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# Due Process in Class Arbitration

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# DUE PROCESS IN CLASS ARBITRATION

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## I. INTRODUCTION

The ubiquity of arbitration clauses in consumer and employment agreements[1] and the Supreme Court's plurality opinion in *Green Tree*

1. DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 5 (1998) ("One of the foremost trends in corporate America in the 1990s has been the shift from traditional litigation and government agency resolution of disputes toward the use of alternative dispute resolution (ADR)."); KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 4–5 (2000) (noting that American Arbitration Association requests increased by twenty-one percent between 1994 and 1998); Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62-63 (2004); Scott L. Nelson, Bazzle, *Class Actions, and Arbitration: An Unfinished Story*, 1472 PLI/CORP 307, 310-11 (2005); Gabriel Herrmann, Note, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 781 (2003); *see also* Steven L. Hayford, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 176 (2002) (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("Two decades ago, the Supreme Court interpreted the Federal Arbitration Act of 1925 (FAA) as

*Financial Corp. v. Bazzle*,[2] which implicitly permitted class arbitration, marked the beginning of a new era in class arbitration.[3] Although it is well-established that procedural due process[4] is not required in non-class arbitration,[5] at least two state supreme court decisions assume that due process is required in class arbitration.[6] The United States Supreme Court

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proclaiming a 'national policy favoring arbitration.'").

2. 539 U.S. 444 (2003).

3. Following the June 2003 *Bazzle* decision, two major arbitration providers established special procedures addressing class arbitration. The American Arbitration Association (AAA) issued its Supplementary Rules for Class Arbitrations in October 2003. *See* AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS [hereinafter AAA RULES] (2003), *available at* http://www.adr.org/sp.asp?id=21936. JAMS issued its Class Action Procedures in February 2005. *See* JAMS, CLASS ACTION PROCEDURES [hereinafter JAMS, CLASS ACTION PROCEDURES] (2005), *available at* http://www.jamsadr.com/rules/class_action.asp.

4. The United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

5. Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1161 (2004) ("Every federal court considering the question has concluded that there is no state action present in contractual arbitration."); Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999) (finding that private actors must satisfy constitutional due process standards only if there is a "close nexus between the State and the challenged action" so that the "State is responsible for the specific conduct of which the plaintiff complains" or the "State . . . has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State" and that "[m]ere approval . . . is not sufficient to justify holding the State responsible for those initiatives") (quoting Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 368-69 (7th Cir. 1999) ("[W]e are satisfied . . . that the arbitral forum adequately protects the employee's statutory rights, both substantively and procedurally [as required by the Fifth Amendment's right to due process]."); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1200-01 (9th Cir. 1998) (holding that the requisite element of state action was lacking in arbitration because there was no state action when parties signed the arbitration agreement); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191-94 (11th Cir. 1995) (stating that because "arbitration was a private proceeding arranged by a voluntary contractual agreement of the parties . . . . the arbitration proceeding itself did not constitute state action," thus the "due process challenge to the arbitration . . . must fail"); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063-64 (9th Cir. 1991) (holding that a party's agreement to arbitration precludes argument that due process was denied); Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988); FDIC v. Air Fla. Sys., Inc., 822 F.2d 833, 843 n.9 (9th Cir. 1987) ("Although Congress . . . 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."); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 (8th Cir. 1986) (describing arbitration as a system of justice structured "without due process"); Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986) (finding that a denial of due process by a private arbitrator does not give rise to a constitutional complaint); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 38 (1st Cir. 1985); Austern v. Chi. Bd. Options Exch., Inc., 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (finding that an arbitration panel's conduct does not constitute state action).

6. *See* Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982), *rev'd in part*, 465 U.S.

has not directly addressed the issue of whether the law requires due process in class arbitration, despite at least two opportunities to do so.[7] After the Supreme Court implicitly authorized class arbitration in *Bazzle*, two arbitration providers promulgated procedural rules for class arbitration[8] that provide some measure of due process-like protection to participants,[9] presumably because in the litigation context, class action judgments bind absent class members only when due process protections

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1 (1984) (requiring court involvement to administer due process in class arbitration to protect the interest of absent class members); Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 362 (S.C. 2002) ("[P]rotection of the due process rights of absent class members is an essential component in all class actions, and one which may necessitate particular attention in class-wide arbitrations . . . ."), *vacated*, 539 U.S. 444 (2003).

7. The issue of due process in the context of class arbitration came before the United States Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and again in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). In each case, the Court opted not to address the issue. In *Southland*, the defendant argued below that "requiring arbitrations to proceed as class actions 'could well violate the [federal] constitutional guaranty of procedural due process.'" *Southland*, 465 U.S. at 8 (alteration in original). But on review, the Supreme Court left the issue of due process in class arbitration unaddressed. *Id.* at 17. In *Bazzle*, Green Tree argued that class arbitration violated the due process rights of absent class members. *Bazzle*, 569 S.E.2d at 362. The South Carolina Supreme Court held that Green Tree had failed to preserve the issue for appeal, *id.* at 362, and the United States Supreme Court made no mention of due process in its plurality decision, *see generally Bazzle*, 539 U.S. 444.

8. The rules for class arbitration promulgated by two major arbitration providers contain provisions that require notice, adequacy of the class representatives, and approval of settlements by arbitrators. *See* AAA RULES, *supra* note 3; JAMS, CLASS ACTION PROCEDURES, *supra* note 3. However, as will be discussed in this Article, providers' rules fall short in significant areas in providing due process to the extent required to assure that the adjudication of the arbitrator in a class arbitration is binding on absent class members.

9. Voluntary due process-like protections provided by private arbitration providers may not derive from the constitutional considerations that require procedural due process in the judicial system, depending upon whether state action is or is not present, which is addressed in detail throughout this Article. I describe these provisions as providing "voluntary due process," consistent with other voluntary due process protocols that are not constitutionally mandated yet also provide due process-like protections. *See, e.g.*, CONSUMER DUE PROCESS PROTOCOL, STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE (1998) [hereinafter CONSUMER PROTOCOL], *available at* http://www.adr.org/sp.asp?id=22019; AMERICAN BAR ASSOCIATION, DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995) [hereinafter EMPLOYMENT PROTOCOL], *available at* http://www.bna.com/bnabooks/ababna/ababna/monographs/PROTOCOL.doc; AMERICAN ARBITRATION ASSOCIATION, AMERICAN BAR ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, COMMISSION ON HEALTH CARE DISPUTE RESOLUTION, FINAL REPORT 14-17 (1998) [hereinafter HEALTH CARE PROTOCOL] (subject to approval by the American Bar Association), *available at* http://www.adr.org/Protocols.

are present,[10] but probably also because of the uncertainty surrounding this newly developing area of the law.

This Article examines three issues concerning due process in class arbitration. First, it examines whether due process is required in class arbitration under the state action doctrine,[11] even though it is not required in non-class arbitration,[12] and concludes that state action may exist under some current models of class arbitration, requiring due process.[13] Second, the Article addresses whether providing due process in class arbitration is appropriate even if it is not required,[14] given other important doctrinal and practical considerations, just as due process-like protections are provided in non-class arbitration through voluntary protocols.[15] Finally, the Article analyzes three existing approaches to providing due process or due process-like protections in class arbitration[16] and concludes that the provision of such protections through a voluntary due process protocol consistent with a pure arbitral paradigm is preferable—both doctrinally and as a practical matter—to the provision of such protections through a hybrid system of class arbitration or through existing provider systems, all of which to varying degrees "judicialize" class arbitration in violation of the Federal Arbitration Act (FAA).[17]

As a foundational matter, Part II of this Article describes the scope of due process required in class action litigation to protect the interests of absent class members,[18] including notice and an opportunity to participate or opt out,[19] assessment of the adequacy of class representatives[20] and class

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10. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940). In contrast, non-class arbitration procedure "need not comply with all of the rules of procedure and evidence followed by courts in order for the resulting judgment to have preclusive effect. All that is required is that the parties receive a 'fundamentally fair hearing.'" 18 MOORE'S FEDERAL PRACTICE § 131.32(3)(c) (3d ed. 1997).

11. *See* discussion *infra* Parts III and V.

12. *See* discussion *infra* Part IV.

13. *See* discussion *infra* Parts V.A (regarding state action under the hybrid model of class arbitration) and V.B (regarding state action under private provider models of class arbitration).

14. *See* discussion *infra* Part V.B.3 (regarding public policy considerations).

15. *See* discussion *infra* Part IV.B.

16. *See* discussion *infra* Parts V.A (regarding due process under the hybrid model of class arbitration) and V.B (regarding due process under private provider models of class arbitration).

17. *See* discussion *infra* Parts V.A.3 (regarding the doctrinal and practical shortcomings of providing due process through the hybrid model of class arbitration), V.B.3 (regarding the doctrinal and practical shortcoming of providing due process-like protections under existing provider models of class arbitration), and VI (regarding the doctrinal and practical benefits of providing due process through a pure arbitral paradigm of class arbitration combined with a voluntary due process protocol).

18. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

19. FED. R. CIV. P. 23(c); *see* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 32 (2000).

20. FED. R. CIV. P. 23(a)(4), (g); *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396 n.5, 399 (1996) (Ginsburg, J., concurring

counsel to represent the interests of the absent members of the class,[21] and the unique role of the judiciary in class action litigation in protecting the interests of absent class members[22] and approving settlements.[23] Part II also considers the risk of collateral attack resulting from the failure to provide adequate due process[24] and the scholarly criticisms regarding the failure of the courts to provide adequate due process protection in class action litigation.[25]

Part III sets forth the state action doctrine, which determines whether due process is required in class arbitration. Briefly, whether state action is present[26] depends on whether the adjudication of class actions is traditionally an exclusive public function[27] or whether a sufficient degree

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in part and dissenting in part) (stressing the "centrality of the procedural due process protection of adequate representation in class action lawsuits"); *Phillips Petroleum*, 472 U.S. at 798; Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV., 1687, 1692-93, 1696 (2004) (describing the "adequacy inquiry" as "central" and indicating that "[d]ue process issues are the single most important feature of class litigation, and adequacy of representation looms over the entire debate"). Thirty-nine states and the District of Columbia have rules requiring adequacy. *See Matsushita*, 516 U.S. at 396 n.5.

21. FED. R. CIV. P. 23(g)(1)(B).

22. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (explaining that the trial judge is charged with the responsibility of ensuring that the interests of the class members are not sacrificed); *Phillips Petroleum*, 472 U.S. at 809 (explaining that in class actions the court acts to protect the absent plaintiffs' interests); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 184 (1974) (stating that trial judges take an "active role" in the conduct of class action litigation); 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 1.13, at 44 (4th ed. 2002) (explaining that trial judges assure that "the interests of absent class members are protected at all stages following the commencement of class litigation"); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE (4th ed. 2005) § 16.7, at 791, § 16.2, at 762, § 16.5, at 781-83.

23. FED. R. CIV. P. 23(e); *see Amchem Prods.*, 521 U.S. at 620; *Phillips Petroleum*, 472 U.S. at 810; *see also* FRIEDENTHAL ET AL., *supra* note 22, § 16.7 at 791-93.

24. Dow Chem. Co. v. Stephenson, 539 U.S. 111, 112 (2003) (per curiam) (permitting class member to avoid the effect of a class settlement due to inadequate representation); *Matsushita*, 516 U.S. at 388 (Ginsburg, J., concurring in part and dissenting in part); *Hansberry*, 311 U.S. at 42-45; Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (finding the class was not bound by the trial court judgment because representation of the class was not adequate due to failure of the representative to pursue an appeal on behalf of the other members of his class).

25. Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 673-74; Mullenix, *supra* note 20, at 1692-93; Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 722-23 (2005) (asserting that courts proceed with certification without achieving any understanding of preclusion, which often would reveal conflicts of interests among class members, that the author characterizes as a "form of judicial malfeasance").

26. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES § 6.4, at 486 (2d ed. 2002); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1 (3d ed. 1999); Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 7.

27. *Leesville Concrete*, 500 U.S. at 621; Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157

of entanglement exists between private and state actors.[28] This Part examines peremptory challenge cases and attachment cases in which courts apply the state action doctrine because these cases are the most analogous to class arbitration, since they involve interrelated conduct of the judicial system and private actors.

Part IV discusses the case law applying the state action doctrine to non-class arbitration, including the rationale for the well-established proposition that non-class arbitration does not involve state action. Briefly, state action is not present in non-class arbitration because the involvement of the courts in non-class arbitration is so minimal that the entanglement requirement of the state action doctrine is not met,[29] and because dispute resolution is not traditionally an exclusive public function.[30] Further, Part IV describes how and why arbitration providers voluntarily provide due process-like protections through voluntary due process protocols applicable to disputes involving consumer, employment, and health care disputes,[31] even though due process is not required, as a prelude to considering the merits of such an approach regarding class arbitration.

Part V addresses whether the state action doctrine requires arbitrators to provide due process in class arbitration. Because "dispute-system design has a significant impact on the structure and operation of the resulting system,"[32] this Part examines three models of class arbitration: the hybrid model, followed in a minority of jurisdictions including California,[33] and two models created by JAMS and the American Arbitration Association

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(1978).

28. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 545, 548 (explaining that "[w]hen judges command private persons to take specific actions which would violate the Constitution if done by the State, state action will be present in the resulting harm to constitutionally recognized rights"); *see also Flagg Bros.*, 436 U.S. at 165-66; Shelley v. Kramer, 335 U.S. 1 (1948) (holding that judicial enforcement of private covenant creates a state action); Cole, *supra* note 26, at 7.

29. Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190-91 (11th Cir. 1995) (finding that the confirmation of an arbitration award does not constitute state action sufficient to trigger constitutional protections); Margaret M. Harding, *The Limits of the Due Process Protocols*, 38 OHIO ST. J. ON DISP. RESOL. 369, 393 (2004) (citing Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997)); Judge Lawrence Waddington, *Federalizing Arbitration*, 26 L.A. LAW. 30, Sept. 2003, at 35.

30. *Flagg Bros.*, 436 U.S. at 157, 161.

31. Harding, *supra* note 29, at 390; *see also* sources cited *supra* note 9.

32. Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 225 (2004).

33. Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 864, 866 (Pa. Super. Ct. 1991); Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002), *vacated*, 539 U.S. 444 (2003); New England Energy v. Keystone Shipping Co., 855 F.2d 1, 7, 8 (1st Cir. 1988).

(AAA) respectively.[34] Next, this Part applies the state action doctrine to existing models of class arbitration and concludes that state action may exist in class arbitration under the public function prong of the state action doctrine because private arbitration providers assume a traditionally exclusive public function in adjudicating class disputes which, until the *Bazzle* decision in 2003, the majority of courts deemed inappropriate for arbitration.[35] Under the hybrid system, the delegation aspect of the public function prong of the state action doctrine[36] is satisfied because courts exercise discretion in sending class disputes to arbitration. However, such delegation may not exist in any particular case under provider models of class arbitration in situations where the class arbitration arises from private

34. AAA RULES, *supra* note 3; JAMS, CLASS ACTION PROCEDURES, *supra* note 3.

35. Most federal and state courts have interpreted arbitration agreements that are silent concerning class actions to preclude class arbitration. *See, e.g.*, Champ v. Siegel Trading Co., 55 F.3d 269, 271 (7th Cir. 1995); Gov't of U.K. v. Boeing Co., 998 F.2d 68, 73–74 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984); Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1997); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993); Harris v. Shearson Hayden Stone, Inc., 441 N.Y.S.2d 70, 75-76 (N.Y. App. Div. 1981) (quoting Vernon v. Drexel Burnham & Co., 125 Cal. Rptr. 147, 152-53 (Cal. Ct. App. 1975)); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); *cf.* Unif. Arb. Act § 10(c) (2000) ("The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation."). A handful of courts have permitted class arbitration when the arbitration agreement is silent on the issue. *See, e.g.*, New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 3 (1st Cir. 1988); Callaway v. Carswell, 242 S.E.2d 103, 106 (Ga. 1978); Boynton v. Carswell, 233 S.E.2d 185, 187 (Ga. 1977); Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 481 A.2d 553, 562 (N.J. Super. Ct. App. Div. 1984); Litton Bionetics, Inc. v. Glen Constr. Co., 437 A.2d 208, 220 (Md. 1981); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991); Episcopal Hous. Corp. v. Fed. Ins. Co., 255 S.E.2d 451, 452 (S.C. 1979). Some courts have permitted class arbitration only pursuant to a hybrid model requiring continuing judicial involvement. *See, e.g.*, Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); Lewis v. Prudential-Bache Sec., Inc., 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986).

36. Georgia v. McCollum, 505 U.S. 42, 51 (1992); Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18 (1st Cir. 1999); Catanzano v. Dowling, 60 F.3d 113 (2d Cir. 1995) (finding that certified home health care agencies (CHHAs) had exercised state action where decisionmaking authority, regarding whether home health care was medically necessary and whether there were cheaper ways to deliver required care, had been delegated by the state); Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978) (finding that the activities of collegiate athletic conference constituted state action for the limited purposes of applying the due process clause where state-supported public universities had delegated to the conference supervision over intercollegiate athletics).

contractual arrangements and where arbitration commences without judicial involvement beyond that typical of non-class arbitration.[37]

Present models of class arbitration also may involve state action as a result of the entanglement or entwinement of the judiciary with class arbitration. Judicial involvement in class arbitration is somewhat analogous to the judicial role in the peremptory challenge cases[38] and property seizure cases,[39] in which the Supreme Court has determined that state action exists. Because at least under some models, and in particular cases, the role of the court in class arbitration is elevated significantly beyond the court's role in non-class arbitration[40]—both qualitatively and quantitatively—the entanglement or entwinement of the judicial state actor with class arbitration is greater than judicial involvement in non-class arbitration. This increases the likelihood that courts will find the existence of state action.

Part V further examines existing approaches to providing due process through the hybrid model and due process-like protections of two private providers' procedural regimes. All three approaches address due process concerns by maintaining a variety of judicial involvement in the class arbitration process, but these approaches suffer both doctrinal and practical flaws. Doctrinally, allowing continuing judicial participation in class

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37. Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 1994) ("Only a limited degree of state action is involved in confirming an arbitration award. The state does not impose the award, or mark out its criteria. It only allows the contracting contestants to secure enforcement of their own bargain. That assertion of state power does require a traditional measure of due process. But to our knowledge, neither constitutional authority nor due process tradition has ever required in this setting, the type of judicial review here contended for.") (citation omitted).

38. *See McCollum*, 505 U.S. at 43, 50-51; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614, 622 (1991) (recognizing that state action exists "when private parties make extensive use of state procedures with the 'overt, significant assistance of state officials'") (quoting Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)).

39. Lugar v. Edmondson Oil Co., 457 U.S. 922, 922, 937 (1982) (finding that the assistance of the County Sheriff in carrying out a prejudgment attachment remedy constituted state action). *But cf.* Flagg Bros., Inc. v. Lefkowitz, 436 U.S. 149, 157 (1978) (explaining that there is no state action where government officials or courts do not participate in the attachment process).

40. In non-class arbitration, judicial involvement typically includes compelling arbitration, entering judgments based on arbitral awards, and enforcing arbitral awards. Waddington, *supra* note 29, at 35. Under the hybrid system of class arbitration, judicial involvement increases to class certification, issuance of notice, approval of settlement, and other class action aspects of the settlement. Keating v. Superior Court of Alameda County, 645 P.2d 1192, 1215 (Cal. 1982); *Izzi*, 231 Cal. Rptr. at 322; *Lewis*, 225 Cal. Rptr. at 76. Private arbitration provider approaches authorize interim review of certification and clause interpretation rulings by the arbitrator, and permit ongoing judicial involvement. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R. 2 & 3; AMERICAN ARBITRATION ASSOCIATION, COMMENTARY TO THE AMERICAN ARBITRATION ASSOCIATION'S POLICY ON CLASS ARBITRATION [hereinafter AAA COMMENTARY] (Feb. 18, 2005), *available at* http//www.adr.org/sp.asp?id=25967&printable=true; AAA RULES, *supra* note 3, R. 1(c), 3, 5(d).

arbitration violates the FAA's mandate to enforce parties' agreements to an arbitral forum[41] and ignores the Supreme Court's opinion in *Bazzle*. Practically, approaches judicializing class arbitration create delay,[42] increase expense,[43] and provide arbitrators with false assurance through interim judicial approval of their decisions which may not, in fact, provide actual due process. Given the possible arguments for the existence of state action, and the risk of collateral attack on class arbitration awards by absent class members if due process or due process-like protections are not provided,[44] and other doctrinal and practical considerations,[45] the more prudent approach is to provide procedural due process-like protections in class arbitration.

Part VI offers an alternative model for providing due process or due process-like protections in class arbitration—a pure arbitral paradigm of class arbitration (without judicial involvement other than as sanctioned under the FAA) combined with a voluntary due process protocol. Such an approach resolves doctrinal and practical issues in a manner superior to both the hybrid and provider models of class arbitration. A pure arbitral model of class arbitration is consistent with the FAA's mandate to enforce parties' agreements that select an arbitral forum and consistent with *Bazzle*'s implicit delegation of such tasks to the arbitrator, not the courts. Making arbitrators solely accountable for providing due process through adherence to a voluntary due process protocol specific to class arbitration is more practical than existing systems. While existing arbitration-provider rules provide a start toward such a model, they fall short in certain respects by permitting continuing judicial involvement, and I recommend instead the adoption of a voluntary due process protocol for class arbitration, which is set forth in Part VII.

Adoption of a pure arbitral model of class arbitration combined with a voluntary due process protocol is doctrinally consistent with the concept

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41. Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 307-10 (2004) (arguing that the hybrid model of class arbitration is preempted by the Federal Arbitration Act and that provider models that require or permit ongoing judicial involvement also are preempted because such models impose judicial involvement in an arbitral proceeding).

42. For example, the AAA rules stay decisions by the arbitrator regarding the construction of the arbitration clause and regarding class certification for thirty days each, to permit the parties to seek interim judicial review. AAA RULES, *supra* note 3, R. 1(c), 3, 5(d).

43. At a minimum, the interim judicial reviews would require filing of documents with the court and a hearing, requiring the parties to incur significant attorneys' fees. *See* Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (And Should) Be Resolved By Class Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451, 468 (2005).

44. *See* cases cited *supra* note 24.

45. *See* discussion *infra* Part V (regarding the doctrinal and practical shortcomings of the hybrid and provider models of class arbitration).

of arbitration as a non-judicial proceeding, yet it preserves the preclusive nature of arbitral adjudications against attack by absent class members,[46] and circumvents potentially protracted litigation regarding whether state action theory requires due process.

## II. DUE PROCESS IN CLASS ACTIONS

The scope of due process in class action litigation defines the possible scope of due process protection that arbitration providers should consider providing in class arbitration. This Part considers the fundamental starting point for this analysis: the scope of due process in class action litigation. The Fifth and Fourteenth Amendments preclude government action that deprives "any person of life, liberty, or property, without due process of law."[47] These clauses guarantee that a person at risk of being deprived of life, liberty, or property shall receive a certain process, essentially a fair procedure, before any such action.[48] "[D]ue process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [but rather] is flexible and calls for such procedural protections as the particular situation demands."[49]

Fundamental elements of due process in non-class action litigation include notice of the claim involved, an opportunity to be heard in some type of an evidentiary hearing, an opportunity to confront adverse witnesses, the assistance of counsel, and a decision by a neutral decision maker.[50] Due process in the class action context involves considerations that extend beyond the requirements of due process in non-class action litigation, because of the representative nature of class action litigation.[51] These considerations derive from the fact that, in class action litigation, all of the claimants are not present before the court.[52] Such claimants are often referred to as "absent class members" or "unnamed class members,"[53] and their absence from the class action proceeding has important "due process consequences."[54]

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46. Harding, *supra* note 29, at 454 ("The use of classwide arbitration, particularly in the context of consumer claims, needs to be addressed in the [due process] protocols. . . .").

47. U.S. CONST. amend. XIV; *see also* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

48. ROTUNDA & NOWAK, *supra* note 26, § 14.6, at 529-30.

49. Harding, *supra* note 29, at 392-93 ( alteration and ommision in original) (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 7.4.2, at 451 (1997) (quoting Matthews v. Eldridge, 424 U.S. 319, 334 (1976))).

50. *Id.* at 392-93 & n.135 (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 7.4.2, at 450 (1997)).

