

Aggregate Dispute Resolution: Class and Labor Arbitration

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* Associate Professor, California Western School of Law. I am grateful for the editors of the Harvard Negotiation Law Review for giving me the opportunity to publish this Article and for their hard work in preparing this Article. Also, I would like to thank Christopher Drahozal for his insightful comments. Finally, I would like to give special thanks to my wife Andrea and children Ella, Ethan, and Evan for their loving support. Research for this Article was generously supported by California Western School of Law.

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This Article examines the original intent of the Federal Arbitration Act with respect to class arbitration and concludes that the Federal Arbitration Act was never intended to support class arbitration. This Article proposes amendments to the Federal Arbitration Act and suggestions for improving class arbitration if parties should agree to such a proceeding. There are some interesting connections between labor arbitration and the enactment of the FAA, and both labor and class arbitration in a broad sense share an important similarity in that both involve aggregate dispute resolution. As explained below, labor arbitration law may provide helpful guidance in the class arbitration context.

INTRODUCTION

Our government provides different degrees and types of assistance for resolving civil disputes. For example, subject to jurisdictional and other constraints, the judicial branch is empowered to adjudicate disputes,¹ and the judicial branch has a high degree of direct involvement in dispute resolution when a party pursues a dispute through the full machinery of trial and appellate proceedings. But even when the judicial machinery is in full operation and steadily moving toward a final decision in an ongoing trial or appellate proceeding, parties typically have the ability to halt the judicial process and resolve the dispute on their own.² At the opposite end of the spectrum of judicial involvement in dispute resolution, parties may

1. U.S. CONST. art. III; *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70 (1982) (disputes involving “the liability of one individual to another . . . lie at the core of the historically recognized judicial power”) (citations omitted).

2. United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 309 (1897) (“Private parties may settle their controversies at any time.”).

privately resolve disputes from start to finish without any assistance of the judicial branch, and perhaps the backdrop of the full judicial machinery may encourage some parties to resolve disputes on their own.

The judicial branch can also provide a somewhat intermediate level of assistance in resolving private disputes pursuant to the Federal Arbitration Act (“FAA”).³ When enacting the FAA in 1925, Congress erected a legal framework that helps support a system of contractual, private dispute resolution. Section 2 of the FAA, described as the FAA’s “centerpiece,”⁴ generally declares that an agreement to resolve a dispute through arbitration is “valid, irrevocable, and enforceable,”⁵ and other provisions of the FAA set forth procedures to enforce an arbitration agreement and to facilitate dispute resolution through arbitration.⁶

During Congressional hearings regarding the proposed bills that would become the FAA, business interests expressed concern that the judicial machinery was being pushed beyond its limits, resulting in costly delays in resolving disputes and “a virtual denial of justice.”⁷ Business interests also expressed frustration about judicial hostility to enforcing arbitration agreements that had been adopted by American courts from England.⁸ The FAA helped alleviate these concerns

3. 9 U.S.C. §§ 1-16 (2006). The federal statute was originally called the United States Arbitration Act, but the statute became known as the Federal Arbitration Act after Congress deleted the section of the statute containing the statute’s original name. See United States Arbitration Act, ch. 213, § 14, 43 Stat. 883, 886 (1925); Act of July 30, 1947, ch. 392, § 2, 61 Stat. 669, 674; IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 181 n.2 (1992). Chapter 1 of the FAA covers domestic arbitration, while Chapters 2 and 3 deal with international arbitration. This Article focuses on issues involving domestic arbitration under Chapter 1 of the FAA, 9 U.S.C. §§ 1-16 (2006).

4. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

5. 9 U.S.C. § 2 (2006).

6. See generally 9 U.S.C. §§ 3 - 16 (2006).

7. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary, 68th Cong. 21 (1924) [hereinafter 1924 Hearings]* (“The clogging of our courts is such that the delays amount to a virtual denial of justice.”); see also *id.* at 18 (with a federal arbitration statute, there would be less congestion in the courts); *id.* at 26 (overcrowded court dockets); *id.* at 34-35 (congestion of courts and the expense of litigation);

8. *1924 Hearings*, *supra* note 7, at 35 (statement of Julius Henry Cohen, Gen. Counsel, New York State Chamber of Commerce) (“[F]ollowing an anachronism in the English law, arbitration agreements have not been enforced by our courts in the United States.”); see also H.R. REP. NO. 68-96, at 1-2 (1924) (“Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to

by providing a legal framework legitimizing and facilitating contractual, private dispute resolution.

Since the FAA's enactment in 1925, the legal framework established by the FAA to support arbitration has evolved and expanded through a series of Supreme Court opinions. For example, there is evidence that the FAA was originally intended to be applied only in federal courts, but the Supreme Court has expanded the FAA to be applicable in state courts as well.⁹ Criticizing the judicial expansion of the FAA, Justice Sandra Day O'Connor wrote in 1995 that "over the past decade, the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."¹⁰ When Congress enacted the FAA in 1925, Congress provided the judicial branch with a certain degree of authority to facilitate private dispute resolution. However, because of judicial expansion of the FAA's legal framework, the current degree of judicial involvement in private dispute resolution has changed beyond the FAA's original meaning,¹¹ and amendments to the FAA through the legislative process are long overdue.

In 2003, the Supreme Court issued *Green Tree Financial Corp. v. Bazzle*,¹² a heavily fractured opinion that has had the effect of another expansion of the FAA's legal framework beyond its original intent. In *Bazzle*, the Supreme Court examined whether a state court's

enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."); S. REP. NO. 68-536, at 2 (1924).

9. See generally MACNEIL, *supra* note 3, at 181; see also *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA is applicable in both state and federal courts); *id.* at 25 (O'Connor, J., dissenting, joined by Rehnquist, J.) ("[The FAA's legislative] history established conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts . . ."). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

10. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

11. Compare *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (stating that the FAA applies broadly to employment contracts, except for a narrowly construed exemption for workers engaged in interstate transportation) *with id.* at 126 (Stevens, J., dissenting, joined by Ginsburg, J., and Breyer, J.) (opining that drafters of the FAA never intended the FAA to apply to agreements affecting employment); see also Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted By Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006) ("[T]he supporters of the [FAA] did not believe that it would apply to any workers at all.")

12. 539 U.S. 444 (2003).

decision ordering class arbitration was consistent with the FAA when the arbitration agreements at issue were arguably silent regarding class arbitration.¹³ A plurality of Justices focused on a threshold question of whether the arbitration agreements at issue were in fact silent regarding class arbitration or forbade class arbitration, and the plurality believed this particular determination must be made by an arbitrator, not a court.¹⁴ The plurality decided to vacate the state court's judgment and remand the case so that an arbitrator could construe the contracts to determine if the contracts provided for class arbitration.¹⁵ Justice Stevens issued a separate opinion explaining that the FAA did not preclude a state court from determining that the agreements are silent regarding class arbitration and that class arbitration is permissible.¹⁶ However, recognizing that adherence to his preferred disposition would result in no controlling judgment, Justice Stevens concurred in the result reached by the plurality.¹⁷ One group of dissenting Justices reasoned that the state court's judgment allowing class arbitration to proceed contradicts "the terms of the contract and is therefore pre-empted by the FAA," and the threshold question of whether an agreement provides for class arbitration is for a court, not an arbitrator, to decide.¹⁸ Another Justice dissented on the basis that the FAA simply does not apply in state court.¹⁹

After the heavily splintered *Bazzle* decision was issued, lower courts,²⁰ the American Arbitration Association,²¹ and arbitrators²²

13. *Id.* at 447.

14. *Id.* at 450-53 (Breyer, J., plurality opinion, joined by Scalia, Souter, & Ginsburg, JJ.).

15. *Id.* at 454.

16. *Id.* at 454-455 (Stevens, J., concurring in the judgment and dissenting in part).

17. *Id.* at 455.

18. *Id.* (Rehnquist, C.J., dissenting, joined by O'Connor & Kennedy, JJ.).

19. *Id.* at 460 (Thomas, J., dissenting).

20. *See, e.g.,* Rollins, Inc. v. Garrett, 176 F.App'x. 968, 968 (11th Cir. 2006) ("When a contract is silent as to whether it prohibits class arbitration, the arbitrator, rather than the court, must resolve the issue as a matter of state law.") citing *Bazzle*, 539 U.S. at 447, *see also* Redman Home Builders Co. v. Lewis, 513 F.Supp.2d 1299 (S.D. Ala. 2007).

21. American Arbitration Association Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=28779> [hereinafter AAA's Policy on Class Arbitrations] ("In *Bazzle*, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted.").

22. *See, e.g.,* Goldstein v. Ibase Consulting of Fairfield County, LLC, No. 11 160 02760 03, at 1 (AAA Mar. 29, 2004) (clause construction award), <http://www.adr.org/si.asp?id=3551> ("After *Green Tree Fin. Corp. v. Bazzle*, the issue of whether a contract,

treated *Bazzle* as setting forth a clear holding that arbitrators, not courts, must determine whether an arbitration agreement provides for class arbitration, and that “class actions may be arbitrated when the agreement between the parties is silent on the question.”²³ However, because of the heavily fractured nature of the *Bazzle* decision, it is not clear that *Bazzle* established such a holding.²⁴ The United States Court of Appeals for the Seventh Circuit has expressly refused to rely on the heavily splintered *Bazzle* opinion.²⁵ The Seventh Circuit explained that “[t]aking these two opinions of [Justice Stevens and the four-Justice plurality] together, we cannot identify a single rationale endorsed by a majority of the Court.”²⁶ The Seventh Circuit accordingly found no precedent established by *Bazzle*.²⁷

silent about whether a claimant may maintain a class or collection action, permits such an action, is clearly for an arbitrator to decide.” (citation omitted)).

23. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006) (“In 2003, the United States Supreme Court held in *Green Tree Financial Corp. v. Bazzle*, that class actions may be arbitrated when the agreement between the parties is silent on the question.”).

24. See, e.g., *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 580 (7th Cir. 2006) (refusing to rely on *Bazzle* because “we cannot identify a single rationale endorsed by a majority of the Court”); see also Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1 (2004). But see *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 586 n.2 (3d Cir. 2007) (finding that a common rationale was “implicitly” adopted by the four-Justice plurality and Justice Stevens in *Bazzle*); see also *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355, 358-59 (5th Cir. 2003).

25. *Century Indem. Co.*, 443 F.3d at 580.

26. *Id.* See also *Green Tree Financial Corp v. Bazzle*, 539 U.S. 444 (2003) (where the four-Justice plurality found that where an arbitration agreement is silent regarding class arbitration, an arbitrator, and not a court, must decide whether class arbitration is permitted). Justice Stevens wrote an interesting separate opinion dissenting from the plurality, but concurring in the judgment of the plurality to vacate the lower court’s decision. *Id.* at 454. Justice Stevens explained that he preferred to simply affirm the lower court’s decision because the lower court’s decision that class arbitration is permitted under state law was correct. *Id.* at 455. As for the issue of who is the correct-decision maker regarding whether an arbitration agreement permits class arbitration, Justice Stevens did not express clear agreement with the four-Justice plurality on this issue, and he deliberately avoided ruling on this issue. *Id.* Recognizing that the parties never raised on appeal this particular issue of the correct decision-maker, Justice Stevens described that this particular issue was “arguabl[e].” *Id.* Justice Stevens believed remanding was unnecessary because there was nothing wrong with the state court’s interpretation of the agreement. *Id.* However, if Justice Stevens adhered to his preferred disposition of letting the lower court’s judgment stand, there would be absolutely no controlling judgment for the particular parties involved in the case, and therefore Justice Stevens dissented from the plurality but concurred in the final result reached by the plurality to vacate the lower court’s judgment. *Id.*

27. *Century Indem. Co.*, 443 F.3d at 580.

