

An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History

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In recent years, there has been an explosion of “class arbitrations”—arbitration proceedings in which the claimant purports to represent a class of absent individuals. In this Article, the authors examine the legislative history of the Federal Arbitration Act, and argue that, in enacting the FAA, Congress intended to open the door to non-judicial dispute resolution proceedings with particular fundamental characteristics, and that class arbitration proceedings do not have those characteristics. The authors argue that class arbitration is, therefore, a novel type of non-judicial dispute resolution neither reviewed nor approved by Congress, and that, as a result, this “uninvited guest” should be subjected to close legal and public-policy scrutiny. The authors also identify multiple areas of particular concern, including, for example, judicial review of class arbitration decisions under a traditional standard of review that is highly deferential to arbitrators, the effect of which is the quiet establishment of a forum that adjudicates disputes involving hundreds, thousands, or even tens of thousands of individuals in decisions that are effectively unreviewable.

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INTRODUCTION

Class arbitration is a swiftly growing phenomenon. In late 2003, the American Arbitration Association (“AAA”) introduced procedures for class arbitrations¹—arbitration proceedings in which the claimant purports to represent a class of similarly situated individuals. As of September 27, 2007, the AAA was administering more than 190 class arbitrations,² and from July 10, 2006 until September 27, 2007 alone, the number of AAA-administered class arbitrations increased by more than 50%.³ Although JAMS also administers class arbitrations, it does not publicly disclose the number of class arbitrations that it is administering.⁴

This new phenomenon is strange. Class actions have historically been the domain of the courts, which seems natural given the breadth, the stakes, the complexity, and the public importance of class action lawsuits. Nonetheless, while class arbitration has spawned its share of court disputes, those disputes have not put front and center the fundamental question of whether class arbitration should exist in the first place.⁵

1. American Arbitration Association, Supplementary Rules for Class Arbitrations (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936>; American Arbitration Association, AAA Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=25967>. (“On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*, the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations.”)

2. See American Arbitration Association, Searchable Class Action Docket, <http://www.adr.org/sp.asp?id=25562>.

3. See David S. Clancy, *Re-evaluating Bazzle: The Supreme Court’s Celebrated 2003 Decision Says Much Less About Class Action Arbitration than Many Assume*, 7 CLASS ACTION LITIG. REP. (BNA) 649, 649 & n.1 (2006) (noting that according to data from the AAA web site as of July 10, 2006, the AAA was administering “more than 120 purported class actions”).

4. See JAMS, <http://www.jamsadr.com/> (last visited Sept. 17, 2007).

5. The litigation associated with this development has generally assumed that class arbitration is proper. Within the context of that assumption, there has been extensive litigation about whether an arbitration clause can legally prohibit class arbitration. See, e.g., *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 103 (N.J. 2006) (invalidating and severing the part of the arbitration agreement prohibiting class arbitration and ruling that “the remainder of the arbitration agreement is enforceable”), *cert. denied*, 127 S. Ct. 2032 (2007). Now the courts are beginning to see disputes about the issue of so-called “clause construction”: essentially, whether an arbitration clause that says nothing about class arbitration should be read to permit it. See, e.g., *Stolt-Nielsen SA v. Animalfeeds Int’l*

Certainly, a private person or organization cannot determine the legal rights of absent individuals—much less hundreds or thousands of them—unless that person or organization operates under some appropriate legislative or judicial sanction. Does that sanction exist? Should it?

This Article does not undertake to answer such questions, but instead makes an observation that should prompt consideration of them, and that should also be relevant in answering them. The observation is this: Congress passed the Federal Arbitration Act (“FAA”)⁶ in 1925 in an atmosphere of “hostility” to arbitration.⁷ In doing so, Congress gave federal sanction to arbitration as a means of non-judicial dispute resolution.⁸ But the FAA’s legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding—apart from its non-judicial nature, it has little in common with what Congress approved in 1925.

In this sense, class arbitration is an uninvited guest. Whether this means that federal courts cannot—or should not—compel or confirm class arbitrations is an open issue; at minimum, though, it is a “strike against” class arbitration in any analysis of the phenomenon’s appropriateness, and it is also a substantial reason to subject class arbitration to meaningful legal and public-policy scrutiny.⁹

Corp., 435 F. Supp. 2d 382, 386 (S.D.N.Y. 2006) (reversing arbitrators’ decision that an arbitration clause containing no reference to class arbitration nonetheless permitted class arbitration).

6. The Federal Arbitration Act is codified as amended at 9 U.S.C. §§ 1–16 (2000 & Supp. V 2005). As initially enacted, the title of the act was the “United States Arbitration Act.” See Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886. When Congress codified the “United States Arbitration Act” as Title 9 of the United States Code in 1947, it did not include the section of the 1925 act that set forth its title. See Act of July 30, 1947, ch. 392, 61 Stat. 669. For decades, the 1925 act has been referred to as the “Federal Arbitration Act.”

7. See *infra* note 11.

8. Act of July 30, 1947, § 3, 61 Stat. at 670 (codified as amended at 9 U.S.C. § 3 (2000)).

9. The recent explosion of class arbitration activity was triggered by the 2003 U.S. Supreme Court decision *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality). In that case, the parties disputed whether the arbitration clause in their contract, which did not explicitly address class arbitration, permitted class arbitration, and the Supreme Court of South Carolina answered that question in the affirmative. See *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360–62 (S.C. 2002), *vacated*, 539 U.S. 444 (2003). A U.S. Supreme Court plurality vacated that ruling, deciding that the question should be resolved in the first instance by the arbitrator. *Bazzle*, 539 U.S. at 454 (plurality). That decision has been widely understood as an implicit endorsement of the practice of class arbitration. See, e.g., Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 187 (2006) (stating that the Court in *Bazzle* “implicitly permitted class arbitration”); Matthew Eisler, Note, *Difficult, Duplicative and Wasteful?: The NASD’s Prohibition of Class Action Arbitration in the Post-Bazzle Era*, 28 CARDOZO L. REV. 1891, 1907 (2007) (stating that the Court in *Bazzle* held that “class arbitration is permissible under the FAA, even where the agreements are silent” (emphasis added)). That reading of the decision is incorrect, see *infra* Part IV and generally Clancy, *supra* note 3, but the decision has nonetheless opened the floodgates to class arbitration, which—prior to *Bazzle*—was unusual. See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38 (2000) (stating, in part, “[o]nly a few courts in California and Pennsylvania have, at least in reported decisions, ordered or allowed arbitrations to proceed on a classwide basis, and several of these cases settled before classwide arbitration could actually take place. Moreover, this author has uncovered just one instance in which an arbitrator independently ordered a dispute to be resolved as a class action.” (footnotes omitted)). Indeed, in *Bazzle* itself, counsel for the plaintiffs, who advocated for class arbitration, could point to little historical basis for it. When Justice Ginsburg asked, “[i]s there any history... of this in South Carolina, or is this the first time? Have there been class proceedings

I. IN PASSING THE FAA IN 1925, CONGRESS OPENED THE DOOR TO A PARTICULAR TYPE OF NON-JUDICIAL DISPUTE RESOLUTION PROCEEDING

A. CONGRESS HAD TO BE PERSUADED TO SANCTION ARBITRATION IN AN ATMOSPHERE OF HISTORICAL “HOSTILITY” TO ARBITRATION

Until Congress passed the FAA in 1925,¹⁰ federal courts generally did not enforce agreements to arbitrate. As the U.S. Supreme Court put it in 1991, the FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts”¹¹

B. ARBITRATION WAS DESCRIBED TO CONGRESS AS A PARTICULAR TYPE OF PROCEEDING, WITH PARTICULAR DISTINCT ATTRIBUTES

In the FAA’s pre-enactment hearings, witnesses explained to Congress what arbitration was, and why it was an appropriate exception to the long-established norm of judicial dispute resolution. Arbitration was described as having particular distinct characteristics:

1. Arbitration Was Described as Prompt, Inexpensive, and Procedurally Streamlined

A prominent figure in the FAA’s pre-enactment hearings was Charles Bernheimer, who was then Chairman of the Arbitration Committee of the Chamber of Commerce of the State of New York. New York was on the arbitration vanguard. In 1920,

before arbitrators in the past?” plaintiffs’ counsel stated, “I’m not aware that there are, Justice Ginsburg. I’m not aware of any reported decisions on that. There have been class arbitrations in [California] for 20 years, and there have been a smattering of class arbitrations in other places” Transcript of Oral Argument at 42, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562.