51. CONTE & NEWBERG, *supra* note 22, § 4.47, at 339-40; Mullenix, *supra* note 20, at 1695.

52. Mullenix, *supra* note 20, at 1695.

53. LINDA S. MULLENIX, STATE CLASS ACTIONS—PRACTICE AND PROCEDURE § 1.08 (2002).

54. *Id.*

Whereas in traditional litigation the judicial system itself bears no responsibility for protection of the parties, who are themselves present before the court in the litigation proceeding, in class action litigation, due process considerations require that adequate procedure protect the absent class members' interests.[55] Because the action is litigated by representatives, i.e., individual parties acting on behalf of others in assertion of their representative claims, due process requires procedures distinct from those used in non-class litigation, if the absent class members are to be bound by the judgment ultimately rendered.[56] These procedures act as "safeguards" for the protection of the interests of class members absent from the litigation.[57]

In class action litigation, due process requires that the "'absent' class members be afforded notice of the suit, an opportunity to be heard and participate in the litigation, and [in actions for damages,] a chance to opt out" of the litigation.[58] Due process in a class action further requires that the court, in certifying the class, evaluate the adequacy of both the representatives and counsel for the class.[59] In order to satisfy due process by protecting absent class members, the court also must scrutinize and approve any settlement of compromise of the class action.[60] Judges effectively serve as guardians of the interests of absent class members in class actions, assuring that their interests are not sacrificed.[61] Each of these requirements is discussed below in further detail.

### A. *Notice*

Notice to class members is designed to fulfill the requirements of due process by serving for the protection of the class.[62] The "best notice practicable" is mandatory in actions certified under Federal Rule of Civil Procedure 23(b)(3),[63] while notice is permissive or discretionary in class actions certified under Rule 23(b)(1) or (2).[64] Notice sent by first-class

55. *Id.*

56. CONTE & NEWBERG, *supra* note 22, § 4:47, at 339-40; Sternlight, *supra* note 19, at 32 (arguing that "while parties may elect to pursue their claims in classwide arbitration rather than through class litigation, the Due Process Clause . . . will constrain this choice").

57. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

58. Sternlight, *supra* note 19, at 32; *see also Phillips Petroleum*, 472 U.S. at 812.

59. Mullenix, *supra* note 20, at 1695-96.

60. *Id.* at 1696.

61. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 637 (1997) (Breyer, J., concurring in part and dissenting in part).

62. FED. R. CIV. P. 23 advisory committee's notes (1966 amendments); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); FRIEDENTHAL ET AL., *supra* note 22, § 16.6, at 784.

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

64. FED. R. CIV. P. 23(c)(2)(A). Due process may require notice in 23(b)(1) and (2) class

mail to each class member, with an explanation of the right to opt out of the class, satisfies due process concerns.[65] Notice for any class certified under Rule 23(b)(3) must describe the nature of the action, define the class to be certified, describe the class claims, defenses and issues, and notify the class member of the opportunity to be heard,[66] including the option of entering an appearance through counsel.[67] Notice also must inform a class member of the opportunity to opt out of the class[68] and describe the time and manner of electing exclusion.[69] Notice must state the binding effect of a class judgment on class members who do not opt out.[70] Notice also may be provided to allow class members to express opposition to the representation.[71] Although notice to class members may be required, notice alone will not satisfy due process.[72]

### B. *Adequacy of Counsel and Class Representatives*

The touchstone of due process in the class action setting is insuring the adequacy of representation of absent class members,[73] both by the

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actions. FRIEDENTHAL ET AL., *supra* note 22, § 16.6, at 767-68. Absent class members may "have interests that may deserve protection by notice." FED. R. CIV. P. 23 advisory committee's notes (2003 amendments).

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

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

67. *Id.*

68. *Id.*; *Phillips Petroleum*, 472 U.S. at 803, 810, 812.

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

70. *Id.* Members who do not request exclusion from the class and who receive notice are bound by the judgment in the class action, FED. R. CIV. P. 23(c)(3), assuming adequacy of representation, which is discussed further below. Thus, notice is essential to bind class members who do not request exclusion to the ultimate judgment in the action.

71. FED. R. CIV. P. 23 advisory committee's notes (1966 amendments).

72. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 397 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("Notice . . . cannot substitute for the thorough examination and informed negotiation an adequate representative would pursue.") (citation omitted); *see also* CONTE & NEWBERG, *supra* note 22, § 4:47, at 342. Notice describing the ability to opt out does serve to insure adequacy of class counsel and class representatives' efforts, but because recipients of notice are not necessarily sophisticated enough to make an informed decision about opting out, notice alone is not sufficient to satisfy due process considerations. *See* Wolff, *supra* note 25, at 785-86. Similarly, notice alone is not an effective means of resolving class conflicts. *Id.* at 786 n.211 (quoting Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 977 (1993)).

73. *Matsushita*, 516 U.S. at 396 n.5, 399 (Ginsburg, J., concurring in part and dissenting in part) (stressing the "centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement"); Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940); *see also* FED. R. CIV. P. 23(a)(4), (g); Ortiz v. Fireboard Corp., 527 U.S. 815, 846-48 (1999); *Phillips Petroleum*, 472 U.S. at 798; CONTE & NEWBERG, *supra* note 22, § 4:47; FRIEDENTHAL ET AL., *supra* note 22, at 765; Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process Implications for Mass Tort Litigation*, 28 U.C. DAVIS L.

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representatives of the class[74] and by class counsel.[75] The determination of adequacy of representation occurs in the context of class certification, implicating due process considerations.[76] Judicial certification results in the "early interposition of a judicial officer," designed to police the litigation for compliance with due process imperatives.[77] Court certification serves due process considerations by focusing the court's inquiry on whether the class has sufficient unity or cohesiveness to fairly represent the interests of absent class members.[78]

The certification process involves examination of the quality of the representation by the class representatives[79] to uncover any conflicts of interest between the named class representatives and the absent class members they represent.[80] To satisfy the adequacy of representation requirement, and thus survive constitutional scrutiny, the class representative must have claims or defenses typical of those of the class and must have no significant conflict of interest with the class, insuring that the representative will vigorously pursue the claims on behalf of the class.[81] If the court finds adequacy of representation lacking, the court may

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REV. 871, 910 (1995); Mullenix, *supra* note 20, at 1692, 1696 (describing the "adequacy inquiry" as "central" and indicating that "[d]ue process issues are the single most important feature of class litigation, and adequacy of representation looms over the entire debate"). Thirty-nine states and the District of Columbia have rules requiring adequacy. *Matsushita*, 516 U.S. at 396 n.5.

74. FED. R. CIV. P. 23(a). Many courts ignore the class representative, subscribing to the "potted-plant theory of the class representative," which holds that "as long as the potted plant is conflict-free, its appropriate role is to remain mute, provide background foliage, and do nothing more." Mullenix, *supra* note 20, at 1703-04 (citing CONTE & NEWBERG, *supra* note 22, § 3:24, at 417). A contrasting view is that a "class representative acts as a fiduciary for the entire class" and owes the class a duty of loyalty. Mullenix, *supra* note 20, at 1704 (quoting JAMES WM. MOORE ET AL., 18 MOORE'S FEDERAL PRACTICE AND PROCEDURE, § 130.07(3) (3d ed. 1997)).

75. FED. R. CIV. P. 23(g); *Phillips Petroleum*, 472 U.S. at 812; Mullenix, *supra* note 20, at 1695 ("[C]lass members need protection both from their own class counsel, who may be tempted to engage in self-dealing, as well as their own class representatives, who may not exercise sufficient independent control over the litigation to prevent breaches of duty to the class.").

76. Mullenix, *supra* note 20, at 1695; Sternlight, *supra* note 19, at 33.

77. Mullenix, *supra* note 20, at 1695.

78. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

79. FRIEDENTHAL ET AL., *supra* note 22, § 16.2, at 766 (stating that adequacy of representation is determined by "their quality"). Plaintiffs in small claimant class actions have little incentive to participate or even monitor class litigation, so that for practical purposes, counsel controls the litigation. Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 AM. J. TRIAL ADVOC. 147, 148, 155 (1995). Currently courts do not disqualify such a disinterested representative. *Id.*

80. *Amchem*, 521 U.S. at 625, 626 n.20. Conflicts can arise, for example, from a willingness of class representatives prosecuting a state court action to release federal claims, which may reflect the inadequacy of the representation. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396-97 (1996).

81. FED. R. CIV. P. 23(a)(2), (3); Hansberry v. Lee, 311 U.S. 32, 44 (1940); CONTE & NEWBERG, *supra* note 22, § 4:47, at 258 ("examine whether the name plaintiffs have the same

condition continued maintenance of the class action upon the strengthening of continuing representation.[82] Where conflicts among class members arise, the court may designate subclasses.[83] To represent fully the interests of absent class members, the court has "the power and the duty to realign classes during the conduct of an action when appropriate."[84]

Counsel also must "adequately represent the interests of the class."[85] The court's assessment of the adequacy of representation by counsel is significantly more rigorous than its scrutiny of class representatives,[86] in light of the practical reality that the lawyers for the class often control the litigation as a practical matter,[87] especially in class actions aggregating numerous low dollar amount claims.[88] In addition to evaluating counsel's competence, including knowledge, experience, and resources,[89] the court considers any other pertinent matters, including conflicts of interest,[90] and polices the risk of collusion between class counsel and defense counsel.[91]

Despite these requirements, courts often fail to sufficiently scrutinize the adequacy of representation afforded to absent class members and tend to rubber stamp proposed class representatives and proposed class counsel.[92] Courts make conclusory findings, and often focus solely on conflicts of interest, rarely analyzing other factors including the competence or lack of knowledge of class representatives.[93] Courts often fail to adequately analyze conflicts of interest that claim or issue

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interest and same injury. *Amchem*, 521 U.S. at 626.

82. FED. R. CIV. P. 23 advisory committee's notes (1966 amendments).

83. FED. R. CIV. P. 23(c)(4). For example, courts often consider designation of subclasses where conflicts exist regarding whether to settle or continue litigation or where different groups of class members have differing "risk structures." Wolff, *supra* note 25, at 783-84. Class members also may have conflicts arising from the assertion of equitable claims, if some but not all class members also hold individual damages claims, and conflicts may arise from the assertion of state-based claims in state court with regard to the simultaneous or subsequent assertion of federal court claims. *Id.* at 805.

84. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185 (1974) (Douglas, J., dissenting in part); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) (stating that "the court may amend the pleadings to ensure that all sections of the class are represented adequately").

85. FED. R. CIV. P. 23(g)(1)(B).

86. *Compare* FED. R. CIV. P. 23(a), *with* FED. R. CIV. P. 23(g).

87. Mullenix, *supra* note 20, at 1699.

88. Hill, *supra* note 79, at 148, 155.

89. FED. R. CIV. P. 23(g).

90. *Id.*; *see also* Wolff, *supra* note 25, at 788 (noting that counsel may have conflicts of interest in addressing preclusion issues).

91. FRIEDENTHAL ET AL., *supra* note 22, § 16.7, at 793.

92. Klonoff, *supra* note 25, at 673-74; Mullenix, *supra* note 20, at 1691-92.

93. Klonoff, *supra* note 25, at 682-84; Mullenix, *supra* note 20, at 1697-98 ("[N]either counsel nor the courts take the adequacy inquiry very seriously, and both typically fail to develop sufficient [F]ed to support findings of adequacy."); Wolff, *supra* note 25, at 802.

preclusion present in connection with class certification.[94] Courts approve counsel and class representatives with little scrutiny and insufficient consideration of the problems that their inattentiveness presents in subsequent class proceedings.[95]

### C. *Settlement*

Significant due process protection extends to settlement in class action litigation, including expanded oversight by judicial officers to protect the interests of absent class members against trade-off or unfair compromise.[96] Prior to dismissal, settlement, and compromise of a class action, the court must provide notice of settlement to the class.[97] Disclosure of any side deals involving settling parties is required,[98] and payment of greater amounts to some class members based on closer geographic proximity to the courts is prohibited.[99] Objectors must be provided with an opportunity to object to any settlement,[100] and may, in the court's discretion, be granted an opportunity to opt out.[101] Judges also must scrutinize so called "coupon settlements," in which class members receive coupons of questionable value, while class counsel receive fees in cash.[102] The court must evaluate the overall fairness of all coupon settlements, determining whether such settlements are "fair, reasonable, and adequate."[103] Ultimately, a court must approve any settlement of a class action by determining, after a hearing, that it is fair, reasonable, and adequate.[104] All federal court class

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94. Klonoff, *supra* note 25, at 687-88; Wolff, *supra* note 25, at 743-44.

95. Mullenix, *supra* note 20, at 1708 ("[M]ost judges presumptively give the proposed class representatives a free pass."); *id.* at 1735 ("[J]udicial assessment of the adequacy of class counsel almost always has consisted of a pro forma, cursory blessing by the court as to whoever appeared in court as counsel of record."); *id.* at 1702; Wolff, *supra* note 25, at 722-23 (explaining that courts proceed with certification without achieving any understanding of preclusion, which often would reveal conflicts of interests among class members and which the author characterizes as a "form of judicial malfeasance"); *see also* Klonoff, *supra* note 25, at 689-92 ("Courts have almost universally resisted finding class counsel inadequate.").

96. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985); FRIEDENTHAL ET AL., *supra* note 22, § 16.7 at 791.

97. FED. R. CIV. P. 23(e)(1)(B).

98. FED. R. CIV. P. 23(e)(2).

99. 28 U.S.C.A. § 1713 (West 2005).

100. FED. R. CIV. P. 23(e)(4)(A).

101. FED. R. CIV. P. 23(e)(3).

102. 28 U.S.C.A. § 1712(e) (West 2005). Attorneys fees awarded in connection with coupon settlements cannot be premised on the value of unpaid coupons; percentage based fees can only be awarded on the basis of coupons actually redeemed. 28 U.S.C.A. § 1712(c) (West 2005).

103. 28 U.S.C.A. § 1712(e) (West 2005).

104. FED. R. CIV. P. 23(e)(1)(C); MULLENIX, *supra* note 53, § 1.08.

action settlements must be reported to the appropriate federal and state officials.[105]

Despite these requirements, courts often give settlements only a "perfunctory review," resulting in inadequate protection of absent class members' interests.[106] Inadequate representation can "'taint[]' the entire settlement process."[107] In fact, judicial approval of settlements involving discount coupons, which often occurred without any inquiry into their value or likely redemption rates,[108] sparked reforms limiting coupon settlements.[109] In the interest of clearing crowded dockets, judges ignore self-dealing.[110] Demands for increased judicial scrutiny, while required by rule, offer little hope given the crowded dockets,[111] limited resources, and a deficit of judicial expertise at evaluating these settlements.[112]

### D. *Judicial Control*

Judges play a unique role in class action litigation by exercising significant control over the proceedings, as compared with traditional litigation in which attorneys exercise greater control.[113] In class litigation,

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105. 28 U.S.C.A. § 1715 (West 2005).

106. Hill, *supra* note 79, at 151; *see also* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 486 (2000) (arguing that "[j]udges need to take more responsibility for the quality of [class action] settlements").

107. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 397 (1996) (Ginsburg, J., concurring in part and dissenting in part) (quoting Prezant v. De Angelis, 636 A.2d 915, 925 (Del. 1994)).

108. HENSLER ET AL., *supra* note 106, at 462; *see also* S. 5, 109th Cong. § 2(a)(3)(A) (2005) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.").

109. The Class Action Fairness Act of 2005 provides that courts may approve coupon settlements only after a hearing in which the court determines and makes findings regarding whether the settlement is fair, reasonable, and adequate for class members, 28 U.S.C.A. § 1712(e) (West 2005), and that a court may not award attorneys' fees based on the value of unclaimed coupons, 28 U.S.C.A. § 1712(c) (West 2005).

110. HENSLER ET AL., *supra* note 106, at 497. This problem is exacerbated with judicial certification of settlement classes, which are highly susceptible to collusion between plaintiff and defense counsel, and fraught with conflicts of interest between plaintiffs' counsel and class representatives over lucrative attorneys' fees, and defense counsel who forego contesting certification to obtain a more favorable settlement. *Id.* at 446.

111. Hill, *supra* note 79, at 163-64.

112. HENSLER ET AL., *supra* note 106, at 493, 498 (characterizing the lack of judicial expertise as one reason judges fail to fully scrutinize class action settlements, and recommending that additional resources be provided to judges, including neutral testimony on settlement issues, to permit judges to evaluate effectively class action settlements).

113. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 184 (1974) (Douglas, J., dissenting in part) (explaining that one purpose of Rule 23 is to ensure that trial judges take an "active role"); FRIEDENTHAL ET AL., *supra* note 22, § 16.7, at 791 (stating that judicial involvement in settlement

judges certify the class, approve settlements, approve notice to the class members, and approve class counsel.[114] Judges are charged, in connection with settlements, with again scrutinizing the adequacy of class representatives and counsel[115] and the relationship between class representatives and opposing parties, and with protecting the interests of absent class members against collusion and fraud.[116] To accomplish this, they may require notice at any step of the proceedings, and they have broad authority to impose conditions on representatives of the class.[117]

With pending settlements and pressure to clear dockets, judges take the adequacy inquiry even less seriously in the context of settlement than they do in the context of class certification.[118] Judges are unlikely to conduct the rigorous examination required for the protection of the absent class members, and they are likely to limit discovery requests by objectors, making it difficult to create a record sufficient to challenge adequacy.[119]

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is "unique in American law"), § 16.5, at 783 ("[J]udge must exercise considerable authority to control and manage class acitons.").

114. FED. R. CIV. P. 23(a) (certification), (e) (settlement), (g) (class counsel) and (c) (notice); HENSLER ET AL., *supra* note 106, at 460-61 (explaining that judges often also maintain continuing jurisdiction over settlement funds, address attorneys' fees, hold multiple fairness hearings, and insist on changes to settlement agreements).

115. Mullenix, *supra* note 20, at 1715 (describing the adequacy of class counsel inquiry as involving two elements, competency and conflicts, and the adequacy of the class representatives as involving one inquiry, conflicts of interest); Wolff, *supra* note 25, at 803 (arguing that the "appropriate means" for "mitigat[ing] an initial court's failure to consider the impact of preclusion on the interests of absentees following entry of judgment when a class action does move forward" is "through scrutiny of the adequacy of the representation that class members were afforded in the first action").

116. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 637 (1997) (Breyer, J., concurring in part and dissenting in part) (recognizing that the district court judge is "charged with the responsibility of ensuring that the interests of no class members are sacrificed"); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (recognizing that named plaintiffs and the court act to protect the absent plaintiffs' interests); CONTE & NEWBERG, *supra* note 22, § 1.13, at 44 (recognizing that judges "assure that the interests of absent class members are protected at all stages following the commencement of class litigation"); FRIEDENTHAL ET AL., *supra* note 22, § 16.2, at 746, § 16.7, at 791-93.

117. FED. R. CIV. P. 23(d)(2) (permitting notice at any stage of the proceedings, including notice to permit absent class members to "signify whether they consider the representation fair and adequate"); FED. R. CIV. P. 23(d)(3) (permitting judges to "impose[] conditions on the representative parties"); FRIEDENTHAL ET AL., *supra* note 22, § 16.6, at 786.

118. Mullenix, *supra* note 20, at 1716-17 ("[N]either the parties nor the court has [any] special interest in extensively probing adequacy in the settlement context, even in the shadow of a potential collateral attack" because typically, "the parties are aligned in interest in obtaining the court's approval of the settlement.").

### E. *Preclusion in Class Actions*

A judgment in a "properly entertained class action" binds class members in any subsequent proceeding.[120] Such a judgment extinguishes the claim of the class and is conclusive in a subsequent action between the same parties.[121] Where the representation afforded to class members in a class action proceeding is inadequate, absentees are not bound, leaving the judgment resulting from the class litigation vulnerable to collateral attack.[122]

However, the failure of courts to undertake a vigorous determination of the adequacy of counsel and class representatives leaves the resolution of a class action vulnerable to a subsequent collateral attack[123] because persons whose interests were not adequately represented in connection with the prior judgment are not bound.[124] In such situations, courts must resolve the competing interests of preclusion and the due process rights of absent class members.[125]

## III. THE QUESTION OF STATE ACTION

Constitutional rights are rights that individuals can assert against government officials and agencies rather than rights that individuals can assert against private actors.[126] The fundamental issue in evaluating

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120. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

121. *Id.*

122. Dow Chem. Co. v. Stephenson, 539 U.S. 111, 112 (2003) (per curiam) (a four-to-four decision following Stephenson v. Dow Chemical Co., 273 F.3d 249, 257-61 (2d Cir. 2001)) (permitting class member to avoid the effect of a class settlement due to inadequate representation); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part); Hansberry v. Lee, 311 U.S. 32, 42-45 (1940); Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (holding that the class was not bound because representation was not adequate due to failure to pursue an appeal).

123. *Matsushita*, 516 U.S. at 396, 399 n.8 (Ginsburg, J., concurring in part and dissenting in part) (criticizing the court below for approving a settlement containing only "boilerplate language referring to the adequacy of representation"); RESTATEMENT (SECOND) OF JUDGMENTS §§ 42 (1)(d)-(e) cmts. e-f, 41 cmt. a (1982); Mullenix, *supra* note 20, at 1717. Mullenix discusses the Agent Orange litigation as an example. In that action, the court made conclusory findings of adequacy, even though the class had no named representatives at the time. *Id.* at 1722-23. The lack of a meaningful record makes assessment of the adequacy determination in subsequent litigation difficult. *Id.* at 1732-33.

124. *Matsushita*, 516 U.S. at 888 (Ginsburg, J., concurring in part and dissenting in part); *Hansberry*, 311 U.S. at 45-46.

125. Mullenix, *supra* note 20, at 1727.

126. ROTUNDA & NOWAK, *supra* note 26, § 16.1, at 758 (stating that individual rights contained in the Constitution apply only to the activities of either state or federal governmental entities); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1 (2d ed. 1988); Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986) (holding that the "National Railroad Adjustment Board, while private in fact, is public in name and function [because] it [was] the

whether private contractual arbitration constitutes state action is whether the law should regard a private arbitrator "in all fairness as a state actor,"[127] such that the private arbitrator's conduct should be regarded as "state action"[128] subjecting the private arbitrator to limitations imposed by the Constitution.[129] In determining this, the courts are essentially deciding which parties' interests are of greater constitutional significance[130] or, from another perspective, deciding whether governmental acquiescence—for example, permitting arbitration—constitutes a "tacit ratification" or a "delegation of a public responsibility to a private party."[131]

Whether state action is present depends in large part on what the Supreme Court described as a "sifting the facts and weighing circumstances"[132] because "formulating an infallible test" is an "impossible task."[133] Still, even though the doctrine is not well-defined, there are several bases upon which courts find state action in private conduct sufficient to subject the private actor to constitutional restraints.[134] If otherwise private conduct is characterized by the courts as a traditionally exclusive public function, then constitutional restraints apply.[135]

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tribunal that Congress [had] established to resolve certain disputes in the railroad industry").

127. ROTUNDA & NOWAK, *supra* note 26, § 16.1, at 762 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991)); *see also* Cole, *supra* note 26, at 7.

128. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988).

129. ROTUNDA & NOWAK, *supra* note 26, § 16.1, at 762.

130. *Leesville Concrete*, 500 U.S. at 620-21 (recognizing that this factor of the analysis involves a "factbound inquiry"); ROTUNDA & NOWAK, *supra* note 26, § 16.1, at 760 ("This question is answered by determining whether the challenged party's activities involve sufficient governmental action so that they are subjected to the values and limitations reflected in the Constitution. . . .").

131. TRIBE, *supra* note 126, § 18-1. Courts also distinguish between "varieties of inaction." *Id.*

132. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 783 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)). The tests that have emerged to assess whether state action exists are not "adequate to predict whether state action will be found in a new case." *Id.* § 16.5. The analysis might more appropriately be evaluated under a "unitary" approach, pursuant to which the issue is whether a sufficient quantity of state connections exist with particular private conduct. *Id.* Alternatively, a balancing approach, in which the court "must balance the relative merits of permitting the challenged practice to continue against the limitation which it imposes on the asserted right," might be preferable to a "formulistic search for an undefined minimum amount of state acts." *Id.*

133. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

134. TRIBE, *supra* note 126, § 18-1 (quoting Charles L. Black, Jr., *The Supreme Court, 1996 Term—Forward: 'State Action,' Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)) ("[T]he Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether . . . private actors are to be deemed responsible for an asserted constitutional violation. . . . [T]he state action cases are a 'conceptual disaster area.'").