Bazzle, despite being a heavily splintered opinion establishing no clear precedent, significantly opened the door for class arbitration. In direct response to the purported “holding” of *Bazzle*, the American Arbitration Association issued rules regarding class arbitration to be applied by arbitrators in connection with arbitration agreements that are silent regarding class arbitration. The American Arbitration Association has since begun administering class arbitrations after *Bazzle* was issued,²⁸ and there are currently about 200 cases on the American Arbitration Association’s class arbitration docket sheet.²⁹ Arbitrators in these matters have held that the arbitration agreements at issue, which are silent regarding class arbitration, nevertheless permit class arbitration despite strenuous objections that class arbitration was never intended when the arbitration agreements were originally entered into.³⁰

There is nothing inherently wrong with parties willingly agreeing to arbitrate on a classwide basis in their contractual relationships. A bedrock principle of arbitration is that arbitration is a matter of agreement between the parties,³¹ and parties, if they so desire, can agree to resolve disputes on a classwide or representative basis. However, if parties never agreed to class arbitration, allowing one party to exploit some courts’ and arbitrators’ willingness to find that class arbitration is appropriate when the contract is silent regarding class arbitration leads to an unjustified expansion of arbitral authority. The very authority of an arbitrator is premised on the agreement of the parties.³² If class arbitration is allowed where parties never agreed to class arbitration, a party expecting non-class arbitration now faces the possibility of significant liability in connection with a class arbitration award.

28. AAA’s Policy on Class Arbitrations, *supra* note 21.

29. Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Aug. 30, 2007).

30. *See, e.g.,* *Bezaury v. Arbor Homes, LLC*, No. 11 148 02161 04 (AAA Jan. 31, 2005) (clause construction award), <http://www.adr.org/si.asp?id=3902> (rejecting respondent’s argument that the arbitration agreement was drafted prior to the development of the AAA’s class arbitration policy and rules, and holding that arbitration agreement that is silent regarding class arbitration permits class arbitration).

31. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties.” (citations omitted)); *see also* *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 500 (8th Cir. 2007); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 933 (3d Cir. 1985); *see also* H.R. REP. NO. 68-96, at 1 (1924) (“Arbitration agreements are purely matters of contract, and the effect of this bill is simply to make the contracting party live up to his agreement.”).

32. *Hollern v. Wachovia Securities, Inc.*, 458 F.3d 1169, 1174 (10th Cir. 2006) (“Arbitrators derive their authority from the parties’ arbitration agreement.” (citation omitted)); *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986)

Relying on *Bazzle* and not paying close attention to its splintered nature, judicial opinions have hastily concluded that “[t]he FAA . . . permit[s] arbitrators to decide whether class actions may be arbitrated under a particular contractual provision,”³³ and “the Court in [*Bazzle*] held that class action arbitrations are permissible under the FAA.”³⁴ However, the Supreme Court in *Bazzle* did not clearly establish such a holding or binding precedent, and the FAA in any event does not “permit” arbitration because arbitration can occur outside of the legal framework of the FAA. If two parties decide to arbitrate a certain issue, the parties do not need the authority of the FAA to permit them to arbitrate. Arbitration existed long before the FAA was enacted,³⁵ and the FAA is not necessary to authorize or permit parties to engage in arbitration. Similarly, parties do not need to be authorized or permitted by the FAA to engage in class arbitration. If parties desire to do so, parties can agree that an arbitration proceeding will be administered in a representative format.

The text of the FAA is drafted broadly enough so that certain provisions would appear to work, although perhaps awkwardly, to facilitate class arbitration when the parties have agreed to such a proceeding. However, as explained in more detail below, it is unlikely that Congress specifically intended the FAA’s legal framework to facilitate class arbitration. The provisions of the FAA were not drafted to support class arbitration or address problems that may arise in connection with class arbitration.

The main purpose of this Article is to examine the original intent of the FAA with respect to class arbitration and to propose suggestions for improving class arbitration if parties should agree to such a proceeding. While exploring the original intent of the FAA and suggestions for improving class arbitration, this Article examines some

("[A]ny power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties. He has no independent source of jurisdiction apart from the consent of the parties.")

33. *Orkin Exterminating Co. v. Petsch*, 872 So.2d 259, 266 (Fla. Dist. Ct. App. 2004) (“The FAA and the rules of the American Arbitration Association permit arbitrators to decide whether class actions may be arbitrated under a particular contractual provision.” (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003))).

34. *Heiko Law Offices, P.C. v. AT&T Wireless Servs., Inc.*, No. 107025/04, 2005 WL 670778, at *3 (N.Y. Sup. Ct. Feb. 22, 2005); *Johnson v. Chase Manhattan Bank USA, N.A.*, No. 603101/02, 2004 WL 413213, at *4 (N.Y. Sup. Ct. Feb. 27, 2004) (discussing *Bazzle*, the court stated “the United States Supreme Court has recently held that class action arbitrations are permissible under the FAA”).

35. See FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 3-4 (1948).

parallels between labor arbitration and class arbitration, and as explained below, some law regarding labor arbitration may provide helpful guidance for class arbitration. Class arbitration shares a general similarity with labor arbitration in that both involve aggregate dispute resolution. A union may bring a grievance to arbitration on behalf of employees in a bargaining unit, and similarly, in the class arbitration context, a representative may bring a claim to arbitration on behalf of a group of individuals.

Representative arbitration involving a union as the representative of a group of employees flourished during the prior century, but supported by the Supreme Court's decision in *Circuit City v. Adams* in 2001, a general trend has developed towards two-party arbitration between an employer and an individual employee.³⁶ With respect to commercial arbitration, there has been an opposite trend moving away from two-party arbitration towards representative arbitration following the Supreme Court's *Bazzle* decision in 2003.³⁷ In light of these general trends, it appears that commercial arbitration and arbitration involving the American workforce have already been in the process of converging to some extent during the past few years. Prior to the proliferation of class arbitration prompted by *Bazzle*, there was already an interesting proposal to unify the law regarding labor arbitration and commercial arbitration.³⁸ The proposal found "there is nothing inherent in labor arbitration or commercial arbitration that makes either of them unsuited for regulation under the same, unitary statutory scheme."³⁹ Now, with the advent of class arbitration in the wake of *Bazzle*, commercial arbitration proceedings are occurring that bear an even stronger resemblance to labor arbitration than in the past when the proposal for merging labor arbitration law and commercial arbitration law was made.⁴⁰ Recently, William B. Gould, IV, a scholar and arbitrator, presented a thesis that "a new and important system of jurisprudence" involving "a hybrid of labor and

36. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

37. *Green Tree Financial Corp v. Bazzle*, 539 U.S. 444 (2003).

38. Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781 (2000).

39. *Id.* at 925; see also *id.* ("[B]ecause commercial arbitration is presently afforded the same degree of respect and deference granted labor arbitration for the last forty years, there is no good reason for the two bodies of law to remain separate.").

40. Labor and class arbitration have significant differences. For example, labor and management will likely have a continuing relationship outside of a labor arbitration proceeding, while a class of claimants in class arbitration may have no such long-term relationship with a respondent. See also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (describing function of labor arbitrator in connection with labor-management relations).

commercial approaches to the arbitral handling of agreements can evolve in the first part of this century.”⁴¹ While exploring some suggestions for improving class arbitration, this Article examines how labor arbitration law may be workable in connection with class arbitration.

The Article is divided into three main sections. To provide some background regarding class arbitration and to illustrate some problems with class arbitration, Section I of the Article provides an overview of how the American Arbitration Association is administering class arbitration in the wake of *Bazzle*. Section II then analyzes whether the legal framework of the FAA was originally intended to cover and support class arbitration, and in exploring this original intent, the Article examines possible historical connections between labor arbitration and the enactment of the FAA. Section II concludes it is unlikely that the FAA’s legal framework was specifically intended to facilitate class arbitration. Finally, based on an examination of labor arbitration, Section III of the Article sets forth proposed amendments to the FAA regarding class arbitration as well as suggestions for improving class arbitration.

I. CLASS ARBITRATION PURSUANT TO THE AMERICAN ARBITRATION ASSOCIATION’S CLASS ARBITRATION RULES

In the aftermath of the heavily splintered *Bazzle* opinion, the American Arbitration Association (“AAA”) began administering arbitration on a classwide basis, and the AAA issued the following policy statement regarding class arbitration:

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. In *Bazzle*, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in

41. William B. Gould IV, *Kissing Cousins? The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L. J. 609 (2006).

accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims. . . .⁴²

Contrary to the AAA's asserted basis for developing and administering such class arbitration procedures where an arbitration agreement is silent on the issue, the Supreme Court in *Bazzle* "held" nothing.⁴³ Nevertheless, in response to the purported holding of *Bazzle*, the AAA developed rules regarding class arbitration to supplement its existing arbitration rules.⁴⁴ The AAA's Class Arbitration Rules are patterned after Rule 23 of the Federal Rules of Civil Procedure, the class action procedural rule applicable in federal courts.⁴⁵

The AAA's Class Arbitration Rules provide that "[t]he AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations,"⁴⁶ and this class arbitration docket contains basic information about the cases that have been filed.⁴⁷ As of August 2007, the class arbitration docket has about 200 cases.⁴⁸ Some of these cases have proceeded to the class certification stage, where the arbitrator makes a determination whether a class is maintainable based on certain criteria derived from Rule 23 of the Federal Rules of Civil Procedure, such as commonality, typicality, numerosity, and adequate representation.⁴⁹ Some of these 200 cases on the

42. AAA's Policy on Class Arbitrations, *supra* note 21; *see also* Commentary to the American Arbitration Association's Class Arbitrations Policy (Feb. 18, 2005), <http://www.adr.org/sp.asp?id=28779> [hereinafter Commentary to AAA's Policy on Class Arbitrations] ("It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement.").

43. *See supra* notes 24-27 and accompanying text.

44. Am. Arbitration Ass'n, Supplementary Rules for Class Arbitrations (Oct. 8, 2003), <http://www.adr.org/sp.asp?id=21936> [hereinafter AAA's Class Arbitration Rules].

45. FED. R. CIV. P. 23.

46. AAA's Class Arbitration Rules, *supra* note 44, R. 9.

47. Class Arbitration Docket, *supra* note 29.

48. *Id.* The AAA is not the only organization administering class arbitrations. JAMS, originally known as Judicial Arbitration and Mediation Services, also administers class arbitration, and JAMS's rules are similarly patterned after Rule 23 of the Federal Rules of Civil Procedure. *See* JAMS Class Action Procedures, http://www.jamsadr.com/rules/class_action.asp (last visited Aug. 30, 2007). However, it does not appear that JAMS publishes a class arbitration docket or awards regarding particular class arbitrations like the American Arbitration Association does. Accordingly, this Article is focusing solely on the AAA's administration of class arbitration.

49. *See, e.g.,* *Bagpeddler.com v. U.S. Bancorp*, No. 11 181 00322 04 (AAA May 4, 2007) (Farber, Arb.), <http://www.adr.org/si.asp?id=4667> (class determination award granting motion for class certification); *Tarek L.L.C. v. Kinkade*, No. 11 Y 114 00578

class arbitration docket have been withdrawn or settled.⁵⁰ For example, in *Johnson v. Chase Manhattan Bank USA, N.A.*, the claimant settled his individual claims, and he received \$4,000 pursuant to the settlement while his attorneys received \$46,000.⁵¹ Pursuant to the settlement, the claimant agreed to withdraw the class claims he had asserted on behalf of a class of credit card holders numbering potentially in the thousands.⁵²

As recognized in the AAA's Policy on Class Arbitration, class arbitration demands can come before the AAA if the arbitration agreement is silent regarding class arbitration.⁵³ Rule 3 of the AAA's Class Arbitration Rules states the following:

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause [that is silent regarding class arbitration], whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award").⁵⁴

During the clause construction phase of the arbitration proceeding, arbitrators have concluded that arbitration can proceed on a class-wide basis in connection with arbitration agreements that are silent regarding class arbitration, over the vigorous objections of respondents. In fact, as of Summer 2007, the overwhelming majority of clause construction awards interpreted such silent arbitration agreements as permitting class arbitration.⁵⁵ Objecting parties in such

04 (AAA Apr. 4, 2005) (Chernick, Mainland, Morganroth, Arbs.), <http://www.adr.org/si.asp?id=3679> (class determination award denying motion for class certification); *Sutter v. Oxford Health Plans, Inc.*, Case No. 18 193 20593 02 (AAA Mar. 24, 2005) (Barrett, Arb.), <http://www.adr.org/si.asp?id=3645> (class determination award granting motion for class certification).

50. See, e.g., *Le v. Toshiba America Info. Sys., Inc.*, No. 11 160 02033 04 (AAA undated) (Paul, Arb.), <http://www.adr.org/si.asp?id=4393> (order granting preliminary approval of class settlement).

51. *Johnson v. Chase Manhattan Bank USA, N.A.*, para. 1, at 3 (AAA July 22, 2005) (stipulation of settlement and dismissal), <http://www.adr.org/si.asp?id=3953>.

