *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 137-38 (S.D.N.Y. 1999) (following Second Circuit's *Desiderio* ruling that Title VII does not preclude mandatory arbitration and concluding no due process claim exists because NASD is not a state actor); *Porush v. Lemire*, 6 F. Supp. 2d 178, 186 (E.D.N.Y. 1998) (denying due process challenge to arbitral award because "private arbitrators are not state actors and, absent state action, there can be no violation of [the Fourteenth or Fifth Amendments]").

217. Cole & Spitko, *supra* note 137, at 1195.

Professor Brunet argues that a nexus exists in arbitration because arbitration relies on governmental participation and aid in the form of broad court enforcement. He asserts that more than mere court enforcement is involved in arbitration:

[T]he ability to obtain quick and routine judicial stays .... [and t]he courts' need for arbitration as a docket clearing device has created a mutually beneficial relationship between courts and the private arbitration establishment. As it now stands, the modern interpretation of the FAA has created a federal delegation to private parties and encourages them to resolve disputes in private at their expense in return for easy and public court enforcement. In sum, a tenable argument for *Shelley*-style state action exists.<sup>218</sup>

Yet, the Supreme Court's "contraction of the state-action doctrine means an uphill fight" for requiring constitutional due process in arbitration.<sup>219</sup> The clear weight of authority to date refuses to find that private contractual arbitration constitutes state action, irrespective of the strong national policy favoring arbitration, presumptions of arbitrability, or statutory authorization for broad judicial support of private contractual arbitration.

#### *4. The Status of Constitutional Rights in Arbitration*

The idea that private arbitration can escape scrutiny of charges that it denied one or more participants constitutional rights based on the lack of state action is doctrinally consistent with Supreme Court jurisprudence, but practically and morally problematic. Should parties who are discriminated against on the basis of race or gender by an arbitrator have no recourse? Even corporate entities charged with exorbitant punitive damage awards in arbitration have met rejection in asserting claims for requiring due process and constitutional limits on such awards. Arbitration need not afford the same level of due process and protections required of the courts, and the FAA provides some level of recourse against serious misconduct or procedural irregularity in the arbitral process. However, private

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218. Brunet, *supra* note 128, at 113.

219. *Id.*

parties' inability to raise constitutional challenges to arbitral awards becomes particularly problematic in the context of class arbitration.

*D. Application of State Action Analysis to Class Arbitration:  
A Case for Finding State Action*

*1. A Hypothetical Primer*

Suppose Person *X* seeks to sue Company *Z* on a claim that was the basis for a prior class arbitration. Company *Z* asserts two defenses: first, that *X* cannot sue in court because *X* is bound by the arbitration provision in the parties' contract; and second, that *X*'s claim must be dismissed on the grounds that it was extinguished as part of the class arbitration judgment under the claim preclusion doctrine. *X* argues that she is not bound by the class arbitral award because she did not receive adequate notice, was not adequately represented, or was not part of the class, and thus her due process rights were violated and the award is void as it applies to her.

This scenario raises several questions. First, who rules on the objections—the arbitrator or the court? If *X* is bound by contract to arbitrate, presumably an arbitrator would decide. Second, on the merits of the due process and claim preclusion arguments, who wins? The defense may argue that the class arbitrator determined that *X* was part of the certified class and thus *X* is bound by the judgment, or that the class arbitration was not state action and thus *X* has no right to due process protection or to second guess the arbitrator's ruling. In other words, bound is bound. Third, what is plaintiff's recourse? On what grounds could a court or arbitrator review the underlying class arbitral procedure to assess the adequacy of notice and process fairness? In short, do absent members have any due process rights in class arbitration?

The effect of a class arbitral award, which under the FAA, may be judicially confirmed and entered as a judgment, is to adjudicate and thereby cut off the rights of all class members. In a judicial class judgment, absent class members whose interests were adequately represented are bound by the final disposition of the case.<sup>220</sup> What

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220. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-14 (1985); *Hansberry v. Lee*,

then do we make of the objection subsequently advanced by a nonparticipating member of a class arbitral judgment?