10. See *supra* note 6.

11. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In 1924, the Chairman of the House Judiciary Committee, Representative George Graham of Pennsylvania, elaborated on the nature of the historical “hostility”: “[o]riginally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts.” 65 CONG. REC. 1931, 1931 (1924). Exemplar cases showing pre-FAA hostility to arbitration are *Hashell v. McClintic-Marshall Co.*, 289 F. 405, 409 (9th Cir. 1923) (refusing to enforce an arbitration provision because “[i]t was a settled rule of the common law that a general agreement to submit to arbitration did not oust the courts of jurisdiction, and that rule has been consistently adhered to by the federal courts”), *Jane Palmer v. French Republic*, 270 F. 609, 613 (S.D.N.Y. 1920) (refusing to enforce an arbitration clause in a contract between France and an American shipping company because “the arbitration clause cannot be availed of by or against [France] to oust our courts of jurisdiction”), *appeal dismissed sub nom. Fr. & Can. S.S. Co. v. French Republic*, 285 F. 290 (2d Cir. 1922), *cert. denied sub nom. Fr. & Can. Steamship Corp. v. French Republic*, 261 U.S. 615 (1923), and *Dickson Manufacturing Co. v. American Locomotive Co.*, 119 F. 488, 490 (C.C.M.D. Pa. 1902) (refusing to enforce an arbitration agreement after plaintiff revoked its consent to arbitration because “[a]s it is not in the power of parties to a contract to oust the courts of their jurisdiction, the whole clause for constituting the board of arbitrators necessarily fell when the plaintiff revoked the submission [to arbitrate]. In such a case as this even an express covenant not to revoke would not prevent a revocation. In its very nature, such an agreement for arbitration as this is revocable.”).

New York had enacted a statute similar to the proposed FAA,¹² and Bernheimer, an expert on New York's experience with arbitration, testified at two pre-enactment congressional hearings: a 1923 hearing of a subcommittee of the Senate Judiciary Committee, and a 1924 hearing of that same subcommittee joined by a subcommittee of the House Judiciary Committee.¹³

At the 1923 hearing, Bernheimer explained that "commercial bodies of the country" were pressing for the legislation because "inexpensive but dependable arbitration" was preferable to "costly, time-consuming and troublesome litigation."¹⁴ He added that "the merchant finds that arbitration is a very direct and expeditious method" because while "[o]ur courts are so clogged that it is sometimes years before they can reach a settlement, . . . arbitration makes a prompt settlement."¹⁵

Bernheimer testified again at the 1924 joint hearing. On that occasion, he stated that in contrast with "costly and ruinous" litigation, arbitration "saves time, saves trouble, [and] saves money."¹⁶

During those hearings, witnesses also explained *why* arbitration was prompt and inexpensive: because it was a procedurally streamlined—even "informal"—process. The draft FAA initially considered by Congress was prepared by the American Bar Association's Committee on Commerce, Trade, and Commercial Law.¹⁷ Julius Cohen, counsel to that committee, submitted to Congress a brief explaining that arbitration would avoid the "long delay usually incident to a proceeding at law, which arises" from "congestion" and "also frequently from preliminary motions and other steps taken by litigants."¹⁸ The brief also stated that the FAA would foster "informal and expert determination[s]" of disputes.¹⁹ Alexander Rose, a representative of the Arbitration Society of America, testified that arbitra-

12. 1920 N.Y. Laws 803–07.

13. This 1924 session was officially called the "Joint Hearings Before the Subcommittees of the Committees on the Judiciary," but for ease of reference it is referred to in this Article as the "1924 joint hearing" or the "1924 hearing." See *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 1 (1924) [hereinafter "1924 Joint Hearing"].

14. *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2–3 (1923) (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce) [hereinafter "1923 Hearing"]. This 1923 hearing was during the 67th Congress, while the FAA was passed by the 68th Congress. However, this 1923 hearing was before a subcommittee whose membership was precisely the same in the 68th Congress. Compare *id.* at 11 (listing members of 1923 subcommittee), with *1924 Joint Hearing*, *supra* note 13, at 11 (listing members of 1924 subcommittee).

15. *1923 Hearing*, *supra* note 14, at 5 (statement of Charles L. Bernheimer).

16. *1924 Joint Hearing*, *supra* note 13, at 6–7 (statement of Charles L. Bernheimer). Bernheimer was not talking about a *de minimis* reduction of expense. The arbitration he described to Congress was something so much cheaper than litigation that, in Bernheimer's view, its use would reduce the price of consumer goods: "[i]t adds to the cost to the consumer if the merchant has in the calculation of his prices to consider, in his overhead, possible litigation, possible claims." *1923 Hearing*, *supra* note 14, at 7 (statement of Charles L. Bernheimer). Further, Bernheimer stated, "if inexpensive but dependable arbitration were possible . . . the risk would be correspondingly smaller and the price made to conform therewith." *Id.* at 3.

17. *1923 Hearing*, *supra* note 14, at 2 (statement of Charles L. Bernheimer).

18. *1924 Joint Hearing*, *supra* note 13, at 34 (brief of Julius Henry Cohen, American Bar Association Committee on Commerce, Trade, and Commercial Law, and General Counsel, New York State Chamber of Commerce).

19. *Id.* at 36.

tion “leaves it to a man who is the choice of the disputants who can hear [the dispute] immediately and free from technicality.”²⁰ Bernheimer echoed the theme: he reported that George Washington himself put an arbitration clause in his will, calling for any “disputants” to select “three men” who would resolve any disagreements “*unfettered by law or legal constrictions.*”²¹

2. Arbitration Was Presented as “Face to Face” in Nature

Bernheimer also testified that arbitration is “face to face” in nature, and that as a result arbitration fosters an atmosphere of good will and compromise:

When the two parties to a dispute . . . are face to face they see, in the presence of a third man, their respective viewpoints better than they did before. . . . They are on speaking terms again and on terms of willingness to listen to reason, which they were not before, when they were separated and did not see each other face to face. It is a state of mind that is developed by this. There are a large percentage of disputes which, if you have a forum where they can be handled expeditiously in a human atmosphere, can be settled.²²

Similarly, Henry Eaton, of American Fruit Growers, Inc., explained that in drafting a wind-up contract between two banks “in which there was a large sum of money involved”:

[W]e put in a clause that in case of any other difficulties, if any difficulties should arise between them, they should select these two lawyers as arbitrators, and if they could not agree the third man should be chosen. The ink was hardly dry on that agreement before five questions arose which required arbitration, and we are now settling those five questions.²³

3. Arbitration Was Described as “Purely Voluntary”

Throughout the pre-enactment proceedings, elected representatives and witnesses alike reminded each other of arbitration’s “voluntary” nature—an important attribute given the then-existing longstanding “hostility” to arbitration agreements. For example:

- During the 1923 hearing, Senator Thomas J. Walsh of Montana stated, “[h]ere are two men who agree to an arbitration. They say if a dispute arises each man shall select an arbitrator, those two to select a third, and those arbitrators shall determine the matter. . . . What was the reason that [English chancery courts], who wanted to do what was right . . . said ‘We will not enforce an agreement of that kind?’”²⁴

20. *Id.* at 27 (statement of Alexander Rose, Arbitration Society of America).

21. 1923 *Hearing*, *supra* note 14, at 3 (emphasis added) (statement of Charles L. Bernheimer).

22. *Id.* at 5.

23. 1924 *Joint Hearing*, *supra* note 13, at 29 (statement of Henry Eaton, American Fruit Growers, Inc.).

24. 1923 *Hearing*, *supra* note 14, at 6 (question of Sen. Thomas J. Walsh of Montana, Subcomm. of S. Comm. on the Judiciary, to William Piatt, Chairman of the Am. Bar Ass’n Comm. on Commerce, Trade, and Commercial Law).

- At the 1924 joint hearing, Cohen, counsel to the American Bar Association committee that initially drafted the FAA, declared, “I think everybody today feels very strongly that the right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion.”²⁵
- Also at the 1924 joint hearing, Alexander Rose (the Arbitration Society of America representative) said that “[a]rbitration . . . does not by any means seek to supplant the courts . . . because after all it is a purely voluntary thing.”²⁶
- After the 1924 joint hearing, the Chairman of the House Judiciary Committee announced on the floor of the House: “[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to.”²⁷

C. WHEN IT ULTIMATELY PASSED THE FAA, CONGRESS UNDERSTOOD ARBITRATION TO BE THE PARTICULAR TYPE OF PROCEEDING THAT HAD BEEN DESCRIBED IN THE PRE-ENACTMENT HEARINGS

After the 1923 and 1924 hearings, the House Judiciary Committee and the Senate Judiciary Committee each generated a report recommending passage of the FAA. Those reports make clear that, when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined—in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings.

The House Judiciary Committee Report stated that “action should be taken at this time when there is so much agitation against the costliness and delays of litigation,” and that “these matters can be largely *eliminated* by agreements for arbitration . . .”²⁸

The Senate Judiciary Committee Report stated:

The Arbitration Society of America . . . has, through its arbitration tribunal, settled more than 500 cases during its less than two years of existence. In the *New York Times* of May 11 is found a brief resume of the work accomplished. We quote the following:

“In contrast with the long time required by courts with their congested calendars to settle a dispute, the records of the society show that the average arbitration

25. 1924 *Joint Hearing*, *supra* note 13, at 14 (statement of Julius Henry Cohen).

26. *Id.* at 26 (statement of Alexander Rose).

27. 65 CONG. REC. 1931, 1931 (1924). The Chairman was Representative George S. Graham of Pennsylvania.