52. *Id.* para. 2, at 3 (agreeing to withdraw class claims); *Johnson v. Chase Manhattan Bank USA, N.A.*, para. 67, at 20 (AAA Jan. 5, 2005) (class action arbitration complaint), <http://www.adr.org/si.asp?id=3640> (alleging that "thousands" of class members are expected).

53. AAA's Policy on Class Arbitrations, *supra* note 21. The Commentary to AAA's Policy on Class Arbitrations also explains that the AAA will administer class arbitration if the arbitration agreement on its face prohibits class procedures and a court finds the class action waiver is unenforceable. See Commentary to AAA's Policy on Class Arbitrations, *supra* note 42.

54. AAA's Class Arbitration Rules, *supra* note 44, R. 3.

55. P. Christine Deruelle & Robert Clayton Roesch, *Gaming The Rigged Class Arbitration Game: How We Got Here And Where We Go Now – Part I*, METROPOLITAN

cases have strenuously argued that they never agreed to class arbitration and never contemplated it because class arbitration did not exist under the AAA policies at the time the arbitration agreement was drafted.⁵⁶ Given the history of non-class arbitration under the FAA,⁵⁷ the silence regarding class arbitration is not surprising and should not be understood as allowing class arbitration. Nevertheless, over the vigorous objections of parties, arbitrators have been construing such silent arbitration agreements as permitting class arbitration.⁵⁸

It is the AAA's policy to administer class arbitrations when the arbitration agreement at issue is "silent" regarding class arbitration. However, it seems that arbitrators are construing silence quite broadly to mean that the arbitration agreement does not explicitly mention class arbitration, and arbitrators appear to ignore that other provisions of the arbitration agreement may be inconsistent with class arbitration. For example, in *Cable Connection, Inc. v. DirecTV, Inc.*, a panel of three arbitrators analyzed an arbitration agreement to determine whether it provides for class arbitration.⁵⁹ Two arbitrators, without providing any detailed analysis of the language of the arbitration agreement, basically stated the arbitration agreement is silent regarding class arbitration and therefore permits class arbitration.⁶⁰ The dissenting arbitrator, however, examined the intent of the parties through a careful analysis of various provisions of the arbitration agreement, and the dissenting arbitrator concluded "[t]here is ample indication in the parties' Agreement that they intended disputes to be resolved by arbitration between them separately and individually, and not in class-wide arbitration."⁶¹ For example, as is

CORP. COUNS., Aug 2007, at 9, available at <http://www.metrocorpcounsel.com/pdf/2007/August/09.pdf> ("As of June 15, 2007, AAA arbitrators have rendered 51 Clause Construction Awards concerning otherwise silent arbitration agreements, and in *all but two* of those decisions, the arbitrators have allowed classwide proceedings.").

56. See, e.g., *Garrett v. Rollins, Inc.*, No. 11 181 01663 04 (AAA Mar. 23, 2005) (O'Leary, Katzenbach, Love, Arbs.) (clause construction award), <http://www.adr.org/si.asp?id=3725>; *Bezaury v. Arbor Homes LLC*, Case No. 11 148 02161 04, at 5-6, 9-10 (AAA Jan. 31, 2005) (O'Leary, Arb.) (clause construction award), <http://www.adr.org/si.asp?id=3902> (rejecting respondent's argument that arbitration agreement was drafted prior to AAA's class arbitration policy and rules, and holding that arbitration agreement that is silent regarding class arbitration permits class arbitration).

57. See *infra* Part II.

58. Deruelle & Roesch, *supra* note 55.

59. *Cable Connection, Inc. v. DirecTV, Inc.*, No. 11 145 00752 04 (AAA Mar. 10, 2005) (Arabian, King, Arbs.) (clause construction award), <http://www.adr.org/si.asp?id=3644>.

60. *Id.* at 2.

61. *Id.* at 7 (Chernick, Arb., dissenting).

typical in arbitration agreements, there was a clause providing how an arbitrator is to be selected by the parties.⁶² The arbitration agreement at issue provided that each party shall select one arbitrator, and this personal choice of an arbitrator is consistent with non-class arbitration, but more difficult to reconcile in connection with class arbitration.⁶³ If each party must select one arbitrator, and if the purportedly silent agreement is somehow construed to permit class arbitration, the arbitration panel of a class arbitration would consist of hundreds or potentially thousands of arbitrators! Properly focusing on the entirety of the arbitration agreement, the dissenting arbitrator explained that “numerous other provisions suggest, as a matter of grammar, syntax as well as substance, that the parties intended their disputes to be resolved in an individual arbitration proceeding, not a class-wide arbitration.”⁶⁴ While the dissenting arbitrator provided a thorough, well-reasoned opinion examining and construing the language of the arbitration agreement, the other two arbitrators provided no analysis of the language of the agreement. If parties agreed only to a two-party arbitration, an arbitrator’s ruling that classwide arbitration is permissible amounts to a drastic re-writing of the parties’ original agreement.⁶⁵

The AAA’s Class Arbitration Rules also provide that after the arbitrator determines the threshold issue of whether the clause permits class arbitration, “[t]he 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.”⁶⁶ The FAA

62. *Id.* at 8.

63. *Id.*

64. *Id.*

65. The respondent in this case was fortunate to subsequently obtain a court order vacating the clause construction award. See *Ruling on Petition By DirecTV Inc., to Vacate Arbitration Award*, No. BS095987 (Cal. App. Dep’t Super. Ct. Nov. 1, 2005), <http://www.adr.org/si.asp?id=3820>. However, other respondents have not been successful, particularly in light of the narrow standard of judicial review of arbitrator’s decisions. See, e.g., *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 489 F. Supp. 2d 772, 780-81 (E.D. Mich. 2007) (“[Respondent] is merely re-raising arguments that the arbitration panel considered and rejected, including the view that the applicable agreements do not provide for class arbitration of these disputes. As noted above, however, the applicable standard of review precludes this Court from reconsidering [Respondent]’s arguments here. Whether this Court agrees with the arbitration panel’s interpretation of the parties’ agreements or not is irrelevant.”). There are several other arbitrator awards on the AAA’s Class Arbitration Docket construing silence to permit class arbitration when the parties likely never intended class arbitration, and such awards do not appear to have been vacated by a court.

66. AAA’s Class Arbitration Rules, *supra* note 44, R. 3.

generally permits a party to petition a court to confirm an arbitral award, and the FAA also allows a party to petition a court to vacate an arbitral award on limited grounds.⁶⁷ Parties who have disagreed with an arbitrator's clause construction award have used the 30-day stay to petition courts pursuant to the FAA to vacate the award regarding the arbitrator's determination of whether the arbitration agreement provides for class arbitration.⁶⁸

However, there appears to be uncertainty whether a court may properly accept, pursuant to the FAA, such a petition to vacate a clause construction award. Some courts have accepted such interlocutory petitions concerning the clause construction award and reviewed the awards on the very limited grounds permitted by the FAA.⁶⁹ However, other courts have refused to accept such petitions under the FAA:

[T]he FAA does not authorize the court to interfere with ongoing arbitration proceedings by making interlocutory rulings concerning the arbitration. . . . The court is unpersuaded that it has any authority under the FAA to grant plaintiff Cummings the type of interlocutory relief that he seeks by interfering with the AAA's decision regarding whether the dispute should be arbitrated under the AAA's Supplementary Rules for Class Arbitration.⁷⁰

Such conflicting judicial decisions regarding the FAA and class arbitration are not surprising. As discussed below in Section II, it is unlikely that the FAA's general framework for supporting private dispute resolution was specifically intended to facilitate class arbitration. The general provisions of the FAA were not specifically designed to support class arbitration or address concerns that may arise in connection with class arbitration.⁷¹

67. 9 U.S.C. § 9 (2006) (procedure for confirming award); 9 U.S.C. § 10 (2006) (procedure for vacating award).

68. Dub Herring Ford, 489 F. Supp. 2d at 774.

69. *Id.* at 775, 778 - 82.

70. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 370 F. Supp. 2d 1135, 1138-39 (D. Kan. 2005); *see also* Marron v. Snap-On Tools, Co., No. Civ.03-4563(FSH), 2006 WL 51193, at *3 (D.N.J. Jan. 9, 2006) (refusing to hear motion to vacate the arbitrators' preliminary clause construction awards and explaining that "[g]iven the early stage of the proceedings and the breadth of issues submitted to the arbitrator that have not even been reached, this arbitral [clause construction] award is not ripe for review by this Court").

71. *See infra* Part II.

II. THE FEDERAL ARBITRATION ACT WAS NOT INTENDED TO FACILITATE CLASS ARBITRATION

Arbitration existed long before the FAA was enacted in 1925, and the existence of arbitration does not depend on the FAA.⁷² Parties can agree to and engage in arbitration, including class arbitration, without the existence of the FAA. The FAA erects a legal framework that provides for the enforcement of arbitration agreements and helps facilitate arbitration within the coverage of the FAA, and it should be determined whether Congress intended the FAA's legal framework to apply to and facilitate class arbitration.

This Section of the Article examines whether the FAA was intended to cover class arbitration. In connection with exploring the original intent regarding the FAA and class arbitration, this Section also examines possible historical connections between labor arbitration and the enactment of the FAA. As explained below, group or representative arbitration occurred in connection with the National War Labor Board during World War I, and supporters of the FAA were involved with the National War Labor Board. Experiences with group arbitration during World War I possibly may have influenced later views regarding the enactment of the FAA and its legal framework to support arbitration. Part A of this Section focuses on the statutory language of the FAA. Part B then discusses the National War Labor Board, and Part C analyzes the FAA's legislative history in light of the National War Labor Board. It is not likely that the FAA's legal framework was specifically intended to facilitate class arbitration.

A. *The Statutory Language of the Federal Arbitration Act*

The FAA is a relatively short statute, and the text of the statute never refers explicitly to representative arbitration. Although some of the FAA's provisions may arguably be used in connection with a class arbitration proceeding, the provisions are better tailored to support a two-party, non-class model of arbitration.

Section 1 of the FAA contains definitions of the terms "maritime transaction" and "commerce," and these definitions by themselves do not shed much light on whether the statute was intended to support representative arbitration.⁷³

72. See KELLOR, *supra* note 35, at 3-4.

73. Section 1 also contains an exemption originally intended to mean that the FAA would not apply to labor disputes. In December 1922, bills drafted by the ABA were introduced in the Senate and House, and these bills were precursors to the bills

Section 2, which has been described as the heart of the FAA, generally declares that a written agreement to settle a controversy by arbitration is “valid, irrevocable, and enforceable.”⁷⁴ Section 2 is drafted in language describing only a single contract, and a system of class arbitration could possibly involve hundreds, if not thousands, of individual agreements to arbitrate pursuant to class arbitration. Even though § 2 is drafted in terms of a single contract, its language is possibly still consistent with class arbitration that is voluntarily agreed to. One can argue § 2 recognizes that each of the hundreds or thousands of agreements to arbitrate on a classwide basis are individually valid, irrevocable, and enforceable.

Section 3 provides for a stay of suit brought in court when any issue therein is referable to arbitration pursuant to a written arbitration agreement.⁷⁵ It may be possible to construe § 3’s language consistently with an agreement to arbitrate on a classwide basis. For example, suppose that Party A files a class action lawsuit against Party B in federal court, and suppose they have an agreement to arbitrate on a classwide basis. Section 3 requires the court to stay the suit upon application of Party B “until such arbitration has been had in accordance with the terms of the agreement.”⁷⁶ If the terms of the

that would eventually become the FAA in 1925. MACNEIL, *supra* note 3, at 88. In January 1923, a subcommittee of the Senate Judiciary Committee held a hearing regarding the proposed bill. *Id.* These bills did not contain an express exemption regarding workers, but during the hearing, it was clearly stated that “[i]t is not intended that this shall be an act referring to labor disputes at all.” *A Bill Relating Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and 4214 Before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9 (1923)* [hereinafter *1923 Hearings*]. These bills were never reported out of the committees because of the lateness of the session. MACNEIL, *supra* note 3, at 91. The ABA then added the exemption to §1 regarding workers, and new bills containing this exemption were introduced in December 1923. *Id.* The only substantive change over the prior bills involved the labor exemption, and these new bills eventually became the FAA. *Id.*; see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126 (2001) (Stevens, J., dissenting, joined by Ginsburg, J., and Breyer, J.) (FAA never intended to apply to agreements affecting employment); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted By Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006) (“[T]he supporters of the [FAA] did not believe that it would apply to any workers at all.”). At the time of the FAA’s enactment, if representative arbitration was conceptualized as inseparable from labor arbitration, then the FAA’s exemption regarding labor disputes would lend support to the argument that the FAA was not likely intended to support representative arbitration.