135. *Leesville Concrete Co.*, 500 U.S. at 620-21; Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-58 (1978).

Alternatively, if an excessively entangled relationship exists between the state actor and the private actor, such that the state commands or encourages the private actor's conduct, the constitution will restrain the private actor's conduct.[136] If the private actor cannot be described as performing a public function, courts examine the nature of the contacts between the government and the private actor to determine whether the private actor's conduct should be subject to constitutional restraint.[137] The state action doctrine preserves the right of individual liberty in the activity of private parties while reinforcing both federalism and the separation of powers.[138]

Alternatively, state action can be premised upon a "symbiotic relationship" between the state and the private actor.[139] Because the law requires direct governmental aid to the private actor in order to find a symbiotic relationship,[140] and such direct governmental aide is absent from private contractual class arbitration, just as it is from non-class arbitration,[141] the third category is not relevant; therefore, this discussion will focus on the other two categories.

### A. *Entanglement as a Basis for Finding State Action*

An analysis of entanglement between the state and a private actor depends on the relationship between the government actor and the actions of the private actor.[142] First, the court examines "whether the claimed

136. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 765; Cole, *supra* note 26, at 7; *see Flagg Bros.*, 436 U.S. at 165-66. For example, when judges command private actors to take action that would violate the constitution if those actions were carried out by the state, state action is present. Shelly v. Kramer, 335 U.S. 1, 16 (1948).

137. ROTUNDA & NOWAK, *supra* note 26, § 16.1 ("[W]hen a case does not involve a traditional government function, a court must simply look at the totality of facts and circumstances in determining whether: (1) the harm caused to the victim was somehow traceable to the private actor using a right granted to him by state law; and (2) whether the connection of the government to the private actor, and the harm caused by the private actor, is such that it is fair to subject the private actor's actions to constitutional restrictions.").

138. TRIBE, *supra* note 126, § 18-2.

139. Cole, *supra* note 26, at 7; *see also* ROTUNDA & NOWAK, *supra* note 26, § 16.4, at 796. For example, where multiple contacts intertwine the government and the private actor, the resulting "symbiotic relationship" can subject the private actor's conduct to the constraints imposed by the Constitution. *See id.*

140. ROTUNDA & NOWAK, *supra* note 26, § 16.4, at 796. The analysis of the entanglement cases involves "no specific test," but considers whether "the state and private individual have, in effect, become joint venturers even though they do not have any formalized agreements." *Id.*

141. Cole, *supra* note 26, at 7 n.25; Cole & Spitko, *supra* note 5, at 1166 n.82 (explaining that a symbiotic relationship requires receipt of "state subsidies or aid" (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961))).

142. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 783 ("There is no formal test for the amount of contacts with government which will subject a private person's activities to the

constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."[143] Private contractual arbitration depends upon either the FAA or state counterparts to satisfy this requirement.[144]

Characterizing the private party as a state actor also depends on the extent to which the private actor relies on governmental assistance and benefits, whether the actor is performing a traditional government function, and whether the injury caused is aggravated in a unique way by the incidents of government authority.[145] A sufficient nexus also may be found if the government significantly encourages the activity, whether overtly or covertly,[146] or directs, commands, or actively approves of the complained-of conduct.[147] For example, judicial commands requiring private parties to take specific action result in state action.[148]

A "non-neutral involvement of the state with the activity" gives rise to state action sufficient to subject the activity to constitutional restraints.[149] For example, in *Shelley v. Kraemer,* the court found state action in the court's enforcement of privately agreed upon racially restrictive covenants.[150] However, private activity that is subject to extensive regulation does not necessarily constitute state action.[151] Only where there

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restrictions of the Constitution.").

143. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939-41 (1982)).

144. Cole, *supra* note 26, at 16.

145. *Leesville Concrete*, 500 U.S. at 620.

146. Cole & Spitko, *supra* note 5, at 1167.

147. ROTUNDA & NOWAK, *supra* note 26, § 16.4, at 798. Although the regulation of a private actor by the government does not render all of the private actor's conduct state action, the "degree of entanglement . . . is not an irrelevant fact." *Id.* Even extensive regulation will not in itself render private conduct subject to constitutional restraint. *Id.* But multiple contacts that "intertwine" the private actor with the state, giving the private conduct the appearance of a government action, will require the imposition of constitutional restraints. *Id.* The authors characterize this test as "a 'catch all' that may have little, if any, substantive meaning." *Id.* at 801.

148. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 785.

149. *Id.* at 786.

150. Shelley v. Kraemer, 334 U.S. 1, 20 (1948). However, as many commentators point out, *Shelley* represents perhaps the height of the state action doctrine, and the Court has not extended *Shelley* to its logical conclusions. *See, e.g.*, CHEMERINSKY, *supra* note 26, at 422 (explaining that it "is difficult to imagine anything that cannot potentially be transformed into state action under [the] reasoning [of *Shelley*]," and that "[i]n fact, the Court only rarely has applied *Shelley* as a basis for finding state action"). Instead, the Court more recently has exhibited extreme reluctance to find state action. *See* Cole, *supra* note 26, at 16–17 (noting the Court's "reluctance to find state action when race issues are absent" and observing that "[s]ince Flagg, the Court has found state action in only one nonrace-based commercial case" (citing Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982))).

151. Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

is a "sufficiently close nexus" between the state and the challenged activity of the private actor is the private conduct treated as that of a state actor.[152]

The state action cases involving entanglement that are closest factually to class arbitration are those in which both courts and private actors have cooperative involvement. For example, the Court has found state action in peremptory challenge cases where courts participate with private parties in the jury selection process, and in property seizure cases where sheriffs participate with private actors in the seizure of private property. These two lines of authority are examined in the next two sections.

### 1. Peremptory Challenge Cases

In cases involving peremptory challenges, the Court characterized the conduct of private actors as state action, requiring constitutional protection. In *Edmonson v. Leesville Concrete Co.*, the Court held that discriminatory conduct by a litigant through use of peremptory challenges constituted state action.[153] *Leesville Concrete* examined the public function factor, as discussed below, but also considered "the extent to which the actor relies on governmental assistance and benefits . . . and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[154] The Court in *Leesville Concrete* described the private actors, the litigants, as assisting the government in jury selection.[155] The intimate entanglement between the judge and jury in the decisionmaking process and the fact that the proceeding took place within a courtroom setting, following court-articulated procedures, supported a finding of state action.[156] In effect, the court "made itself a party" to the discrimination, placing its "power, property and prestige behind" the litigant's actions, essentially sanctioning the conduct of the private litigant, and permitted discriminatory conduct to occur within the courtroom itself.[157]

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152. *Id.* at 351 (holding that the conduct of a private utility company did not constitute state action because there was insufficient nexus between the state and the challenged actions of the private utility company).

153. 500 U.S. 614, 622 (1991) (finding that state action exists "when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials'").

154. *Id.* at 621-22. In finding state action, the *Leesville Concrete* Court relied heavily on the promulgation of rules and statutes implementing the system of jury selection as well as the involvement of the judge—"who beyond all question is a state actor"—in the process of jury selection. *Id.* at 622-24. In contrast, in her dissent, Justice O'Connor characterized the judge's involvement as simply excusing jurors when a peremptory challenge is exercised. *Id.* at 634 (O'Connor, J., dissenting).

155. *Id.* at 620 (majority).

156. Cole, *supra* note 26, at 14-15.

157. *Leesville Concrete*, 500 U.S. at 624; ROTUNDA & NOWAK, *supra* note 26, § 16.3.

In *Georgia v. McCollum*, the Court held that a defendant's use of peremptory challenges to exclude a person from a jury based on his or her race constituted state action because the right derived from the authority of the state[158] and occurred with the assistance of the court system.[159]

Professor Cole describes the court's involvement with the jury—with which the judge will "share decisionmaking functions"—as much deeper than its involvement with non-class arbitration, which she describes as "enforcing neutral private arrangements."[160] Professor Cole distinguishes the court's role in non-class arbitration from its role in the jury selection cases, characterizing the court's involvement in non-class arbitration as non-state action, in part because the court does not inquire "into the underlying subject matter of the contract [to arbitrate]."[161] As discussed further below, these rationales for distinguishing the peremptory challenge cases from non-class arbitration do not apply in the same manner to class arbitration, where the court may examine the underlying merits to a far greater degree and may move well beyond neutrally enforcing the private arbitration agreement, instead exercising functions which—if conducted outside of the arbitral context—would require due process protection.

### 2. Attachment/Seizure Cases

In several decisions involving the seizure of property, the Court has considered whether a denial of due process rights by a private actor involves state action. In *Flagg Bros., Inc. v. Brooks*, the Court held that where the state merely acquiesced in private action through enforcement of a state statutory scheme permitting enforcement of a possessory lien, the lienholder's sale of the debtor's goods did not constitute state action requiring compliance with constitutional due process requirements.[162] Significant to the decision was the "total absence of overt official involvement" in the deprivation of property.[163]

In contrast, in *Lugar v. Edmondson Oil Co.*, the Court found state action sufficient to require due process protections where a clerk of the court signed a writ and a sheriff enforced it by attaching the debtor's

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158. Georgia v. McCollum, 505 U.S. 42, 56-59 (1992).

159. ROTUNDA & NOWAK, *supra* note 26, § 16.2, at 780-81.

160. Cole & Spitko, *supra* note 5, at 1173.

161. *Id.* at 1174.

162. Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 166 (1978); *see also* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 53 (1999) (finding that mere acquiescence or "subtle encouragement" in private use of a statutory procedure does not constitute state action).

163. *Flagg Bros.*, 436 U.S. at 157. The Court distinguished cases where government officials or courts participated in the process. *Id.* at 157-64 (dismissing the city marshall from the action and distinguishing the situation where the state actor put its "own weight on the side of the proposed practice *by ordering it*") (emphasis in original).

property, in large part because the private actor joined with the county sheriff and the state judicial system to seize the disputed party's property.[164] Thus, state statutes allowed a party to attach property and the state "provide[d] a state official to assist the party in the attachment," rendering the private party a state actor.[165] The *Lugar* Court distinguished *Flagg Brothers* based on the critical role of state personnel in accomplishing the levy through "joint participation with state officials"[166] and through the "use of the courts to authorize the seizure of a debtor's property."[167] Without "overt, significant assistance of state officials," or direct involvement of state officials in the deprivation, the conduct of private actors does not rise to the level of state action.[168] However, where the private actor "has obtained significant aid from state officials, or . . . his conduct is otherwise chargeable to the State," the person "may fairly be said to be a state actor."[169]

In *Soldal v. Cook County*, another due process case, the seizure of the debtor's mobile home by deputy sheriffs assisting the owner gave rise to state action because the police acted "under color of state law."[170] Thus, while self-help by creditors may not amount to state action, the involvement in the process of governmental administrative systems, judicial systems, or law enforcement creates state action that is subject to due process constraints.[171]

### 3. Other Cases

Entwinement cases extend beyond the seizure and peremptory challenge contexts. The entwinement of an association of public and private schools that governed high school athletics resulted in state action.[172] State action existed given the state's "pervasive and substantial" involvement in the notice process required of an executrix of an estate, where the government compelled the notice by statute, and the District Court "reinforced" the statute by ordering compliance.[173] In another context, the insinuation of the state into a "position of interdependence"

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164. Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982).

165. TRIBE, *supra* note 126, § 18-1, at n.9.

166. *Lugar*, 457 U.S. at 941-42.

167. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 793.

168. Cole, *supra* note 26, at 19, 46.

169. *Lugar*, 457 U.S. at 937.

170. 506 U.S. 56, 72 (1992).

171. ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 789 n.16; *see, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 10 (1991); Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 84-87 (1988) (holding that "a judgement entered without notice or service is constitutionally infirm" despite the fact that due process would have resulted in the same outcome).

172. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298-302 (2001).

173. Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 487 (1988).

with a private restaurant operator rendered the private actor's decision to discriminate state action, in part because the private actor and the state actor were, in the public's perception, connected.[174]

However, the courts distinguish degrees of involvement carefully, and cases in which state action is found are factually contingent. For example, a congressional provision authorizing an exclusive license for the word "Olympic" was insufficient to bring a private actor's decision to deny organizers of a gay athletic event use of the word within the realm of state action.[175] Likewise the decision of a private insurer, regulated by a state workers' compensation system, that involved a dispute resolution process established by the state did not involve state action because the decisions of the government did not command, approve, or encourage the private insurer's decisions, which the private insurer made acting alone.[176] Because the government did not provide "overt, significant assistance," the court held that state action did not occur.[177]

### B. *Delegation of a Traditional Public Function Renders Private Actor's Conduct State Action*

In determining whether private actors must comply with constitutional protections, courts also evaluate whether private entities are performing "public functions," i.e., functions that are traditionally and exclusively activities controlled by the state.[178] States cannot avoid constitutional

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174. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725-26 (1961) (finding state action in the symbiotic relationship between the state parking authority and the restaurant because the state acted as a "joint participant" and stood in a "position of interdependence" such that the state could profit from the restaurant's activity).

175. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547 (1987).

176. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 54-58 (1999). The Court also dismissed the notion that "subtle encouragement" is sufficient to create state action where the private actor was making decisions alone. *Id.* at 53. As discussed in this Article, decisions regarding the certification of the class—which carry constitutional implications—are made in classwide arbitration by private arbitrator providers alone, but are subject to review by judges. *See* discussion *infra* Part V.B.3. Such encouragement arguably is much less "subtle" than the state conduct examined in *American Manufacturers*.

177. Cole, *supra* note 26, at 20. Accordingly, Cole concludes that since the state provides no encouragement for arbitration, and since state officials do not assist private parties in using either FAA or state statutory arbitration schemes, the "private party use of the FAA . . . would result in a finding of no state action." *Id.* at 20-21. However, as discussed in this Article, under both the hybrid model of classwide arbitration and under provider models, the state—through the judicial system—provides varying degrees of assistance and encouragement to class arbitration. *See* discussion *infra* Part V.

178. ROTUNDA & NOWAK, *supra* note 26, § 16.2, at 771 ("The state cannot free itself from the limitations of the Constitution . . . merely by delegating certain functions to otherwise private individuals."); *see also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-58 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 352-53 (1974). The Court has narrowly interpreted this basis for finding

requirements by delegating conduct to private actors,[179] and some state authorizations of private action have a "Constitution-triggering effect," depending upon the nature and extent of responsibility placed in private hands.[180] Because public functions involve "powers traditionally exclusively reserved to the State,"[181] whether activity involves a "public function" is a historical inquiry.[182] Thus, for example, a utility is not traditionally an exclusive public function,[183] nor is a shopping center,[184] or a school.[185] But running a park[186] or a city[187] or an election[188] is a public

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state action, holding that running a primary election, *see* Terry v. Adams, 345 U.S. 461, 481-84 (1953), or a company town, *see* Marsh v. Alabama, 326 U.S. 501, 507-09 (1946), constitutes state action, and that "education, fire and police protection and tax collection" may be public functions, *Flagg Bros.*, 436 U.S. at 163; *see also*, Cole & Spitko, *supra* note 5, at 1175-76 (explaining that "state action attaches only to those functions that the government traditionally has performed," and not to functions the government could perform, regardless of their importance).

179. Georgia v. McCollum, 505 U.S. 42, 53 (1992).

180. TRIBE, *supra* note 126, § 18-5 ("However described, there must exist a category of responsibilities regarded at any given time as so 'public' or 'governmental' that their discharge by private persons, pursuant to state authorization even though not necessarily in accord with state direction, is subject to the federal constitutional norms that would apply to public officials discharging those same responsiblities.").

181. *Jackson*, 419 U.S. at 352; *see also* TRIBE, *supra* note 126, § 18-5, n.3.

182. *Flagg Bros.*, 436 U.S. at 162 ("Creditors and debtors have had available to them *historically* a far wider number of choices . . . .") (emphasis added); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991) ("Legislative authorizations, as well as limitations, for the use of peremptory challenges date as far back as the founding of the Republic; and the common-law origins of peremptories predate that."). *But see Flagg Bros.*, 436 U.S. at 640 (O'Connor, J., dissenting) (suggesting that peremptory challenges cannot be a public function because they are "older than the Republic").

183. *Jackson*, 419 U.S. at 353 (rejecting petitioner's invitation to expand the scope of the public function doctrine to include all businesses affected with the public interest as state actors).

184. CHEMERINSKY, *supra* note 26, at 501-02 ("[S]hopping centers do not meet the *Jackson* test for public functions; obviously, they are not a task that has been traditionally, exclusively done by the government.").

185. *See* Powe v. Miles, 407 F.2d 73, 79-80 (2d Cir. 1968) (holding that a private university's conduct, regulating student demonstrations on a football field, was not state action); Grossner v. Trs. of Columbia Univ., 287 F. Supp. 535, 549 (S.D.N.Y. 1968) (finding that a private university's conduct in educating persons is not state action). *But see* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 289 (2001) (explaining that the "nominally private character" of the state interscholastic athletic association was "overborne by the pervasive entwinement of public institutions and public officials," which rendered regulatory enforcement by the interscholastic athletic association state action); CHEMERINSKY, *supra* note 26, at 503-05 (explaining that because "*Jackson* narrowly defines public function, . . . . the Court has refused to apply the public functions exception" to private entities "managing or regulating schools," because private education has a long history of existence so that the *Jackson* exclusivity requirement is unmet).

186. Evans v. Newton, 382 U.S. 296, 301-02 (1966) (finding that "the public character of [the] park require[d] that it be treated as a public institution subject to [due process requirements], regardless" of whether the park was publicly or privately owned).

187. Marsh v. Alabama, 326 U.S. 501, 506, 509 (1946) (finding that a town, owned by a

function. Thus, to perform a public function, the service involved must be one that the state is obligated to provide and that is "clearly governmental in nature."[189] The public function doctrine is intended to "flush out a State's attempt to evade its [constitutional] responsibilities by delegating them to private entities."[190]

The fact that the government has engaged in particular conduct does not necessarily mean that a private actor engaged in similar conduct is subject to constitutional constraints.[191] A state's authorization and approval of private conduct that does not place the state's imprimatur upon the private actor's conduct will not constitute state action.[192] While state action ordering or initiating the complained-of private conduct would render the private actor's conduct state action, conduct initiated by a private actor would not constitute state action.[193] Absent both "'exclusivity' and tradition, the Court rarely finds that a private activity is a state action."[194]

Where private actors conduct public or governmental functions, their activities are subject to the constraints imposed by the Constitution.[195] In

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private corporation, could not "govern a community of citizens so as to restrict their fundamental liberties").

188. CHEMERINSKY, *supra* note 26, at 502-03 (holding an election for government office is the "paradigm instance of the public functions exception").

189. N.Y. City Jaycees, Inc. v. U.S. Jaycees, Inc., 512 F.2d 856, 860 (2d Cir. 1975) (quoting Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968)). Delegation of the electoral process is a public function. *See* Smith v. Allwright, 321 U.S. 649, 663-64 (1944). However, the Court does not explain how the importance of the electoral system equates with the governmental role. TRIBE, *supra* note 126, § 18-5. The provision of a park is a public function. *See Evans*, 382 U.S. at 301. But, the provision of electrical service is not a public function. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974).

190. Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18-19 (1999); *see also* Catanzano v. Dowling, 60 F.3d 113, 119-20 (2d Cir. 1995) (finding that certified home health care agencies (CHHAs) exercised state action where decisionmaking authority, regarding whether home health care was medically necessary and whether there were cheaper ways to deliver required care, had been delegated by the state); Stanley v. Big Eight Conference, 463 F. Supp. 920, 927 (W.D. Mo. 1978) (finding that the activities of a collegiate athletic conference constituted state action where state-supported public universities had delegated to the conference certain functions such as supervision over intercollegiate athletics).

191. *Jackson*, 419 U.S. at 354 n.9 (citing Evans v. Newton, 382 U.S. 296, 300 (1966)).

192. *Id.* at 357 (finding that the conduct of a private utility is not state action because although the utility was state-regulated, the state did not place its "imprimatur" on the particular utility company conduct at issue by "ordering" such conduct and because the conduct was "initiated" by the utility, not the state).

193. *Id.* at 356-57 (finding that the private utility's conduct was not state action because the state did not "order[]," "initiate[]," or "insinuate[] itself" regarding the complained-of practice, which was instead initiated by the utility).

194. Cole & Spitko, *supra* note 5, at 1177.

195. ROTUNDA & NOWAK, *supra* note 26, § 16.2, at 771 ("[I]t is very difficult to determine what activities should be deemed public functions and [therefore] subjected to constitutional limitations.").

the context of non-class arbitration, the Ninth Circuit determined that, because "dispute resolution is not an 'exclusive' governmental function, neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action."[196] A state appellate court in Florida held that a state law permitting parties to agree privately to dispute resolution does not render such procedures state action.[197] However, while the Supreme Court rejected the proposition that dispute resolution is traditionally and exclusively a state function,[198] the Court left the door slightly open by indicating that "[t]his is not to say that dispute resolution . . . involves a category of human affairs that is never subject to constitutional constraints."[199] This language appears to acknowledge that some non-exclusively public or governmental functions might be restrained by the Constitution.[200] As discussed in further detail below, courts hold that, because non-class arbitration is a private dispute resolution process and because dispute resolution is not a traditionally exclusive function of government, neither private non-class arbitration nor the judicial enforcement of non-class arbitration constitutes state action sufficient to subject it to constitutional scrutiny in any degree.[201]

*Edmonson* and *McCollum*, discussed above as examples of entanglement,[202] also address the public-function prong of the state-action doctrine because these cases hold that jury selection is a traditional government function.[203] The Court held in *Leesville Concrete* that the exercise of peremptory challenges involved a "traditional function of government" and not of a "select, private group beyond the reach of the

196. Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1202 (9th Cir. 1998) (citing FDIC v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987)), *overruled by* E.E.O.C. v. Luce, 345 F.3d 742 (9th Cir. 2003).

197. Gassner v. Bechtel Constr. & Indus. Indem., 702 So. 2d 548, 554 (Fla. 1st DCA 1997).

198. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157, 161 (1978).

199. *Id.* at 162 n.12.

200. ROTUNDA & NOWAK, *supra* note 26, § 16.2, at 778 (noting that in his dissent in *Flagg Brothers*, "Justice Stevens went to the heart of the issue when he stated his belief that the power to order a resolution of debtor-creditor conflicts was precisely the type of power that involved the values of the due process clause").

201. Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190-91 (11th Cir. 1995) (finding that the confirmation of an arbitration award does not constitute state action sufficient to trigger constitutional protections); Harding, *supra* note 29, at 393-94 (citing Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) (citing Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995))); Waddington, *supra* note 29, at 35.

202. *See supra* Part III.A.1.

203. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) ("A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor."); Georgia v. McCollum, 505 U.S. 42 (1992).

Constitution,"[204] because peremptory challenges serve an important function within the government and private litigants exercise the peremptories with "substantial assistance" from the government, "within the courthouse" and "[i]n full view of the public," where the fairness of proceedings is paramount.[205] For example, the Court has found that where state statutes establish a procedure for review of disputed claims, such review involves state action, although the Court held that the procedure in question satisfied the mandates of the due process clause.[206]

## IV. DUE PROCESS IN NON-CLASS ARBITRATION

### A. *Due Process Not Required*

While the law sometimes requires private actors to satisfy constitutional standards, including due process of law, federal courts hold that due process is not required in non-class arbitration, which derives fundamentally from the agreement of the parties and involves no state action.[207] State courts also refuse to require due process in non-class

204. *Leesville Concrete*, 500 U.S. at 624-25.

205. *Id.* at 628. Justice O'Connor dissented, characterizing the exercise of peremptory challenges as a "private choice," which is "not a government function at all," and pointing out that "peremptory strikes are older than the Republic." *Id.* at 639-40 (O'Connor, J., dissenting). As for the significance of exercising a peremptory challenge in the courtroom, Justice O'Connor pointed out that "[n]ot everything that happens in a courtroom is state action," and relied on the Court's prior opinions requiring coercive power, or judicial encouragement or enforcement. *Id.* at 632, 634-35 (citing Shelley v. Kraemer, 334 U.S. 1, 19 (1948)).

206. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

207. Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999) (finding that private actors must satisfy constitutional due process standards only if there is a "close nexus between the State and the challenged action" so that the "State is responsible for the specific conduct of which the plaintiff complains" or the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval . . . is not sufficient to justify holding the State responsible for those initiatives.") (quoting Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)); Koveleskie v. SBC Cap. Mkts., Inc., 167 F.3d 361, 368-69 (7th Cir. 1999) (finding that "the arbitral forum adequately protects an employee's statutory rights, both substantively and procedurally"); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1201 (9th Cir. 1998) (holding that the requisite element of state action was lacking in arbitration because there was no state action when parties signed the arbitration agreement), *overruled by* 345 F.3d 742 (9th Cir. 2003); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (finding that because the relevant "arbitration was a private proceeding arranged by a voluntary contractual agreement of the parties . . . . the arbitration proceeding itself did not constitute state action," therefore, the due process challenge to the arbitration must fail); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063-64 (9th Cir. 1991) (finding that a party's agreement to arbitration precludes the argument that due process was denied); FDIC v. Air Fla. Sys., Inc., 882 F.2d 833, 842 n.9 (9th Cir. 1987) (finding that "although Congress provided for some governmental regulation of private

commercial arbitration.[208] "Although courts initially determine whether to grant or deny petitions to compel arbitration and may correct or vacate an award, no court has suggested that arbitration satisfies the legally indispensable element of 'state action' necessary for judicial intervention in constitutional issues."[209]

Although some commentators contend that constitutional procedural due process should apply to non-class arbitration primarily because of the state's endorsement of and involvement in arbitration, including compelling arbitration and enforcement of arbitration awards,[210] other commentators have concluded that non-class arbitration involves no state action,[211] and courts addressing the question uniformly conclude that there

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arbitration agreements, . . . in private arbitration proceedings the state action requisite for a constitutional due process claim" is lacking); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986) (describing arbitration as "an inferior system of justice structured without due process"), *quoted in* Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988); Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986) (finding that the denial of due process by a private arbitrator did not give rise to a constitutional complaint); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 38-39 (1st Cir. 1985); Austern v. Chi. Bd. Options Exch., Inc., 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (finding that an arbitration panel's conduct did not constitute state action); Cole & Spitko, *supra* note 5, at 1161 (stating that "[e]very federal court considering the question has concluded that there is no state action present in contractual arbitration").

208. *See, e.g.*, Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 1994) (explaining that although "[o]nly a limited degree of state action is involved in confirming an arbitration award," the state's enforcement of the parties' arbitration award is an "assertion of state power [that] does require a traditional measure of due process," but "neither constitutional authority nor due process tradition has ever required" the court to "superimpos[e] traditional judicial review of compensatory damages upon private arbitrations"); Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young, 524 N.W.2d 752, 755-56 (Minn. Ct. App. 1994) (citing *Rifkind*, 33 Cal. Rptr. 2d at 829); Sawtelle v. Waddell & Reed, Inc., 789 N.Y.S.2d 857, 858-60 (N.Y. Supp. Ct. 2004).

209. Waddington, *supra* note 29, at 35.

210. Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 109 (1992); Jeffrey L. Fisher, *State Action and the Enforcement of Compulsory Arbitration Agreements Against Employment Discrimination Claims*, 18 HOFSTRA LAB. & EMP. L.J. 289, 295-97 (2000); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1040 (2000); 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 (1997) (asserting that state action is present because Congress and the courts express a preference for arbitration).

211. Cole, *supra* note 26, at 43, 49 (concluding that "courts have resolved the issue correctly—there is no state action in contractual arbitration" and that the entanglement exception to the state action doctrine does not require private non-class arbitration to be characterized as state action, in large part because "the FAA is a neutral enforcement scheme"); *see also* Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583, 601 n.6 (1995).

is no state action involved in non-class arbitration.[212] Alternatively, courts addressing this issue hold that, by agreeing to arbitration, parties effectively waive the right to insist upon procedural due process and other constitutional rights that would be required if a state actor were involved.[213]

Although the Supreme Court has not ruled on whether private commercial arbitration constitutes state action, lower courts have held that non-class private contractual arbitration—where the court does not inquire about the merits of the underlying dispute or provide "'overt, significant assistance'" from state officials—arguably warrants a finding that the requisite state action necessary for the imposition of constitutional rights is missing.[214] As discussed below, the discretionary judicial involvement in class arbitration under the hybrid system in which courts maintain ongoing involvement,[215] or under private arbitral rules allowing judicial review of interim arbitral rulings,[216] creates a heightened degree of entanglement, such that state action may exist despite these rulings.

As to private non-class arbitration, Congress's exercise of its commerce power to regulate private arbitration agreements does not render the enforcement of such agreements[217] or the confirmation of arbitration

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212. *See supra* notes 76-77 and accompanying text; *see also* Cole, *supra* note 26, at 4.

213. Brunet, *supra* note 210, at 102 ("The orthodox view holds that parties who consent by contract to arbitration expressly waive their constitutional rights."); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 176-180 & n.60 (2004) (arguing that contract law standards not requiring knowing consent apply to civil waivers of constitutional rights other than the right to jury trial, including waivers of constitutional rights in reference to arbitration governed by the FAA, which places arbitration agreements on "the same footing as other contracts"); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 216-17 (1998).

214. Cole, *supra* note 26, at 15, 20-21 (quoting Am. Mfrs. Mut. Ins. Co. v Sullivan, 526 U.S. 40, 54 (1999) (quoting Tulsa Prof'l Collection Servs., Inc. v Pope, 458 U.S. 478, 386 (1988)). *But see* Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 628-31 (1997) (asserting that the court has an "intimate involvement in contractual arbitration," because it "must decide whether to compel arbitration and . . . must determine the legitimacy of any contract-based defense[s]," and that the court is statutorily authorized to "retain an active supervisory role . . . correct, modify, or vacate an arbitration award. . . . [and] confirm the award as a judgment, thus making it available for enforcement . . . including [through] garnishment and attachment") (citations omitted).

215. Buckner, *supra* note 41, at 333-34.

216. *Id.* (explaining that both JAMS and the AAA permit interim judicial review of arbitral decisions regarding the construction of the arbitration clause and class determination, the equivalent of class certification, and that allowing such review interjects the court into the arbitration beyond its traditional role, by permitting the court to reexamine the underlying merits of the parties' dispute).

217. FDIC v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987); *see also* Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986); Int'l Ass'n of Heat & Frost Insulators &

awards state action of the nature required for a constitutional due process claim.[218] Again, opinions of courts and commentators diverge. Although some commentators characterize non-class arbitration as a traditional exclusive public function,[219] at least one commentator characterizes class arbitration as an "extrajudicial mechanism,"[220] and courts express reluctance to "constitutionalize" non-class arbitration by requiring due process, acknowledging that doing so would "diminish[] both the effectiveness and the appeal of the arbitral forum as an alternative means for resolving disputes."[221] It is argued that "constitutionaliz[ing]" arbitration proceedings by grafting on procedures sufficient to comport with due process would threaten to undermine many of the fundamental features of arbitration including privacy, efficiency, and informality.[222]

Although the arguments in support of state action and the bases for rejecting application of the state action doctrine vary, the results are uniform: Courts hold that no state action exists in non-class arbitration, including securities arbitration.[223] For example, in *Desiderio v. National Association of Securities Dealers*, the plaintiff challenged a mandatory arbitration clause, arguing that it unconstitutionally required her to forfeit her rights to due process. The court held that because the requisite element of state action was absent, her claim failed.[224] In support of her constitutional claims, she asserted that the extensive regulation of the securities industry, including the regulation of her broker-dealer employer, rendered the employer a state actor.[225] However, the court rejected this

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Asbestos Workers Local Union 42 v. Absolute Envtl. Servs., Inc., 814 F. Supp. 392, 402-03 (D. Del. 1993); Austern v. Chi. Bd. Options Exch., Inc., 716 F. Supp. 121, 125 (S.D.N.Y. 1989).

218. Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1192 (11th Cir. 1995) (citing United States v. Am. Soc'y of Composers, Authors & Publishers, 708 F. Supp. 95, 96-97 (S.D.N.Y. 1989)).

219. Reuben, *supra* note 210, at 997-98 (asserting that binding dispute resolution is a "traditionally exclusive public function"); Reuben, *supra* note 214, at 621-22 (asserting that arbitration does not operate independently of the judicial system).

220. Cole, *supra* note 26, at 47 ("[T]he contention that dispute resolution is a unique function of the state seems inaccurate.").

221. *Davis*, 59 F.3d at 1193-94 (citing Rifkind & Sterling, Inc., v. Rifkind, 33 Cal. Rptr. 2d 828, 834 (Cal.Ct.App. 1994) for the proposition that the imposition of due process requirements upon the arbitral process would undermine the "simplicity, informality, and private nature of arbitration").

222. *Id.*

223. Professor Cole contends that certain agency-initiated arbitration, including securities arbitration under Securities and Exchange Commission regulations requiring broker dealers to register with a self-regulatory organization (SRO), may "rise to the level of state action," since all SROs mandate arbitration of certain employment claims. Cole, *supra* note 26, at 50.

224. 191 F.3d 198, 206 (2d Cir. 1999).

225. *Id.*

argument, holding that such regulation of a business entity defendant did not convert that entity's conduct into state action.[226]

In *Duffield v. Robertson Stephens & Co.*, the Ninth Circuit applied a similar test and concluded that because of the lack of state action, there was no constitutional bar to enforcing the plaintiff's agreement to arbitrate.[227] The challenged action was the plaintiff's agreement to arbitrate, rather than to litigate, her claims, and that requirement derived not from any state statute, but from the parties' agreement.[228] Examining the government's role in the creation of arbitration rules and procedures, the court found such conduct insufficient to fulfill the state action requirement, because although the plaintiff demonstrated Securities and Exchange Commission (SEC) involvement in the creation of arbitration rules and procedures, she failed to show "governmental encouragement or endorsement of the compulsory arbitration requirement itself."[229]

The Eleventh Circuit's *Davis v. Prudential Securities, Inc.* decision is in accord.[230] In *Davis,* the court rejected the defendant's argument that due process constraints applied to an award of punitive damages issued by an arbitrator,[231] finding that the court's enforcement of a voluntary, contractual "private" arbitration proceeding did not involve state action.[232] The rationale is similar in *Rifkind & Sterling, Inc. v. Rifkind*, where a California court described the arbitration award in question as "not a product of public law or state proceedings, but rather[] a private arrangement, governed by rules of the parties' own making or selection. . . . not constrained by due process."[233]

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226. *Id.* at 207 ("The SEC's '[m]ere approval' of [compulsory arbitration] is 'not sufficient' to justify holding the state liable for the effects of the arbitration clause." (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)); *see also* Perpetual Sec., Inc. v. Tang, 290 F.3d 132, 137-39 (2d Cir. 2002) (finding that the NASD's requirement of mandatory arbitration was not state action because the NASD is not a state actor).

227. 144 F.3d 1182, 1200 (9th Cir. 1998), *overruled by* 345 F.3d. 742 (9th Cir. 2003).

228. *Id.* at 1201.

229. *Id.* at 1202.

230. 59 F.3d 1186 (1995).

231. *Id.* at 1190.

232. *Id.* at 1191-93 ("[C]ourts considering the issue have rejected the argument that the limited state action inherent in the confirmation of private arbitration awards mandates compliance with the Due Process Clause.") (citing Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 1994) for the proposition that state court confirmation of an arbitration award constitutes only a "limited degree of state action" not requiring due process); *see also* Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064 (9th Cir. 1991) (rejecting a due process challenge to an arbitral award of punitive damages).

233. *Rifkind*, 33 Cal. Rptr. 2d at 834 ("Only a limited degree of state action is involved in confirming an arbitration award. The state does not impose the award, or mark out its criteria. It only allows the contracting contestants to secure enforcement of their own bargain. That assertion of state power does require a traditional measure of due process. But to our knowledge, neither

Despite judicial opinions to the contrary, commentators contend that the courts' "preference" for arbitration and reference of matters to arbitration constitute state action sufficient to require the observance of due process considerations.[234] For example, Professor Sternlight has argued that the SEC "is sufficiently intertwined with the private dealer associations that require arbitration to give rise to state action."[235] She asserts that to support the argument that such conduct constitutes state action, "parties can cite a series of Supreme Court cases holding that where the activities of a private entity are closely intertwined with those of a public body, actions taken by the private group may be considered state action."[236]

Professor Brunet also asserts that court enforcement of arbitration agreements, confirmation of awards, and staying court actions supports a state action nexus, because the courts, through such conduct, facilitate and encourage arbitration.[237] Professor Reuben asserts that alternative dispute resolution results in an "intense entanglement of public courts" in the delegation of the "government's traditionally exclusive role in legally binding dispute resolution," which "often establish[es] state action that must trigger constitutional protections at some level."[238] Professor Reuben argues that constitutional constraints "should apply with less force in ADR processes than in full-blown adjudication."[239]

In contrast, Professor Cole differentiates between distinctive types of arbitration, asserting that court-ordered arbitration involves state action because courts not only enforce statutes requiring parties to participate in arbitration against their wishes, but also regulate the arbitral process.[240] She concludes that agency-initiated arbitration also involves state action, given the excessive entanglement of the SEC with self-regulatory organizations that actively encourage and endorse arbitration.[241] She concludes, however, that state action does not result from contractual arbitration, given the traditionally private nature of the arrangement and the limited involvement of the judiciary in the arbitration process.[242] Professor Cole rejects the proposition that judicially-enforced neutral

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constitutional authority nor due process tradition has ever required . . . the type of judicial review here contended for.") (citations omitted).

234. Harding, *supra* note 29, at 394 (citing Reuben, *supra* note 214, at 590; Sternlight, *supra* note 210, at 40-47).

235. Sternlight, *supra* note 210, at 40.

236. *Id.* at 41.

237. Brunet, *supra* note 210, at 111-12.

238. Reuben, *supra* note 214, at 579, 590.

239. *Id.* at 591.

240. Cole, *supra* note 26, at 28.

241. *Id.* at 31.

242. *Id.* at 41.

arbitration agreements in race-based cases will rise to the level of state action,[243] but she does not consider the more merits-based role of courts in arbitral class actions discussed further below.

Although to date courts have rejected arguments characterizing private arbitration providers' roles in non-class arbitration as state action, reconsideration of this analysis is appropriate as to class arbitration, which in current practice, results in greater entanglement with the court system than non-class arbitration and replaces an arguably distinct and arguably public function: the resolution of the class action dispute, which historically has not been conducted outside the judicial system, except under the hybrid system, which requires ongoing judicial involvement. Given the differences between class arbitration and non-class arbitration, commentators' arguments may have greater persuasive force regarding class arbitration, in connection with which courts have not yet considered them in a detailed manner. This analysis is presented in Part V below.

### B. *Due Process Provided Through Voluntary Protocols*

It is important to acknowledge that although courts have held that due process is not required of non-class arbitration,[244] in response to criticisms concerning fairness in arbitration,[245] and the failure of the justice system to provide sufficient access to justice for employees,[246] a combination of arbitral organizations, the organized bar, and dispute resolution organizations crafted certain due process protocols concerning the arbitration of employment, consumer, and health care-related disputes.[247] Although the protocols do not have the force of law,[248] major arbitration providers have voluntarily agreed to follow the protocols, which in many respects closely mirror the procedural and substantive protections offered

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243. *Id.* at 44.

244. *See supra* Part IV.A.

245. Harding, *supra* note 29, at 371-72, 390.

246. *Id.* at 385-86 (explaining that "few employees, particularly low-wage employees, had access to justice. Justice was inaccessible because of the costs, delays, and other barriers associated with bringing claims in either the judicial forum or to an administrative agency.") (citing Commission on the Future of Worker-Management Relations, Fact-Finding Report, at xi (May 1994)).

247. *Id.* at 390 (explaining that the protocols were developed by industry leaders as well as others outside the industry, including the AAA, the American Civil Liberties Union, the Society of Professionals in Dispute Resolution, the Federal Mediation and Conciliation Service, the National Employment Lawyers Association, the National Academy of Arbitrators, and the American Bar Association). Critics assert that major stakeholders were excluded from the process. *See* Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 215 (1998).

248. Harding asserts that even voluntary codes of conduct have significant restraining influence. Harding, *supra* note 29, at 452.

by the litigation process.[249] Thus, arbitration providers implement due process through adoption and enforcement of the protocols and by rejecting the arbitration of claims that do not meet the due process standards set forth in the protocols.[250] Although some have criticized the protocols as a "bare minimum" of due process standards,[251] the protocols have "helped restore the public's perception of arbitration, leading some to believe that all disputants are given a level playing field in the arbitral process."[252]

The existence of these voluntary protocols, despite the lack of any legal requirement to provide procedural due process in arbitration, provides a model for an approach to class arbitration. Examination of existing protocols reveals that while some of their provisions would assure certain aspects of due process in class arbitration, because the existing protocols did not contemplate class arbitration, they fall short of addressing the aspects of due process that are unique to class arbitration. Additionally, other provisions of existing protocols, particularly those concerning privacy, arguably are inappropriate for class arbitration.

### 1. The Rationale for the Voluntary Due Process Protocols

The primary bases for the creation of the due process protocols include "legitimate concerns . . . [for] fairness," particularly where arbitration is

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249. Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 776 (2001); Harding, *supra* note 29, at 369-71 (describing the protocols as a self-regulatory effort by the arbitration industry that both legitimizes arbitration and fends off direct governmental regulation). Harding notes that the due process safeguards present in labor (union-management) arbitration served as a model for the employment due process protocol. *Id.* at 395.

250. Harding, *supra* note 29, at 455.

251. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017, 1045 (1996) (asserting that the protocol provides employees with "few, if any, significant process rights").

252. Harding, *supra* note 29, at 372. Prior to the creation of the Employment Due Process Protocol, "employer dispute resolution plans . . . 'constituted inequitable and oppressive efforts to tilt the result of such [arbitration] to the employer, while depriving employees of many rights usually associated with due process and fairness.'" *Id.* at 391 (quoting JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION & ARBITRATION OF EMPLOYMENT DISPUTES, at xiii (1997)). By imposing due process standards on arbitration, the Employment Due Process Protocol hoped to "'overcome[] the high level of skepticism and criticism'" and positively influence the public perception of the arbitral process to overcome its image as a "one-sided process that inures solely to the benefit of the party who insisted on the clause." *Id.* at 397-98 (citation omitted) (quoting Thomas Kochan, *Using the Dunlop Report to Achieve Mutual Gains*, 34 Indus. Rel. 350, 358 (1995)). Although the due process protocols made progress in rectifying this imbalance, Professor Harding offers a significant critique of the protocols in that they do not contain any monitoring and enforcement provisions, so that even arbitration providers who do not conform to the protocols benefit from their legitimizing effects. *Id.* at 372.

agreed to pursuant to "take-it-or-leave-it" contractual provisions, as well as the relative lack of sophistication of individual parties to such contracts.[253] In a broader sense though, the impetus for the creation of the protocols also includes the desire of arbitration providers to assure the fundamental integrity of the process provided by their organizations.[254] Another expressed motivation was the encouragement of the timely, inexpensive, and fair resolution of certain disputes, given huge backlogs in administrative agencies and the courts.[255] Courts cite the due process protocols with approval in upholding arbitration clauses[256] and overturn arbitration provisions that do not comply with the protocols.[257] Protocols can restore some balance into the arbitral process and substitute, at least in part, for what might otherwise be perceived as one-party control of the arbitration system.[258]

### 2. The Provisions of the Voluntary Due Process Protocols

#### a. The Due Process Protocol for Employment Disputes

The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (Employment Protocol) focuses on "standards of exemplary due process."[259] The Employment Protocol provides that parties to an employment dispute utilizing arbitration "should have the right to be represented by a

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253. CONSUMER PROTOCOL, *supra* note 9, at Intro.

254. Harding, *supra* note 29, at 402 ("'The future of privatized justice depends upon the integrity of administering institutions and the quality of their response to key procedural and remedial issues.'"); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 294 (2004) ("[E]mpirical research repeatedly confirms that participant perceptions of procedural fairness are crucial to the participant's acceptance of the decisional outcome as substantively fair."); Thomas J. Stipanowich, *Resolving Consumer Disputes*, DISP. RESOL. J. 8, 13 (1998). On some level, the arbitration process is "accountable to the public," who will forego arbitration if the services provided are undesirable. *Id.* at 300. One of the primary determinants of procedural legitimacy is perceived procedural fairness. *Id.* at 312.

255. EMPLOYMENT PROTOCOL, *supra* note 9.

256. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483 n.11 (D.C. Cir. 1997) (holding an arbitration agreement enforceable because it satisfied the safeguards necessary for an employee as a result of the AAA's adoption of the Employment Due Process Protocol).

257. Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 600, 614 (D. S.C. 1998) (holding "unconscionable" an arbitration scheme that compared unfavorably with the Employment Due Process Protocol).

258. Bingham, *supra* note 32, at 221 ("[C]ritics have identified a series of concerns regarding the fairness of mandatory arbitration systems, including lack of consent, lack of due process, privatization of public law, shifting costs, and others.").

259. EMPLOYMENT PROTOCOL, *supra* note 9, § A.

spokesperson of their own choosing,"[260] should have "[a]dequate but limited pre-trial discovery,"[261] and should have experienced, diverse, independent, neutral, and knowledgeable arbitrators.[262] The Employment Protocol was widely endorsed, adopted, and imitated.[263] Through these provisions, the Employment Protocol created a more balanced arbitral process with "far-reaching impact" that also served as a model for the creation of protocols for arbitration of consumer and health care disputes.[264]

b. The Due Process Protocol for Consumer Disputes

The Consumer Due Process Protocol[265] (Consumer Protocol) also was created by stakeholders across the spectrum.[266] The Consumer Protocol's provisions are designed to provide a "fundamentally-fair ADR process," by assuring the provision of certain due process protections typical of non-class litigation and arbitration, including

> specific minimum due process standards which embody the concept of fundamental fairness, including: informed consent; impartial and unbiased Neutrals; independent administration of ADR; qualified Neutrals; access to small claims court; reasonable costs . . . ;convenient hearing locations; reasonable time limits; adequate representation; fair hearing procedures; access to sufficient information; confidentiality; availability of court remedies; application of legal principle and precedent by arbitrators; and the option to receive a statement of reasons for arbitration awards.[267]

The Consumer Protocol also had widespread influence.[268] However, the Consumer Protocol neither provides for nor addresses some of the

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260. *Id.* § B1.

261. *Id.* § B3.

262. *Id.* § C1.

263. The AAA and the Judicial Arbitration and Mediation Services "both endorsed the Employment Protocol and revised their arbitration rules to reflect its principles." Harding, *supra* note 29, at 403. Other arbitration providers followed, including the National Arbitration Forum, which adopted an Arbitration Bill of Rights to assure fair process and the CPR Institute of Dispute Resolution, which adopted similar procedures. *Id.* at 403 & n.196.

264. *Id.* at 401.

265. CONSUMER PROTOCOL, *supra* note 9.

266. Harding, *supra* note 29, at 405 (explaining that participants included the instigator—the AAA—and "representatives from consumer groups, providers of goods and services, state and federal agencies and academic institutions").

267. CONSUMER PROTOCOL, *supra* note 9, at Principle 1, Reporter's Comments.

268. The AAA adopted the Consumer Protocol, influencing other providers, including the NAF and JAMS. Harding, *supra* note 29, at 407 & n.216.

particularized due process concerns arising in connection with class arbitration that are described in Part II of this Article.[269] Although the Reporter's Comments mention "adequate representation,"[270] Principle 9, which details this aspect of fair process, addresses the parties' right "at their own expense, to be represented by a spokesperson of their own choosing," which involves the "right to be counseled by an attorney or other representative,"[271] and does not address the adequacy of the representation by a class representative acting on behalf of absent class members. The Consumer Protocol does address certain aspects of the due process required in class actions that also would apply in class arbitration, including the right to notice of hearings and the opportunity to be heard.[272]

As discussed more fully below, other provisions of the Consumer Protocol arguably would not provide sufficient due process for class arbitration. The provision of the Consumer Protocol providing for confidentiality in arbitration, which requires that the privacy of hearings be maintained by arbitrators,[273] may be insufficient for class arbitration, where some information arguably should be provided to absent class members.[274] The provision of the Consumer Protocol providing for "brief written explanation of the basis for the [arbitral] award" upon a timely request from a party[275] also is inadequate to satisfy due process concerns in class arbitration, where the binding nature of the arbitral award may be adversely impacted by an insufficiently detailed award.[276]

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269. Other provisions of the Consumer Protocol arguably would not be appropriate for class arbitration, such as the provision regarding Confidentiality in Arbitration, which provides that the privacy of hearings should be maintained by arbitrators. *See* CONSUMER PROTOCOL, *supra* note 9, at Principle 12.2.