28. H.R. REP. NO. 68-96, at 2 (1924) (emphasis added).

required but a single hearing and occupied but a few hours of the time of disputants, counsel and witnesses . . . ”²⁹

II. CLASS ARBITRATION IS NOT THE TYPE OF NON-JUDICIAL PROCEEDING THAT CONGRESS SANCTIONED IN 1925

Class arbitration is very different from the arbitration contemplated by Congress when Congress passed the FAA, and it is different in ways that plainly matter: its characteristics are the opposite of those that impressed Congress about arbitration.

First, class arbitration is not prompt, inexpensive, and streamlined. Class actions resolve the claims of many individuals, and, as such, they inherently require the staged and deliberate resolution and administration of complex issues.³⁰ Logically, that is just as true in an arbitration forum as it is in a court,³¹ and, in implicit recognition of that fact, the AAA’s class action rules—the “Supplementary Rules for Class Arbitrations”³²—borrow heavily from Federal Rule of Civil Procedure 23.³³

One might argue that Congress, when passing the FAA, was impressed by arbitration’s *relative* efficiency, and so the question is not whether class arbitration is fast, but instead whether it is faster than its judicial counterpart. But there is no good reason to expect a class arbitration to be faster—much less materially faster—than a traditional, judicial class action.³⁴ If one envisions the entire course of class action litigation—from commencement of the case through settlement or trial—it is difficult to identify any aspect of the proceeding that would *not* exist in an arbitration forum,³⁵ other than matters relating to management of a

29. S. REP. NO. 68-536, at 3 (1924) (quoting *500 Trade Cases Are Arbitrated*, N.Y. TIMES, May 11, 1924, at E3). In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985), the U.S. Supreme Court “reject[ed] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims,” but this statement can be properly understood only in context. The appellant had argued that the Court should disregard the parties’ agreement to arbitrate a claim because another claim was outside the scope of the arbitration agreement and would need to be resolved separately in court, and it would be inefficient to resolve one dispute in two forums. *Id.* at 216–17. The Supreme Court acknowledged that Congress, when passing the FAA, saw arbitration as an efficient method of dispute resolution, but found that Congress did not view the efficiency of dispute resolution as such an important overarching goal that it would somehow trump a valid agreement to arbitrate. *Id.* at 220. Stated differently, the Supreme Court held in *Dean Witter* that, in passing the FAA, Congress did not instruct federal courts confronted with an arbitration agreement to take whatever steps would lead to the most efficient overall result—instead, Congress instructed federal courts to enforce arbitration agreements, in part because Congress was impressed by arbitration’s efficiency. That holding is entirely in accord with the observations in this Article.

30. See, e.g., Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2017 (2007).

31. See generally *infra* Part IV.

32. American Arbitration Association, Supplementary Rules for Class Arbitrations (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936>.

33. See W. Mark Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 94 (2007) (noting that the AAA class arbitration rules “largely imitate federal class action practice”).

34. See Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs’ Lawyers (but Undermine Federal Arbitration Act) by Refusing To Enforce “No-Class Action” Clauses in Consumer Arbitration Agreements*, 58 BUS. LAW. 1289, 1299 n.57 (2003).

35. See Weidemaier, *supra* note 33, at 95.

jury, e.g., jury selection and the preparation and delivery of jury instructions (which do not always happen in a judicial class action anyway because some cases settle prior to trial and some cases are tried by the judge). The absence of those jury-management matters almost certainly does not make a class arbitration meaningfully speedier than a traditional class action because the time expended on such matters is significantly less than the time expended on everything else, i.e., the time devoted to class certification discovery, to briefing and argument with respect to whether a class should be certified, to merits discovery, and to resolving the case on the merits through a trial or hearing, with all the attendant work.³⁶ One might suggest that there are “procedural shortcuts” in arbitration, like sharply limited discovery and relaxed evidentiary standards, but as discussed in Part IV, it is a mistake to assume that such traditional shortcuts in arbitration are properly transferable to class arbitration.

Further, in class arbitration, the parties often need to address at least one significant issue that they do *not* need to address in court. The threshold issue in class arbitration is the so-called “clause construction” determination—whether the particular arbitration clause at issue should properly be construed as embodying an agreement to permit class action proceedings in arbitration.³⁷ This threshold question must be resolved before a motion for class certification can be filed, it exists only in class arbitration, and it adds a significant layer of complexity

36. Professor Sternlight in her 2000 article discusses various potential “concerns” about class arbitration—including that it could be “inefficient”—but then states that “several attorney participants in some of the few classwide arbitrations that have taken place to date did not tend to support those concerns.” Sternlight, *supra* note 9, at 50–52. However, the author’s own description of those interviews suggests that the interviewees were in fact quite equivocal about class arbitration. *See id.* at 45 n.168 (describing interviewee Steven G. Nelson as having stated that “he could imagine that arbitral class actions could sometimes be problematic,” interviewee Jon A. Schoenberger as having stated that the class arbitration “mechanism ‘doesn’t make a lot of sense,’” interviewee John F. Wells as “failing to set out efficiency advantages [of class arbitration],” and interviewee Steven G. Zieff as “failing to identify any major efficiency or other savings” in class arbitration).

Moreover, the isolated pre-*Bazze* arbitrations described in those interviews were not the kinds of arbitration proceedings that, post-*Bazze*, are now becoming prevalent. Those isolated pre-*Bazze* arbitrations were what Professor Sternlight referred to as “hybrid” class arbitrations, in which “courts [had] retained the responsibility for resolving all of the major class action issues” including class certification, class notice, settlement approval, and sometimes “all discovery issues and motions leading up to the point of trial.” *Id.* at 40–42. The class arbitration that is becoming prevalent now (post-*Bazze*) is not “hybrid” class arbitration. In current class arbitrations, there is virtually *no* court involvement, except upon review of the final award, and—possibly—upon interlocutory review of the clause construction decision and the class certification decision. *See, e.g.,* Thomas Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 FLA. ST. U. L. REV. 1005, 1031 (2004) (noting that AAA rules “place all the procedural responsibilities in the hands of the parties and the arbitrator”).

Further, some courts have rejected interlocutory appeals as inappropriate, *see, e.g.,* E & M Motels, Inc. v. Super 8 Motels, Inc., Civ. No. 05-234(MJD/RLE), 2006 WL 3610816, at *1 (D. Minn. Dec. 11, 2006), even though the AAA rules permit them. *See* American Arbitration Association, Supplementary Rules for Class Arbitrations, Rules 3 & 5(d) (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936>. Consequently, in the novel kind of class arbitration that is the subject of this Article, the entire case, including “all the major class action issues,” is most likely decided in the arbitration forum, and in that new and strange situation lies delay and cost.

37. *See* Burch, *supra* note 36, at 1033.

to such proceedings that is absent in a judicial class action.³⁸ As of January 2007, available information on the AAA's web site showed that, on average, "clause construction" decisions were issued approximately eight months after the filing of a class arbitration,³⁹ and that does not include the time expended on judicial review of the "clause construction" decision, an additional procedure for which the AAA rules provide an automatic stay of "at least" thirty days and which the arbitrator can extend at his or her discretion.⁴⁰

As to expense, there is no reason to expect class arbitration under the AAA rules to be significantly less expensive than its judicial counterpart.⁴¹ Assuming no procedural shortcuts, the process of resolving a class action in an arbitration forum is just as involved as resolving a class action in court. Class arbitrations also require the significant additional fees and costs of the arbitrators themselves, an expense that has no equivalent in a traditional, judicial class action. In effect, a class arbitration is a class action proceeding in which there may be multiple judges, each charging by the hour. With respect to a group of fifty-one arbitrators on the AAA's "Class Action Panel" identified by the AAA in late 2004 in connection with a purported class arbitration, the hourly billing rate of those arbitrators ranged from \$100 to \$600 per hour.⁴²

Second, a class arbitration does not have the "face to face" quality of the very different kind of proceeding described to Congress prior to the FAA's enactment. In class arbitrations, as in judicial class actions, every claimant other than the class representative (or representatives) is "absent" from the proceeding,⁴³ and the claimants' lawyers have a duty to advance zealously class members' interests⁴⁴ and have a personal interest in maximizing the suit's monetary recovery.⁴⁵ That type

38. *See id.*

39. The AAA's web site contains a "Searchable Class Action Docket" that lists each case "being administered under the American Arbitration Association's Supplementary Rules for Class Arbitration." For each case, the web site contains links to the arbitration demand and subsequent decisions. *See* American Arbitration Association, Searchable Class Action Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Sept. 17, 2007).

40. *See* American Arbitration Association, Supplementary Rules for Class Arbitrations, Rule 3 (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936> ("The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award."). Of course, obtaining a court ruling on the correctness of a "clause construction" decision will take more than thirty days. For example, the federal district court in *Stolt-Nielsen* vacated the arbitrators' clause construction decision more than six months after it was issued. *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006).

41. *See* Weidemaier, *supra* note 33, at 101.

42. This is based on one of the author's review of 51 curricula vitae which were provided by the AAA to the parties in the case.

43. *See* Buckner, *supra* note 9, at 196.

44. *See id.* at 199.

45. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (amending 28 U.S.C. by (1) adding a new Chapter 114—Class Actions, consisting of §§ 1711–15; (2) adding a new subsection (d) to § 1332; and (3) adding a new § 1453, Removal of Class Actions, to Chapter 89). The Act was enacted in part because of Congress's concern that in modern class actions "the lawyers who bring the lawsuits effectively control the litigation," that "their clients—the injured class members—typically are not consulted about what they wish to achieve in the litigation and how they wish it to proceed,"

of proceeding lacks the intangible benefits of a “face to face” proceeding—i.e., a “human atmosphere” that fosters a spirit of compromise.

Third, the kind of class arbitration that has spread in recent years is not the product of mutual agreement. In many cases, the arbitration clause in the contract has not specifically authorized class arbitration, and the defending party nonetheless has had class arbitration forced upon it, in effect as a penalty for writing a contract that is purportedly “ambiguous” as to the availability of class arbitration.⁴⁶ In other cases, defendants have been pulled into class arbitrations notwithstanding arbitration provisions specifically *prohibiting* class arbitration.⁴⁷ For a time, JAMS's policy was simply to disregard such prohibitions, thus making a mockery of any contention that the resulting extra-judicial proceeding was voluntary.⁴⁸ In one JAMS arbitration, the federal district court determined that a class action prohibition

and that ultimately “the clients are marginally relevant at best.” See S. REP. NO. 109-14, at 4 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 5. See also Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 26 (2002).

46. As of June 9, 2007, there were fifty-five clause construction decisions available on the AAA Searchable Class Action Docket. (This excludes clause construction awards where the outcome was stipulated or court-mandated.) Fifty-three of those fifty-five decisions involved arbitration agreements that either did not reference class arbitration or expressly prohibited it. And in fifty-one of those fifty-three decisions, the arbitrator nonetheless determined that class arbitration was contractually permissible, often on the theory that the agreement's “silence” as to class arbitration was an “ambiguity” that should be construed “against” the drafter, or on a strained reading of the agreement's terms (e.g., that a reference to arbitration of “any” dispute meant the parties had “agreed” to class arbitration). See American Arbitration Association, Searchable Class Action Docket, <http://www.adr.org/sp.asp?id=5562>. As the arbitrator in one of those decisions bluntly stated, “[i]f the person drafting the revised arbitration agreement form wanted to exclude class or representative arbitrations, he or she could have and should have said so, plainly.” *Harris v. Teletech Holdings, Inc.*, Clause Construction Order, AAA No. 11 160 02701 04, at 7 (Gary H. Barnes Dec. 16, 2005), <http://www.adr.org/si.asp?id=3823>. That analysis is flawed: an arbitration contract that says nothing about class arbitration should be deemed an agreement to the kind of arbitration that has prevailed since the FAA's enactment, i.e., an individual, non-class arbitration—not an agreement to a new and unusual form of arbitration that the parties almost certainly did not contemplate. During the *Bazzele* Supreme Court oral argument, Justice Scalia agreed: “to pluck out a right to a class action for no other reason than it is against the interests of the person who drafted the contract. It's weird.” Transcript of Oral Argument, *supra* note 9, at 32.

47. See, e.g., *Cooper v. QC Fin. Servs., Inc.*, No. CV 06-010-TUC-FRZ, 2007 WL 974100, at *20–21 (D. Ariz. Mar. 30, 2007) (invalidating a clause in an arbitration agreement prohibiting class arbitration, compelling arbitration, and “direct[ing] the parties to submit to the arbitrator the question whether Plaintiff satisfies the requisite criteria necessary for class arbitration”); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 255, 276–78 (Ill. 2006) (affirming intermediate appellate court decision invalidating and severing a clause in an arbitration agreement prohibiting class arbitration, the effect of which “[was] to stay Plaintiff's lawsuit while her class claim proceeded to arbitration”); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 103 (N.J. 2006) (invalidating and severing the portion of the arbitration agreement prohibiting class arbitration and otherwise enforcing the arbitration agreement), *cert. denied*, 127 S. Ct. 2032 (2007); *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Super. Ct.*, 34 Cal. Rptr. 3d 659, 669–71 (Ct. App. 2005) (invalidating a clause in an arbitration agreement prohibiting class arbitration and stating that trial court “should have accepted [plaintiffs'] showing” that “group arbitration would be a preferred means of dispute resolution”). *But see*, e.g., *Dale v. Comcast Corp.*, --E3d--, No. 06-15516, 2007 WL 2471222, at *7 (11th Cir. Sept. 4, 2007) (holding a contract clause that prohibits class arbitration unconscionable and finding the entire arbitration clause unenforceable because the class action waiver could not be severed from the arbitration clause).

48. Press Release, JAMS, JAMS Takes Steps To Ensure Fairness in Consumer Arbitrations (Nov. 12, 2004), http://web.archive.org/web/20041209010914/www.jamsadr.com/press/show_release.

was enforceable, but the arbitrator subsequently declared that determination “of no moment.”⁴⁹ The arbitrator relented only when the district court stepped in and “strictly enjoin[ed] the Plaintiff from pursuing her claims in an arbitration proceeding on a class-wide basis.”⁵⁰

In sum, in enacting the FAA, Congress envisioned a particular kind of non-judicial dispute resolution proceeding, and class arbitration is a very different kind of proceeding.

III. HISTORICAL CONTEXT REINFORCES THE LEGISLATIVE HISTORY

As shown, the legislative history of the FAA indicates that, in passing the FAA, Congress was authorizing something distinctly *different* from class arbitration. The historical context in which the FAA was passed reinforces that conclusion: it indicates that Congress almost certainly did not even imagine arbitration as a means of simultaneously resolving the claims of a class of “absent” claimants, much less consciously authorize arbitration as a means of resolving such claims.

When the FAA was passed, the possibility of an adjudication binding on absent parties was uncertain, even in the courts. At that time, Rule 23 of the Federal Rules of Civil Procedure did not exist.⁵¹ Its closest counterpart was Equity Rule 38, which was fundamentally different from Rule 23. Equity Rule 38 governed proceedings solely “in equity”—it did not govern actions at law, i.e., those traditionally associated with monetary relief.⁵² In addition, Equity Rule 38 was silent on whether a “class” judgment would actually bind absent class members, an issue as to which there was uncertainty in the federal courts until 1966, long after the 1925 passage of the FAA.⁵³

asp?id=187(“JAMS unequivocally takes the position that it is inappropriate for a company to restrict the right of a consumer to be a member of a class action arbitration or to initiate a class action arbitration. The implementation of this policy means that JAMS will not enforce these clauses in class action arbitrations and will require that they be waived in individual cases.”).

After a controversy, JAMS withdrew the policy on March 10, 2005 and “reaffirm[ed] that JAMS and its arbitrators will always apply the law on a case by case basis in each jurisdiction.” Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2005), http://www.jamsadr.com/press/show_release.asp?id=198.

49. *Gipson v. Cross Country Bank*, Order Respecting Issue Preclusion and Scheduling Order No. 3, J.A.M.S. No. 062104A, at 6–7 (F. Carlton King, Jr. Oct. 5, 2004).

50. *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1289 (M.D. Ala. 2005).

51. The Federal Rules of Civil Procedure themselves did not become effective until September 1938. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1004 (3d ed. 2002); see also FED. R. CIV. P. 86(a) (“Effective Date of Original Rules”).

52. FLEMING JAMES, JR. & GEOFFREY L. HAZARD, *CIVIL PROCEDURE* 26 (3d ed. 1985).

53. Equity Rule 38 was enacted in 1912. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 485 (2003). It replaced Equity Rule 48, which had been in place since 1842. *Id.* at 484–85. Equity Rule 48 stated explicitly that class judgments were not binding on absent class members. See *id.* Equity Rule 38 dropped that statement, but the rule proceeded to say nothing on whether class judgments were binding on absent class members one way or the other—a silence that led to years of uncertainty on that issue. Compare *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) (“If the decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree.”), with *Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) (finding class judgment not binding on members of class of defendants, and dismissing Equity Rule 38

Nor did Congress expect that arbitration proceedings would generally follow and reflect developments in the Federal Rules of Civil Procedure. Again, when the FAA was passed, the Federal Rules of Civil Procedure did not even exist.⁵⁴ While other procedural rules existed in the 1920s (separate ones for law and equity proceedings), legislative history suggests that, to Congress, the point of arbitration was to bypass such rules, not to create an additional forum in which they would be applied. In 1924, after arbitration was described as “unfettered by law or legal constructions,”⁵⁵ the House proclaimed that the “costliness” and “delays of litigation” could be largely “eliminated” by arbitration,⁵⁶ and the Senate quoted a report stating that the “average” arbitration “occupied but a few hours” and “a single hearing.”⁵⁷

In sum, when it passed the FAA, Congress did not expect that arbitrators would adjudicate anything like the modern class action, and it does not appear that Congress contemplated arbitration proceedings being governed even by the then-existing procedural rules, much less by subsequently promulgated ones like Rule 23.