74. 9 U.S.C. § 2 (2006).

75. *Id.* § 3.

76. *Id.*

agreement provide for arbitration on a classwide basis, it seems that the suit would be stayed until such a proceeding occurred.

When a party to an arbitration agreement is in default and refuses to arbitrate, § 4 sets forth an enforcement procedure to obtain an order directing that arbitration proceed in the manner provided for in the arbitration agreement.⁷⁷ Section 4 requires that five days notice of the application must be given to the party in default before petitioning for an order.⁷⁸ Before issuing such an order, the court must be satisfied that the making of the arbitration agreement is not in issue, and if there is an issue regarding the making of the arbitration agreement, §4 requires the court to proceed summarily to a mini-trial solely on the issue of the making of the arbitration agreement.⁷⁹ In connection with §4 petitions to compel arbitration, courts have permitted discovery regarding the making of the arbitration agreement.⁸⁰ The specific procedures in § 4 appear to provide for the enforcement of a single agreement between two parties. A party could not petition a court to order an entire class of thousands of individuals to arbitrate pursuant to § 4 unless the requirements of § 4, such as notice to each individual, are satisfied. Also, pursuant to § 4, the court would have to make sure that all arbitration agreements of the entire class were valid, and the potential of mini-trials regarding the making of each individual contract would seem contrary to a class device. However, § 4's procedure may work in connection with class arbitration if a court, for example, only compelled arbitration with respect to the representative claimant and respondent pursuant to § 4.⁸¹ With respect to absent class members who may number in the hundreds or thousands, there should be some procedure to verify that the arbitrator has power over each of them based on each class member's arbitration agreement. It appears that § 4 was designed with a two-party, non-class model of arbitration in mind, and expanding § 4 to support class arbitration may be somewhat awkward. Section 4 was intended to effectuate the core principle of § 2 that arbitration is a matter of agreement. If a court ordered, pursuant to § 4, a representative claimant and respondent to arbitrate under the terms of a contract providing for classwide arbitration, there is still a concern

77. *Id.* § 4.

78. *Id.*

79. *Id.*

80. *Kincaid v. Commercial Credit Corp.*, No. CIV. A. 2:98-0842, 1999 WL 33510175, at *6 (S.D. W. Va. Nov. 16, 1999) ("The parties shall be permitted to conduct limited discovery . . . concerning the making of the agreement to arbitrate between plaintiff and defendant.").

81. *See Szalai, supra* note 24, at 60-63, 68-78.

whether absent class members have valid arbitration agreements.⁸² Because arbitration is a matter of agreement and the very power of the arbitrator with respect to a class of hundreds or thousands of individuals depends on the individual agreements of such individuals, some manner of ensuring that every class member has a valid arbitration agreement must exist. There are different options available for making sure each class member's arbitration agreement is valid, but the options have potential drawbacks.⁸³

Section 5 provides for court appointment of an arbitrator.⁸⁴ For example, if there is a lapse in the naming of an arbitrator, "then upon the application of either party to the controversy the court shall designate and appoint an arbitrator."⁸⁵ This language from § 5 suggests the drafters had a two-party, non-class arbitration in mind. However, one could perhaps interpret this language in connection with a class arbitration as referring to a representative claimant and respondent.

Section 6 provides that applications made pursuant to the FAA shall generally be made and heard in the manner provided by law for motions, and Section 7 deals with the power of arbitrators to compel witnesses.⁸⁶ Sections 6 and 7 do not specifically address class arbitration, and they do not appear to be inconsistent with class arbitration.

Section 8 deals with admiralty issues and as such would generally be inapplicable to consumer class arbitration.⁸⁷

Sections 9, 10, 11, 12, and 13 deal with confirming, vacating, correcting, and modifying arbitration awards.⁸⁸ The term "party" is found throughout these sections, and one can perhaps construe these sections consistently with class arbitration by interpreting the term "party" to refer to the representative claimant or the respondent in the arbitration. However, as explained below in more detail, the right of vacating a class arbitration award perhaps should apply to class members in order to protect them, and there have already been conflicting court decisions as to whether these provisions apply to clause construction awards, which are issued during the initial stages of a class arbitration.⁸⁹ Even though these FAA provisions

82. *Id.*

83. *Id.*

84. 9 U.S.C. § 5 (2006).

85. *Id.*

86. *Id.* §§ 6, 7.

87. *Id.* § 8.

88. *Id.* §§ 9-13 (2006).

89. *See supra* notes 69-70 and accompanying text.

may be workable in connection with class arbitration, they do not appear to be specifically tailored to deal with special issues that could arise in connection with class arbitration.

Section 14 simply states that the FAA is inapplicable to contracts made prior to 1926, and Section 15 recognizes that the enforcement and confirmation of arbitration awards and the execution of a judgment based on orders confirming awards shall not be refused on the basis of the act of state doctrine.⁹⁰ Section 16 provides for appeals of district court decisions pursuant to other sections of the FAA, and § 16 is drafted in broad terms and does not specify who has the right to appeal.⁹¹

Focusing solely on the FAA's language, it may be possible to construe its language consistently with facilitating class arbitration to some extent. If several people truly agreed to class arbitration, the FAA may be construed to provide some basic assistance in connection with class arbitration. However, the FAA's legal framework would operate with some uncertainty and perhaps awkwardly in connection with class arbitration. For example, an unnamed class member's ability to vacate an award and the ability of even the representative claimant or respondent to immediately vacate a clause construction award or a class certification award is not entirely clear.⁹² Also, applying § 4's enforcement procedures to hundreds or thousands of class members would seem contrary to the benefits of a class device. Although perhaps the FAA may be workable to some degree in connection with class arbitration, the FAA was not likely intended or drafted with class arbitration in mind, particularly considering the FAA's legislative history as discussed below.

B. *The National War Labor Board and Representative Arbitration*

In *Discover Bank v. Superior Court*, the California Supreme Court discussed Congressional intent in connection with the FAA and class arbitration.⁹³ The arbitration agreement in *Discover Bank* required the parties to arbitrate disputes on an individual basis and waive class arbitration. The *Discover Bank* court discussed the general value of class procedures and cited an earlier case from 1982 holding that judges have discretion under California law to order a

90. 9 U.S.C. §§ 14, 15 (2006).

91. *Id.* § 16.

92. See *supra* notes 69-70 and accompanying text.

93. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110-11, 1113 (Cal. 2005).

“hybrid” model of class arbitration where appropriate.⁹⁴ In light of this prior law, the *Discover Bank* court determined that clauses waiving class arbitrations are generally unconscionable and unenforceable under California law. The court also addressed whether the FAA preempted this California law making class arbitration waivers generally unenforceable.⁹⁵ The California Supreme Court reasoned that because the FAA is “silent on the matter of class actions and class action arbitration” and because “modern class action practice” under Rule 23 of the Federal Rules of Civil Procedure did not really exist in 1925, the “Congress that enacted the FAA therefore cannot be said to have contemplated the issues before us [regarding FAA preemption of a state law prohibiting class arbitration waivers].”⁹⁶ As a result, the court relied on general principles regarding FAA preemption and ultimately concluded the FAA did not preempt California law prohibiting class arbitration waivers.⁹⁷

Based on the California Supreme Court’s observations in *Discover Bank*, more particularly, that modern class action practice under Rule 23 did not exist in 1925,⁹⁸ it is tempting to jump to the conclusion that Congress could not have contemplated that the FAA’s framework would support class arbitration. But the California Supreme Court’s general observations about modern class action practice do not necessarily support such a conclusion. Instead of focusing narrowly on modern class action practice under Rule 23, if one focuses more generally on representative or collective arbitration proceedings, then it becomes at least theoretically possible that arbitrations conducted on a representative or collective basis were

94. *Id.* at 1106 (citing *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982)). The *Keating* court had approved a “hybrid” model where a court would be significantly involved in the class arbitration by “mak[ing] initial determinations regarding certification and notice to the class,” as well as maintaining “external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement.” *Keating*, 645 P.2d at 1209. See also Carole J. Buckner, *Toward A Pure Arbitral Paradigm Of Classwide Arbitration: Arbitral Power And Federal Preemption*, 82 DENV. U. L. REV. 301, 320, 330-33 (2004) (explaining that *Keating* approved of hybrid model, and post-*Bazzle*, courts have approved a pure arbitral model of class arbitration).

95. *Discover Bank*, 113 P.3d at 1110.

96. *Id.* at 1110 n.4.

97. *Id.* at 1110-17.

98. FED. R. CIV. P. 23. “It was not until the promulgation of original Rule 23 and the first Federal Rules of Civil Procedure in 1938 that law and equity were merged and class suits for damages in the United States first became available. . . .” 1 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1:9 (4th ed. 2007). “[S]weeping innovations” to Rule 23 occurred in 1966 when the rule was amended. *Id.* For a detailed history of group litigation, see STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

perhaps contemplated when the FAA was enacted in 1925 because such proceedings existed at the time. A few years before the FAA was enacted, members of commercial organizations endorsing the FAA were involved with the National War Labor Board, which administered representative arbitration.

Arbitration has played a significant role in labor-management relations in the United States.⁹⁹ Arbitration in the labor context can provide a potentially expeditious and inexpensive method of settling labor-management disputes without resort to strikes or lockouts.¹⁰⁰ Labor arbitration also has been described as more than just a substitute for litigation or work stoppages:

[Labor arbitration] is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.¹⁰¹

Labor and management enter into “thousands” of collective bargaining agreements every year, and “[v]irtually all of these agreements provide for arbitration of unresolved grievances.”¹⁰² Arbitration is generally the final step of dispute settlement under collective bargaining agreements,¹⁰³ which may establish several preliminary steps, such as having an employee’s grievance brought immediately to a supervisor and then, if no resolution occurs, through different levels of management.¹⁰⁴

99. LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 3-4 (Max Zimny et al. eds., 1990).

100. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 7- 11 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

101. *Id.* at 15 (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955)); *see also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964) (emphasizing “the central role of arbitration in effectuating national labor policy” and that arbitration is a “substitute for industrial strife” and “part and parcel of the collective bargaining process itself” (citations and internal quotations omitted)).

102. Am. Arbitration Ass’n, Labor Arbitration Rules, Introduction (Aug. 1, 2007), <http://www.adr.org/sp.asp?id=32599#Intro> (last visited Aug. 30, 2007) [hereinafter Labor Arbitration Rules].

103. ELKOURI & ELKOURI, *supra* note 100, at 8 (“There is a general disposition on the part of labor and management to provide, as the final grievance step, for the arbitration of contract interpretation and application disputes.”); *id.* at 214.

104. *Id.* at 232 (“Grievance machinery usually consists of a series of procedural steps to be taken within specified time limits. The nature of the procedure will depend on the structure of the company and on the needs and desires of the parties, but there is a tendency to follow a fairly definite pattern [involving bringing a grievance

Historically, the “[d]evelopment of labor arbitration in the United States began during the latter part of the nineteenth century, and advanced rapidly after the United States became involved in World War II.”¹⁰⁵ During World War I, the government sanctioned a body called the National War Labor Board to handle labor disputes in fields related to war production needs. By the time the FAA was enacted in 1925, various industries had some experience with labor arbitration either through the National War Labor Board or otherwise.¹⁰⁶

The National War Labor Board was in operation during 1918 and 1919 and was formally dissolved on August 12, 1919, prior to the enactment of the FAA in 1925.¹⁰⁷ There are some possible connections between the National War Labor Board and the FAA, and an examination of labor arbitration conducted by the National War Labor Board during World War I provides an interesting perspective to consider class arbitration under the FAA. In establishing the National War Labor Board and enacting the FAA, the government sanctioned arbitration as a general method to resolve disputes across a broad range of industries.¹⁰⁸ Also, a significant feature of arbitration conducted by the National War Labor Board is the representative or collective nature of the proceedings,¹⁰⁹ and similarly, a distinctive characteristic of modern class arbitration following the Supreme Court’s 2003 decision in *Bazzle* is the representative nature of the proceedings.¹¹⁰ Finally, there is an interesting overlap between commercial interests involved in the collective proceedings conducted by the National War Labor Board and the commercial interests that subsequently lobbied Congress in support of the FAA.¹¹¹

In December 1917, representatives of several government departments such as the Navy Department, War Department, and Labor Department, issued a report regarding how to handle labor problems arising from the government’s war activities.¹¹² The report

to a first-line supervisor and then through successive steps of the management hierarchy].” (citations omitted)).