270. *Id.* at Principle 1, Reporter's Comments.

271. *Id.* at Principle 9 & Reporter's Comments.

272. *Id.* at Principle 12.

273. *Id.* at Principle 12.2, Reporter's Comments. The Consumer Protocol does recognize that "[a]lthough confidentiality of hearings may be considered an advantage of arbitration, there is no absolute guarantee of confidentiality." *Id.*

274. *See infra* Part V.A.1-2. For example, the American Arbitration Association provides some information regarding pending arbitrations through its website. AMERICAN ARBITRATION ASSOCIATION, CLASS ARBITRATION CASE DOCKET, http://www.adr.org/sp.asp?id=25562.

275. CONSUMER PROTOCOL, *supra* note 9, at Principle 15.3. The Consumer Protocol recognizes that "[l]eading modern arbitration statutes do not require arbitrators to provide a written explanation or give reasons for their awards" although "some other commercial arbitration rules call for a statement of the underlying rationale" for the award. *Id.* at Principle 15.3, Reporter's Comments.

276. *See infra* Part V.B.3. To render the award sufficient to support a claim of preclusion, a more detailed award is appropriate and should be required in class arbitration. Such a detailed award should also be provided as a matter of course, regardless of the request of either party.

### c. The Due Process Protocol for Health Care Disputes

The Commission on Health Care Dispute Resolution[277] created the Due Process Protocol for the Resolution of Health Care Disputes (Health Protocol), which acknowledges that patients and health care providers do not negotiate Alternative Dispute Resolution (ADR) agreements. The role of the Health Protocol is to "ensure a 'level playing field'" by providing for "key aspects of procedural due process."[278] Again, the Health Protocol provides for minimal due process standards similar to those set forth in the Employment and Consumer Protocols.[279]

As the foregoing reflects, in the area of non-class arbitration, the issue of what process is due has evolved to a significant degree, if not fully matured. As a legal matter, despite criticisms of commentators wishing it were not so, the law is fairly well settled that non-class arbitration does not constitute state action, in part because arbitration is not historically an exclusive public function, and in part because arbitration is not sufficiently entangled with the state. Consequently, due process is not guaranteed, or alternatively, is waived by virtue of the agreement to arbitrate. Beyond the law, providers and stakeholders have agreed to the due process protocols and related procedural rules based on the protocols, providing due process to varying degrees although without monitoring and enforcement. This self-regulation bolsters the perceived legitimacy of non-class arbitration. In marked contrast, because of the relative newness of class arbitration, neither the law pertaining to due process nor the rules and protocols are fully developed. Given the unique due process concerns associated with the class action aspects of class arbitration, existing protocols are insufficient.

## V. DUE PROCESS IN CLASS ARBITRATION

Despite well-established precedent holding that due process is not required in non-class arbitration because the limited involvement of the courts does not constitute state action, both commentators[280] and courts[281]

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277. The Commission was comprised of representatives of the AAA, the American Bar Association, and the American Medical Association. Harding, *supra* note 29, at 407.

278. COMMISSION ON HEALTH CARE DISPUTE RESOLUTION, *supra* note 9, at 14.

279. *Id.*; Harding, *supra* note 29, at 408. Unlike its predecessor Protocols, the Health Protocol approves of the use of arbitration of patient disputes only when the parties agree to arbitrate post-dispute. *Id.* at 409. Perhaps because of this provision, the Health Protocol was only more recently endorsed by the AAA in 2003, and it has not enjoyed the widespread acceptance of its predecessors. *Id.* at 408-09.

280. *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: C. Federal Arbitration Act*, 117 HARV. L. REV. 410, 419-20 (2003) ("[B]inding absent class members to an arbitrator's judgment would likely implicate due process requirements of adequate

assert and assume—sometimes without analysis of state action doctrine—that due process is required in the arbitration of class actions. This Part describes three existing models of class arbitration, the hybrid model[282] and two provider models,[283] applies state action doctrine to each of these distinctive models to determine whether each model involves state action requiring due process, then analyzes whether and how each of these models purports to provide due process, and examines the doctrinal and practical shortcomings of each model's approach to providing due process. Finally, in view of this analysis, this Part recommends a fourth approach, a pure arbitral paradigm (without judicial involvement) combined with a due process protocol specific to class arbitration, providing due process.

### A. *Due Process Under the Hybrid Model of Class Arbitration*

This Part describes the hybrid model of class arbitration, applies state action doctrine to the hybrid model, and concludes that state action exists under the hybrid approach to class arbitration primarily because the level of judicial involvement or entanglement in class arbitration is extensive and is significantly greater than the more limited scope of judicial involvement in non-class arbitration, so that due process is required under the hybrid approach. This Part then analyzes the doctrinal and practical shortcomings of the hybrid approach's use of the courts to provide due process in class arbitration.

#### 1. The Hybrid Model of Class Arbitration

Under the hybrid model of class arbitration, courts remain involved in the class action-related aspects of the arbitration, to assure that due process protection of absent class members is provided.[284] The California Supreme

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notice and representation."); Nelson, *supra* note 1, at 8, 14 ("[C]lass arbitrations must provide the basic requisites of due process. . . .").

281. Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984) (requiring court involvement to administer due process in class arbitration to protect the interest of absent class members); Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 362 (S.C. 2002) ("Protection of the due process rights of absent class members is an essential component in all class actions, and one which may necessitate particular attention in class-wide arbitrations. . . .").

282. *See* Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 863-65 (Pa. Super. Ct. 1991) (holding that class arbitration is not precluded by virtue of an arbitration clause that did not contain an express provision precluding class arbitration).

283. Prior to *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), many courts prohibited class arbitration. Buckner, *supra* note 41, at 302-03. The AAA issued its Supplementary Rules for Class Arbitrations in October 2003. AAA RULES, *supra* note 3. JAMS issued its Class Action Procedures in February 2005. JAMS, CLASS ACTION PROCEDURES, *supra* note 3.

284. Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 864, 866 (Pa. Super. Ct. 1991)

Court established the hybrid model of class arbitration in *Keating v. Superior Court*.[285] Unlike non-class arbitration in which courts honor parties' agreements to arbitrate by compelling arbitration,[286] under the hybrid system of class arbitration, courts maintain "discretion" to determine whether a particular case is appropriate for class arbitration.[287] Although arguably discretion violates the spirit of the Supreme Court's plurality opinion in *Bazzle*,[288] courts operating under the hybrid model continue to assert that they (rather than the arbitrator) have discretion to determine which cases are appropriate for class arbitration treatment.[289] Like the hybrid model developed in California, Pennsylvania also requires that the trial court handle the class certification issues and supervise notice.[290] South Carolina[291] and the First Circuit[292] also permit class arbitration under similar hybrid models.

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(holding that class arbitration was not precluded by virtue of an arbitration clause that did not contain an express provision precluding class arbitration).

285. 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984).

286. *Id.* at 1209.

287. *Id.* at 1209-10.

> Whether . . . an order [for class arbitration] would be justified in a case of this sort is a question appropriately left to the discretion of the trial court. In making that determination, the trial court would be called upon to consider, not only the factors normally relevant to class certification, but the special characteristics of arbitration as well, including the impact upon an arbitration proceeding of whatever court supervision might be required, and the availability of consolidation as an alternative means of assuring fairness. Whether classwide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court rather than submitting to class wide arbitration.

*Id.*

288. Buckner, *supra* note 41, at 356-58 (asserting that the Supreme Court's plurality opinion in *Bazzle* implicitly rejected the hybrid model of class arbitration established by *Keating v. Superior Court* and its progeny, and that the hybrid model is preempted by the FAA).

289. Parrish v. Cingular Wireless, 28 Cal. Rptr. 3d 802, 813 (Cal. Ct. App. 2005).

290. Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991). Notably, the *Dickler* decision did not appear to premise these requirements on the rationale that judicial involvement was necessary in order to satisfy due process considerations. *Id.* at 867.

291. Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002) (holding that the parties' contractual silence regarding class arbitration permitted class arbitration in the discretion of the trial court, where such a procedure would serve efficiency and not result in prejudice to the parties).

292. New England Energy v. Keystone Shipping Co., 855 F.2d 1, 7, 8 (1st Cir. 1988) (holding that, where arbitration contracts are silent regarding consolidation, "[u]nquestionably, there is no intent manifested against consolidation," and concluding that the lower court had not abused its discretion by consolidating the matters for arbitration).

Comparison of the hybrid system of class arbitration to non-class arbitration reveals the distinctive nature of the hybrid system. In typical private contractual non-class arbitration, once the court compels arbitration, judicial involvement in the matter terminates until completion of the arbitration on the merits,[293] at which time, if the losing party does not simply voluntarily comply with the arbitrator's award, the parties may return to the judicial system to have the arbitration award confirmed[294] or to pursue a vacatur motion[295] or to seek modification of the award.[296] Outside of compelling the parties to honor their arbitration agreement and confirming the award or considering a motion to vacate or modify the award, in non-class arbitration, the judicial system has no involvement in the underlying adjudication on the merits of the action, which the arbitrator determines.[297]

In contrast, under the hybrid system of class arbitration, courts maintain a greater degree of judicial involvement than is commonly associated with non-class arbitration.[298] Courts retain jurisdiction over the dispute, and remain very involved in the class-related aspects of the case, as well as other aspects, including discovery, motions, and settlements.[299] Trial courts determine class-related issues, including class certification and notice to the class, and exercise external supervision over the litigation to safeguard the absent class members' rights to adequate representation.[300] In the hybrid system of class arbitration, courts, rather than arbitrators, handle issues involving class certification, proper notice, review of

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293. The FAA requires courts to enforce arbitration agreements with orders that parties specifically perform those agreements by arbitrating. 9 U.S.C.A. §§ 3, 4 (West 2005); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (directing courts to move cases out of the judicial system and into arbitration as soon as possible).

294. 9 U.S.C.A. § 9 (West 2005). The confirmed award has the same enforceability of a court judgment. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION, § 2.40, at 87 (2001).

295. 9 U.S.C.A. § 10(a) (West 2005). For a discussion of the statutory and non-statutory bases for vacatur of arbitration awards, see WARE, *supra* note 294, §§ 2.43-.45.

296. 9 U.S.C.A. §§ 11-12 (West 2005).

297. Keating v. Superior Court, 645 P.2d 1192, 1215-16 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984) (Richardson, J., concurring and dissenting) ("'[An] arbitration proceeding is, except in specified particulars, outside the court realm and jurisdiction . . . . It is supposed to be a complete proceeding, without resort to court facilities.'") (quoting E. San Bernadino County Water Dist. v. City of San Bernadino Couty, 109 Cal. Rptr. 510 (1973) (quoting Application of Katz, 160 N.Y.S. 2d 159, 159 (1957))); WARE, *supra* note 294, §§ 2.1, 2.3 (explaining that the arbitrator conducts the adjudication of the parties' dispute and issues an award); Cole & Spitko, *supra* note 5, at 1188.

298. *Keating*, 645 P.2d at 1209.

299. Sternlight, *supra* note 19, at 39-41 & n.149 (quoting Application of Katz, 3 A.D.2d 238, 239 (N.Y. App. Div. 1957)) (indicating that according to trial counsel, courts retaining jurisdiction in class arbitrations maintained control over a wide variety of matters, including motions, class certification, discovery, and settlement).

300. *Id.* at 40.

proposed settlements, and conflicts among class representatives over the selection of arbitrators and they intervene as otherwise necessary to adequately safeguard the interests of absent members of the class.[301] Courts have discretion to order arbitration and "reserve jurisdiction" over class action-related issues, delegate such issues to the arbitrator, and allow the arbitrator to rule upon them "subject to due process review by the court" to "enhance the integrity and autonomy of the class-wide arbitration device."[302]

Thus, the hybrid approach to class arbitration is more like court-annexed or court-ordered arbitration than private contractual arbitration. In court-annexed arbitration, participation of the parties in the arbitral process is "required by a government actor" rather than voluntarily agreed upon by the parties.[303] Under a typical system of court-annexed arbitration, courts order private arbitration of claims below a low threshold of relief, and the arbitrator's award becomes the final judgment "unless the losing party requests a trial de novo."[304] Such a system involves state action such that due process must be provided.[305]

Judicial involvement under the hybrid approach substantially exceeds the involvement of the courts in non-class arbitration and court-annexed arbitration, in both quantity and quality.[306] The substantive character of the

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301. *Id.* (citing Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991)); *see also* Cruz v. Pacificare Health Sys., Inc., 66 P.3d 1157, 1167 (Cal. 2002) (recognizing that "courts may find it appropriate to become involved in supervising the equitable distribution of assets resulting from a class recovery" but cautioning that they should not get involved with the "merits of the underlying dispute"); Sanders v. Kinko's, Inc., 121 Cal. Rptr. 2d 766, 769-70 (Cal. Ct. App. 2002) (staying arbitration to address class action-related issues, including certification, prior to arbitration); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986) (allowing judicial involvement in certification of the class, provision of notice, and any discovery problems); Lewis v. Prudential-Bache Sec., 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986) (reserving determination of notice and certification for the court and requiring "adequate judicial supervision over the class aspects" of the dispute).

302. *Izzi*, 231 Cal. Rptr. at 322 & n.6 (observing that, because such ongoing "due process review" of arbitration proceedings could be disruptive to the arbitration process, judicial determination of the class action-related aspects of the dispute would be preferable until further experience with class arbitration suggested otherwise).

303. Cole, *supra* note 26, at 24-25.

304. *Id.* at 25-27.

305. *Id.* at 24-25.

306. The creation of arbitration rules and procedures does not constitute state action, *see* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1202 (9th Cir. 1998), *overruled by* 345 F.3d 742 (9th Cir. 2003), nor does judicial enforcement of arbitration agreements constitute state action, FDIC v. Air Fla. Sys., Inc., 822 F.2d 833, 842-43 n.9 (9th Cir. 1987); Elmore v. Chi. & Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986); 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); Austern v. Chi. Bd. Options Exch., Inc., 716 F. Supp. 121, 125 (S.D.N.Y. 1989). Likewise, judicial confirmation of arbitration awards does not constitute state action. Davis v.

court's involvement in the hybrid system also differs from the court's involvement in non-class arbitration and court-annexed arbitration.[307] Rather than compelling arbitration and affirming arbitral awards, judicial involvement in the hybrid system of class arbitration addresses more than whether the matter should be arbitrated, and it extends to *how* the matter should be arbitrated, and even to the underlying merits of the action.[308] For example, in approving settlement, the court evaluates the fairness of the proposed settlement,[309] which cannot be disassociated from the merits of the action, and in determining class certification, the court evaluates various substantive factual and legal issues involved in the dispute[310] ranging well beyond the arbitration aspects of the matter.

The law creating the hybrid approach to class arbitration rests on several assumptions. First, these decisions expressly acknowledge that class arbitration differs from non-class arbitration with respect to due process, although they provide no state action-related doctrinal explanation supporting this assertion.[311] Rather, courts assume without analysis of state action doctrine that due process is required in class arbitration and do not address well-established case law holding that due process is not required in non-class arbitration.[312] Thirdly, ignoring the Supreme Court's jurisprudence regarding the capabilities of arbitrators, these courts imply, or even directly assert, that arbitrators are ill-equipped to assure due process,[313] ignoring the fact that arbitrators routinely provide due process-

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Prudential Sec., 59 F.3d 1186, 1192 (11th Cir. 1995) (citing United States v. Am. Soc'y of Composers, Authors & Publishers, 708 F. Supp. 95, 96-97 (S.D.N.Y. 1989)).

307. Blankley, *supra* note 43, at 476-77.

308. *Id.*

309. FED. R. CIV. P. 23(e)(1)(C) (stating that a court may approve a settlement only after finding it is fair, reasonable, and adequate).

310. Certification involves many factual and legal issues. For example, Rule 23 requires the court to assess whether there are common questions of law and fact, FED. R. CIV. P. 23(a)(2), and to evaluate the parties conduct and whether common questions of law and fact predominate over individual questions, FED. R. CIV. P. 23(b).

311. Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 & n.6 (Cal. App. Ct. 1986) (finding that courts can "reserve jurisdiction" over class action–related issues and delegate such issues to the arbitration, "subject to due process review by the court" to "enhance the integrity and autonomy of the class-wide arbitration device") (citation omitted); Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984) (requiring "substantial judicial involvement" in class action to assure that due process safeguards are satisfied).

312. *Keating*, 645 P.2d at 1215 (assuming due process is required without discussion of the state action); *Izzi*, 231 Cal. Rptr. at 321-22 (assuming due process is required without discussion of the state action).

313. *Keating*, 645 P.2d at 1215 (pointing out that arbitrators are often neither lawyers or judges, and speculating that class arbitration might not be appropriate for lay arbitrators, or alternatively, would require ongoing judicial intrusion in the arbitral process); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 n.5 (Pa. Super. Ct. 1991) (indicating arbitrators were "probably not equipped and appropriate for the task of class certification" because their orders are

 

like protections through the voluntary due process protocols in non-class arbitration,[314] and without setting forth any rational reasons why arbitrators cannot provide due process-like protections independent of the judicial system. Finally, these courts assume that judicial involvement is the only appropriate and, indeed, the necessary means of providing for due process in class arbitration,[315] and do not consider explicitly the possibility that arbitrators may in certain respects be better equipped to assure due process.[316] The next sections provide the analysis missing from these decisions, beginning with application of the state action doctrine to the hybrid model.

### 2. Judicial Entanglement Under the Hybrid Model of Class Arbitration

In the hybrid model of class arbitration, entanglement between the state actor, the courts, and the private actor—the arbitration provider—is elevated beyond the degree of judicial involvement in non-class arbitration that courts deem too minimal to constitute state action.[317] Courts following the hybrid system of class arbitration provide continuing governmental assistance throughout the entire arbitral process to protect constitutional due process rights of parties involved in class arbitration, assisting the arbitral process by handling the aspects of the class arbitration that under the litigation system require due process.[318] Given the disputable premise that arbitrators are not capable of providing due process, judicial involvement makes class arbitration possible.

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unreviewable prior to a final award and because they lack broad subpoena powers).

314. *See supra* Part IV.B.

315. *Keating*, 645 P.2d at 1215 (requiring ongoing judicial intrusion in the arbitral process); *Izzi*, 231 Cal. Rptr. at 322 & n.6 (referencing "due process review" by the courts); *Dickler*, 596 A.2d at 866 (assigning the notice and class certification issues to the trial court).

316. Courts come under significant criticism for failing in their role of providing adequate due process protections in the context of class actions, due in part to heavy caseloads. Mullenix, *supra* note 20, at 1691-92 (asserting that "courts and litigants . . . do a very poor job of ensuring adequacy of representation at the front end of class action litigation" and that "for a variety of reasons, courts do a fairly poor job of ensuring adequacy of representation at the time of the approval of settlement-only classes . . . on the back end of class litigation"). Professor Mullenix asserts that "courts pay lip service to the concept of adequate representation" and "rubber stamp approval of proposed class counsel," rather than engaging in any meaningful, robust inquiry regarding adequacy, in part due to the "court's independent interest in settling cases on its docket." *Id.* at 1692, 1702, 1717. Arguably, arbitrators in class actions, who are compensated by the hour and do not have the same docket pressures as courts, will not have the same incentives as courts to rubber stamp adequacy determinations and settlements, and because of the hourly fee structure, could have an incentive to thoroughly explore these issues in the interest of providing a determination insulated from subsequent collateral attack.

317. *See supra* Part IV.A.

318. *See* Lauren Scholarship Repository, 2006

This judicial involvement provides "significant assistance"[319] to the arbitral process. First, the provision of due process by the courts increases the likelihood that a judge evaluating a subsequent collateral attack on an arbitration award would find that the absent parties received due process in the underlying proceeding.[320] This in turn reduces the likelihood of a subsequent collateral attack on the arbitral award arising from an alleged lack of due process.

Through the hybrid approach to class arbitration, the judicial layer of involvement encourages, legitimizes, endorses, and facilitates[321] the aspects of class arbitration administered by the private arbitration provider in much the same way that the court's involvement enhances the process in peremptory challenge cases.[322] First, a significant amount of the decisionmaking regarding class arbitration takes place in the court itself and is sanctioned by the court,[323] explicitly, in the case of the initial decision to delegate the matter to arbitration, and implicitly, through the public's perception regarding the ongoing judicial involvement that is designed to safeguard the class arbitration process. Much as the judge, jury, and counsel participate in a cooperative enterprise in the process of jury selection,[324] so the judge and arbitrator enter into a cooperative enterprise under the procedure established for the hybrid approach to class arbitration. In effect, by preserving a discretionary function to conduct a due process review, and handling the class action-related aspects of class arbitration, the courts purport to act to safeguard the rights of absent parties in the arbitral process. Also, the extent of judicial involvement in class arbitration is greater than the judicial involvement in the peremptory challenge cases because the involvement of the court in jury selection is somewhat more peripheral to the merits of the action.

Judicial involvement in class arbitration also involves the provision of due process, so that a claim of denial of due process finds its source in state authority.[325] For example, if an absent class member asserts a denial

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319. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

320. *Id.*

321. In effect, the court lends its "power . . . and prestige" to the process of class arbitration in much the same way that the court lends its power and prestige to the process of jury selection. *Id.* at 624-25.

322. The court provides "overt, significant assistance" to class arbitration under the hybrid model, in a manner similar to, but arguably greater than, the assistance provided in the peremptory challenge cases. *Id.* at 622.

323. Under the hybrid model, the court holds hearings concerning certification. *See, e.g.*, Lewis v. Prudential Bache-Sec., Inc., 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986) (regarding class certification under the hybrid model).

324. *Leesville Concrete*, 500 U.S. at 620 (discussing private litigants assistance to the government in the process of jury selection).

325. Entanglement theory requires that the claimed deprivation of the constitutional right

of due process as a result of the certification of a class where the representative or counsel is not adequate, that denial of due process occurs as a result of the judicially authorized procedure involving the state actor, in this case the courts, in the denial of due process. Much as judicially annexed arbitration involves state action,[326] the hybrid system involves state action.

The assistance of the judicial system in class arbitration also is analogous to the judicial involvement in the peremptory challenge cases to the extent that in both cases, judicial involvement preserves constitutional rights. While judicial involvement in the peremptory challenge process preserves equal protection rights against discrimination and impacts the constitutional right to a jury trial,[327] the ongoing participation of judges in class arbitration is designed, at least in the perception of some courts, to preserve due process rights.[328] In both cases, the role of the judiciary in preserving important constitutional rights lends significance to the overall proceeding.

Analogy to the attachment/seizure cases[329] also suggests that the hybrid approach creates entanglement that constitutes state action. The role of the judge in the hybrid model of class arbitration exceeds the "total absence of overt official involvement" and the "mere acquiescence" in private conduct held insufficient to constitute state action in *Flagg Brothers, Inc. v. Brooks*,[330] because under the hybrid model of class arbitration, judges serve an ongoing, overt, and important constitutional function, analogous to the role of state actors—judicial officers and sheriffs—participating jointly with private actors in the attachment/seizure cases.[331] Just as sheriffs assist with seizures of property, courts following the hybrid approach participate in class arbitration by exercising discretion to authorize class arbitration and handling the class action aspects of the litigation.

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result from "the exercise of a right or privilege having its source in state authority." *Id.*

326. Cole, *supra* note 26, at 24-25 ("Court-ordered arbitration involves state action because the party participation in the arbitral process is compulsory and required by a government actor as opposed to a private agreement. Thus, court-ordered arbitration must satisfy constitutional due process requirements.").

327. *Leesville Concrete*, 500 U.S. at 616 (stating that racial discrimination in jury selection violates equal protection clause).

328. Keating v. Superior Court, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984).

329. *See* Soldal v. Cook County, Ill., 506 U.S. 56, 60 (1992); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 941 (1982).

330. 436 U.S. 149, 157, 164 (1978).