## *2. Significant State-Private Nexus Under the Hybrid Approaches*

Although courts have largely rejected the argument that private contractual arbitration constitutes state action, unique characteristics in class arbitration suggest that state action in this process is more pronounced and that procedural protections are warranted. Despite the varied scope of procedural protections in arbitration, parties in a participatory arbitration at least know about the arbitration and the scope of the arbitrator's powers.<sup>221</sup> In a class arbitral setting, absent class members, by definition, do not actively participate in the process or necessarily know of the action.

Although the process for administering a class arbitration is not specifically regulated by statute,<sup>222</sup> significant court involvement is maintained under either of the hybrid approaches. Unlike the judicial role in participatory arbitration under the FAA, where the court is limited to a procedural role in enforcing agreements to arbitrate and arbitral awards, court involvement in either of the hybrid approaches is more extensive and continuous.<sup>223</sup>

Courts addressing the concept of class actions in arbitration have largely contemplated a continued, significant judicial role in overseeing key aspects of the class arbitration under a hybrid approach, in order to protect the rights of the absent members.<sup>224</sup>

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311 U.S. 32, 42-43 (1940).

221. See *Mandl v. Bailey*, 858 A.2d 508, 521 (Md. Ct. Spec. App. 2004) ("When parties to an arbitration knowingly and voluntarily agree upon the rules of procedure that will govern the arbitration of their disputes, ... courts will recognize the validity of such procedures, so long as they comport with basic requirements of due process." (emphasis added)).

222. See *supra* note 73 and accompanying text.

223. See *supra* Part I.B.2.a-b.

224. See, e.g., *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986) (acknowledging a hybrid class arbitration procedure whereby a court certifies a class and then orders an arbitration to proceed on a classwide basis); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 861 (Pa. Super. Ct. 1991) ("[W]e find that this class action, if properly certified, may continue through arbitration on a class-wide basis. We therefore remand to the trial court for class certification proceedings. After this ruling, the trial court must compel arbitration."); see also Alan S. Kaplinsky, *Arbitration and Class Actions: A Contradiction in Terms*, in *CONSUMER FINANCIAL SERVICES LITIGATION 2004*, at 215, 245 (PLI Corporate Law

The hybrid approaches recognize the need to permit parties an option to some judicial recourse. This interaction between the courts and private arbitrators in a hybrid administration creates a heightened level of governmental assistance tantamount to state action. For example, judicial involvement in key aspects of the class certification, notice and supervision, adequacy of representation, and fairness assessment of settlement or case disposition inherently obligates a court to do more than simply enforce an arbitral agreement or award. The court must implicitly, or even expressly, consider the merits of the underlying dispute in order to fulfill the role under either of the hybrid approaches. Thus, where the court is involved in administering class arbitration, the judge, a state actor, becomes integrally involved in critical classwide arbitration decisions.<sup>225</sup>

In applying the jurisprudential analysis to class arbitration, state action exists, at a minimum, under the hybrid approaches. First, although private conduct pursuant to a statutory scheme does not, ipso facto, convert to state action, the FAA and governmental assistance, through the judicial enforcement of arbitral procedures, provides a scheme that would not exist absent an element of state action. Further indicia of state action exist in classwide arbitration. The hybrid approaches call for judicial administration or judicial confirmation of critical arbitral decisions affecting notice, adequacy of representation, and fairness disposition, and, by definition, rely on governmental assistance for legitimacy. Any legitimacy to the class arbitration process is premised on the express or implied assurance that recourse to a public forum, the judicial branch of government, is available. The ability of private entities that sell arbitration services to advertise and assure parties of the availabil-

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& Practice, Course Handbook Series No. B-1414, 2004) ("Both *Dickler* and *Keating* envisioned a hybrid procedure in which the court would retain jurisdiction over the class certification process while the arbitrator would adjudicate the merits of the claim.").