105. *Id.* at 3 (citations omitted).

106. LABOR ARBITRATION, *supra* note 99, at 8-10

107. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULLETIN NO. 287, NATIONAL WAR LABOR BOARD: A HISTORY OF ITS FORMATION AND ACTIVITIES, TOGETHER WITH ITS AWARDS AND THE DOCUMENTS OF IMPORTANCE IN THE RECORD OF ITS DEVELOPMENT 12-13 (1921) [hereinafter LABOR BULLETIN].

108. *See infra* notes 131-132, 139-140 and accompanying text.

109. *See infra* notes 133-139 and accompanying text.

110. AAA’s Class Arbitration Rules, *supra* note 44.

111. *See infra* notes 149-162 and accompanying text.

112. LABOR BULLETIN, *supra* note 107, at 9.

stated that each government department was dealing with its own labor problems independently, with no unified policy or procedure, and the report also recognized there was no "adequate system for dealing promptly and uniformly on a nation-wide basis with labor disputes affecting war work."¹¹³ The report made several recommendations, including the creation of "machinery which will provide for the immediate and equitable adjustment of disputes Such machinery would deal with demands concerning wages, hours, shop conditions, etc."¹¹⁴ In early January 1918, President Woodrow Wilson appointed the Secretary of Labor with authority to organize a labor administration recommended by the report, and in late January, the Secretary of Labor created a body known as the War Labor Conference Board.¹¹⁵ The Secretary asked both business interests and labor interests to each appoint five representatives to the War Labor Conference Board.¹¹⁶ The five business representatives would in turn select a sixth person to represent the public, and similarly, the five labor representatives would select a sixth person to represent the public.¹¹⁷ William Howard Taft, the former president, was selected by the business representatives to represent the public.¹¹⁸

On March 29, 1918, the War Labor Conference Board issued a report calling for the establishment of a National War Labor Board ("NWLB") for the duration of the war.¹¹⁹ The report outlined the basic functions and powers of the proposed NWLB, including a multi-step dispute resolution process culminating in the appointment of a neutral person to "hear and finally decide the controversy."¹²⁰ The report explained that an important function of the proposed NWLB was to help bring about voluntary settlement of controversies affecting production necessary for the war.¹²¹ The proposed NWLB would provide "machinery . . . for selection of committees or boards to sit in various parts of the country where controversies arise, to secure settlement by local mediation and conciliation."¹²² If there was a failure

113. *Id.* at 29.

114. *Id.*

115. *Id.* at 9-10.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 10, 31-33.

120. *Id.* at 31.

121. *Id.*

122. *Id.*

to secure voluntary settlement of a controversy through local mediation and conciliation, the NWLB could "summon the parties to the controversy for hearing and action by the national board."¹²³

The Secretary of Labor, believing that the members of the War Labor Conference Board who made the recommendations were "best fitted to carry them out," appointed them as the original members of the NWLB.¹²⁴ On April 8, 1918, President Woodrow Wilson by formal proclamation approved the NWLB and its policies.¹²⁵ "Governmental sanction was thus placed upon a system of mediation and arbitration which had been adopted voluntarily by the parties concerned."¹²⁶

A report from the U.S. Department of Labor explained that the NWLB functioned primarily as an arbitration tribunal:

Although the board was constituted both a conciliatory agency and an arbitration tribunal, in practice it seldom acted in a conciliatory capacity. The examiners and investigators of the board sometimes acted in such a capacity, but the board itself functioned as a court to which complainants brought their cases and requested adjudication.¹²⁷

Regarding procedure, when the NWLB received a complaint within its jurisdiction, a copy of the complaint was served on the defendant together with a request for information and a request that the defendant also submit the issue to the NWLB and agree to abide by its decision.¹²⁸ However, if one of the parties refused to submit to arbitration, the case was known as an *ex parte* case, and the decision of the NWLB regarding such a case constituted just a recommendation.¹²⁹ In joint submission cases, the NWLB was bound to render a decision, but if the board could not do so by unanimous agreement, an umpire, selected randomly from a list of potential umpires, would issue a decision.¹³⁰

The board's decisions had an impact beyond the employees directly involved in a controversy. "In many cases the decision [of the

123. *Id.*

124. *Id.* at 11.

125. *Id.* at 11, 34.

126. *Id.* at 11.

127. *Id.* at 16.

128. *Id.*

129. *Id.* at 16-17.

130. *Id.* at 16. According to the report from the U.S. Department of Labor, "[t]here were three outstanding cases in which there was resistance to the decisions of the board." *Id.* at 24-25. However, after the government took action in these matters such as commandeering the plant of employees who refused to abide by the NWLB's decision, "there was a minimum of resistance to its decisions thereafter." *Id.* at 25.

board] was applied in practice to other employees of a plant than those in whose names the controversy was filed, and very frequently a decision in regard to one company was accepted by other companies similarly situated.”¹³¹ Also, there was a “growing inclination” of employers to adjust hours and working conditions in conformity with decisions already rendered by the board.¹³²

The board’s procedure expressly provided for representative arbitration by which three employees or a union could act on behalf of a larger group of employees:

When the complaint is made on behalf of employees against an employer, it shall be filed by three employees for and on behalf of all claiming the same grievances. . . . If the shop is one in which the employer contracts with a union, the union may file a complaint against the employer, but it shall associate with it as party complainants and as signers of the complaint at least 3 employees as in other cases.¹³³

The board’s rules stated that a complaint must be in a form approved by the board,¹³⁴ and the form complaint developed for employees made clear that representative arbitration was permitted:

We, the undersigned, being at least three employees or recent employees of the respondent, on behalf of ourselves and all other similarly situated and having like grievances, make this complaint to your honorable board, and we hereby specifically agree to be bound by such recommendations or award as your honorable board may make. . . .¹³⁵

The form complaint also contained a questionnaire which stated that the board would take no action upon the complaint unless every question was answered, and the questionnaire would be incorporated as a part of the original complaint.¹³⁶ One question asked, “how many employees do you represent?”¹³⁷ The next question asked the representative employees, “by what authority do you represent them; that is, when, where, and how were you appointed?”¹³⁸ The NWLB’s procedure expressly provided for representative arbitration, and the rights of individual employees in a wide variety of industries were

131. *Id.* at 19.

132. *Id.*

133. *Id.* at 42.

134. *Id.*

135. *Id.* at 44.

136. *Id.* at 45.

137. *Id.*

138. *Id.*

determined through representative arbitration.¹³⁹ During the sixteen months the NWLB was in existence, 1,251 controversies were placed before the board.¹⁴⁰

As exemplified by the form complaint and the questionnaire in the form complaint, the government through the NWLB sanctioned representative arbitration proceedings where the representatives were selected or appointed to represent a class of “similarly situated” employees in arbitration.¹⁴¹ Post-Bazzele class arbitration similarly involves representative arbitration proceedings with a class member seeking to represent a class of similarly situated individuals.¹⁴² The NWLB’s work directly affected important business interests throughout the country,¹⁴³ and as explored below, there are some interesting links between some of these business interests and the enactment of the FAA.

C. *The Federal Arbitration Act’s Legislative History*

On January 9, 1924, Subcommittees of the House and Senate Committees on the Judiciary conducted joint hearings on the bills that would become the FAA, and representatives appearing on behalf of the American Bar Association¹⁴⁴ and more than seventy commercial organizations presented written and oral testimony strongly endorsing the FAA and explaining the FAA to members of Congress.¹⁴⁵ However, before examining Congressional intent regarding the FAA in more detail, there is an important caveat to keep in mind. Professor Macneil, the author of a leading treatise and book regarding the

139. See, e.g., *id.* at 19 (“The awards and findings of the board for which information is available directly affected more than 1,100 establishments, employing approximately 711,500 persons. . . .”); *Int’l Bhd. of Elec. Workers v. N. Indiana Gas & Elec. Co.*, Case No. 45 (November 22, 1918) (award establishing, among other things, retroactive pay), reprinted in *LABOR BULLETIN*, *supra* note 107, at 169-70; *Employees v. Midvale Steel & Ordnance Co.*, Case No. 129 (February 11, 1919) (award establishing, among other things, wages, overtime, holidays, and retroactive pay for several categories of employees), reprinted in *LABOR BULLETIN*, *supra* note 107, at 182; *Employees v. Corn Prod. Ref. Co.*, Case No. 130 (November 21, 1918) (award establishing, among other things, wages, luncheon periods, overtime, and holidays for several categories of employees), reprinted in *LABOR BULLETIN*, *supra* note 107, at 183 - 198.

140. *LABOR BULLETIN*, *supra* note 107, at 20.

141. *Id.* at 42, 44-45; see also *id.* at 11 (“Governmental sanction was thus placed upon a system of mediation and arbitration which had been adopted voluntarily by the parties concerned.”).

142. AAA’s Class Arbitration Rules, *supra* note 44.

143. See, e.g., *LABOR BULLETIN* *supra* note 107, at 5-6.

144. The American Bar Association (“ABA”), through its Committee on Commerce, Trade, Commercial Law, played a central role in drafting and enacting the FAA. See, generally, MACNEIL, *supra* note 3.

145. *1924 Hearings*, *supra* note 7.

FAA, explains that legislative action can be placed on a continuum, ranging from a “pure rubber stamp of legislative approval following presentation of the privately drafted bill” to “legislation entirely crafted by a legislator or legislative committee with no external input,” and on this continuum, the FAA falls very close to the model of rubber-stamped legislation.¹⁴⁶ Professor Macneil explains that Congressional purpose under these circumstances is “entirely derivative from the purpose of those presenting the legislation to Congress.”¹⁴⁷ Professor Macneil suggests that to the extent legislative intent is discoverable, when searching for legislative intent in connection with the FAA, one must examine “what Congress understood to be the goals of those presenting the fully drafted statute.”¹⁴⁸ Thus, to determine whether Congress specifically intended the FAA to cover representative arbitration proceedings, one should examine whether Congress understood this to be a purpose of the FAA’s supporters. Under such an analysis, it is not likely that Congress specifically intended the FAA’s legal framework to support representative or class arbitration.

Some members of the commercial organizations supporting the FAA may have had an awareness of representative arbitration through the National War Labor Board. As explained below, some officers of companies that appeared before the NWLB during World War I in significant cases became leaders of the arbitration movement in the 1920s. For example, the General Electric Company was involved with multiple cases before the NWLB. In one case, *Employees v. General Electric Co.*, the NWLB issued an award covering General Electric’s employees in Schenectady, New York, and the award provided, among other things, an increase in “day and piece rate” of 10% and 15% for various categories of employees and retroactive pay.¹⁴⁹ Also, the award appointed an “examiner who shall hear any differences arising in respect to the award between the parties and promptly render his decision,” with an appeal of the decision by either party to the NWLB.¹⁵⁰ Also, for General Electric’s workers in Lynn, Massachusetts, the NWLB issued another award providing for, among other things, retroactive pay and hours.¹⁵¹

146. MACNEIL, *supra* note 3, at 108.

147. *Id.*

148. *Id.*

149. Case No. 127 (July 31, 1918), *reprinted in* LABOR BULLETIN, *supra* note 107, at 179-80.

150. *Id.*

151. *Employees v. General Electric Co.*, Lynn, Mass., Case No. 231 (October 24, 1918), *reprinted in* LABOR BULLETIN, *supra* note 107, at 243-44.