331. *Soldal*, 506 U.S. at 61; *Lugar*, 457 U.S. at 941.

Cases finding no state action in non-class arbitration[332] pose no obstacle to a finding that the hybrid system of class arbitration involves state action. The non-class arbitration cases are premised on the minimal and neutral participation of the courts in non-class arbitration.[333] Judicial involvement under the hybrid model is ongoing, more substantial, intended to preserve constitutional rights, discretionary, and non-neutral—meaning, in essence, merits-based. Accordingly, the non-class arbitration cases are distinguishable. Thus, despite the Court's determination that dispute resolution in general does not involve state action under the entanglement prong of the state action doctrine, and the Court's general unwillingness to find state action in non-race-related cases,[334] it is more likely that state action exists under the hybrid model of class arbitration.

3. Hybrid Model of Class Arbitration and Public Function Doctrine

Class arbitration under the hybrid model also may satisfy the public function test for determining state action because the state has "traditionally" and "exclusively" controlled class action litigation.[335] Although dispute resolution "is not traditionally an exclusive public function,"[336] the class action device has a distinct pedigree as an exclusively judicial procedure[337] deriving from the bill of peace procedure developed by the English courts of chancery[338] and evolving in the American judicial system through a series of federal rules[339] and state

332. *See infra* Part IV.A.

333. *See infra* Part IV.A.

334. Cole, *supra* note 26, at 10-11 (describing the Court's reluctance to find state action in non-race cases).

335. ROTUNDA & NOWAK, *supra* note 26, § 16.1, at 764.

336. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 161 (1978).

337. CONTE & NEWBERG, *supra* note 22, § 1.1 ("Historically and under modern jurisprudence, a class action is a nontraditional litigation procedure. . . ."); CHARLES A. WRIGHT ET AL., 7A FEDERAL PRACTICE & PROCEDURE § 1751 (3d ed. 2005) (explaining that "from an early date, class actions were authorized in federal courts").

338. FRIEDENTHAL ET AL., *supra* note 22, § 16.1; WRIGHT ET AL., *supra* note 337, § 1751. Justice Story developed the American doctrine of class actions in *West v. Randall*, 29 Fed. Cas. 718 (No. 17,424) (C.C.D.R.I 1820). JAMES WM. MOORE ET AL., 5 FEDERAL PRACTICE AND PROCEDURE § 23 App. 100 (3d ed. 1997); *see also* Stephen C. Yeazell, *From Group Litigation to Class Action; Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1979) (providing a history of the modern class action).

339. Federal Rule of Equity 48 applied from 1842 until 1912, when Equity Rule 38 replaced it. WRIGHT ET AL., *supra* note 337, § 1751. Federal Rule of Civil Procedure 23 was adopted in 1938 and substantially amended in 1966. *Id.*

statutes,[340] permitting class actions to be adjudicated by either federal or state courts.[341]

Until recently, aside from the hybrid model, a majority of courts held that the law prohibited arbitration of class actions.[342] Under the prevailing view, courts prohibited class arbitration because courts lacked the power and authority to send class action litigation to arbitration and because courts interpreted private contracts agreeing to arbitration without directly addressing class actions to preclude class arbitration.[343] The law effectively preserved an exclusive judicial forum for the resolution of class action disputes throughout much of the nation.[344] Except for the hybrid system, the preservation of the state's exclusive role in class action dispute resolution remained intact until *Bazzle*, when the Supreme Court implicitly reversed the course of both federal and state law—prohibiting class arbitration—and expanded arbitral power to adjudicate class actions.[345] Apart from the hybrid system, the adjudication of class actions was historically a public function of the judicial system.

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340. WRIGHT ET AL., *supra* note 337, § 1751 ("The equity class action practice was incorporated into the procedural codes of many states.").

341. CONTE & NEWBERG, *supra* note 22, § 1.1, at 3 (explaining that "class counsel may choose a state or federal forum").

342. Prior to *Bazzle*, most federal courts concluded that, absent a provision in the parties' arbitration agreement expressly allowing the parties' arbitration to proceed on a class basis (in other words, where the parties' agreement was silent regarding class arbitration), the arbitration could not proceed on a class or consolidated basis. Champ v. Siegel Trading Co., 55 F.3d 269, 271 (7th Cir. 1995); Gov't of U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1423–24 (M.D. Ala. 1997); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993).

343. *Champ*, 55 F.3d at 276–77.

344. Most federal circuits prohibited class arbitration. *See id.* at 271; *Boeing Co.*, 998 F.2d at 73–74; *Am. Centennial Ins. Co.*, 951 F.2d at 107-08; *Baesler*, 900 F.2d at 1195; *Protective Life Ins. Corp.*, 873 F.2d at 282; *Del E. Webb Constr.*, 823 F.2d at 150; *Weyerhaeuser Co.*, 743 F.2d at 637; *Randolph*, 991 F. Supp. at 1423-24; *Howard*, 977 F. Supp. at 665 n.7; *Gammaro*, 828 F. Supp. at 674. In addition, several state courts also prohibited class arbitration. *See* Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998); Harris v. Shearson Hayden Stone, Inc., 82 A.D.2d 87, 94 (N.Y. App. Div. 1981).

345. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–54 (2003); *see also* Buckner, *supra* note 41, at 304, 344 (asserting that *Bazzle* renders the lack of authority rationale for prohibiting class arbitration moot); *id.* at 345-49 (asserting that *Bazzle* also undermines the contract interpretation rationale for prohibiting class arbitration).

The hybrid system of class arbitration preserves the historic judicial role in handling the class-related aspects of the dispute.[346] Thus, the existence of the hybrid system does not undermine the argument that resolution of class action disputes is a public function. Occasionally, courts employing the hybrid model exercise their discretion to delegate certain class-related aspects of the litigation to arbitrators, while maintaining judicial supervision over the arbitrators' conduct to assure due process.[347] Where courts delegate such functions, the conduct of the private actor constitutes the exercise of a traditional public function, because the government "should not be able to avoid the Constitution by delegating its tasks to a private actor."[348] Also, the hybrid system of class arbitration is analogous to the peremptory challenge cases characterizing jury selection—which is conducted in a courtroom by judicial officers and private litigants—as a traditional public function,[349] and to court-annexed arbitration, in which the court compels the parties to arbitrate their dispute.[350] Thus, under either the public function or entanglement prong of the state action doctrine, the hybrid system involves state action, requiring that due process be provided.

### 4. Doctrinal and Practical Problems of the Hybrid Approach to Providing Due Process

The provision of due process through the courts under the hybrid system raises both doctrinal and practical issues, suggesting the superiority of a pure arbitral model of class arbitration combined with a voluntary due process protocol pursuant to which arbitration providers administer due process without involvement of the courts.

First, doctrinally, the hybrid model of class arbitration may no longer be viable after *Bazzle*. The requirement in *Bazzle* that the arbitrator, not the court, decide whether the parties' agreement permits class arbitration calls into question the continuing viability of the hybrid approach.[351] If the

346. Keating v. Superior Court, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); Lewis v. Prudential Bache-Sec., 225 Cal. Rptr. 69, 76 (Cal. Ct. App. 1986).

347. *Izzi*, 231 Cal. Rptr. at 322 n.6.

348. CHEMERINSKY, *supra* note 26, § 6.4, at 498.

349. *See infra* Part III.A.1.

350. Cole, *supra* note 26, at 24-25 (finding that court-annexed arbitration involves state action requiring due process).

351. Buckner, *supra* note 41, at 353-54 ("Taking the analysis suggested by Bazzle to the next logical step, one must infer that a court no longer retains authority to decide class action-related issues previously addressed by courts using the hybrid model, including class certification, notice, discovery and settlement. The rationale for the Bazzle plurality's opinion is that the parties agreed to have an arbitrator, and not a court, decide all of their disputes and to limit the aspects of those disputes that would come before the court to 'certain gateway matters.' This reasoning is equally

arbitrator must decide without judicial input whether the parties agreed to class arbitration, there can be no persuasive rationale for ongoing judicial input that serves to provide due process under the hybrid model.[352]

The hybrid model of class arbitration also is vulnerable to the argument that because it requires a partial judicial forum when the parties agreed to an arbitral forum, the hybrid model is preempted by the FAA, which requires courts to enforce the parties' agreement and preempts laws inconsistent with that provision.[353] A system that requires continuous judicial intervention, even for the well-intentioned purpose of providing due process, runs afoul of the parties' agreement and therefore violates the FAA.[354]

On a more practical level, commentators harshly criticize the effectiveness of courts at providing due process, particularly in the context of class certification and settlement, describing adequacy determinations as a "rubber stamp."[355] Given docket pressures, we should not expect that where courts are not liable for the ultimate determination on the merits, courts will provide a higher quality of due process than courts provide when their responsibility includes the substantive merits.

Also, on a practical level, the back-and-forth interaction required between the court and arbitration provider under the hybrid system increases the expense of the proceeding[356] and delays proceedings in order to accommodate backlogged judicial dockets. Where courts take the laboring oar in assuring that the absent class members' interests are protected, duplicate filings with courts and arbitrators are appropriate. Crowded dockets mean that the class action aspects under judicial control via the hybrid approach will not be addressed in as timely a manner as they could be through arbitration, where scheduling is not similarly backlogged.

Conceptually, it is difficult to ascertain how the court can police whether due process is provided without receiving filings on a continuing

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applicable to restrict the court's ability to decide all class action-related issues previously addressed by courts operating under the hybrid model. . . . Under the reasoning of Bazzle and its progeny, there is no rationale for continued court involvement in the class-related aspects of a class-wide arbitration proceeding.").

352. *Id.* at 354.

353. *Id.* at 354 ("Just as courts have invalidated numerous other state laws requiring more protection or process than arbitration provides, so too should courts determine that the hybrid model singles out the arbitration of class actions for specialized treatment, and therefore is preempted by federal arbitration law.").

354. *Id.* at 354-55.

355. Mullenix, *supra* note 20, at 1702; *see also* Klonoff, *supra* note 25, at 673-74; Wolff, *supra* note 25, at 722-23 (explaining that courts proceed with certification without achieving any understanding of preclusion, which often would reveal conflicts of interests among class members and which the author characterizes as a "form of judicial malfeasance").

356. Blankley, *supra* note 43, at 468.

basis; but it is even more difficult to imagine the court reading all of the ongoing filings in a class action matter arbitrated under the hybrid model and reacting to them in a manner that effectively executes the judicial role as protector of the interests of the absent parties. The concept that the court is an effective watchdog overseeing due process under the hybrid model of class arbitration sounds nice; but it may be more a vestige of the historic mistrust of arbitration[357] than practical reality. The soundness of the idea is belied by the experience of pure class action litigation, where docket pressures result in the court rubber stamping important due process protections,[358] approving settlements without adequate scrutiny,[359] and allowing the collusive settlements that provide large attorneys fees with little real return to class members that generated much fodder for the media in connection with the Class Action Fairness Act of 2005.[360]

Another practical issue is that allocating to the court the role of due process guardian effectively relieves the arbitrator of this function, resulting in a division of labor that sends the wrong message to the arbitrator. Making the court, rather than the arbitrator, responsible for due process under the hybrid model places this important concern in the hands of the entity less integrally involved with the proceeding and more burdened by crowded dockets, and implicitly licenses the arbitrator to ignore these important considerations.

The proffered rationale for the hybrid model's division of labor between court and arbitrator—that courts must oversee due process because arbitrators cannot effectively manage due process—also seems misguided, given that arbitrators frequently administer complex litigation,[361] administer due process-like protections in other contexts under the due process protocols,[362] and are not subject to the same docket pressures as judges.[363] Providing for due process under the hybrid system by reserving for the court control over the due process aspects of class-related suits does not seem likely to increase the quality of justice provided. While the involvement of the courts may provide a significant benefit in the public's perception, and arbitrators may prefer the delegation

357. Buckner, *supra* note 41, at 307.

358. Klonoff, *supra* note 25, at 673-74 (discussing the results of a study finding that courts do not "give adequacy of representation the attention that it requires").

359. Mullinex, *supra* note 20, at 1695-96.

360. 28 U.S.C.A. § 1712 (West 2005); HENSLER ET AL., *supra* note 106, at 460-63.

361. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989) (holding that Securities Act claims are arbitrable); Sheavson/Am. Express Inc. v McMahon, 482 U.S. 220, 238, 242 (1987) (holding that Securities Exchange Act and RICO claims are arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (enforcing an agreement to arbitrate antitrust claims).

362. *See* discussion *infra* Part IV.B.

363. HENSLER ET AL., *supra* note 106, at 497-99.

of due process to the courts, the actual overall quality of justice may be reduced.

### B. *Due Process Under Provider-Created Models of Class Arbitration*

The second existing approach to class arbitration involves the administration of class arbitration by private arbitration providers pursuant to rules promulgated by those providers and agreed to by the parties in connection with their agreement to arbitrate. Such rules are loosely patterned on Federal Rule of Civil Procedure 23.[364] In this subpart, I analyze how the state action doctrine applies to provider models of class arbitration to determine whether due process is required, and I conclude that provider models probably often do not involve state action under the public function prong of the state action doctrine. Provider models may, but do not always, satisfy the public function prong of the state action doctrine because the delegation requirement often is unmet, given that class arbitration arises from a private, consensual agreement of the parties that can proceed to arbitration without delegation by the courts.

Provider models of class arbitration also may involve state action under the entanglement prong of the state action doctrine, given that the role of the court in class arbitration is increased beyond that involved in non-class arbitration, and that the judicial review of an arbitrator's certification decisions potentially available under provider models occurs in connection with a potential area of deprivation of constitutional rights. Because this type of judicial involvement may amount to state action, where judicial involvement is present, the arbitrator and/or court should provide due process, otherwise the resulting award remains vulnerable to collateral attack. However, under both of the provider models considered here, judicial involvement is subject to the discretion of either the arbitrator (under the JAMS Procedures)[365] or the parties (under the AAA Rules).[366] Therefore, class arbitration under provider models could involve no judicial involvement, in which case state action requiring due process would not be present.

Accordingly, this Part next considers the doctrinal and practical consequences of a failure to provide due process-like protections in class arbitration, and concludes that even where due process is not required, doctrinal and practical considerations support the creation of a system explicitly providing for due process—like protections in class arbitration. This Part then critiques how existing provider models address due process

364. *Compare* AAA RULES, *supra* note 3, *and* JAMS, CLASS ACTION PROCEDURES, *supra* note 3, *with* FED. R. CIV. P. 23.

365. JAMS, CLASS ACTION PROCEDURES, *supra* note 3.

366. AAA RULES, *supra* note 3.

concerns, describes the strengths and the doctrinal and practical shortcomings of existing provider models, and concludes that provider approaches to class arbitration suffer some of the same doctrinal and practical flaws as the hybrid model, but to a lesser degree, given the contingent involvement of the state under such models. Doctrinal considerations support the refinement of existing provider systems to eliminate judicial involvement except as provided under the FAA, and doctrinal and practical considerations support the adoption of a voluntary due process protocol for class arbitration, both to avoid the prospect of extensive litigation regarding due process issues and to assure that class arbitral awards bind absent class members.

### 1. Entanglement Under Provider Models of Class Arbitration

The AAA promulgated its rules for class arbitration (AAA Rules) in 2003,[367] following the *Bazzle* decision, to administer arbitration agreements with "silent" arbitration clauses.[368] The AAA Rules are patterned loosely on Federal Rule of Civil Procedure 23.[369] The JAMS Class Action Procedures (JAMS Procedures), issued in February 2005, are patterned somewhat loosely[370] on Rule 23[371] and differ in several respects

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367. AAA RULES, *supra* note 3.

368. AMERICAN ARBITRATION ASSOCIATION, POLICY ON CLASS ARBITRATIONS [hereinafter AAA POLICY] (July 14, 2005), *available at* http://www.adr.org/sp.asp?id=25967&printable=true; AAA COMMENTARY, *supra* note 40. "Silent" arbitration clauses are those that do not address class arbitration expressly. *Id.* Because the law remains unsettled, the AAA will not accept demands for class arbitration where the underlying agreement precludes class arbitration, unless a court order directs the parties to submit their dispute to arbitration. *Id.*

369. The AAA Rules include provisions similar to Rule 23 of the Federal Rules of Civil Procedure, including provisions regarding prerequisites to a class action, FED. R. CIV. P. 23(a), types of class actions maintainable, FED. R. CIV. P. 23(b), and some of the provisons regarding notice, FED. R. CIV. P. 23(c). The AAA Rules omit other provisions of Rule 23, including provisions for partial class actions and division of the class into subclasses, FED. R. CIV. P. 23(c)(4), and provisions empowering the court to grant special orders in class actions, including requiring notice asking class members to signify whether they consider the representation fair and adequate, FED. R. CIV. P. 23(d), and a provision for appeals, FED. R. CIV. P. 23(f), which are unnecessary in class arbitration because vacatur is governed by the Federal Arbitration Act, and more significantly, omitting specific provisions concerning the appointment of class counsel, FED. R. CIV. P. 23(g), and court approval of attorneys' fee awards, FED. R. CIV. P. 23(h).

370. The JAMS Procedures incorporate the provisions of Rule 23 regarding prerequisites to a class action, FED. R. CIV. P. 23(a), types of class actions maintainable, FED. R. CIV. P. 23(b), and some of the provisions regarding notice, FED. R. CIV. P. 23(c). The JAMS Procedures omit other provisions of Rule 23, including provisions for partial class actions and division of the class into subclasses, FED. R. CIV. P. 23(c)(4), provisions empowering the court to grant special orders in class actions, including requiring notice asking class members to signify whether they consider the representation fair and adequate, FED. R. CIV. P. 23(d), and a provision for appeals, FED. R. CIV. P. 23(f), which are unnecessary in class arbitration because vacatur is governed by the Federal Arbitration Act, and more significantly, the JAMS Procedures omit specific provisions concerning

from the AAA Rules.[372] These rules, promulgated by two major arbitration providers, govern the class arbitrations conducted by these organizations.

Both providers' class arbitration rules specifically permit judicial involvement in class arbitration. The JAMS Procedures permit interim judicial review of the arbitrator's determination regarding whether the arbitration clause permits the matter to proceed as a class adjudication[373] and regarding the class certification of the matter.[374] Under the JAMS Procedures, such reviews are permissive and discretionary with the arbitrator, rather than mandatory.[375] The AAA Rules permit broader opportunities for judicial involvement. First, AAA policy states that the AAA "will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves."[376] This provision implicitly permits judicial involvement as extensive as that required under the hybrid model of class arbitration. The AAA Rules mandate a thirty-day stay of all arbitral proceedings following the clause construction award and certification award to "permit any party to move a court of competent jurisdiction to confirm or to vacate" these determinations.[377]

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the appointment of class counsel, FED. R. CIV. P. 23(g), and court approval of attorneys' fee awards, FED. R. CIV. P. 23(h).

371. FED. R. CIV. P. 23.

372. The JAMS Procedures differ from the AAA Rules in several significant respects. For example, the JAMS Procedures permit class arbitration over all types of class actions within Rule 23(b), *see* JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.3(b), while the AAA Rules permit class arbitration only of damages class actions within Rule 23(b)(3), *see* AAA RULES, *supra* note 3, R.4(b). Also, the JAMS procedures describe the arbitrator's rendering of partial final awards concerning certification and the construction of the arbitration clause to permit class arbitration and related judicial review of these determinations in discretionary and permissive terms, *see id.* at R.2, 3(c), while the AAA Rules describe the creation of these partial final awards as mandatory ("shall") and require that the arbitration be stayed to allow parties to seek interim judicial review, *see* AAA RULES, *supra* note 3, R.3, 5(a), (d). The JAMS Procedures refer to "these Supplementary Rules," *see, e.g.*, JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2, which appears to be a drafting error carried over from the AAA Supplementary Rules, since the JAMS Procedures elsewhere refer to themselves as "these Procedures," *see, e.g.*, JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.1.

373. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2 ("The Arbitrator *may* set forth his or her determination in a partial final award subject to immediate court review.") (emphasis added).

374. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.3(b), (c) ("*In the discretion of the Arbitrator*, his or her determinations with respect to the matter of Class Certification *may* be set forth in a partial final award subject to immediate court review.") (emphasis added).

375. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2, 3. As discussed below, the AAA Rules require that the arbitrator's determinations regarding whether the arbitration clause permits class arbitration and regarding the certification of the class be set for forth in "reasoned, partial final award[s]," and require the arbitrator to "stay all proceedings" following issuance of the awards in order to allow the parties to seek judicial review of the awards. AAA RULES, *supra* note 3, R.3, 5(a), (d).

376. AAA COMMENTARY, *supra* note 40; AAA RULES, *supra* note 3, R. 1(c).

377. AAA RULES, *supra* note 3, R.3, 5(d). This structure is vulnerable to the argument that it

Substantively, both sets of rules authorize a narrower range and character of judicial involvement than exists under the hybrid model, particularly under the JAMS Procedures,[378] and specifically authorize judicial involvement in due process-related aspects of class arbitration only by virtue of the judicial *review* of the arbitrator's class certification decision.[379] Aside from the broad judicial involvement authorized by the AAA Rules, judicial involvement under provider models is restricted to "review" of arbitrator decisions; arbitrators make those decisions in the first instance, rather than courts making those decisions as they do under the hybrid model. Second, again setting aside the broad judicial involvement possible under the AAA Rules, the more specifically authorized judicial involvement permits review of only two arbitrator rulings, albeit important rulings. Provider models authorize judicial review of only the arbitrator's ruling on the construction of the arbitration clause (regarding whether the arbitration clause permits class arbitration) and on class certification,[380] as opposed to broader range of initial judicial decisionmaking under the hybrid model. The latter judicial review implicates due process.

Under either provider model, class arbitration can proceed with no judicial involvement. Under the JAMS Procedures, the arbitrator could elect not to create partial final awards regarding class certification and the construction of the arbitration clause, and to forego any interim judicial review of these arbitral decisions.[381] Such a strategy would result in a self-contained arbitral proceeding without judicial involvement beyond that occurring in non-class arbitration. Under AAA Rules, the parties could

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violates the FAA because it expands the narrow vacatur review authorized by the FAA. Buckner, *supra* note 41, at 356 ("[S]uch procedures are inconsistent with *Bazzle* and the FAA, which do not authorize interim review or appeal of arbitrators' decisions. Allowing such judicial involvement is not only inconsistent with the FAA and with the spirit of federal arbitration law, but also undermines some of the fundamental benefits of arbitration such as avoiding the expense and delays inherent in litigation, including the lengthy appellate process.").

378. The hybrid model allows courts to make decisions regarding certification, notice, discovery, and settlement. Keating v. Superior Court, 645 P.2d 1192, 1209-10 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); Lewis v. Prudential-Bache Sec., Inc., 225 Cal. Rptr. 69, 76 (Cal. Ct. App. 1986); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991).

379. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.3(b)(c); AAA RULES, *supra* note 3, R.5(d).

380. AAA RULES, *supra* note 3, R.3, 5(d); JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2, 3(b), (c).

381. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2, 3. As discussed below, the AAA Rules require that the arbitrator's determinations regarding whether the arbitration clause permits class arbitration and regarding the certification of the class be set forth in "reasoned, partial final award[s]," and require the arbitrator to "stay all proceedings" following issuance of the awards to allow the parties to seek judicial review of the awards. AAA RULES, *supra* note 3, R.3, 5(a), (d).

elect not to proceed with the available judicial review of the arbitrator's rulings on clause construction and class certification, again resulting in a self-contained arbitral proceeding.[382]

While provider rules for class arbitration to some extent expand the judicial role beyond that permitted in non-class arbitration by allowing judicial review of interim arbitral rulings, they authorize far less judicial involvement than that which occurs under the hybrid system.[383] Whereas judicial involvement under the hybrid model is a virtual certainty, judicial involvement beyond that in non-class arbitration is uncertain and contingent upon the court, parties, or arbitrator triggering specific provisions. Judicial involvement occurs under JAMS Procedures only if the arbitrator chooses to create partial final awards regarding class certification and clause construction.[384] Judicial involvement occurs under the AAA Rules only if a party elects to pursue judicial review of the clause construction award or certification award, or if a court otherwise insinuates itself into the proceeding.[385]

If the judicial trigger is pulled under either provider system, the judicial involvement that follows significantly exceeds that involved in non-class arbitration. In non-class arbitration, the court compels arbitration[386] or confirms,[387] modifies,[388] or vacates the final award on very narrow grounds.[389] Under provider models of class arbitration, courts review the arbitrator's substantive determinations regarding the construction of the arbitration clause to determine whether it permits class arbitration and, more importantly for due process analysis, the certification of the class.[390] Under such a scenario, an important part of the class arbitration process takes place in the judicial setting. Courts provide non-neutral, substantive assistance beyond that provided in non-class arbitration by providing input

382. *See* AAA RULES, *supra* note 3, R.3, 5(a), (d).