225. See *supra* Part I.B.1.b (discussing expectation of continued judicial role in classwide arbitrations); see also *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (affirming that the court, not the arbitrator, will make initial determinations regarding certification and notice, and noting the balance between the required judicial supervision and the potential slippery slope of judicial involvement in class arbitration), *rev'd on other grounds sub nom.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The court stated that "[a] good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute ... and to minimize complexity, costs, or delay." *Id.*; Waltcher, *supra* note 90 (asserting that judicial discretion must exist to protect absentees' due process rights).



ity of at least some judicial review bolsters their credibility and reinforces parties' hope for a fair process. An arbitrator administering and adjudicating a class arbitration certainly performs a function, albeit in private, traditionally and exclusively performed by a court. Thus, the significant judicial role in the hybrid model warrants the conclusion that state action is present.

### *3. Permitting Escape From Any Court Involvement: Practical Absurdity*

When a court remains involved in key aspects of administering class arbitration, a stronger case for state action and corresponding due process rights exists. However, the alternative *Lackey* model, which avoids all court involvement in class arbitration, seemingly bypasses state action and thus the obligation to provide constitutional due process.<sup>226</sup> Yet, the risks to absent class members in a class arbitration with no judicial involvement are more grave than the minimal process options under the hybrid model. Providers following the hybrid model attempt to offer some procedural protections for absent class members, and integrity in a complicated process, but this may sufficiently trigger state actor status and, therefore, due process obligations. By contrast, those who ignore traditional class procedural protections may conceivably avoid due process scrutiny and thus eliminate all procedural safeguards for absent class members. Certainly, it would be an absurd and unwise policy to create an incentive for providers to eschew judicial oversight and avoid due process obligations by using a class arbitration approach.

### *4. Minimal Fair Process: A Political and Practical Necessity*

Even if courts reject mandating constitutional due process in class arbitrations through the state action doctrine, the concerns for a fair process in class arbitrations are as significant, if not more, as they are in judicial class actions, which are open to public view and scrutiny. From a policy standpoint, if we allow class arbitration, the rights of nonparticipatory class members should not be adjudicated

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226. See *supra* Part I.B.2.c.

without notice and other protections. Accordingly, as a matter of constitutional, political, or practical necessity, some process must be due in class arbitration.<sup>227</sup>

The *Keating* decision recognized the importance of a continuing judicial role in class arbitrations. The court thought it was important for a court to conduct class certification decisions. In addition, Justice Richardson stated:

[T]he court must notify class members of the existence of the suit so that they will have the opportunity to “opt out.” Because of the *due process safeguards* required to keep class members apprised of the course of the litigation, substantial judicial involvement by the court will be required to monitor the progress of the arbitration and potentially will undermine the arbitrator’s discretion. In fact, the *court’s due process responsibilities* include the duty to undertake a stringent and continuing examination of the adequacy of representation by the named class representative at all stages of the litigation.<sup>228</sup>

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227. Professor Huber posits:

If the courts have no role in the certification process, as posited by *Bazzle*, presumably the courts have no role during the arbitration process either. What about protection of absent parties? Who will monitor the adequacy of representation? Do the courts have a role in reviewing a settlement prior to a class award? After an award, will the scope of judicial review be the same as for other arbitral awards (extremely limited)? How is meaningful judicial review possible in the absence of a record of the proceeding or a written decision, as is standard in commercial, consumer, and employment arbitration?

Stephen K. Huber, *Confusion About Class Arbitration*, 7 J. TEX. CONSUMER L. 2, 10 (2003), available at [www.jtexconsumerlaw.com/CLJ\\_V7N1\\_Fall03.html](http://www.jtexconsumerlaw.com/CLJ_V7N1_Fall03.html).

228. *Keating*, 645 P.2d at 1215 (Richardson, J., concurring in part) (emphasis added) (internal quotation marks omitted). The court observed:

If the alternative in a case of this sort is to force hundreds of individual [parties] each to litigate its cause ... in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.

*Id.* at 1209; see also *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 361 n.21 (S.C. 2002) (noting that “preclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract”), *vacated*, 539 U.S. 444 (2003).