Anson Burchard served as General Electric's vice-president from 1912 to 1922, its vice-chairman of the board of the directors from 1922 to 1927, and chairman of the executive committee of the board of directors from 1922 to 1927,¹⁵² and he was a strong supporter of the arbitration reform movement. He was a member of the Chamber of Commerce of the State of New York, which lobbied heavily in favor of the FAA, and he succeeded Charles L. Bernheimer as the chairman of its Committee on Arbitration.¹⁵³ Additionally, Burchard served as the first president of the American Arbitration Association.¹⁵⁴

The NWLB also heard a case filed by machinists, electrical workers, and other employees against the Bethlehem Steel Company.¹⁵⁵ The NWLB issued an award regarding, among other things, bonuses, piece rates, hourly rates, and overtime.¹⁵⁶ During the Congressional hearings regarding the enactment of the FAA, there was testimony regarding the work of Charles M. Schwab in promoting arbitration.¹⁵⁷ From 1917 to 1925, Schwab was the president of Bethlehem Steel,¹⁵⁸ and he was a strong supporter of the arbitration reform movement. Schwab served as "chairman of the general committee" of the Arbitration Society,¹⁵⁹ and he was also a member of the Chamber of Commerce of the State of New York, which strongly supported the enactment of the FAA.¹⁶⁰ Additionally, James Ward, who was the

152. See THIRTY-FIFTH ANNUAL REPORT OF THE GENERAL ELECTRIC COMPANY 5 (1926).

153. *Chamber Elects Hughes*, N.Y. TIMES, Apr. 3, 1925, at 32; see also JOSEPH BUCKLIN BISHOP, A CHRONICLE OF ONE HUNDRED & FIFTY YEARS: THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK 1768-1918, at 273 (1918) (listing Burchard on roll of members since 1910).

154. KELLOR, *supra* note 35, at 17.

155. *Machinists & Electrical Workers & Other Employees v. Bethlehem Steel Co.*, Case No. 22 (July 31, 1918), *reprinted in* LABOR BULLETIN, *supra* note 107, at 138-40.

156. *Id.*

157. *1924 Hearings*, *supra* note 7, at 25.

158. THIRTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1917); FOURTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1918); FIFTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1919); SIXTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1920); SEVENTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1921); EIGHTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1922); NINETEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1923); TWENTIETH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1924); TWENTY-FIRST ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1925); TWENTY-SECOND ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION 3 (1926).

159. *1924 Hearings*, *supra* note 7, at 25.

160. BISHOP, *supra* note 153, at 287 (listing Schwab on roll of members since 1902).

vice-president of Bethlehem Steel during the same time period,¹⁶¹ was a member of the Arbitration Conference Board, an organization formed shortly after the enactment of the FAA to promote arbitration.¹⁶²

The existence of group or representative arbitration by the time the FAA was enacted in 1925 makes it possible, in theory, that the drafters of the FAA could have intended the FAA to facilitate a broad, flexible notion of arbitration, including group or representative arbitration. Some leaders of the arbitration reform movement likely had an awareness of representative arbitration through the NWLB. However, during the Congressional hearings regarding the bills that would become the FAA, the supporters of the bills did not explicitly inform Congress that a goal of the FAA was to facilitate class arbitration.¹⁶³ Instead, supporters of the FAA as well as members of

161. THIRTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); FOURTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); FIFTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); SIXTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); SEVENTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); EIGHTEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); NINETEENTH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); TWENTIETH ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); TWENTY-FIRST ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president); TWENTY-SECOND ANNUAL REPORT OF BETHLEHEM STEEL CORPORATION, *supra*, note 158, at 3 (vice-president).

162. *Committee is Named for Arbitration Task*, N.Y. TIMES, Mar. 25, 1925, at 13 (listing Ward as vice-president of Bethlehem Steel and member of the Arbitration Conference Board).

163. Moreover, even if some FAA supporters had an awareness of representative arbitration through the NWLB, such awareness does not automatically translate into approval of representative arbitration, and it is difficult to assess exactly how their experiences with the NWLB influenced their views of arbitration. Perhaps, these business interests disfavored representative arbitration as a result of their experiences with the NWLB and supported the FAA only insofar as the FAA applied to two-party arbitration. Or perhaps their experiences with representative arbitration with the NWLB helped them develop a positive appreciation of arbitration in general, and thus they supported the FAA. It is difficult to determine exactly how experiences with representative arbitration through the NWLB may have influenced supporters of the FAA. Nevertheless, arbitration with a procedure for group representation existed at the time the FAA was enacted. Contrary to the suggestion of the California Supreme Court in *Discover Bank*, it seems theoretically possible that the FAA may have been intended to apply to arbitration involving group representation. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (“The Congress that enacted the FAA therefore cannot be said to have contemplated the [class arbitration] issues before us.”).

Congress focused on numerous examples of nonclass, two-party arbitrations.¹⁶⁴ Some members of Congress may have been aware of the representative proceedings before the NWLB, but during the enactment of the FAA, they did not explicitly convey an understanding that the FAA would apply to such proceedings.

There may have been an indirect allusion to the work of the NWLB in the legislative history of the FAA. William Howard Taft was a co-chairman of the NWLB, which was popularly known as the "Taft-Walsh Board."¹⁶⁵ Taft was briefly mentioned three times during the Congressional hearings regarding the FAA, but these cursory references to Taft in the FAA's legislative history do not convey a clear understanding that the FAA's framework was intended to support class arbitration.¹⁶⁶

164. See *infra* notes 168-187 and accompanying text.

165. Currin V. Shields, *The Authority of the War Labor Board*, 1943 Wis. L. REV. 378, 381 n.8 ("During the First World War a similar board, also called the National War Labor Board, was established by President Wilson. The Board was popularly known as the Taft-Walsh Board, named after the joint chairmen.").

166. First, a member of Congress asked the chairperson of the ABA's Committee on Commerce, Trade, and Commercial Law whether the ABA had discussed the matter with Taft, and the chairperson simply replied he was not aware of such a discussion. 1924 *Hearings*, *supra* note 7, at 11. Second, Julius Henry Cohen, a principal drafter of the FAA, described Taft as believing "it is the business of the bar so to improve the processes of justice as to make it an instrument of justice indeed." 1924 *Hearings*, *supra* note 7, at 13. Finally, a representative of the Arbitration Society of America described the public's frustration with the legal system, and he explained that "[legal matters] have become too burdensome. People are dissatisfied with the courts. I mean no disrespect to the courts, because what I may say has been very much more forcibly expressed by Chief Justice Taft, who expressed much more vigorously the same sentiment." 1924 *Hearings*, *supra* note 7, at 26-27. Taft was a long-time advocate of reforming the judicial system. See Robert Post, *Taft & The Administration Of Justice*, 2 GREEN BAG 2d 311, 312 (1999). Some of these references to Taft during the 1924 Hearings may be construed as referring to Taft's work in reforming the judicial system, which included the promotion of arbitration. Taft had generally spoken with approval of arbitration in connection with reforming the judicial system. William Howard Taft, *Inequalities in the Administration of Justice*, 20 GREEN BAG 441, 442, 446 (1908). Also, as part of his efforts to reform the judicial system, Taft strongly supported the Judiciary Act of 1925. See, e.g., Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After The Judges' Bill*, 100 COLUM. L. REV. 1643, 1660-1704 (2000) (describing Taft's extraordinary efforts to promote the Judiciary Act). The Judiciary Act of 1925 has a connection with the FAA. Congress was considering both the FAA and the Judiciary Act at the same time, and both statutes were intended, at least in part, to address the overcrowded dockets of the federal judiciary. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 369-372 (2007). The references to Taft during the 1924 Hearings are perhaps referring to his efforts to reform the judicial system, and arbitration fit together with Taft's strong beliefs in judicial reform. Also, Taft's name may have been mentioned during the FAA's legislative history because of Taft's other experiences with arbitration. Taft was a strong

Moreover, even if the references to Taft could be construed as referring to his experiences with group arbitration through the NWLB, there is an additional problem with trying to link group arbitration with the original intent of the FAA. Section 1 of the FAA contains an exemption that likely was originally intended to mean that the FAA would not apply to labor disputes.¹⁶⁷ If FAA supporters were aware of representative arbitration through the NWLB, and if members of Congress were also aware of such arbitration, it is not clear how the exemption of labor disputes from the coverage of the FAA would impact the understanding of the FAA with respect to representative arbitration. If representative arbitration was conceptualized as inseparable from labor arbitration, then the FAA's exemption regarding labor disputes would lend support to the argument that the FAA was not likely intended to facilitate representative arbitration. However, if the representative nature of labor arbitration was conceptualized as merely a procedure that could be divorced from labor arbitration and applied in non-labor arbitration proceedings, then the existence of the §1 exemption regarding labor disputes would be inconclusive regarding the legislative intent of the FAA with respect to representative arbitration. In any event, the general references to Taft during the 1924 Hearings, even if somehow understood as referring specifically to Taft's experiences with representative arbitration through the NWLB, do not convey an understanding that the FAA would support representative arbitration.

The Congressional testimony during the 1924 Hearings contains several explicit references to two-party, non-class disputes to be resolved in arbitration and no references regarding class arbitration. For example, Julius Henry Cohen, a prominent New York City attorney who was one of the main drafters of the FAA, presented both oral and written testimony to the Subcommittees, and his testimony contained numerous examples of two-party disputes. After introducing

supporter of arbitration to resolve international disputes, and as explained above, Taft was directly involved with the NWLB. Post, *supra* at 312 ("Taft was convinced that law was the only plausible alternative to violence, which is why as President he pushed (unsuccessfully) to bind the United States to mutual arbitration treaties with its neighbors."). These general, cursory references to Taft in the FAA's legislative history do not convey a specific understanding that the FAA's framework was intended to support representative arbitration.

167. See *supra* note 73.

himself, Cohen described an arbitration between two people involving one million dollars, and he gave another example of an arbitration between two people involving five hundred dollars.¹⁶⁸ In both his oral and written testimony, Cohen cited more than 20 cases, each of which involved non-class disputes.¹⁶⁹ For example, Cohen cited one matter involving a dispute between a buyer and seller regarding the sale of goatskins, as well as another matter involving a dispute between a buyer and seller regarding the sale of molasses.¹⁷⁰ Another matter cited by Cohen involved a dispute between a British corporation and an American corporation regarding the chartering of two steamships.¹⁷¹ Cohen cited several other cases or examples involving two-party disputes.¹⁷² Cohen primarily cited to these cases to show that an arbitration agreement under prior law was revocable, that damages could be awarded for the breach of an arbitration agreement, and that the enforcement of an arbitration agreement is within the law of procedure as opposed to substantive law.

168. *1924 Hearings*, *supra* note 7, at 14 (example of million dollar dispute between two people and five-hundred dollar dispute between two people).

169. *Id.* at 33-41. All of these non-class disputes involved only two-parties, subject to a few exceptions dealing with consolidated arbitration proceedings, which will be discussed below and which do not resemble class arbitration.

170. *Id.* at 33. Both of these matters were addressed in one appellate case, *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288 (N.Y. 1921).

171. *1924 Hearings*, *supra* note 7, at 33, 37, 39 (citing *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915)). Cohen also cited other cases involving a dispute between the owner of a vessel and a charterer. *See 1924 Hearings*, *supra* note 7, at 33, 37 (citing *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 232 F. 403 (S.D.N.Y. 1916)); *1924 Hearings*, *supra* note 7, at 37 (citing *The Eros*, 241 F. 186 (E.D.N.Y. 1916)).

172. *See, e.g., 1924 Hearings*, *supra* note 7, at 33, 37 (citing *Meacham v. Jamestown, F. & C.R. Co.*, 105 N.E. 653 (N.Y. 1914) (dispute between railroad company and construction company)); *1924 Hearings*, *supra* note 7, at 37, 39 (citing *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N.Y. 250 (N.Y. 1872) (dispute between a company owning a canal and a coal company using the canal)); *1924 Hearings*, *supra* note 7, at 38 (citing *Miller v. Junction Canal Co.*, 41 N.Y. 98 (N.Y. 1869) (dispute canal company and owner of land)); *1924 Hearings*, *supra* note 7, at 38 (citing *Thomas W. Finucane Co. v. Board of Education*, 82 N.E. 737 (N.Y. 1907) (dispute between builder and owner regarding a building contract)); *1924 Hearings*, *supra* note 7, at 38 (citing *Haggart v. Morgan*, 5 N.Y. 422 (N.Y. 1851) (dispute between builder and owner regarding a building contract)); *1924 Hearings*, *supra* note 7, at 40 (“If both parties are willing to arbitrate, the arbitration proceeds without the interference of any court.”).