IV. THE VALIDITY OF CLASS ARBITRATION IS AN OPEN QUESTION—AND ONE THAT SHOULD BE ADDRESSED

The just-addressed legislative history indicates that class arbitration has not been legislatively validated. Class arbitration has not been judicially validated, either. And it is by no means clear that class arbitration *should* be validated, by Congress or by the courts.

The U.S. Supreme Court's closest encounter with class arbitration was in *Green Tree Financial Corp. v. Bazzle*. There is a common misconception that, in *Bazzle*, the Supreme Court endorsed the practice of class arbitration.⁵⁸ Close inspection of *Bazzle* shows why that perception is wrong.

Bazzle involved two South Carolina state court lawsuits brought by home-loan borrowers against Green Tree Financial Corp. (“Green Tree”).⁵⁹ In both suits,

as applicable to a narrow situation in which a court is “render[ing] a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court”). As Professors Wright and Miller put it, “the confusion over the binding effect of class actions in the federal courts continued even after the [1938] adoption of the federal rules because the drafters of the original rules chose not to deal with the question in the text of Rule 23. It was not until the 1966 amendment that some direct guidance was offered in [Rule 23] itself” 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (3d ed. 2005). The pre-1966 version of Rule 23 was a “substantial restatement” of the already-confusing Equity Rules. FED. R. CIV. P. 23 (Advisory Committee Notes, 1937 Adoption).

54. See *supra* note 51.

55. 1923 *Hearing*, *supra* note 14, at 3 (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce).

56. H.R. REP. NO. 68-96, at 2 (1924).

57. S. REP. NO. 68-569, at 3 (1924).

58. See, e.g., Buckner, *supra* note 9, at 187 (stating that the Court in *Bazzle* “implicitly permitted class arbitration”); Eisler, *supra* note 9, at 1907 (stating that the Court in *Bazzle* held that “class arbitration is permissible under the FAA, even where the agreements are silent”).

59. 539 U.S. 444, 449 (2003) (plurality). In both actions plaintiffs alleged violation of the South Carolina Consumer Protection Code in connection with Green Tree's alleged failure to provide a form notifying customers of their right to be represented by their own attorneys and/or insurance agents. *Id.* at 448.

Green Tree successfully moved to compel arbitration on the basis of an arbitration clause in the loan agreements, and then found itself defending a class action in arbitration.⁶⁰ In each case, the trial court confirmed a multimillion dollar class judgment against Green Tree awarded in arbitration.⁶¹ The Supreme Court of South Carolina affirmed both judgments, holding that the arbitration provisions in the loan agreements were “*silent* regarding class-wide arbitration” and that, under South Carolina law, they permitted class arbitration: “[w]e adopt the approach taken by the California courts . . . and hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice.”⁶²

The U.S. Supreme Court vacated the Supreme Court of South Carolina’s decision: on the basis of the particular facts at issue, the U.S. Supreme Court remanded the cases to the arbitrator “so that the arbitrator,” instead of the courts, “[could] decide the question of contract interpretation,” i.e., the question of whether the applicable arbitration provisions permitted class arbitration.⁶³

In doing so, the U.S. Supreme Court did not explicitly validate class arbitration: the Court simply did not address the legal validity of class arbitration. Nor did the Supreme Court implicitly validate class arbitration. The Court merely asked the arbitrator to decide whether the parties had agreed to class arbitration.⁶⁴ Because the arbitrator could have answered that question in the negative, the Supreme Court did not need to go so far as to resolve the validity of class arbitration. The Court did not need to resolve that issue for another fundamental reason: no party challenged the validity of class arbitration in the first place. The plaintiffs affirmatively wanted class arbitration, and defendant Green Tree conceded “that if the parties agreed, yes, you could have a class action in arbitration.”⁶⁵

The Supreme Court has otherwise addressed class arbitration only obliquely, never declaring it valid or invalid, in any context. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, the plaintiff argued that the New York Stock Exchange (“NYSE”) should not arbitrate his Age Discrimination in Employment Act (“ADEA”) claim, in part because “arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable

60. In one action, the trial court simultaneously certified a class and compelled arbitration. *Bazzle*, 539 U.S. at 449. In the other action, the trial court compelled arbitration (after being instructed to do so by an appellate court) and the arbitrator certified a class. *Id.*

61. *Id.* The same arbitrator decided both actions. *Id.*

62. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 359–60 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

63. *Bazzle*, 539 U.S. at 454 (plurality).

64. *Id.*

65. Transcript of Oral Argument, *supra* note 9, at 12–13 (question from Justice Ginsburg, to which Green Tree’s counsel answered, “[y]es, although, Justice Ginsburg, there is not a single example I could identify of any parties ever agreeing to go into a class action through arbitration”).

As to *Bazzle*, see also Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 266 (*Bazzle* “left unanswered . . . whether class-wide arbitration should be permissible at all”), and Clancy, *supra* note 3, at 652–54 (addressing the widespread misinterpretation of *Bazzle*).

relief and class actions.⁶⁶ The Court rejected that argument, but without deciding that class arbitration is permissible.⁶⁷ The Court noted that the then-existing NYSE rules did not foreclose equitable relief and “provide[d] for collective proceedings,”⁶⁸ but then made clear that the viability of collective or class arbitration proceedings was not an issue it needed to reach:

[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred. Finally, it should be remembered that arbitration agreements [between employer and employee] will not preclude the *EEOC* [which can enforce the ADEA on behalf of private parties] from bringing actions seeking class-wide and equitable relief.⁶⁹

In a 2006 article, Professor Maureen Weston stated that in a case preceding *Gilmer—Southland Corp. v. Keating*⁷⁰—the U.S. Supreme Court “implicitly acknowledged that class actions could be brought in arbitration.”⁷¹ If Professor Weston meant that the Court in *Southland Corp.* implicitly acknowledged that an FAA-governed matter could *properly* be pursued as a class arbitration, the basis for that reading of *Southland Corp.* is not stated in Professor Weston’s article, and it is belied by the text of the decision itself.

In *Southland Corp.*, a 7-Eleven franchisee brought a purported class action suit against 7-Eleven franchisor Southland Corporation, asserting common law claims and a statutory claim under the California Franchise Investment Law.⁷² Southland moved to compel arbitration, plaintiff moved for class certification, and when the dust settled after the first round of litigation, the Supreme Court of California ruled that the statutory claim was exempt from arbitration, and that, while the common law claims were arbitrable, the trial court would need to consider whether arbitration of those claims could proceed on a classwide basis over Southland’s objection.⁷³

66. 500 U.S. 20, 32 (1991).

67. *See id.*

68. *Id.* For this proposition, the Supreme Court cited NYSE rule 612(d). *Gilmer*, 500 U.S. at 32. In 1991—as is the case now—NYSE rule 612(d) did not provide for a “representative” claimant to seek relief on behalf of absent claimants; it instead provided for “joining” or “consolidation” of “directly related” arbitration claims. In 1992, the New York Stock Exchange removed any doubt about the availability of class arbitration with NYSE rule 600(d): “A claim submitted as a class action shall not be eligible for arbitration” *See* Order Approving Proposed Rule Change Relating to Amendments to Rules 600 (Arbitration), 607 (Designation of Number of Arbitrators), 621 (Interpretation of the Provisions of the Code and Enforcement of Arbitrator(s) Rulings) and 636 (Requirements When Using Pre-Dispute Arbitration Agreements with Customers), Exchange Act Release No. 31907, 52 SEC Docket 1160 (Aug. 26, 1992).

69. *Gilmer*, 500 U.S. at 32 (second alteration in original) (internal citation and quotation marks omitted).

70. 465 U.S. 1 (1984).

71. Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1733 n.77 (2006).

72. 465 U.S. at 4–5.

73. *Keating v. Super. Ct.*, 645 P.2d 1192, 1198, 1210 (Cal. 1982), *rev’d in part, dismissed in part sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

Southland brought that Supreme Court of California decision to the U.S. Supreme Court for review, and there, Southland prevailed on one of its arguments: the U.S. Supreme Court agreed that the statutory claim was subject to arbitration, finding that the Supreme Court of California's contrary conclusion conflicted with the FAA and the Supremacy Clause of the U.S. Constitution.⁷⁴ However, Southland also challenged the propriety of class arbitration,⁷⁵ and that challenge failed. Importantly, though, the Supreme Court did not consider and reject that challenge on the merits. Instead, the Supreme Court simply declined to address it. The Supreme Court noted that in the state court proceedings Southland had never challenged the propriety of class arbitration "*on federal grounds*," and ruled that, therefore, "this Court is without jurisdiction to resolve this question"⁷⁶ and "no decision by this Court would be appropriate at this time."⁷⁷

The inherent validity of class arbitration is therefore an open question, and it is also a question that should be seriously explored. By their nature, class actions have substantial public importance and implicate weighty issues of due process, because, in a single proceeding, they definitively adjudicate the rights of potentially thousands or hundreds of thousands of individuals (or more), with concomitant high stakes for both sides.⁷⁸ Administration of such proceedings in arbitration raises concerns in multiple areas, including these five:

i. *Adequacy of Judicial Review*. Review of an arbitration decision is severely circumscribed. In a recent report, the Committee on Capital Markets Regulation went so far as to say that in arbitration "there is no appeal."⁷⁹ While that is acceptable in the kind of case that has traditionally been arbitrated, it is very troubling in the context of a class action. It means that cases involving the rights of potentially thousands or hundreds of thousands of individuals and potentially staggering judgments could proceed from start to finish without any meaningful involvement from the judiciary—the body that has historically been entrusted to protect the due process rights of both class members and defendants, with multiple levels of review.⁸⁰

74. *Southland Corp.*, 465 U.S. at 15–16.