### III. WHAT PROCESS IS DUE IN CLASS ARBITRATION: BY LAW OR NECESSITY?

#### *A. Procedural Fairness in Class Arbitration*

Concerns for procedural fairness are significant in any adjudicative forum, whether public or private. When a court remains involved in key aspects of administering a class arbitration, the argument for finding state action and corresponding rights for due process merits attention. Even if courts avoid mandating constitutional due process in class arbitrations, the concerns for a fair process in class arbitrations are as significant, if not more, as in judicial class actions, which are open to public view and scrutiny. In arbitral class actions, all members have not necessarily agreed to proceed, and no procedural rules mandate either notice or assurance that members' rights will be adequately protected.

Assuming that class arbitration requires a level of due process either as a constitutional or politically practical matter, what procedure must be present in arbitration to protect the due process rights of class members?<sup>229</sup> Although it is a flexible concept, due process requires "fundamental fairness."<sup>230</sup> Courts have construed this provision to require that an individual be given notice and an opportunity for a hearing prior to any deprivation of life, liberty, or property interest.<sup>231</sup> Notice is a fundamental component of due process.<sup>232</sup> In the judicial class action context, due process is the

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229. The due process issue implicit in classwide arbitration is whether such arbitration is unconstitutional when it lacks adequate procedural protections. See Sternlight, *supra* note 149, at 80-81.

230. For all its consequences, "due process" has never been, and perhaps never can be, precisely defined. As the Supreme Court explained, due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); see also Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24-25 (1981) ("Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

231. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); see also Hansberry v. Lee, 311 U.S. 32, 42 (1940) ("[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.").

232. See, e.g., Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that a "fundamental requirement of due process in any proceeding which is to be

source for many requirements including the right of class members to opt out of the proceedings, the adequacy of representation, judicial oversight, and case disposition fairness approval.<sup>233</sup> The following Part considers the scope of due process in the context of class arbitration.

### *B. Defining Due Process for Class Arbitration*

Assuming class arbitration invokes the prerequisite state action, a due process inquiry asks (1) whether the party challenging the procedure was deprived of a constitutional right to life, liberty, or property; and (2) whether the party was provided with a procedure that was “due” under the Constitution.

#### *1. Constitutionally Protected Interests Are Invoked in Class Arbitration*

Assuming class arbitration invokes state action, due process protections apply where a party is allegedly deprived of a constitutional right. A judgment resulting from a class arbitral award, potentially rendered without notice to absent members, may bind class members and deprive them of their rights to property and to adjudicate their claims individually.<sup>234</sup> Consequently, the constitutionally protected interests to property and adjudication of absent members are invoked by a class arbitral award. Therefore, the only real question is whether arbitration provides sufficient due process protections for all class members.<sup>235</sup>

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accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

233. Outside the class action context, courts generally use the *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), balancing test to determine what level of procedure the due process clause requires. Courts will balance the following factors: protecting the party's interest in adequate process, the risk of erroneous decision making, and the government's interest in expedited decision making. *See id.*

234. *See* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 433 (1982) (stating that “a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause”).

235. *See* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hansberry*, 311 U.S. at 42.

## 2. What Procedure Is "Due" to Class Arbitrants?

Although due process is a flexible standard and can adapt to various factual circumstances, it requires at a minimum that parties be provided with (1) reasonable notice and (2) an opportunity to be heard. A number of stages in class arbitration implicate due process concerns. Analyzing these stages of class arbitration, step-by-step, brings into focus the need for a degree of judicial participation to protect the rights of class members.

### a. Notice in Class Action Arbitration

Notice is an essential element of due process because it ensures that individuals in jeopardy of serious loss will be apprised of the situation and given a meaningful opportunity to present their case.<sup>236</sup> According to the Supreme Court, the "primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is *meaningful*."<sup>237</sup> In other words, notice must be provided "to apprise the affected individual of, and permit adequate preparation for, an impending hearing."<sup>238</sup> In the class action setting, notice remains important because absent class members may otherwise have their property rights in that litigation foreclosed by the impact of claim preclusion rules without their knowledge. Court procedural rules protect absentee members when a similar action is brought in court,<sup>239</sup> but arbitrators are not required to apply such rules when the same action is brought in arbitration. Thus, the question arises, how must arbitrators treat the issue of notice in order to comport with due process?