Cohen also cited two cases involving the consolidation of disputes of a few parties.¹⁷³ However, these consolidation cases do not resemble class arbitrations where one party represents absent class members who are so numerous that joinder would be impractical.¹⁷⁴ These two consolidation cases appear to involve just a handful of parties who, after a dispute has arisen, consented to consolidation¹⁷⁵ or merely proposed that their claims be consolidated before an arbitrator.¹⁷⁶ These two cases are both consistent with modern cases involving the consolidation of claims in arbitration if all parties consent to such a joint proceeding.¹⁷⁷ Cohen did not mention that these cases involved the consolidation of disputes and instead cited to these two cases to demonstrate that arbitration agreements are revocable and that damages could be awarded for breach of an arbitration agreement.¹⁷⁸

Cohen was not the only person to testify at the Congressional hearings, and the FAA's legislative history contains examples from

173. 1924 Hearings, *supra* note 7, at 33, 38 (citing *Hamilton v. Home Ins. Co.*, 137 U.S. 370 (1890)); 1924 Hearings, *supra* note 7, at 38 (citing *Union Ins. Co. v. Central Trust Co.*, 52 N.E. 671 (1899)).

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

175. *Union Ins. Co. v. Central Trust Co.*, 52 N.E. 671 (1899) (involving four parties who entered into a quadripartite agreement providing for arbitration of existing disputes among the four parties).

176. The *Hamilton* case involved an individual policyholder who apparently had insurance policies with more than one insurance company covering the same loss. *Hamilton* 137 U.S. at 373-78, 384. The Court focused on a two-party dispute between the policyholder and one particular insurance company, and the insurance policy at issue contained an arbitration clause. Although the Court's decision focused on the dispute between the policyholder and one insurance company, the Court provides summaries of correspondence with the other insurance companies. *Id.* at 373-78. The correspondence shows that after the dispute arose, other insurance companies proposed a consolidated arbitration, but the proposed arbitration does not appear to have occurred. *Id.* The correspondence indicated the arbitration clauses differed in each policy. The correspondence expressed uncertainty regarding a consolidated arbitration proceeding because "[the various policies] are not alike in their provisions upon this subject of arbitration, and a literal compliance with some of them would be inconsistent with a literal compliance with others." *Id.* at 375. Based on the correspondence, it appears that the arbitration agreements did not envision a consolidated proceeding.

177. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274 (7th Cir. 1995) ("[A]bsent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from . . . requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." (citing, *inter alia*, *Gov't of U.K. v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation")))).

178. 1924 Hearings, *supra* note 7, at 33, 38.

other people regarding two-party, non-class disputes to be resolved in arbitration.¹⁷⁹ Also, on May 14, 1924, the Senate Committee on the Judiciary issued a report on the Senate bill that would become the FAA, and the report cites a United States Supreme Court case involving a two-party dispute to be arbitrated between a steamship company and a fruit company that had chartered a vessel.¹⁸⁰ The House Committee on the Judiciary also issued a report regarding the proposed bill that would become the FAA.¹⁸¹ Both the Senate Report and House Report use language suggesting that the FAA was intended for two-party disputes in arbitration.¹⁸²

The FAA's legislative history also showcases arbitration as relatively quick, simple, and inexpensive.¹⁸³ A complex, lengthy, technical class procedure in arbitration would appear contrary to the understanding of arbitration expressed in the FAA's legislative history. Julius H. Cohen, one of the drafters of the FAA, explained that arbitration would avoid the long delays and complexity of litigation arising from "preliminary motions and other steps taken by litigants, appeals therefrom, which delay consideration of the merits, and appeals from decisions upon the merits."¹⁸⁴ Cohen also stressed that by adopting the FAA, Congress would not "reinject into controversies between businessmen the very technicalities and details which they

179. *Id.* at 7 ("The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance."); *id.* at 9 (example of a dispute between two parties who had agreed to sign an arbitration agreement); *id.* (dispute between the French government and a party in New York); *id.* at 27 ("[A] merchant in New York sells his merchandise to some one in a foreign jurisdiction.").

180. S. REP. NO. 68-536, at 3 (1924) (citing *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924)).

181. H.R. REP. NO. 68-96 (1924).

182. The Senate Report uses language that seems to envision a two-party dispute, like "either of the parties" and "the party aggrieved by the refusal of the other party to carry out the arbitration agreement." S. REP. NO. 68-536, at 2 (1924). The House Report similarly uses language referring to two parties, describing "one party" who is "recalcitrant" and not willing to comply with his contract for arbitration and the other "party willing to perform his contract for arbitration." H.R. REP. NO. 68-96, at 2 (1924). The House Report also describes how an arbitration award may be entered in court as a judgment, but "the other party" may attack the award for fraud. *Id.*

183. 1924 *Hearings*, *supra* note 7, at 36 (the arbitration "proceeds without any formality and without interference from the court. All technicalities of legal procedure and requirements are removed."); *id.* at 7 ("arbitration saves time, saves trouble, saves money"); *id.* at 22 (arbitration would help eliminate expensive litigation); *id.* at 24 (arbitration saves "time, trouble and money"); *id.* at 31 (arbitration offers "the best means yet devised for an efficient, expeditious, and inexpensive adjustment" of disputes arising in the "daily business transactions" of merchants); *see also* 65 CONG. REC. 11080 (1924) ("The result of such a bill will be to do away with a lot of expensive litigation.").

184. 1924 *Hearings*, *supra* note 7, at 34 - 35.

have sought to escape by their arbitration agreements.”¹⁸⁵ In describing arbitration proceedings and the benefits of arbitration during the Congressional hearings, Charles L. Bernheimer, who has been called the father of the arbitration reform movement,¹⁸⁶ described a benefit of arbitration as bringing the disputants “face to face” in the presence of a neutral person. Such a “face to face” meeting during an arbitration proceeding would be virtually impossible with the potentially hundreds or thousands of individuals covered by a class arbitration.¹⁸⁷ All these descriptions of arbitration covered by the FAA are consistent with a simple, non-class, two-party arbitration, and incompatible with a procedurally complex, technical proceeding such as class arbitration.

Based on the several explicit references in the legislative history to non-class and two-party disputes to be resolved in arbitration, the absence of explicit references to class arbitration, and the descriptions of a simple, “face to face” arbitration procedure which helped avoid the “technicalities and details” of litigation, those who presented the FAA to Congress showcased the FAA as a legal framework supporting non-class arbitration, and there is nothing in the legislative history to indicate that Congress understood otherwise. Based on Macneil’s methodology for determining Congressional intent regarding the FAA by examining “what Congress understood to be the goals of those presenting the fully drafted statute,”¹⁸⁸ it is unlikely that the FAA was intended to facilitate class arbitration.¹⁸⁹

185. *1924 Hearings*, *supra* note 7, at 40.

186. MACNEIL, *supra* note 3, at 28 (describing Bernheimer as the founder of the arbitration reform movement); JULIUS H. COHEN, *COMMERCIAL ARBITRATION AND THE LAW*, dedication (1918) (describing Bernheimer as having “done more than any other one man to encourage and develop the practical use of commercial arbitration in the United States”).

187. *1923 Hearings*, *supra* note 73, at 5 (describing the benefits of arbitration as bringing the disputants “face to face”).

188. MACNEIL, *supra* note 3, at 108.

189. There are a few key concepts that one can fairly characterize as legislative intent regarding the FAA. An important concept conveyed by the lobbyists and restated by members of Congress was that the FAA was intended to reverse judicial hostility to enforcing arbitration agreements that had been adopted by American courts from England. *1924 Hearings*, *supra* note 7, at 35 (“[F]ollowing an anachronism in the English law, arbitration agreements have not been enforced by our courts in the United States.”); *see also* H.R. REP. NO. 68-96, at 1-2 (1924) (“Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.”); S. REP. NO. 68-536, at 2 (1924). Also, the FAA was intended to address the costly delays in resolving disputes and intended to relieve

There is nothing clearly expressed in the legislative history regarding the FAA's applicability to class arbitration.

If the original intent of Congress was to support a model of two-party, non-class arbitration, what are the implications for class arbitration? Arbitration can exist independently of and without the legal framework of the FAA, and if parties so desire, parties can consent to arbitrate on a classwide basis.¹⁹⁰ However, if parties do agree to class arbitration, the FAA's legal framework was likely not intended to support such a proceeding. As demonstrated above, judges have tried to apply the FAA in connection with class arbitration and have come to different conclusions regarding how the FAA would work in connection with class arbitration proceedings.¹⁹¹ Such confusion is understandable because the FAA was likely not intended to facilitate class arbitration, and the terms of the FAA are not specifically designed to address issues that may arise in connection with class proceedings. Haphazard judicial expansion of the FAA to facilitate such class arbitration proceedings could lead to inconsistent results and potential harm to absent class members. If parties truly wish to engage in class arbitration, Congress should amend the FAA to facilitate class arbitration, which may encourage more parties to explicitly consent to class arbitration.

One of the hottest areas of contention in connection with the FAA and class arbitration is the enforceability of a clause in an arbitration agreement prohibiting class arbitration (a "class arbitration waiver"). To explore this problem area, this Article will use a hypothetical based on an example given in the FAA's legislative history. Suppose there is a "farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance," and they

congestion in the courts. 1924 *Hearings*, *supra* note 7, at 21 ("The clogging of our courts is such that the delays amount to a virtual denial of justice," and the congestion in the New York court system would be worse if the New York arbitration statute did not exist); *see also id.* at 18 (with a federal arbitration statute, there would be less congestion in the courts); *id.* at 26 (overcrowded court dockets); *id.* at 34-35 (congestion of courts and the expense of litigation); *see also* 65 CONG. REC. 984 (1924) ("The business interests of the country find so much delay attending the trial of lawsuits in courts that there is a very general demand for a revision of the law in this regard.").

190. During the oral argument in *Bazzle*, an exchange took place between Justice Ginsburg and counsel for Green Tree regarding whether parties could agree to arbitrate on a classwide basis. Justice Ginsburg recognized that Green Tree had conceded that there is no "inherent inconsistency" between arbitration and class actions, and if the parties agreed, they could arbitrate on a classwide basis. Transcript of Oral Argument of Petitioner at 12-13, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634).

191. *See supra* notes 69-70 and accompanying text.

agree to resolve any disputes arising out of their relationship in arbitration.¹⁹² The farmer is a supplier of potatoes for dealers and grocers across the country. Further suppose that the parties only envisioned a two-party, non-class arbitration, and although the arbitration agreement did not explicitly address class arbitration, the language of the arbitration agreement, such as the language regarding the selection of an arbitrator, strongly suggests the parties intended their disputes to be resolved in non-class arbitration. Suppose that in 2003, they amend the arbitration agreement to include a class arbitration waiver to reinforce the original intent of their arbitration agreement and because of reasonable post-*Bazzle* worries that the silence in their arbitration agreement may be erroneously interpreted as permitting class arbitration.¹⁹³

In 2007, a dispute arises between the farmer and the dealer involving \$200. The farmer claims that because of new tax and regulatory laws, the farmer had to charge an extra \$200 regulatory fee in connection with a shipment of potatoes. The dealer claims that the new tax and regulatory laws would have added only \$100 to a shipment of potatoes, and in any event, the farmer should be responsible for the entire new fee because the dealer never agreed to pay for such extra charges. The dealer initiates a class action against the farmer in court, claiming the \$200 regulatory fee amounted to a scheme to defraud, breach of contract, unfair business practice, and unjust enrichment, and the dealer purports to represent a class of hundreds of similarly situated dealers who were charged the \$200 regulatory fee. Pursuant to §4 of the FAA, which provides for a court “order directing the parties to proceed to arbitration in accordance with the terms of the agreement,”¹⁹⁴ the farmer moves to compel the dealer to arbitrate the dealer’s individual dispute in accordance with the arbitration agreement which always provided for two-party, non-class arbitration and which was amended post-*Bazzle* to make it crystal clear that class arbitration was never intended.

Numerous courts, said to be in the majority, have enforced class arbitration waivers and compelled parties, like the dealer in the

192. This example of a farmer and dealer comes directly from the FAA’s legislative history. See 1924 Hearings, *supra* note 7, at 8.

193. During oral argument in *Bazzle*, Justice Stevens predicted that after *Bazzle*, it is “fairly clear that all the arbitration agreements in the future will prohibit class actions.” Transcript of Oral Argument of Respondent at 55, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634).