75. *Id.* at 3–5.

76. *Id.* at 9.

77. *Id.* at 15–17.

78. See Class Action Fairness Act of 2005, *supra* note 45, § 2, 119 Stat. at 4–5 (setting forth purposes of the act which include "providing for Federal court consideration of interstate cases of national importance").

79. COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 18 (Nov. 30, 2006), available at http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf. "The Committee on Capital Markets Regulation is an independent, bipartisan committee composed of 22 corporate and financial leaders from the investor community, business, finance, law, accounting, and academia." *Id.* at vii. Its members include former Secretary of Commerce Donald Evans and Glenn Hubbard, the Dean of the Columbia Business School. *Id.* at i. For further discussion of the limited review of arbitral decisions, see Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1, 95–96 & n.542 (2004) (noting that the review of arbitrator decisions "has been described as among the 'narrowest known to the law'").

80. Courts are reviewing arbitrators' class certification awards under the same extremely deferential standard of review traditionally used in reviewing other arbitration awards. It is unsurprising, then,

This problem has been acknowledged by other authors. For example, in his 2006 BNA's *Class Action Litigation Report* article, *Consumer Arbitration: A Class Action Panacea?*, Edward Bilich provides an overview of developments concerning "class-arbitration prohibition provisions"—that is, clauses in arbitration contracts that prohibit class arbitration.⁸¹ As part of that overview, he argues that class arbitration lacks sufficient due process protections because "courts traditionally apply an extremely lenient standard of review to arbitral awards, with a presumption that the arbitrator's ruling is correct."⁸² He writes that "[i]f a court reviewing an arbitral decision cannot meaningfully review the legal and factual merits of the arbitrator's class certification analysis, it cannot provide any assurance that class treatment of the dispute would meet basic notions of fundamental legal fairness."⁸³ Similarly, in a 2003 article in *The Business Lawyer*, Alan Kaplinsky and Mark Levin considered several California rulings that invalidated class action waivers in arbitration agreements.⁸⁴ As part of their analysis, the authors noted that class arbitration is as high risk as class action litigation, with "millions of dollars and perhaps the company's future . . . at risk,"⁸⁵ and that without "the safeguards litigation provides[,] . . . the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option."⁸⁶

Disturbingly, plaintiffs' lawyer Gary Jackson actually rejoices at this problem. In materials prepared for the 2006 Annual Convention of the Association of Trial Lawyers of America, Jackson commends class arbitration to other plaintiffs' lawyers because "[f]irst and foremost, a decision by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable . . . a feature which terrifies corporate defendants."⁸⁷ Jackson disregards that this "feature" should concern *all* parties to a class arbitration. For example, a losing party in a class proceeding would want—and should have—a meaningful right of appeal, whether that losing party is a corporate defendant or an absent class member.⁸⁸

that through September 28, 2007, no court has reversed an arbitrator's decision to certify a class. See, e.g., *Sutter v. Oxford Health Plans LLC*, 227 F. App'x 135, 137 (3d Cir. 2007) (affirming the district court's finding that an arbitrator's decision to certify a class was not made in "manifest disregard of the law" and rejecting appellant's argument for a standard of review less deferential to the arbitrator in the class certification context); *Long John Silver's Rests., Inc. v. Cole*, 409 F. Supp. 2d 682, 684 (D.S.C. 2006) (finding that an arbitrator's class certification decision was not made in "manifest disregard of the law," stating that "review of an arbitration award is among the narrowest known to the law," and, as in *Sutter*, refusing to apply a less deferential standard of review to a class certification decision (internal quotation marks and citation omitted)).

81. Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea*, 7 CLASS ACTION LITIG. REP. (BNA) 768, 770 (2006).

82. *Id.* at 771.

83. *Id.*

84. Kaplinsky & Levin, *supra* note 34, at 1289–91.

85. *Id.* at 1299.

86. *Id.*

87. Gary W. Jackson, *Prosecuting Class Actions in Arbitration*, 2006 ATLA ANN. CONVENTION REFERENCE MATERIALS 829.

88. See Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2–2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1592 (1991).

ii. *Right to Jury Trial*. There is no jury in class arbitration. That could be a constitutional violation unless the right to a jury has been properly waived, and the existence of such a waiver is at best questionable in situations in which class arbitration has been, in effect, imposed on a party.⁸⁹ For example, consider a situation in which a defendant is compelled to arbitrate despite an arbitration clause that says nothing about class arbitration,⁹⁰ or an arbitration clause that explicitly prohibits class arbitration.⁹¹ In those scenarios, the defendant is denied jury resolution of a significant dispute without having waived the right to a jury trial in the arbitration clause (or anywhere else).

A proponent of class arbitration might say that the waiver was “implicit” in the arbitration clause, but such an argument is flawed. Parties often enter into arbitration agreements on the basis of an understanding that they are trading off certain otherwise-available procedures and protections (such as the right to a jury trial) to obtain the efficient resolution of a modest, individual dispute.⁹² In the class arbitration context, however, it would make no sense to find this kind of “implicit” waiver of basic procedural protections—class arbitration is a proceeding of profoundly different substance and scope, in which many of millions of dollars and the company’s future could be at stake.⁹³

iii. *Arbitrator Fees and Costs*. As Alan Kaplinsky and Mark Levin observed in their May 2003 article in *The Business Lawyer*, “[c]lass arbitration . . . would require extensive adjudication to ascertain and protect the rights of absent class members—and thereby forfeit the speed and efficiency that individual arbitration offers.”⁹⁴ Consequently, a class arbitration will necessarily involve substantial arbitrator fees.⁹⁵ Tellingly, in his 2006 article commending class arbitration to fellow plaintiffs’ lawyers, Gary Jackson acknowledges that AAA class action arbitrators

89. See Weston, *supra* note 71, at 1744.

90. This has happened time and time again in AAA proceedings. See *supra* note 46.

91. See *supra* note 47.

92. In *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2005) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)), the U.S. Court of Appeals for the Fifth Circuit stated:

As the Supreme Court has explained, the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration’s ability to offer “simplicity, informality, and expedition,” characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.

93. “Parties, particularly businesses, may be willing to forego the safeguards litigation provides in favor of the speed and lower expense of arbitration when the stakes are not overwhelming, but decide that litigation in court is worth the expense and delay when millions of dollars and perhaps the company’s future is at risk. If the risk is limited to a single customer’s contract, arbitration is an attractive alternative. When the customer seeks to champion the cause of hundreds or thousands of others as well and to recover millions of dollars in damages or restitution, the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option.” Kaplinsky & Levin, *supra* note 34, at 1299 (citing, *inter alia*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that class certification may require defendants to “stake their companies on the outcome of a single jury trial”).

94. Kaplinsky & Levin, *supra* note 34, at 1299 n.57.

95. See, e.g., Weidemaier, *supra* note 33, at 101 (stating that “current AAA rules do little to make [class arbitration] efficient or cost effective”); Debra S. Neveu, *An Informational Note on Aggregation Devices in Arbitration*, 10 WORLD ARB. & MEDIATION REP. 224, 229 (1999) (stating that an argument

have “comparatively high hourly rates,” and that the “fees assessed can be very substantial.”⁹⁶ Consider, too, that parties could want multiple arbitrators for a class arbitration, to avoid staking such a substantial matter on the judgments of a single person—yet securing a panel of arbitrators could potentially triple the overall hourly arbitrator fee.

Substantial arbitrator fees are a cost that has no equivalent in traditional litigation, and that cost could be a serious problem. For example, cost considerations could impair parties' ability to avail themselves of important procedures, such as individualized determinations on one or more issues. Issues concerning cost could otherwise impair the due process afforded in the proceeding by causing the arbitrator to spend less time on the matter than is warranted or to forego certain proceedings because of his or her own concerns—or the arbitration forum's institutional concerns—about cost to the parties.⁹⁷

An AAA arbitrator recently raised a related issue: he stated that in a class arbitration “determinations of jurisdiction and arbitrability are fraught with financial conflicts of interest for the arbitrator.”⁹⁸ While the AAA arbitrator did not elaborate, presumably he was troubled by the possibility that, in a class arbitration proceeding, an arbitrator's decision on important issues may substantially affect his or her compensation—for example, a decision to certify a class almost certainly would substantially prolong the time needed to resolve the case, and therefore increase the arbitrator's compensation for the case. There are countervailing factors, of course, including the ethics and professionalism of the arbitrators themselves,⁹⁹

against class arbitration is “the creation of more delay and costs, rather than enhanced efficiencies, in trying to superimpose a complex, rule-based class action procedure, designed to involve rigorous and extensive court supervision, over an out-of-court process specifically designed to avoid lengthy and invasive court procedures”).