383. *See supra* Part V.A.

384. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2, 3.

385. AAA RULES, *supra* note 3, R.3, 5(d).

386. The FAA requires courts to enforce arbitration agreements with orders that parties specifically perform those agreements by arbitrating. 9 U.S.C.A. § 3, 4 (West 2005); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (directing courts to move cases out of the judicial system and into arbitration as soon as possible).

387. 9 U.S.C.A. § 9 (West 2005). The confirmed award has the same enforceability of a court judgment. WARE, *supra* note 294, at 87.

388. 9 U.S.C.A. §§ 11-12 (West 2005).

389. 9 U.S.C.A. § 10(a) (West 2005). For a discussion of the statutory and non-statutory bases for vacatur of arbitration awards, see WARE, *supra* note 294, §§ 2.43- 2.45.

390. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2, 3; AAA RULES, *supra* note 3, R.3, 4(a), 5(d).

into key substantive aspects of class arbitration, including class certification,[391] which implicates due process.

Like the jury selection cases,[392] judicial review of arbitral rulings takes place in a courtroom setting. Through such involvement, courts lend their power and prestige to the provider model of class arbitration by conducting a substantive review that implicitly validates provider models of class arbitration.[393] Because one concern of arbitration critics is the narrow range of the available review of arbitrator rulings,[394] judicial involvement in review of class arbitration rulings benefits private arbitration providers by providing a broader scope of review than otherwise available in non-class arbitration, satisfying the due process concerns of critics and courts.[395] Just as under the peremptory challenge cases the court makes itself a party to the private litigant's conduct, essentially sanctioning it by permitting it to occur,[396] so in class arbitration the court endorses or reverses, through its review, the private arbitrator's conduct. This cooperative sharing of decisionmaking functions extends beyond the enforcement of neutral private arrangements into the underlying subject matter, and through the review of class certification, into constitutional considerations.[397]

The issue is whether the quantity and quality of judicial involvement amounts to pervasive entwinement or entanglement resulting in state action and requiring due process. At one end of the spectrum lies the hybrid model of class arbitration, where extensive, judicial involvement triggers due process requirements.[398] At the other end of the spectrum lies non-class arbitration, where judicial involvement is so limited that no due process is required.[399] Provider models fall somewhere between these two

391. *See* JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.3; AAA Rules, *supra* note 3, R.4-5.

392. Cole & Spitko, *supra* note 5, at 1168-77.

393. One common criticism of arbitration is the limited review available under the FAA. *See* Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 231 App. (1998) (proposing statute granting expanded judicial review of consumer, franchisee and employee arbitration awards). To the extent that provider models of class arbitration expand the scope of review available, reducing these concerns, the involvement of the judicial system increases the credibility and acceptability of class arbitration.

394. Blankley, *supra* note 43, at 469, 484-85 (recommending expanded judicial review of arbitration awards in class arbitration).

395. *See, e.g.*, JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.3(c) (describing available judicial review of class certification); AAA RULES, *supra* note 3, R.5(d) (same).

396. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991); ROTUNDA & NOWAK, *supra* note 26, § 16.3, at 785, 786.

397. Cole & Spitko, *supra* note 5, at 1173 (comparing jury selection cases to non-class arbitration).

398. *See* discussion *supra* Part V.A.1.

399. *See* discussion *supra* Part IV.A.

extremes. While provider models may involve judicial review or even more extensive judicial involvement (under AAA Rules),[400] they permit far less judicial involvement than the hybrid model, and the character of that involvement differs (review versus the retention of jurisdiction to make initial decisions). Provider models also allow for the possibility of no judicial involvement beyond that found in non-class arbitration, assuming that the arbitrator does not find himself in the position of having to defer to a court using the hybrid system under the AAA Rules.[401] In comparison to non-class arbitration, where there is no possibility of judicial involvement beyond compelling arbitration and confirmation of the award, no judicial involvement in the merits of the action, and only limited judicial review, there is, given the option to seek interim judicial review of arbitral certification decisions, at least an increased possibility of substantive judicial involvement that implicates due process under provider models.[402]

The question is this: At what point along this continuum of judicial involvement does the degree of judicial involvement cross the state action "line," thereby requiring due process? How a court will rule in this area of the law is unclear because of the factual specificity of the cases applying state action theory[403] and inconsistent case results.[404] But, it is difficult to conceive of a court making a state action distinction that hinges upon whether the court makes the initial determination regarding class certification or reviews the arbitrator's rulings on these same issues. State action results, in either instance, from the use of the courts and the assistance of the state that results from the heightened entwinement of the judicial and arbitral systems, much like judicial involvement in court-ordered arbitration[405] and in the peremptory challenge cases[406] and the involvement of state actors in property seizure cases,[407] where such involvement is non-neutral. Once the scene of the potential constitutional

400. *See supra* text accompanying notes 368-83.

401. AAA RULES, *supra* note 3, at R.1(c).

402. *See* discussion *supra* Part V.B.

403. ROTUNDA & NOWAK, *supra* note 26, § 16.5, at 817 (explaining that the determination of state action involves a "sifting [of] the facts and weighing [of] the circumstances") (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

404. "[I]n examining the exceptions to the state action doctrine it must be recognized that the cases do not neatly fit together. Some of the decisions seem clearly inconsistent with one another, and the Court often has made little effort to reconcile them." CHEMERINSKY, *supra* note 26, at 496. Cases concerning the exceptions to the state action requirement, i.e., situations in which private conduct constitutes state action, have been called a conceptual disaster area. *Id.* at 488.

405. Cole, *supra* note 26, at 24-25 (explaining that court ordered arbitration involves state action because "the party participation in the arbitral process is compulsory and required by a government actor as opposed to a private agreement," therefore due process is required).

406. *See supra* Part III.A.1.

407. *See supra* Part III.A.2.

deprivation shifts from the arbitral forum to the courtroom, whether for an initial determination of class certification (under the hybrid model) or a review of an arbitrator's determination (under provider models), judicial participation places the court's imprimatur upon the proceeding. Just as in the peremptory challenge cases,[408] where the court, in essence, "reviews" the constitutionality of the private actors' jury selections, a court's review of the private arbitration providers' certification determinations involves state action.

On the other hand, the contingent nature of the judicial involvement under provider models of class arbitration means that, in class arbitrations in which judicial review is not sought by the parties (under AAA Rules) or is effectively precluded by the arbitrator's decision not to issue an interim ruling on class certification (under JAMS Procedures), or when review does not implicate the deprivation of due process,[409] no state action occurs and due process is not required.[410] Like the property seizure cases in which creditors exercise self-help without the involvement of state actors,[411] class arbitrations where judicial involvement is available but not utilized will not involve state action requiring due process.

The contingent nature of the judicial involvement under both the AAA Rules and the JAMS Procedures creates a two-track system. One track potentially requires due process when courts (under AAA Rules), parties (under AAA Rules), or arbitrators (under JAMS procedures) elevate the level of judicial involvement beyond that occurring in non-class arbitration in a manner that has constitutional implications; a second track requires no due process when the proceeding remains strictly within the arbitral setting.[412] Given this, under the AAA Rules, an arbitrator cannot determine

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408. *See supra* Part III.A.1.

409. For example, review of the clause construction award implicates no constitutional considerations, but rather, is primarily a creature of contract. In contrast, review of class certification involves the adequacy of the class representatives and counsel, which raise fundamental due process concerns. *See supra* Part II.B.

410. A counter argument also might be made that whether interim judicial review of partial final arbitral awards is utilized in any particular case should not be determinative of whether state action exists, because to do so would ignore the reality that the integration of judicial review into the private arbitral system implicitly facilitates that system by establishing a degree of integrity perhaps perceived as lacking without judicial review. In essence, by making available potential judicial review of otherwise private arbitral decisions, the state, through its judicial system, enters into a joint venture with arbitral providers. Arguably, such joint participation results in state action requiring due process. Commentators advance similar arguments regarding non-class arbitration. Brunet, *supra* note 210, at 111-13; Reuben, *supra* note 214, at 579, 589-90; Sternlight, *supra* note 210, at 41. However, courts reject those arguments in the non-class arbitration context, *see* discussion *infra* Part IV.A, and would likely reject them in the context of class arbitration.

411. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 152-53 (1978).

412. *See, e.g.*, JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2-3; AAA RULES, *supra* note 3, R.3, 5(d).

in advance of a class certification ruling whether due process is required.[413] Thus, as a practical matter under AAA Rules, because the parties control the possibility of judicial review, arbitrators must provide due process in connection with certification rulings. If the parties elect interim judicial review, courts addressing the issue after the fact could construe the entanglement resulting from judicial review as creating state action, requiring the private actor to provide due process in the first instance. Because an arbitrator cannot predict or control the interim judicial review of the certification ruling under the AAA Rules, ignoring due process at any stage places the final arbitral award at risk of collateral attack.

Under the JAMS Rules, the situation differs subtly, but significantly, because the arbitrator (rather than the court or the parties) controls the review trigger.[414] A JAMS arbitrator could decide in advance that she will not provide partial interim awards regarding clause construction and class certification.[415] Such an approach could insulate these interim rulings from judicial review, leaving only the more minimal judicial involvement found in non-class arbitration, which courts have determined does not require due process.[416] While the argument that no state action exists might succeed under such a scenario under the JAMS Procedures because the entanglement does not exceed judicial involvement in non-class arbitration, it remains possible that courts may later determine that state action exists in all class arbitration, separate from any entanglement theories, if class arbitration constitutes a public function. Such a decision would leave arbitral awards issued from class arbitration proceedings occurring without due process vulnerable to collateral attack. Desire to

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413. For example, an AAA arbitrator would not ignore due process requirements when ruling on a class certification motion, given the contingency that a party might seek judicial review of the arbitrator's ruling, invoking state action that would require due process. Rather, the prudent arbitrator would provide due process when rendering a certification award, given the possibility of judicial review that is already available, to some degree, under the AAA Rules. *See* AAA RULES, *supra* note 3, R.3, 5(d).

414. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2 ("The Arbitrator *may* set forth his or her determination in a partial final award subject to immediate court review.") (emphasis added), R.3(c) ("*In the discretion of the Arbitrator*, his or her determinations with respect to the matter of Class Certification *may* be set forth in a partial final award subject to immediate court review.") (emphasis added).

415. Although such a decision appears possible under the JAMS Procedures, such an approach may negatively impact due process considerations by rendering it extremely difficult to evaluate whether the arbitrator's determination of class certification satisfied due process considerations such as adequacy of counsel and class representatives if an absent party collaterally attacks an arbitral award at a later date. Mullinex, *supra* note 20, at 1732-33 (describing the difficulty of sorting out in the context of a collateral attack whether due process was provided in connection with certification rulings and settlement approval, given the minimalist rulings generated by most judges).

416. *See supra* Part IV.A.

avoid this result suggests that arbitration providers should satisfy due process requirements voluntarily, even if not required by law. The possibility that provider models constitute state action under the public function prong of the state action doctrine is discussed below.

### 2. Public Function Analysis Under Provider Models of Class Arbitration

The application of the public function prong of the state action doctrine to provider models is similar in some respects to the analysis of public function doctrine under the hybrid model, but it differs in at least one significant respect. The analysis of the public function prong of the state action doctrine that focuses upon whether the class action device was traditionally or historically the exclusive province of the states is similar to the analysis regarding the hybrid model.[417] Application of the requirement of delegation by the state actor,[418] however, yields a different result when applied to provider models of class arbitration, as compared to the hybrid model of class arbitration. The result varies further under the different provider models.[419]

To the extent that a private arbitrator accepts a judicial delegation as authorized by the AAA Rules,[420] the delegation element of the public function arm of the state action doctrine continues to be satisfied. However, private parties may make their way to arbitration providers for class arbitration without judicial involvement. After the *Bazzle* decision, it is more likely that courts will simply compel the arbitrator to decide whether class arbitration is proper or not,[421] deferring all decisions from that point onward to the arbitrator. Under such a scenario, discretionary judicial delegation of an arbitral matter to class arbitration is absent. The involvement of the courts is much like the court's involvement in non-class arbitration in that it is not the state actor, but rather private parties who delegate the power to the arbitrator or arbitration provider.[422] Private

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417. *See supra* Parts V.A.2-3.

418. *See supra* Part III.B; *see also* CHEMERINSKY, *supra* note 26, at 498 ("The government should not be able to avoid the Constitution by delegating its tasks to a private actor.").

419. *Compare supra* Part V.A.2 (under the hybrid model, a court exercises its discretion to delegate the class arbitration, resulting in state action), *with supra* Part V.B (provider models).

420. AAA COMMENTARY, *supra* note 40; AAA RULES, *supra* note 3, R.1(c) (providing that AAA arbitrators in class arbitration will accommodate judicial direction and involvement).

421. Pedcor Mgmt. Co. v. Nations Personnel of Tex., Inc., 343 F.3d 355, 363 (5th Cir. 2003) (holding that arbitrators should decide whether class arbitration is appropriate); Garcia v. DIRECTV, Inc., 9 Cal. Rptr. 3d 190, 191 (Cal. Ct. App. 2004) (finding that after *Bazzle*, a contract interpretation issue regarding whether an agreement permitted class arbitration should be determined "by the arbitrators, not the courts"); *In re* Wood, 140 S.W.3d 367, 368-69 (Tex. 2004) (holding that arbitrators should make decisions regarding class arbitration and class certification).

422. Cole & Spitko, *supra* note 5, at 1194-95 (indicating that, in private non-class arbitration,

provider models operating without delegation involve no state action and require no due process under the public function prong of the state action doctrine.

3. Other Doctrinal and Practical Considerations Under Provider Models

Putting aside the doctrinal question of whether state action exists under private provider models of class arbitration, this subpart considers whether due process-like protections are desirable, and should nonetheless be provided using voluntary due process protocols, as they are in connection with certain types of consumer, health care, and employment-related arbitration. The lack of clarity regarding due process in class arbitration and the fact that due process is required in class action litigation to create a binding decision[423] both suggest that the prudent approach is to provide due process voluntarily, just as JAMS and the AAA have endeavored to do.[424] But only two providers have chosen this path, leaving the risk that other providers may utilize alternative approaches. As this Article suggests, a voluntary due process protocol establishing minimal due process-like protections offered by all arbitration providers handling class arbitration is preferable.

State action doctrine involves complex factual considerations, and given the somewhat inconsistent state of the law regarding state action, litigation of these issues will generate substantial amounts of litigation, and at considerable expense.[425] Courts examining such issues could avoid the state action question entirely if the private arbitration providers' procedures plainly provide due process-like protections.[426]

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"the parties, not the government, delegate the power to the arbitrator to resolve the dispute" and that "[a]bsent government delegation of the public function to a private entity, the Court will not find state action using the public function test").

423. *See supra* Part II.E.

424. JAMS, CLASS ACTION PROCEDURES, *supra* note 3; AAA RULES, *supra* note 3.

425. In an analogous context, Professors Sternlight and Jensen point out that litigating issues regarding the unconscionability of prohibiting class actions "on a case-by-case basis" has resulted in courts "reaching disparate conclusions" and imposed a very high cost on plaintiffs seeking to pursue class arbitration, rendering litigation of such issues economically unfeasible. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitrtion to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 99-101 (2004).

426. For example, the South Carolina Supreme Court in the underlying *Bazzle* decision dismissed the due process issue in a sentence by indicating that the procedure for notice seemed to comply with due process requirements, without a word regarding the state action doctrine. Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 362 (S.C. 2002) (observing that, although the issue was not adequately preserved for appeal, absent members' rights appearred to have been adequately protected by notice).

Considerations of public policy, including the importance of democratic values in public justice,[427] also suggest that class arbitration providers should include due process-like protections in class arbitration. Democratic virtues include individual liberty, the rule of law, and fundamental fairness.[428] Democracy's legal values include due process and equality of treatment, assured in part by a neutral and independent judiciary.[429] Democracy's political values include participation, transparency, and rationality.[430] Professor Richard Reuben asserts that because arbitration "inextricably intertwines governmental and private conduct, and . . . derives its legitimacy from the government," arbitration should further the goals of democratic governance, to avoid "possible diminishment of public trust in the rule of law as an institution," and provide to the participant a "perception[] of procedural fairness [which is] crucial to the participant's acceptance of the decisional outcome as substantively fair."[431] Regardless of the technical application of the state action doctrine, these fundamental democratic values are widely held. As Professor Reuben indicates, the implementation of democratic values through arbitration renders the "process . . . accountable to the public because people will vote with their pocketbooks."[432] Critics of arbitration cite the lack of due process as one of a host of concerns.[433] Other commentators have observed that providing due process in arbitration preserves the integrity of the arbitration system in the public's perception.[434] This is no less true of class arbitration. Accordingly, even if due process is not required in class arbitration by virtue of the technical application of state action theory, providers should consider providing procedures that satisfy due process considerations. The next section critiques the provider rules for class arbitration from a due process perspective.

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427. Reuben, *supra* note 254, at 280-82, 294.

428. *Id.* at 281.

429. *Id.* at 290-91.

430. *Id.* at 287.

431. *Id.* at 280, 282, 294. Although I disagree, as have most courts, with Professor Reuben's description of arbitration as involving an "inextricabl[e] intertwine[ment]," *see id.* at 280, particularly in reference to class arbitration, *see* discussion *supra* Part V.B.1, I nonetheless accept the need to implement commonly held democratic values through class arbitration to preserve its integrity and to preserve respect for class arbitration.

432. Reuben, *supra* note 254, at 294, 300.

433. Bingham, *supra* note 32, at 221 (explaining that critics also express concern with lack of consent, shifting costs, and the privatization of public law).

434. *Id.*; Harding, *supra* note 29, at 402; Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 13.

Neither provider's rules make explicit mention of providing procedure intended to satisfy due process requirements in class arbitration.[435] However, in a separate statement, the AAA affirms its "fidelity to its Due Process Protocols" and indicates that it will "continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols."[436] Because the AAA's existing due process protocols do not address the specific concerns of due process in the context of class actions,[437] this statement cannot be read to encompass the unique due process issues that arise in class arbitration, and there is no other mention of due process in the AAA's Rules.[438] The JAMS Procedures do not explicitly mention due process.[439]

The arbitration providers' rules also fail to require explicitly the arbitrator to protect or safeguard the rights of absent parties throughout the class action proceeding as explicitly required in class action litigation[440] and under the hybrid model of class arbitration.[441] Although both providers' rules track Federal Rule of Civil Procedure 23 generally, each provider omits certain aspects of Rule 23 that have important due process implications,[442] reducing the arbitrator's responsibility to protect the interests of absent parties. Unlike the AAA Rules and Rule 23, the JAMS Procedures do not explicitly require that JAMS arbitrators approve the adequacy of counsel.[443] Instead, in their provisions addressing notice to the

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435. *See* JAMS, CLASS ACTION PROCEDURES, *supra* note 3; AAA RULES, *supra* note 3.

436. AAA COMMENTARY, *supra* note 40.

437. The AAA follows the Consumer Due Process Protocol, the Health Care Providers Due Process Protocol, the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship, the eCommerce Dispute Management Protocol, and the DRB Protocol, none of which address due process issues in the context of class actions. *See* AMERICAN ARBITRATION ASSOCIATION, PROTOCOLS, http://www.adr.org/Protocols (last visited Sept. 18, 2005).

438. *See* AAA RULES, *supra* note 3.

439. *See* JAMS, CLASS ACTION PROCEDURES, *supra* note 3.

440. *See supra* Part II.

441. *See supra* Part IV.A. The role of the judge in insuring due process is in part a function of Rule 23(d) of the Federal Rules of Civil Procedure—a provision of Rule 23 that the AAA Rules omit—and in part a matter of case law, *see* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 637 (1997); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985). This important due process protection for absent parties' rights in representative litigation is lacking in the AAA's system of class arbitration. *See* AAA RULES, *supra* note 3.

442. For example, the provisions of Rule 23 regarding orders in conduct of actions are omitted from the AAA Rules. *Compare* AAA RULES, *supra* note 3, *with* FED. R. CIV. P. 23(d). The provisions of Rule 23 concerning the possible division of classes into subclasses also are omitted from the AAA rules. *Compare* AAA RULES, *supra* note 3, *with* FED. R. CIV. P. 23(c)(4)(B). The provisions of Rule 23 requiring court approval of class counsel based on a specified procedure and criteria also are omitted from the AAA Rules. *Compare* AAA RULES, *supra* note 3, *with* FED. R. CIV. P. 23(g).

443. *See* JAMS, CLASS ACTION PROCEDURES, *supra* note 3.

class, JAMS Procedures only obliquely reference "counsel that have been approved by the Arbitrator" without designating any specific procedural mechanism or substantive criteria for such approval.[444]

Both the JAMS Procedures and the AAA Rules create a three-stage approach patterned on Rule 23. First, the arbitrator construes the arbitration clause to determine whether it permits class arbitration.[445] Second, the arbitrator considers the requirements necessary for class certification.[446] Third, the arbitrator proceeds with the arbitration on the merits and issues a final award,[447] or addresses settlement of the action.[448] Each step of the process is critiqued below for its due process compliance.

The general notice provisions of the provider rules[449] track the notice provisions of Rule 23,[450] but they omit certain provisions of Rule 23 that have important due process implications. The Federal Rules permit courts to require additional notices "for the protection of the members of the class" at "any step in the action," including providing for the "opportunity of members to signify whether they consider the representation fair and adequate,"[451] a provision omitted from the provider rules. The provider rules also fail to authorize arbitrators to divide a class into subclasses.[452] Dividing a class into subclasses pursuant to Rule 23[453] permits the court to address conflicts of interests within classes and ensure the adequacy of representation of absent class members, thereby ensuring due process. Because the existence of conflicts of interest directly affects adequacy of representation, which in turn may adversely affect preclusion, these provisions are critical to both due process and preclusion considerations.

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444. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.4(7). Whereas AAA Rules require that the arbitrator determine as part of the certification procedure that "counsel selected to represent the class will fairly and adequately protect the interests of the class," AAA RULES, *supra* note 3, R.4(a)(5), the JAMS Procedures omit such a requirement, providing only that the notice sent to the class must state the identities of "the class representative(s) and *class counsel that have been approved by the Arbitrator to represent the class.*" JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.4(7) (emphasis added). *Cf.* Rule 23(g) (providing specific procedure and substantive criteria for approval of class counsel).

445. AAA RULES, *supra* note 3, R.3; JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.2.

446. AAA RULES, *supra* note 3, R.4; JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.3.

447. AAA RULES, *supra* note 3, R.7; JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.5.

448. AAA RULES, *supra* note 3, R.8; JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.6.

449. AAA RULES, *supra* note 3, R.6 (requiring "the best notice practicable" to " members who can be identified through reasonable effort"); JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.4.

450. FED. R. CIV. P. 23(c)(2).

451. FED. R. CIV. P. 23(d)(2).

452. AAA RULES, *supra* note 3, R.4 (addressing the class determination, which is the AAA equivalent of certification, and omitting any reference to subclasses).

453. FED. R. CIV. P. 23(c)(4).

The provisions of the provider rules concerning class counsel also compare less favorably than Rule 23 in due process terms, particularly given the difficulty of courts in effectively administering this issue and the recent amendments to Rule 23. The AAA Rules provide that the arbitrator will determine in connection with certification that "counsel . . . will fairly and adequately protect the interests of the class."[454] The AAA Rules refer to the class counsel "approved by the arbitrator to represent the class" without explicitly providing for such approval, or setting forth any specific procedure or criteria for approval.[455] The JAMS Procedures are even less explicit regarding the arbitrator's approval of class counsel.[456] In contrast, in recognition of the pivotal role played by counsel in connection with representative litigation, recent amendments to Rule 23 require that the court appoint the class counsel best able to represent the class, pursuant to a procedure contingent on the adequacy of the class counsel, and based on specific criteria including counsel's knowledge, experience, resources, work investigating the potential claims, and any other pertinent matters.[457]

Finally, although attorneys' fees remain available in class arbitration, provider rules do not provide for the arbitrator to award attorneys' fees and costs in a manner similar to the provisions of Rule 23.[458] The award of fees is thought to impact counsel's adequacy to represent the class, since conflicts of interest between counsel and class members often manifest themselves through settlement and fee awards.[459]

While the arbitrator's discretion not to set forth the class certification award in a written "partial final award" may significantly reduce expenses,[460] and may serve to insulate the arbitrator's interim determination from judicial review,[461] such a decision has other

454. AAA RULES, *supra* note 3, R.4(a)(5). The AAA Rules further provide that the "Class Determination Award certifying a class arbitration shall define the class, and identify . . . counsel. . . ." AAA RULES, *supra* note 3, R.5(b).