The Supreme Court's ruling in *Bazzle* has significant implications for the issue of class arbitration notice. The *Bazzle* Court held that the arbitrator, not the judge, must make the decision whether, under the contract, a class action may be maintained in arbitration.<sup>240</sup> The Court left open, however, whether the judge

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236. See *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314).

237. *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999) (emphasis added) (citing *Mullane*, 339 U.S. at 314).

238. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978).

239. See *FED. R. CIV. P.* 23(c).

240. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003); *Pedcor Mgmt. Co. Welfare*

retains any responsibility when an arbitrator has determined class arbitration permissible. Arguably, *Bazzle* relinquished judicial involvement in class arbitration.<sup>241</sup> Under a complete arbitral approach, the arbitrator makes all decisions regarding the class arbitration, including certification, notice, representation, and case disposition.<sup>242</sup> The AAA rules contemplate similar arbitral duties, but specify standards that largely mirror Rule 23 of the Federal Rules of Civil Procedure and that provide an option for judicial review. Like the AAA, other courts have also understood the *Bazzle* ruling to bestow on arbitrators the responsibility of overseeing notice. In *Johnson v. Long John Silver's Restaurants, Inc.*, the magistrate judge refused to address the issue regarding court-supervised notice to class members until the district court determined whether to compel arbitration or to hear the case in court.<sup>243</sup> The district court compelled arbitration, leaving to the arbitrator the class certification decision.<sup>244</sup> The district court directed the termination of the case file and never addressed the issue of notice.<sup>245</sup>

Yet the complete arbitral administration of class claims does not guarantee fundamental due process rights to notice. *Bazzle* should not be read so far as to authorize circumventing due process rights. Proponents of judicial involvement in hybrid-form class arbitration recognize that a court must remain responsible for decisions affecting a person's due process rights.<sup>246</sup> The AAA procedure seeks to provide a level of due process, yet compliance with the procedure is subject to AAA's self-regulation. Few other arbitration associa-

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Benefit Plan v. Nations Pers. of Tex., Inc., 343 F.3d 355, 363 (5th Cir. 2003).

241. Buckner, *supra* note 82, at 353-54.

242. See AM. ARBITRATION ASS'N SUPP. R. FOR ARBITRATIONS 6(a) (providing that "the arbitrator shall ... direct that class members be provided the best notice practicable under the circumstances ... [and that it] shall be given to all members who can be identified through reasonable effort"); see also AM. ARBITRATION ASS'N SUPP. R. FOR ARBITRATIONS 6(b) (enumerating eight elements that must be present in concise, clearly stated, and easily understood language).

243. 320 F. Supp. 2d 656, 660 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005).

244. *Id.* at 668, 671.

245. *Id.*

246. See *supra* Part I.B.1; see also *Thibodeau v. Comcast*, No. 4546, 2006 Phila. Ct. Com. Pl. LEXIS 59 (Pa. Ct. Com. Pl. Jan. 24, 2006) (announcing that "the trial court judge remains responsible for all of the key procedural decisions that ensure fairness for named and unnamed plaintiffs in the class, even in a class action removed to class arbitration").

tions or providers have even attempted to adopt class procedural rules. Until the Supreme Court or legislature outlines how arbitration providers must handle notice or otherwise direct that a court retain responsibility for overseeing notice, arbitration providers are free to determine their own rules, which may or may not provide constitutionally sufficient notice to all class members with a property interest at stake.