96. Jackson, *supra* note 87. For further discussion of Jackson's comments, see the text accompanying note 87.

97. Interestingly, in its class action rules themselves, the AAA may have made at least one potentially prejudicial concession to cost. Under the AAA's class action rules, class actions are resolved by one arbitrator, absent an agreement to the contrary by the parties or a case-specific determination by the AAA that more than one arbitrator is warranted. See American Arbitration Association, Supplementary Rules for Class Arbitrations, Rule 2(b) (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936>. A one-arbitrator default for class action cases is odd, particularly given that the AAA's securities arbitration rules provide for three arbitrators in cases in which the claim “exceeds \$100,000,” American Arbitration Association, Securities Arbitration Supplementary Procedures, Rule 4, <http://www.adr.org/sp.asp?id=22009>, and that the AAA's complex commercial disputes rules provide for three arbitrators in cases in which the claim “involves at least \$1,000,000,” American Arbitration Association, Large, Complex Commercial Disputes Procedures, Rule L-2, <http://www.adr.org/sp.asp?id=22114>. Even though the AAA has previously determined that a panel is appropriate in substantial matters, maybe the AAA is concerned that the cost of a three-arbitrator panel in a class action would make the AAA an unattractive class action forum not just for defendants but also for plaintiffs—and so it has dispensed with a three-member panel as the default in class action cases.

98. *Hobby v. Snap-on Tools Co. LLC*, Preliminary Award on Hobby's Request To Allow Class Action (Clause Construction Award), AAA No. 11 114 01884 04, at 12 n.5 (Joseph M. Matthews June 8, 2005), <http://www.adr.org/si.asp?id=3695>.

99. See Burch, *supra* note 36, at 1034 (recognizing that “[a]rbitrators may have a financial incentive to certify a class because the longer the arbitrator spends on the case the more money the arbitrator receives,” but stating that “arbitration institutions, and arbitrators as well, have incredibly strong financial incentives to avoid any appearance of bias”). See also Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, DISP. RESOL. J., Feb.–Apr. 2004, at 1.

and the financial incentives of the arbitrators and the arbitration forums to appear unbiased in order to attract continued business.¹⁰⁰ Still, judges are simply not faced with that potential financial conflict of interest, and so this is another area of concern unique to class arbitration that warrants examination.

iv. *Adequacy of Resources for Individualized Determinations.* Arbitrators do not have access to certain resources that are routinely available to federal court judges such as law clerks, magistrate judges, and special masters. For particular cases, arbitrators may be able to marshal such resources, e.g., by utilizing the assistance of law firm associates and staff, but doing so raises the cost of the arbitration, which, as discussed above, is problematic.¹⁰¹

This issue is also significant because preserving due process and other basic rights in a class action may require complex and elaborate case management techniques such as the creation and separate adjudication of subclasses, or trials specific to individual class members on some or all issues. For example, in *Cimino v. Raymark Industries, Inc.*,¹⁰² the U.S. Court of Appeals for the Fifth Circuit reversed the judgment of the district court for certain class plaintiffs, finding that the district court's class action trial plan was not sufficiently individualized; that is, in the interest of making efficient, collective rulings, the court created a trial plan that glossed over person-by-person variances and thus impacted the defendant's right to have a jury determine the "distinct and separable issues of the actual damages of each of the extrapolation plaintiffs."¹⁰³ The trial plan utilized by the district court involved "160 sample cases" and "extrapolation" of the results in those cases to "categories" of remaining class members.¹⁰⁴ Needless to say, a *sufficiently* individualized trial plan would have been an extraordinarily elaborate and resource-intensive process. In a situation such as a class arbitration where those resources are unavailable, or are difficult and costly to obtain, there will naturally be greater pressure to abbreviate the proceedings, and that pressure could ultimately impair the quality of justice afforded all parties, e.g., by increasing the risk of "rough-justice" proceedings and rulings pursuant to which there is over-recovery or under-recovery by individual class members or the class as a whole.¹⁰⁵

In her article *Due Process in Class Arbitration*, Professor Carole J. Buckner argues that class actions are more likely to be accorded adequate attention by arbitrators than by courts, citing the courts' "crowded dockets" and their purported tendency to "rubber stamp[] important due process protections."¹⁰⁶ Greater involvement

100. See Burch, *supra* note 36, at 1034.

101. See *supra* notes 94–100 and accompanying text.

102. 151 F3d 297 (5th Cir. 1998).

103. See *id.* at 320–21.

104. *Id.* at 300. See also, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F2d 1005, 1018 n.23 (2d Cir. 1973) (finding that a nationwide class was improperly certified in part because the damages of each class member would need to be individually determined and "[t]he administrative problems posed by this action [would] frustrate any effort to provide the individual class members with compensation for the alleged injuries"), *vacated on other grounds*, 417 U.S. 156 (1974).

105. See *infra* notes 110–21 and accompanying text.

106. Buckner, *supra* note 9, at 238.

by judges in class action litigation may well be desirable, but the question is not whether the courts need to improve in this regard, but instead whether, in this regard, arbitration will be equivalent or superior to litigation—and Professor Buckner's support for that critical point is unpersuasive. For example, she cites U.S. Supreme Court decisions in which the Court held that securities, RICO, and antitrust claims are arbitrable.¹⁰⁷ In the cited decisions, though, the Supreme Court did not rule that *classwide* claims of that nature are arbitrable,¹⁰⁸ and so these decisions show only that arbitration has been deemed an appropriate forum for the resolution of non-class cases involving potentially complex underlying subject matters. That does little to prove that arbitration is an appropriate forum for matters that are not only substantively complex, but are also *procedurally* complex and extraordinarily time- and resource-intensive.¹⁰⁹

v. *Other Procedural Protections*. There is cause for concern over whether arbitrators and arbitration forums will protect the due process rights of the parties to a class arbitration more generally. Society has become used to the idea that in arbitration, parties are entitled to a diluted form of due process, and, as a result, procedural shortcuts (e.g., sharply limited discovery and relaxed evidentiary standards) are generally seen as an inherent part of—and often the very point

107. *Id.* at 238 n.361 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985)).

108. *Rodriguez de Quijas*, 490 U.S. at 479–84, 485–86 (affirming Fifth Circuit ruling that claims under § 12(2) of the Securities Act of 1933 are arbitrable; no discussion of classwide claims; the Fifth Circuit's decision itself, *Rodriguez de Quijas v. Shearson/Lehman Brothers, Inc.*, 845 F.2d 1296, 1296–97 (5th Cir. 1988), shows that the context was “consolidated cases” brought by several “individual investors”); *McMahon*, 482 U.S. at 238, 242 (rejecting argument of a husband and wife that their section 10(b) and RICO claims against Shearson were nonarbitrable); *Mitsubishi Motors*, 473 U.S. at 628–40 (rejecting automobile distributor's argument that its Sherman Act antitrust counterclaim against Mitsubishi was not arbitrable).

109. Professor Buckner also cites a “study finding that courts do not ‘give adequacy of representation the attention that it requires.’” Buckner, *supra* note 9, at 238 n.358. Here too, this is merely criticism of the attention courts give to class actions, which, right or wrong, does not amount to proof that class actions will be accorded *greater* attention and resources by arbitrators. For example, the study cited by Professor Buckner collects written class certification decisions, and then criticizes them for being “conclusory” on Rule 23's adequacy-of-representation requirement. See Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's “Adequacy of Representation” Requirement*, 2004 MICH. ST. L. REV. 671, 673–74. Professor Buckner seems to assume that adequacy of representation will be addressed in a more substantial way in arbitration, but there is no basis for that assumption. Indeed, under JAMS's class action rules, an arbitrator may make a class certification ruling without any written decision at all. See JAMS, JAMS Class Action Procedures, Rule 3(c) (February 2005), http://www.jamsadr.com/rules/class_action.asp. (“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 . . .” (emphasis added)), The AAA's class action rules do require a written class certification decision, see American Arbitration Association, Supplementary Rules for Class Arbitrations, Rule 5(a) (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936>, (“The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award . . .”), but there is no reason to believe that the quality of those decisions will generally be superior to the quality of the class-certification decisions issued by courts—particularly given that arbitrators are used to deciding issues without any written opinion at all, that they operate without law clerks, magistrates, and special masters, and that they know that their decisions are effectively unreviewable.

of—arbitration.¹¹⁰ There is a good reason for this belief: as noted above, parties consciously and reasonably *agree* to such streamlined proceedings for the resolution of modest, individual disputes.¹¹¹ But arbitrators, arbitration forums, and plaintiffs' lawyers may lose sight of that reason, and they may assume that procedural shortcuts common in individual arbitration are also appropriate in the very different context of class arbitration.¹¹²

Professor W. Mark C. Weidemaier, in a 2007 article in the *Arizona Law Review*, makes just that wrongheaded assumption. Professor Weidemaier commends class arbitration for the very reason that it will permit procedural shortcuts that would not be allowed in court.¹¹³ The author states that “many of the constraints that shape class action practice in court do not apply to arbitration,” and that arbitrators will therefore be able to dispense with time-consuming processes that would be necessary in court.¹¹⁴ As an example, he suggests that an arbitrator could follow an abbreviated trial plan whereby an “average loss” is determined through certain “representative” hearings, and then each class member is awarded that same “average loss.”¹¹⁵ The author admits that this is a type of abbreviated trial plan that has been “proposed” but “rarely accepted” in court.¹¹⁶

110. For example, in *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063–64 (9th Cir. 1991), Cunard challenged an arbitrator's \$1,000,000 punitive damages award, arguing that it violated due process because, *inter alia*, “the absence of rules of evidence [in arbitration] create[s] a substantial likelihood of an erroneous award.” *Id.* at 1063. The court sharply rejected that argument:

Cunard's assertion that arbitrators are not bound by rules of evidence, procedure or substantive law, applies to all arbitrator decisions. Because of the lack of formality, parties enter into arbitration by contract, rather than through a statutory scheme imposed involuntarily. . . . Having taken advantage of this process, into which it entered voluntarily, Cunard cannot now argue that its due process was denied.