455. AAA RULES, *supra* note 3, R.6(b)(7).

456. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R.4(7).

457. FED. R. CIV. P. 23(g).

458. *Compare* AAA RULES, *supra* note 3 (reflecting no provisions regarding attorneys fees), *with* FED. R. CIV. P. 23(h).

459. Sternlight, *supra* note 19, at 34 (describing concerns with coupon settlements while attorneys reap high fees).

460. AAA arbitrators have ruled on the permissibility of class arbitration in nine cases to date, ruling in all cases that the dispute was not precluded from proceeding as an arbitrate class action. HOW TO ARBITRATE A CLASS ACTION—OR NOT (A.B.A. 2005) (teleconference & live audio Webcast), *available at* http://www.abanet.org/cle/programs. The partial final awards available on the AAA class action docket are detailed, complex determinations that must be expensive for arbitrators to create at their hourly rates. *See, e.g.*, Cole & Kaufman v. Long John Silver's Rest. (2004) (Hodge, Arb.), *available at* http://www.adr.org/sp.asp?id=22305.

461. Without the interim judicial review authorized by the JAMS Procedures, review of interim arbitral rulings is unavailable under the FAA, which limits review to a motion for vacatur

undesirable due process implications. Whether a judgment in a class action is binding on absent class members (and therefore invulnerable to collateral attack) depends upon whether due process is provided.[462] Due process is provided, at least in part, through the determinations made at the time of the certification of the class. Indeed, at the time of a subsequent collateral attack, certification determinations often serve as evidence that due process considerations were satisfied by the initial certification determination.[463] JAMS provisions excusing the arbitrator from issuing a written certification determination seem unjustified, given assertions that rote recitations of adequacy fail to satisfy due process and render the resulting settlements subject to collateral attack.[464] If JAMS arbitrators exercise their discretion not to set forth their certifications in writing, parties may find it difficult to defend against a collateral attack on an arbitral award due to lack of due process, given the lack of a record.

Another vulnerable aspect of the provider models is the judicial review available under both AAA Rules[465] and JAMS Procedures,[466] and the AAA Rules' recognition of and deferral to judicial involvement in class arbitration.[467] These provisions, perhaps designed to accommodate the hybrid model of class arbitration or perhaps an effort to cover all bases given the lack of clarity in the *Bazzle* decision, are vulnerable to the same argument under *Bazzle* as is the hybrid model of class arbitration,[468] although to a lesser degree. Because *Bazzle* implicitly requires an arbitrator to make decisions regarding class arbitration,[469] the plurality opinion implicitly rejected the interim judicial review permitted under the AAA Rules and the JAMS Procedures, as well as the broader judicial involvement permitted under the AAA Rules.[470]

Provider models of class arbitration also are doctrinally vulnerable because it is likely that the courts will find that provider rules sanctioning judicial intervention into private arbitral proceedings exceed the authority of the FAA, which explicitly circumscribes the judicial role in contractual

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at the end of the arbitral proceedings. 9 U.S.C.A. § 10 (West 2005).

462. *See supra* Part II.E.

463. Mullenix, *supra* note 20, at 1697-98, 1733 (asserting that both courts and counsel "typically fail to develop a sufficient record to support a finding of adequacy," leaving settlements and class adjudications subject to collateral attack because future courts "often have little to work with other than conclusory, meaningless recitations of adequacy").

464. *Id.*

465. AAA COMMENTARY, *supra* note 40; AAA RULES, *supra* note 3, R.1(c), 3, 5(d).

466. JAMS, CLASS ACTION PROCEDURES, *supra* note 3, R. 2, 3(c).

467. AAA COMMENTARY, *supra* note 40.

468. *See supra* text accompanying note 284.

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

470. *Id.*

arbitration.[471] Arbitration providers lack the power to co-opt the courts to expand the judicial role in class arbitration without congressional action.

The provider models of class arbitration also suffer from some of the same practical problems as the hybrid approach, although to a somewhat lesser degree. The prospect of interim judicial review "creates an impracticable and time-consuming shuffling between the arbitrator and the courts,"[472] which delays[473] and increases the expense of proceedings.[474]

Courts already accused of rubber stamping due process determinations in the context of class certification and settlement[475] are unlikely to improve the quality of their scrutiny when relegated to the position of reviewing arbitral rulings. Arbitrators do not suffer the same docket pressures as judges,[476] and they have greater control of their case load; thus, they are arguably better able to address these complex matters.[477]

## VI. A THIRD APPROACH: A PURE ARBITRAL MODEL AND VOLUNTARY DUE PROCESS PROTOCOL FOR CLASS ARBITRATION

### A. *The Rationale*

Both hybrid and provider approaches to providing due process in class arbitration involve significant doctrinal and practical shortcomings. A third

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471. 9 U.S.C.A. § 10 (West 2005). The vacatur provisions of the FAA allow judicial review of arbitrator decision only at the end of the proceeding, not on the interim basis described by provider rules for class arbitration, and only regarding certain narrowly described aspects of the arbitration proceeding, proscribing a scope of judicial review that does not include either the construction of an arbitration clause to determine whether it permits class treatment or the certification of a class. *See id.*

472. Blankley, *supra* note 43, at 476; *id.* at 483-84 (characterizing the hybrid approach to class arbitration as inadequate because of the cumbersome relationship between the courts and the arbitrators, and recommending instead a more streamlined approach combined with legislatively increased review through either a uniform state law or an amendment to the FAA).

473. For example, the AAA Rules provide for a thirty-day stay of the arbitral proceeding after the clause construction award and the class certification award, delaying the proceeding. AAA RULES, *supra* note 3, R.3.

474. Keating v. Superior Court, 645 P.2d 1192, 1215-16 (Cal. 1982), *rev'd in part*, 465 U.S. 1 (1984) (Richardson, J., concurring in part and dissenting in part) (finding that continued judicial monitoring of class arbitration increases the length, formality, and inefficiency of arbitration); Sternlight & Jensen, *supra* note 425, at 100; C. Evan Stewart, *Are Class Actions Appropriate in Arbitrations?*, N.Y. L.J., June 13, 1991, at 5 (arguing that continuing judicial intervention is likely to result in confusion and inefficiency); Elizabeth P. Allor, Note, Keating v. Superior Court: *Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CAL. L. REV. 1239, 1253 (1983).

475. Klonoff, *supra* note 25, at 673-74; Mullenix, *supra* note 20, at 1697-98; Wolff, *supra* note 25, at 722-23.

476. HENSLER ET AL., *supra* note 106, at 497.

477. Class arbitration determinations under the AAA Rules are available at the Class Arbitration Case Docket, http://www.adr.org/sp.asp?id=25562.

approach to providing due process in class arbitration combines a pure arbitral model of class arbitration[478] with a voluntary due process protocol for class arbitration. A pure arbitral model eliminates judicial intervention in the class arbitral process beyond that authorized under the FAA by eliminating interim reviews and voluntarily requiring arbitrators to provide due process-like protections in a manner that preserves the efficiency of the arbitral process and vests responsibility for safeguarding the interests of absent class members with arbitration providers who are in the best position to assure such protections.

Assuming either that the law requires due process or that doctrinal and policy considerations make the provision of voluntary due process-like protections desirable in class arbitration, the question that follows is how due process should be provided. Some commentators urge that only judicial involvement can adequately administer due process, similar to the hybrid system,[479] while others describe judicial review after the arbitration has terminated as the most optimal means of providing due process.[480] For the reasons discussed below, both of these approaches are less desirable than a pure arbitral paradigm for class arbitration combined with a voluntary due process protocol.

If due process must, or should be, provided in class arbitration, the next issue is whether arbitrators are capable of providing due process or whether due process must be provided through the courts, which has been the underlying assumption of the hybrid system.[481] Commentators argue

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478. Buckner, *supra* note 41, at 301.

479. Sternlight, *supra* note 19, at 111 ("[S]ome judicial participation in an arbitral class action is necessary to protect the due process rights of absent class members. Allowing arbitrators on their own to decide such issues simply will not comport with the Due Process Clause."); Stewart, *supra* note 474, at 5 (explaining that "the procedures mandated by Rule 23 have due process implications and require extensive judicial involvement throughout the entire class action process. The court's role at the certification stage can not suddenly be stopped; it must carry on to such stages as notice, settlement, protection of class members, etc. It is inconceivable to believe that non-Article III arbitrators could properly oversee, for example, the notice procedures mandated by the Supreme Court. Moreover, it is extremely difficult to envision arbitrators dealing with objecting class members. Other and equally obvious problems (e.g., fairness of settlement, protection of absent class members, etc.) are no less daunting.").

480. Blankley, *supra* note 43, at 483 (recommending "increased judicial review at the end of the entire proceeding"); 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, 404-05 (1989) (recommending "arbitration without court involvement during the actual proceedings, but with class certification hearings at the filing of the action and freer appeals process at the close of the arbitration"); Note, *Class Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787, 813 (1981) [hereinafter Note, *Class Arbitration*] (suggesting that courts play a more limited role, reviewing arbitral rulings only upon termination of the arbitration).

481. Blankley, *supra* note 43, at 502.

that arbitrators are ill-equipped to administer due process.[482] Others have leveled similar lack-of-capability arguments at arbitrators since arbitration commenced.[483] The argument is a vestige of the historic animosity of courts toward arbitrators that the Supreme Court has sought to sweep aside.[484] Although courts initially accepted arguments limiting the scope of the law that arbitrators could be empowered to address, each limitation has been reversed over time.[485] Certainly if arbitrators can administer RICO claims, antitrust law, and other complex litigation,[486] and administer due process-like protections under other due process protocols,[487] it is difficult to argue plausibly that they are incapable of providing due process-like protections in class arbitration.

Assuming that arbitrators are capable of providing due process, the next question is whether courts or arbitration providers should provide due process or due process-like protections in class arbitration. For several reasons, class arbitration providers should follow the model that exists in non-class arbitration, and adhere to a voluntary due process protocol[488] rather than rely upon courts to provide due process. A pure arbitral model for class arbitration involves minimal judicial involvement, consistent with the FAA.[489] A system requiring continuing judicial involvement where the parties have agreed upon arbitration should be considered preempted by the FAA.[490] The hybrid system is susceptible to this preemption argument,[491] and the JAMS and AAA models of class arbitration

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482. Sternlight, *supra* note 19, at 113 (writing that "it seems questionable whether a case in which each of these [class action-related] functions was performed by an arbitrator rather than a court would comport with due process," and indicating that "it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing"); Waltcher, *supra* note 480, at 401 (asserting that judicial involvement is necessary to protect absent parties' interests).

483. Buckner, *supra* note 41, at 307.

484. *Id.*

485. *Id.*

486. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989) (holding that Securities Act claims are arbitrable); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987) (holding that Securities Exchange Act and RICO claims are arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (enforcing an agreement to arbitrate as to antitrust claims).

487. *See supra* Part IV.B.

488. *See supra* Part IV.B.

489. 9 U.S.C.A. § 10 (West 2005) (allowing judicial review of arbitrator decisions only at the end of the proceeding, not on the interim basis described by provider rules for class arbitration, and only regarding certain narrowly described aspects of the arbitration proceeding, proscribing a scope of judicial review that does not include either the construction of an arbitration clause to determine whether it permits class treatment or the certification of a class).

490. Buckner, *supra* note 41, at 354.

491. *Id.* (asserting that the hybrid model of class arbitration is preempted by the FAA because it requires a partial judicial model, violating the FAA's mandate of enforcing parties' agreement to arbitrate).

attempt to extend the scope of judicial review beyond that authorized by the FAA and thus must fail.[492]

Practical considerations also strongly support the argument that arbitrators, rather than courts, provide due process or due process-like protections in class arbitration. Current systems of class arbitration involve an inelegant duplication of efforts by courts and arbitrators, resulting in delay and expense that parties agreeing to arbitrate intended to avoid.[493]

Some commentators suggest an expanded review on the back end of an arbitration,[494] which may be the worst solution of all because it would require parties to undergo the entire class arbitration, only to have the court at the end set aside the award due to some deficiency of due process. Because many parties opt for arbitration specifically because of the limited review available,[495] such a proposal creates another result that parties agreeing to arbitrate intended to avoid. Instead, a voluntary protocol for due process in class arbitration would require the arbitrator to assure that due process-like protections are provided within the arbitration proceeding.[496]

Yet another reason why it makes sense to take the provision of due process in class arbitration away from the courts is that courts do a poor job of administering due process in class action litigation.[497] Given the anticipated increase in federal class actions resulting from the Class Action Fairness Act of 2005,[498] the predictable increase on existing docket pressures[499] and the "rubber stamp[]" approach that courts already have been taking to due process inquiries,[500] it does not make any practical

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492. *Id.* at 357 (arguing that "to the extent that AAA's new classwide arbitration rules facilitate the hybrid model, they too are flawed").

493. *See* sources cited *supra* note 474.

494. Blankley, *supra* note 43, at 483 (recommending "increased judicial review at the end of the entire proceeding"); Note, *Class Arbitration*, *supra* note 480, at 813-14 (suggesting that courts play a more limited role, reviewing arbitral rulings only upon termination of the arbitration).

495. LIPSKY & SEEBER, *supra* note 1, at 5.

496. *See supra* Part IV.B.

497. Klonoff, *supra* note 25, at 673-74; Mullenix, *supra* note 20, at 1691-92; Wolff, *supra* note 25, at 722-23 (arguing that courts proceed with certification without achieving any understanding of preclusion, which often would reveal conflicts of interests among class members, that the author characterizes as a "form of judicial malfeasance").

498. The Class Action Fairness Act (CAFA) "federalizes" class actions by expanding federal diversity jurisdiction and removal jurisdiction, "shifting the largest and most complex class actions to federal court," and removing "local cases involving state law claims from the state courts." D. Alan Rudlin & George P. Sibley III, *CAFA 2005: The New Release of a Long-Awaited Vintage or Same Old Wine in a New Bottle?*, MASS TORTS (ABA SECTION OF LITIGATION—MASS TORTS LITIGATION COMMITTEE) Vol. 6, No. 5 (Mar. 11, 2005).

499. HENSLER ET AL., *supra* note 106, at 497; Mullenix, *supra* note 20, at 1717.

500. Mullenix, *supra* note 20, at 1702; *see also* Klonoff, *supra* note 25, at 673; Wolff, *supra* note 25, at 722.

sense to set up a system in which courts simply rubber stamp arbitral rulings to assure due process. Such a system is likely to result in even less scrutiny than the often minimal attention that courts already give these issues.[501] Since arbitration providers can elect to enter into the business of class arbitration, those that do so should accept the responsibility of providing due process without the imprimatur of a judicial rubber stamp on their rulings. This will provide the greatest incentive for arbitration providers to assure due process-like protections are administered properly. If, over time, arbitration providers fail to address adequately due process concerns, then awards rendered without adequate due process may be subject to collateral attack.[502] If collateral attacks succeed, providers will find their reputations for effectively administering class arbitration tarnished, and their forays into class arbitration will end when parties steer their claims away,[503] as arbitration users have threatened to do when class arbitration fails to satisfy their objectives.[504] These economic realities provide the greatest practical incentive for arbitration providers to ensure due process-like protections on the front end.

### B. *A Proposed Text for a Voluntary Due Process Protocol for Class Arbitration*

Set forth below is a proposed text for a Due Process Protocol for Class Arbitration:

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501. Klonoff, *supra* note 25, at 673.

502. *See supra* Part II.E.

503. Although Professor Reuben acknowledges that "[o]ne might argue, and with some force, that accountability in arbitration is provided by the private marketplace. . . . The arbitration process is . . . accountable to the public because people will vote with their pocketbooks," he discounts the argument. Reuben, *supra* note 214, at 300-01 (asserting that the market argument fails in part because it "is completely dependent upon the voluntariness of arbitration").

504. Recent developments illustrate how arbitration providers respond to economic pressures from users. When JAMS announced on November 12, 2004 that, in consumer cases, JAMS will not enforce clauses that waive consumer's rights to arbitrate their claims in a class action arbitration, *see* Press Release, JAMS, JAMS Takes Steps to Ensure Fairness in Consumer Arbitrations (Nov. 12, 2004), http://www.adrworld.com/sp.asp?id=381078&printerfriendly=1, commentators on both sides of the issue responded. One attorney recommended that corporate counsel discontinue using JAMS as an arbitration provider, given its position. Nancy J. Moore, *JAMS Reverses Policy on Preclusion Clauses Citing Court Decisions, Neutrality Concerns*, CLASS ACTION 6 LITIGATION REPORT (BNA No. 6) (Mar. 25, 2005), *available at* http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-5ARV27?OpenDocument. Commenting on JAMS's position, attorney Alan Kaplinsky stated that "[t]he policy must be seen as cost effective and efficient before companies will use JAMS for arbitrations." *JAMS Retracts Class Arbitration Policy, Citing Confusion*, ADRWORLD.COM, Mar. 25, 2005, *available at* http://www.adrworld.com/sp.asp?id=381078&printerfriendly=1. Ultimately, JAMS later reversed this position. Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2006), www.jamsadr.com/press/show_release.asp?id=198.

**Scope of the Voluntary Due Process Protocol for Class Arbitration**

The stakeholders involved in the arbitration of class actions endorse the Principles set forth in this Voluntary Due Process Protocol for Class Arbitration (Protocol) as broad statements requiring the provision of due process-like protections in class arbitration, whether or not due process is required as a matter of law in any particular class arbitration, to protect the rights of those who are represented by other parties in the class arbitration and who are not present before the tribunal (Absent Parties) and to assure the binding nature of class arbitration awards.

This Protocol is intended to provide due process-like protections regarding the particular issues that arise in class arbitration as a result of the representative nature of the arbitration. This Protocol is intended to apply to the arbitration provider/arbitrator administering class arbitration, regardless of whether or not there is judicial involvement in the class arbitration. This Protocol is intended to supplement existing protocols that also may apply in class arbitration, including but not limited to the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, the Due Process Protocol for Resolution of Health Care Disputes, and the Consumer Due Process Protocol (Earlier Protocols).

This Protocol does not address the fundamental elements of due process that are commonly provided in non-class arbitration, including the opportunity to be heard, notice of the claim, confrontation of adverse witnesses, assistance of counsel, and a neutral decision maker, which are addressed in the Earlier Protocols.

**Statement of Principles**

Principle 1: Provision of Due Process-Like Protections in Class Arbitration

Arbitrators conducting class arbitration shall undertake reasonable measures to provide due process-like protections in class arbitration throughout the arbitral process, regardless of judicial involvement in the class arbitration, such that the interests of Absent Parties receive adequate protection and to ensure that awards in class arbitration shall have binding effect.

Principle 2: The Role of the Arbitrator

Arbitrators conducting class arbitration shall bear in mind the representative nature of class arbitration, and shall endeavor to safeguard the interests of Absent Parties throughout the class arbitration proceeding in a manner that ensures that such Absent Parties' interests are protected and are not sacrificed or compromised due to conflicts of interest involving class counsel, class representatives or class members, or collusion between class counsel and defense counsel.

Arbitrators shall address in an appropriate manner any conflicts of interest on the part of class counsel, class representatives, or class members (whether present or absent before the arbitrator) regardless of any judicial involvement in such proceedings, through the creation of subclasses with separate representation if necessary, through the provision of additional notice to class members regarding any aspect of the class arbitration proceeding or through such other means as are appropriate under the circumstances.

Principle 3: Adequacy of Class Representatives

Arbitrators conducting class arbitration shall assure that class representatives at all times adequately represent the interests of Absent Parties. Arbitrators shall properly address any conflicts of interest on the part of class members (whether present or absent) through the creation of subclasses with separate representation if necessary, through the provision of additional notice to class members regarding any aspect of the class arbitration proceeding, or through such other means as are appropriate under the circumstances, so as to ensure the continuing adequacy of class representatives.

Arbitrators conducting class arbitration shall issue written determinations regarding the adequacy of class representatives in connection with class certification.

Principle 4: Adequacy of Class Counsel

Arbitrators conducting class arbitration shall recognize the important role of class counsel in representing Absent Parties in class arbitration and shall assure that class counsel adequately represent the Absent Parties throughout the class arbitration proceeding. Arbitrators shall assure that class counsel adequately represent both class representatives and Absent Parties and shall approve the adequacy of class counsel only after scrutinizing said counsel's knowledge, experience, and resources. Arbitrators shall properly address any conflicts of interest on the part of class counsel, through the creation of subclasses and/or the appointment of additional counsel, if necessary, so as to ensure the continuing adequacy of class counsel, and to avoid collusion between class counsel and defense counsel or between class counsel and class representatives. Arbitrators shall also approve the attorneys' fees payable to class counsel.

Arbitrators conducting class arbitration shall issue written determinations regarding the adequacy of class counsel in connection with class certification.

Principle 5: Notice

Arbitrators conducting class arbitration shall direct that class representatives provide notice to all members of the class, including the

Absent Parties, of the certification of the class. Such notice shall describe the class and the nature of the action, disclose the identity of and provide information regarding the arbitrator, class representatives, and class counsel, advise members of their opportunities to participate in or opt out of the class arbitration, and describe the binding effect of an arbitral award on the class members.

Arbitrators conducting class arbitrations shall direct the class representatives to provide notice of any pending settlement to class members, and shall permit such members to opt out and/or object to such pending settlements.

Arbitrators may require additional notice(s) to class members as necessary to protect the interests of the class members.

Principle 6: Approval of Settlement; Objectors

Arbitrators conducting class arbitration shall approve any settlement of the parties in class arbitration after requiring notice to all parties of any pending settlement and an opportunity to object to and to opt out of any pending settlement, and only upon finding that the settlement is fair, reasonable, and adequate to all parties.

Arbitrators conducting class arbitration shall require disclosure of any side-agreements among the parties to a settlement. In approving any class arbitration settlement, arbitrators conducting class arbitration shall bear in mind the ongoing duties of adequate representation by class counsel and by the class representatives, and their own role of safeguarding the interests of Absent Parties.

Principle 7: Documentation of Awards; Notification

Arbitrators conducting class arbitration shall publish their awards in such actions in a manner that is reasonably accessible to the public and shall report all settlements to the appropriate federal and state officials.

Principle 8: Availability of Information

Although one of the hallmarks of arbitration is that it is a private dispute resolution process, class arbitration differs from non-class arbitration because of the representative nature of the proceeding, so that the privacy traditionally associated with non-class arbitration is inappropriate for class arbitration. Therefore, class arbitrators shall provide information regarding the proceedings before them in a reasonably accessible manner concerning the scope and status of class arbitration proceedings and the identity of the arbitrators, parties, class representatives, and counsel involved in such proceedings.

Principle 9: Binding Nature of Award

Arbitrators conducting class arbitration shall take all reasonable steps to assure that the award resulting from the class arbitration is binding upon the members of the class. This includes clearly describing the class in the award.

## VII. CONCLUSION

State action may require due process in some models of class arbitration, and perhaps would not require such protections under other models. Given this uncertainty, to avoid the expense of litigating these complex issues and to assure the preclusive effects of class arbitration awards, due process-like protections should be provided in arbitration. Given the doctrinal and practical shortcomings of existing approaches to class arbitration, a pure arbitral paradigm combined with a voluntary due process protocol specific to class arbitration provides a more doctrinally sound and more practical option, consistent with the FAA and with the notions of efficiency so integral to arbitration. At the same time, such an approach vests responsibility for protection of absent class members with arbitration providers, who are closest to the process and best able to provide the appropriate protections. This approach achieves the most streamlined class arbitration process possible, while assuring the binding nature of arbitral awards.