*b. An Opportunity for Class Members To Be Heard and To Opt Out*

An opportunity to be heard is another way of saying that each individual is entitled to a full and fair hearing. But what constitutes a full and fair hearing? "[R]equirements of fairness ... extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."<sup>247</sup> In *Phillips Petroleum Co. v. Shutts*, the Court held that due process required that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an opt out.<sup>248</sup>

*C. Unique Aspects of Class Arbitration Mandate Process Protections*

In addition to the essential requirements for notice and an opportunity to be heard, class arbitration involves unique characteristics which underscore the need for procedural protections for absent class members—whether these protections are triggered by a conclusion that class arbitration involves state action, or if not, simply that public policy and practical necessity warrant some form of fair process.

*1. The Right To Select the Arbitrator*

Parties in a participatory arbitration generally have the power to select an arbitrator jointly in accordance with the method prescribed

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247. *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 105 (1963).

248. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

by the arbitration agreement.<sup>249</sup> In a class arbitration, however, the named plaintiffs, or more likely the class attorney(s), will work in conjunction with the defendant to select an arbitrator for the class proceedings.<sup>250</sup> The concern, after *Bazzle*, is that absent class members can never take part in the selection process because the class is not created at the time an arbitrator is chosen. Recall that *Bazzle* held that the arbitrator must determine whether to allow a class in the arbitration,<sup>251</sup> which means the arbitrator must be selected before the class is created. To protect the due process rights of absent class members, Professor Sternlight argues for judicial supervision over the selection process in class arbitration.<sup>252</sup> Otherwise, “the absent class members will ultimately be bound by the ruling of an arbitrator they had absolutely no role in selecting.”<sup>253</sup> Others argue that requiring courts to oversee the selection process is unnecessary because (1) the class attorney is obligated by an ethical duty to act in the best interest of the entire class by selecting a fair and unbiased arbitrator, (2) the arbitrator has a duty to disclose any conflicts of interest that may lead to bias, and (3) arbitration institutions have a strong financial incentive to avoid even the appearance of bias.<sup>254</sup> Further, the inability to select an arbitrator is not necessarily a due process violation. When litigating class actions, absent members do not “choose” which judge will hear their case or in which venue the case is filed. However, the right to participate in the selection of an unbiased decision maker is central to arbitration, and even this preliminary step to class arbitration has process implications.

## 2. *The Right to an Unbiased Decision Maker*

The Supreme Court has repeatedly held that “[w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of

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249. Sternlight, *supra* note 73, at 111-12.

250. *Id.*

251. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

252. Sternlight, *supra* note 73, at 112.

253. *Id.*

254. Thomas Burch, Comment, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 FLA. ST. U. L. REV. 1005, 1032-33. (2004)



impartiality."<sup>255</sup> This requirement of a neutral and unbiased decision maker applies also when judges delegate their adjudicating authority to arbitrators.<sup>256</sup> Numerous jurisdictions have expressly adopted provisions mandating use of an unbiased arbitrator to provide process fairness to the parties.<sup>257</sup>

In *Cole v. Burns International Security Services*, the Court of Appeals for the District of Columbia Circuit found that the arbitration procedure set forth in the parties' arbitration agreement was not unconstitutional because it provided for minimal standards of procedural fairness, including the right to a neutral arbitrator.<sup>258</sup> *Cole* followed the guidelines set forth in *Gilmer* and found that due process could be satisfied in arbitration when the parties' agreement provided for neutral arbitrators and other specified requirements.<sup>259</sup> Similarly, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, the Supreme Court of California created a list of certain minimum standards that must be met in arbitration, with neutrality of the arbitrator noted as its first consideration.<sup>260</sup>

255. See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.7 (1953) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950)).

256. See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (holding that "due process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party" (citations omitted) (internal quotation marks omitted)); see also *Murray v. Wilner*, 325 N.W.2d 422, 425, 427 (Mich. Ct. App. 1982) (holding that arbitrators too must be unbiased to "satisfy the appearance of justice"), *rev'd*, 348 N.W.2d 6 (Mich. 1984); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 176 (Cal. 1981) (holding that a neutral arbitrator is essential to ensuring "minimum levels of integrity" in the arbitration process).

257. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (noting NYSE arbitration rules and the FAA provide protections against biased arbitrators); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674, 682 (Cal. 2000).

258. *Cole*, 105 F.3d at 1482.

259. *Id.* The court found that arbitration agreements satisfy due process when the agreement

(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require [parties] to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

*Id.*

260. *Armendariz*, 6 P.3d at 674 (holding that for vindication of a party's statutory rights, "the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration").

Unlike the courts and some other arbitration institutions, the FAA does not specify that private arbitration must satisfy due process in this way. It does, however, permit a court to set aside an award "procured by corruption, fraud, or undue means," or "evident partiality ... in the arbitrators."<sup>261</sup> In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, a divided Supreme Court set aside an arbitration award because one of three "neutral" arbitrators failed to disclose that he had been employed by a contractor whose surety was a party to the arbitration.<sup>262</sup> The Court reasoned that arbitrators must be subject to at least the same standards of impartiality as judges because arbitrators are not constrained in applying substantive law and are not subject to appellate review.<sup>263</sup> Going even further, several Michigan appellate courts have found that even the appearance of bias is a violation of the Due Process Clause when state-mandated medical malpractice arbitration required a doctor or hospital administrator to serve as one of three arbitrators.<sup>264</sup> Because arbitrators have wide discretion in deciding factual and legal issues, courts should not require a tremendous amount of evidence from parties seeking to show not only the appearance of bias but also the incapacity for fairness.

### 3. Class Certification

The *Bazze* Court determined that the arbitrator, not the judge, must determine whether the parties' arbitration agreement permits classwide arbitration.<sup>265</sup> The Court did not address, however, whether allowing the arbitrator to make this decision would affect class members' due process rights. Class certification is critically important because it determines who will be affected and how the suit will be structured to ensure adequate protection of absentee members' interests.<sup>266</sup> In most consumer cases, class certification is the "death knell" decision for the case altogether.<sup>267</sup> Rule 23 and

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261. 9 U.S.C. § 10 (2000).

262. 393 U.S. 145, 146, 150 (1968).

263. *Id.* at 148-49.

264. See Sternlight, *supra* note 149, at 88 & n.387 (citing cases).

265. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 447 (2003).

266. Sternlight, *supra* note 73, at 112.

267. See *supra* Part I.A.1.

similar state counterparts provide judges with explicit guidance for protecting class members' rights. Although arbitrators may look to the procedural rules for reference, this inquiry is merely optional. Professor Sternlight questions arbitrators' expertise in handling complex class proceedings and argues that certification by an arbitrator does not comply with the Due Process Clause because "judges are substantially burdened by the responsibility of protecting the interests of absent class members, and .... [arbitrators] may not yet have reached the point at which they are deemed equally capable of protecting individuals' critical due process interests."<sup>268</sup> While the AAA has adopted a "national roster of class arbitration arbitrators"<sup>269</sup> who are trained to handle class arbitration, the AAA is only one of numerous arbitration institutions, and this attempted self-governance does not ensure that the rights of absentee class members will be protected in all instances.

#### 4. *The Right to Adequate Representation*

In the context of a class action, whether adjudicated in court or in arbitration, adequate representation of named class representatives and class counsel is crucial, particularly because the proceedings are less formal and generally not subject to full public or judicial scrutiny.<sup>270</sup> Adequate representation in a class action can also serve as a proxy for due process.<sup>271</sup> In arbitration, parties may play a larger role in the direction of the proceedings. For due process to be satisfied, and for the arbitrator's award to effectively bind absent parties, the arbitrator must be certain that named representatives adequately represent the class's interests at all times. Professor Sternlight argues that the best way to ensure adequate representation of absent class members is to provide them the right to representation by counsel. She posits that such representation "might well be necessary in an arbitration, because of the ad-

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268. Sternlight, *supra* note 73, at 113-14. *But see* Burch, *supra* note 254, at 1035 (indicating that some arbitrators, such as those on the AAA roster, handle large, complex disputes).

269. *See* AM. ARBITRATION ASS'N SUPP. R. FOR ARBITRATIONS 2(a).