Id. at 1063–64.

111. See *supra* note 92 and accompanying text. Note that in *Todd Shipyards*, the court's rejection of Cunard's due process challenge to the arbitration proceeding was based heavily on the voluntariness of that proceeding: “[h]aving taken advantage of this process, *into which it entered voluntarily*, Cunard cannot now argue that its due process was denied”; “parties enter into arbitration by contract, rather than through a statutory scheme imposed involuntarily.” *Id.* at 1063–64 (emphasis added).

112. The law has never been clear on whether due process protections apply in a traditional arbitration. There is uncertainty about whether an arbitration proceeding implicates “state action,” thereby triggering application of the requirements of constitutional due process, or is instead “an entirely private action” involving “no constitutional protections.” Weston, *supra* note 71, at 1744–45. Consequently, it is possible that arbitrators and parties will take the extreme—and disturbing—position that a defendant may not only be called upon to defend a class action in the unwanted forum of arbitration, but may be required to do so without the protections of due process. That argument seems intuitively wrong, and, fortunately, even the most prominent pro-class arbitration court decisions find that, in a class arbitration, due process protections *do* apply. See *Keating v. Super. Ct.*, 645 P.2d 1192, 1198, 1210 (Cal. 1982) (holding that in class arbitration the court must protect the due process rights of all members of the class), *rev'd in part, dismissed in part sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *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). Professor Maureen Weston agrees. Weston, *supra* note 71, at 1763–67.

113. Weidemaier, *supra* note 33, at 97–99.

114. *Id.* at 97–98.

115. *Id.* at 96–97.

116. *Id.*

This kind of thinking is deeply problematic, and it could spread and take hold, particularly if class arbitration remains subject to sharply limited judicial review. Some scholars have expressed similar concerns. In her 2006 *William and Mary Law Review* article, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, Professor Maureen Weston argues that without meaningful judicial oversight, class arbitration “threatens notions of fundamental fairness.”¹¹⁷ She concludes that “Congress must directly address, through the FAA, the increasingly complex questions regarding class actions in arbitration,” and that, among other things, “the FAA should . . . specify appropriate procedures, incorporating the procedural standards of class administration under Federal Rule of Civil Procedure 23, and should address the issues unique to arbitration regarding arbitrator selection, neutrality, and the need for reasoned decisions”¹¹⁸ Further, Professor Jean Sternlight, in her 2000 *William & Mary Law Review* article, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, concluded “that the hybrid arbitral class action should be permitted, but only so long as courts maintain sufficient involvement to protect the due process rights of absent class members.”¹¹⁹ Sternlight stated that as of 2000, “courts ha[d] chosen to retain all of their usual class action responsibilities, including definition of the class, notification of absent class members, and approval of settlements,” and that “[t]his seems to be the wisest way to proceed in order to ensure that the due process rights of absent class members are protected.”¹²⁰ She also stated that even though the “hybrid” class arbitration should be “permitted,” she believed that “defendants, plaintiffs, and society as a whole, likely will adopt the securities industry’s conclusion that class actions are most efficiently and justly handled through litigation.”¹²¹

Arbitration proponents may bristle at the suggestion that serious thought be given to whether arbitration is an appropriate forum for class actions. But there is nothing odd or inappropriate about questioning a particular forum’s suitability for

117. Weston, *supra* note 71, at 1725.

118. *Id.* at 1778.

119. Sternlight, *supra* note 9, at 126. Of course, that is definitively *not* what has actually happened—in the class arbitration now becoming prevalent, courts are almost entirely uninvolved. See *supra* note 36.

120. Sternlight, *supra* note 9, at 126.

121. *Id.* See also 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 (1989). In that note, Daniel Waltcher observed that because Rule 10b-5 cases had become arbitrable (under the 1987 *McMahon* decision), and because Rule 10b-5 was “an area traditionally popular for class actions,” “the classwide arbitration device . . . likely [would be a] topic of judicial attention in the near future.” *Id.* at 380. That turned out *not* to be true because the National Association of Securities Dealers and the New York Stock Exchange banned class arbitration of securities claims in the early 1990s, substantially delaying “judicial attention” to class arbitration. See *supra* note 68; Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, Exchange Act Release No. 31371, 52 SEC Docket 2189 (Oct. 28, 1992). However, now that class arbitration is spreading, Waltcher’s observations about class arbitration remain relevant. Waltcher stated, among other things, that “due process issues connected with class action aspects of classwide arbitration are simply too important to be relegated to arbitrators,” and concluded that if class arbitration were to be permitted, a court would need to decide the issue of class certification itself “at the filing of the action,” and there would need to be “a freer appeals process at the close of the arbitration.” *Id.* at 404–05.

resolution of class actions. Indeed, just recently, in passing the Class Action Fairness Act of 2005 (“CAFA”),¹²² Congress forcefully expressed concern about the administration of class actions in state courts—a *judicial* forum, and a forum that is far more established than arbitration. Moreover, some of Congress’s concerns in connection with the CAFA are squarely applicable to arbitration, even if, in passing the CAFA, Congress did not have arbitration in mind. For example, the Senate Judiciary Committee’s report in connection with the CAFA stated that “the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions.”¹²³ Citing concerns about potential “provincialism,” bias against out-of-state defendants, and “inconsistent” decisions, the Senate Judiciary Committee expressed a strong preference for adjudication of significant class actions in a particular forum: federal court.¹²⁴ That Committee also stated that state court judges often do not have the resources of federal judges (such as “law clerks” and “access to magistrates and . . . special masters”), and that this lack of resources creates significant problems in “complex litigation like class actions,” such as the inability to “give class action cases and settlements the attention they need.”¹²⁵ These same concerns apply to arbitration proceedings as well, and it is ironic that just as Congress was acting to restrain class action activity in state courts, class actions were exploding in arbitration forums.

CONCLUSION

When it passed the FAA, Congress opened the door to arbitration, an invited guest, and now class arbitration, an uninvited guest—and a boisterous one—has stepped inside.

The fact that Congress never even imagined class arbitration, much less approved it, is important, and seems not to have been recognized. That fact, together with the concerns about class arbitration that are summarized in Part IV of this Article, constitute a powerful basis for vigorous examination of the inherent propriety of class arbitration.

The debate on that fundamental issue should be a noisy one, but, to date, it has been strangely quiet. Courts, practitioners, and commentators seem prematurely resigned to the existence of class arbitration, and they discuss *how* class arbitrations should be conducted, rather than *whether* they should be conducted.

Counsel, courts, and Congress all should be addressing the fundamental question of whether class arbitration should exist at all—should this uninvited guest stay, or should it go? As to what this means for day-to-day litigation, counsel opposing class arbitration should certainly avoid any explicit or implicit concession that class arbitration is permissible, and they should consider whether they and their clients want to argue explicitly that class arbitration is not permissible. That

122. See *supra* note 45.

123. S. REP. NO. 109-14, at 5–6 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 6–7.

124. *Id.*

125. *Id.* at 14.

fundamental issue has not been resolved by Congress or the courts, and it is one that cries out for meaningful examination and resolution.

In addition, as long as class arbitration is part of the legal landscape, it should be subjected by courts and counsel to probing questions in areas ranging from the commencement of a class arbitration (e.g., how can imposition of class arbitration on unwilling defendants be consistent with the FAA and its legislative history?), to the conduct of a class arbitration (e.g., are the decision makers sufficiently qualified?; are the resources adequate?; is cost prejudicing fairness?; are arbitrators respecting the need for appropriate individualization?), to the conclusion of a class arbitration (e.g., does the traditional standard for review of an award by an arbitrator apply to a class arbitration, and, if so, how can it be appropriate that class action rulings and judgments are effectively unreviewable?).

Class arbitration is a new and strange phenomenon that, unlike traditional arbitration, has never been reviewed, much less authorized, by Congress. It should not be given a free pass, and it needs to be subjected to vigorous legal and public-policy scrutiny.