270. *See* *Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940) (holding that due process was not satisfied unless named plaintiffs adequately represent absent members at all times).

271. *Cf. Pennoyer v. Neff*, 95 U.S. 714, 725-27, 733 (1877) (describing the circumstances for when in rem proceedings satisfy due process, even though no actual notice is served).

versarial posture of the opposing parties [and because] the legal and factual issues at stake in an arbitration may often be complex, so that a party would benefit greatly from the assistance of an attorney.<sup>272</sup>

While the issue of class members' right to representation by counsel has yet to be addressed by the courts, two of the most prominent arbitration institutions have preemptively included provisions in their arbitration rules that require the arbitrator to determine and monitor the adequacy of representation in class arbitration. Under the AAA's Class Rule 4(a), "the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described."<sup>273</sup> This determination must be made before the arbitrator certifies the class. Similarly, JAMS, a large provider of arbitration services, requires employee arbitration agreements to "provide that an employee has the right to be represented by counsel."<sup>274</sup> These provisions may ward off due process attacks for lack of adequate representation. While such action may be effective when arbitration is conducted through one of these arbitration institutions, there is no guarantee that the parties' claim will be heard by either of them; and if it is not, there is no guarantee that absent members will be adequately represented.

### 5. Other Process Issues Unique to Class Arbitration

As with judicial class actions, it is important to ensure fairness of any settlement or final disposition of arbitral class claims. A corresponding right to attend the proceedings should accompany the notice provisions. And, although arbitrators do not typically provide written opinions that explain their decisions, the process should include a right to a reasoned decision.<sup>275</sup> Without such a written

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272. Sternlight, *supra* note 149, at 91. Restrictions and prohibitions in mandatory, binding arbitration should therefore violate due process. *See id.*

273. *See* AM. ARBITRATION ASS'N SUPP. R. FOR ARBITRATIONS 4(a).

274. JAMS, POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 2 (rev. 2005), available at [http://www.jamsadr.com/images/pdf/employment\\_arbitration\\_min\\_std.pdf](http://www.jamsadr.com/images/pdf/employment_arbitration_min_std.pdf).

275. *See* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 444-45 (1998) (noting that arbitrators usually do not set forth the facts of

decision, parties cannot effectively (1) appeal the award and submit it for judicial review, or (2) govern their future behavior to avoid such conflict. Because the FAA specifies several grounds on which a court may vacate an arbitrator's award,<sup>276</sup> a written opinion must be available to the parties and the court to provide meaningful review.

### CONCLUSION

Congress must directly address, through the FAA, the increasingly complex questions regarding class actions in arbitration, including both the potential evisceration of class actions through express contractual bans and the due process requirements for a fair process in class arbitration. Due process rights of all class members are implicated in class arbitration, as the rights of unnamed parties are adjudicated and extinguished, and as the courts participate in the process and enforce such arbitral awards. As a matter of constitutional import, or simply political and practical necessity, a modicum of fair process is required for arbitral class actions to hold legitimacy. The FAA should therefore specify appropriate procedures, incorporating the procedural standards of class administration under Federal Rule of Civil Procedure 23, and should address the issues unique to arbitration regarding arbitrator selection, neutrality, and the need for reasoned decisions to apprise class members of the basis of the arbitral award. These procedures should clarify the role of the court and arbitrator. The AAA Class Rules attempt to balance an arbitrator's adjudicative responsibilities under the parties' agreement to arbitrate with important concerns to ensure a level of procedural fairness. Thus, the option

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the case or the applicable substantive law in a detailed written opinion, and they do not explain how the facts and law combine to produce the result the arbitrator has reached).

276. The FAA provides that the judge may vacate an arbitration award

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2000).

for judicial oversight remains essential to protect absent class members and to give meaning to the principle that arbitration merely changes the forum, not the substantive rights. Absent congressional action, long overdue in reevaluating the FAA, individual states should adopt procedures for class arbitration requiring a minimal level of judicial recourse.