194. 9 U.S.C. § 4 (2006).

above hypothetical, to arbitrate claims on an individual, non-class basis pursuant to the terms of the arbitration agreement,¹⁹⁵ and this approach is consistent with the FAA's legislative history which focuses on the ability of two parties to resolve a dispute between them in arbitration. In fact, the example of a dispute between a dealer and farmer selling a carload of potatoes comes directly from the FAA's legislative history.¹⁹⁶ However, there are some courts that may allow the dealer in the above hypothetical to proceed in arbitration on a classwide basis, effectively and drastically rewriting the arbitration agreement of the parties, because such courts may find a class arbitration waiver substantively unconscionable.¹⁹⁷ Such decisions striking down class arbitration waivers are, in effect, finding that the two-party arbitration provided for in the arbitration agreement (and enshrined in the FAA's legislative history) is an inadequate form of dispute resolution under the circumstances, and such decisions are in effect holding that claimants are entitled to assert class claims in private dispute resolution. These decisions are indicative of a judicial mistrust towards two-party, non-class arbitration, which Congress intended to reverse more than eighty years ago when enacting the FAA.

Putting aside the debate whether the FAA's legal framework was intended to facilitate class arbitration when class arbitration is voluntarily agreed to, the FAA's legislative history recognizes that two parties can agree to resolve a dispute between themselves through two-party, non-class arbitration. Such a two-party arbitration, including the example of the farmer and dealer given above, is the exact type of arbitration envisioned in the FAA's legislative history. During the Congressional testimony regarding the FAA, it was recognized that two individuals generally have a right to resolve controversies between them with minimal procedure, "face-to-face," and

195. *Coady v. Cross County Bank*, 729 N.W.2d 732, 746 (Wis. Ct. App. 2007) ("[A] majority of state and federal courts have enforced class action waivers and found them not unconscionable."); *Spann v. American Exp. Travel Related Services Co., Inc.*, 224 S.W.3d 698 (Tenn. Ct. App. 2006) ("[W]ith the exception of courts sitting in California, the vast majority of state and federal courts that have considered the question have rejected the argument that class action and class arbitration waiver clauses are unconscionable *per se.*"); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005) ("Numerous courts, both federal and state, have rigorously enforced no-class-action provisions in arbitration agreements and found them to be valid provisions of such agreements and not unconscionable.").

196. *1924 Hearings*, *supra* note 7, at 8.

197. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

without government intrusion.¹⁹⁸ Julius H. Cohen, one of the drafters of the FAA, explained that adopting the FAA would only lead to a “minimum of legal intervention” in private dispute resolution.¹⁹⁹ The FAA recognizes the freedom of two parties to agree to resolve disputes by foregoing the complex procedures of court for the simplicity of arbitration. Cohen stressed that by adopting the FAA, Congress would not “reinject into controversies between businessmen the very technicalities and details which they have sought to escape by their arbitration agreements.”²⁰⁰ However, courts that are currently mandating private disputants to conduct class arbitration, contrary to the disputants’ original agreement to arbitrate on an individual basis, are directly interfering with the private arbitration process. Such courts are injecting into private dispute resolution “the very technicalities and details” of judicial proceedings, which is in direct conflict with the intent of the FAA. Whatever the advantages or disadvantages may be regarding two-party arbitration, courts that are declaring such two-party arbitration as inferior or inadequate are making negative judgments about arbitration that Congress intended to reverse and preclude when enacting the FAA.²⁰¹

In the current environment involving a resurrected mistrust of two-party arbitration, parties can be trapped in a classic “Catch-22” situation. If parties agree to a two-party model of arbitration, and if their arbitration clause is silent regarding class arbitration, there is a risk that an arbitrator will find their arbitration agreement permits

198. 1923 *Hearings*, *supra* note 73, at 5 (testimony of Charles L. Bernheimer) (describing the benefits of arbitration as bringing the disputants “face to face”).

199. 1924 *Hearings*, *supra* note 7, at 40.

200. *Id.*

201. Equally troubling is that some courts are creating their own methodologies to determine on a case-by-case basis that two-party, non-class arbitrations provided for in an agreement may be appropriate for situations X, Y, and Z, but are inappropriate for situations A, B, and C. In California, when a court is determining whether the two-party arbitration provided for in an agreement is appropriate for particular situations, courts consider whether the claimant is making an “allegation of a scheme to defraud consumers.” *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005); *Shroyer v. New Cingular Wireless Services, Inc.*, No. 06-55964, 2007 WL 2332068, *5 (9th Cir. Aug. 17, 2007) (in determining whether a class arbitration waiver is unconscionable, courts must consider whether the plaintiff is alleging a scheme to defraud consumers). An allegation by the claimant of a “scheme to defraud” tends to weigh in favor of finding that two-party arbitration would be inappropriate. Once classwide arbitration is ordered, if the arbitrator does certify a class, the certification may create significant pressure on the respondent to settle the claims, without ever reaching the merits of whether the claimant’s initial allegation of a scheme to defraud, which provided a basis for avoiding two-party arbitration, was in fact true.

class arbitration. If there is a clarification that the arbitration agreement is limited to two-party arbitration through an express clause prohibiting class arbitration, there is a risk that some courts may strike down such a clause and require class arbitration. This sort of “heads I win, tails you lose” treatment of two-party arbitration agreements, which effectively mandates that parties are to resolve their own disputes using complex judicial procedures like Rule 23, represents an opposition to two-party arbitration and an unwarranted judicial intrusion into the realm of private dispute resolution, contrary to the intent behind the FAA. In order to avoid this “Catch-22” situation, if the FAA is amended to facilitate class arbitration that parties truly agree to, perhaps Congress could provide that certain language in an arbitration agreement gives rise to a presumption that class arbitration is permitted or that only non-class arbitration is permitted.

III. IMPROVING THE FEDERAL ARBITRATION ACT AND CLASS ARBITRATION BY EXAMINING LABOR ARBITRATION

As explained above in Section II, if one focuses solely on the FAA’s language, it may be possible to construe its language consistently with facilitating class arbitration to some extent. If several people truly agreed to class arbitration, the FAA arguably provides some basic assistance in connection with class arbitration. However, the FAA’s legal framework would operate with some uncertainty and perhaps awkwardly in connection with class arbitration. For example, an unnamed class member’s ability to vacate an award and the ability of even the representative claimant or respondent to immediately vacate a clause construction award or even a class certification decision is not entirely clear.²⁰² Although perhaps the FAA may be workable to some degree in connection with class arbitration, the FAA was not likely intended or drafted with class arbitration in mind, particularly considering the FAA’s legislative history and its multiple references to two-party, non-class arbitration, the absence of references to class arbitration, and the descriptions of a simple, “face to face” arbitration procedure which helped avoid the “technicalities and details” of litigation.

A recurring problem with the FAA is that its language is arguably broader than the intent behind the statute as expressed during the Congressional hearings, and unfortunately this disconnect between the intent behind the statute and its language has probably

202. See *supra* notes 69-70 and accompanying text.

contributed in the past to the Supreme Court's expansion of the FAA. For example, in *Circuit City v. Adams*, a majority of Justices believed it was inappropriate to resort to the FAA's legislative history because they viewed the particular language of the FAA at issue as apparently clear.²⁰³ The dissenting Justices, however, characterized the majority as "[p]laying ostrich to the substantial history behind" the language at issue.²⁰⁴ The dissent criticized the majority's approach to interpreting the FAA as follows:

A minimalist judge who holds that the purpose of the statute may be learned only from its language has more discretion than the judge who will seek guidance from every reliable source. A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.²⁰⁵

It appears that to some degree, there may be a similar disconnect between the language of the FAA and the intent of the FAA with respect to facilitating class arbitration.

A clearer relationship among courts, class arbitration tribunals, the named parties to a class arbitration, and unnamed class members should be defined through amendments to the FAA if parties desire to engage in class arbitration. Based on an examination of labor arbitration, this section of the Article proposes some amendments for the FAA with respect to class arbitration as well as some suggestions for improving class arbitration procedure. In addition, as already mentioned above, if the FAA is amended to facilitate class arbitration, perhaps Congress could provide that certain language in an arbitration agreement gives rise to a presumption that class arbitration is permitted or that only non-class arbitration is permitted.

In 2000, prior to the wave of class arbitration prompted by *Bazzele*, there was already an interesting proposal by Stephen L. Hayford, a scholar and arbitrator, to unify the law regarding labor arbitration and commercial arbitration.²⁰⁶ The proposal, broadly examining "front end" issues like the enforcement of agreements to arbitrate as well as "back end" issues like vacatur, recognized "a striking similarity between the two bodies of law sufficient to facilitate their merger,"

203. 532 U.S. 105, 119 (2001) ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.").

204. *Id.* at 128 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.) (FAA never intended to apply to agreements affecting employment).

205. *Id.* at 133 (Stevens, J., dissenting, joined by Ginsburg, Breyer, & Souter, JJ.).

206. Hayford, *supra* note 38.

and the proposal found “there is nothing inherent in labor arbitration or commercial arbitration that makes either of them unsuited for regulation under the same, unitary statutory scheme.”²⁰⁷ Now, with the advent of post-*Bazze* class arbitration, commercial arbitration proceedings are occurring that bear an even stronger resemblance to labor arbitration than in the past when Hayford initially proposed a merger. As explored below, a standard developed in connection with labor arbitration may be workable in connection with class arbitration, which is consistent with the broader proposal to merge the entire law of labor and commercial arbitration. Also, more recently, William B. Gould, IV presented a powerful thesis that “a new and important system of jurisprudence” involving “a hybrid of labor and commercial approaches to the arbitral handling of agreements can evolve in the first part of this century.”²⁰⁸ He examines how labor arbitration could improve aspects of employment arbitration to produce a justice system for the workplace.²⁰⁹ In addition, Prof. Gould, recognizing that the Supreme Court has already found that courts could properly look to the FAA for “guidance” in labor arbitration cases, examines the application of the FAA to collective bargaining agreements.²¹⁰ He finds that application of the FAA to collective bargaining agreements in the labor context can be beneficial in some circumstances.²¹¹ As explained below, the converse may also be true. Application of labor arbitration law principles to class arbitration may also be helpful, and there are aspects of labor arbitration proceedings which should be considered for adoption in connection with class arbitration proceedings if parties wish to engage in class arbitration. Part A of this section examines the issue of judicial review of class arbitration by unnamed class members, and part B of this section examines how class arbitration proceedings can be improved based on certain aspects of labor arbitration proceedings.

207. *Id.* at 784, 925; *see also id.* at 925 (“[B]ecause commercial arbitration is presently afforded the same degree of respect and deference granted labor arbitration for the last forty years, there is no good reason for the two bodies of law to remain separate.”)

208. Gould, *supra* note 41, at 611.

209. *Id. passim.*

210. *Id.* at 639 (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 41 n.9 (1987)).

211. *Id.* at 644 (FAA’s appellate standards could allow labor arbitration to proceed more expeditiously in some circumstances); *id.* at 646 (FAA’s provision of subpoena power could be helpful in those states lacking an effective discovery machinery applicable to collective bargaining agreements); *id.* (there does not seem to be “appreciable differences” between judicial review under the FAA or the National Labor Relations Act).

A. *Judicial Review of Class Arbitration by Unnamed Class Members*

A mechanism for aggregate dispute resolution may become too unwieldy if extensive appellate or review procedures were easily available for individual members of the represented group to broadly contest every issue raised in a representative proceeding. However, some type of review of a representative proceeding should exist to help ensure that individuals are properly represented. This section of the Article proposes that existing law regarding labor arbitration may provide some guidance regarding a standard of judicial review for an individual class member in connection with class arbitration. Part 1 of this section examines the importance of limited review in connection with arbitration and class procedures in general. Part 2 of this section then focuses on labor arbitration law, more particularly, judicial review of labor arbitration by individual employees. Part 3 then examines how this law regarding judicial review of labor arbitration may be used in connection with class arbitration.

1. *The Importance of Limited Review in Connection With Arbitration and Class Procedures*

Before discussing a proposed standard of judicial review of class arbitration for unnamed class members, it is worth examining some of the justifications given for the limited review traditionally applied in connection with non-class arbitration under the FAA; judicial class actions; and labor arbitration - which already involves collective action in an arbitral setting.

a. *The Importance of Limited Review of Non-Class Arbitration*

The standard of judicial review of arbitration awards under the FAA is "one of the narrowest standards of judicial review in all of American jurisprudence."²¹² Courts have justified this limited standard of judicial review as follows:

Limited judicial review [of arbitral decisions] is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it. A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one

212. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005) (citation omitted).

would hardly achieve the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation. Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party. Thus, in reviewing arbitral awards, a district or appellate court is limited to determining whether the arbitrators did the job they were told to do - not whether they did it well, or correctly, or reasonably, but simply whether they did it. Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts. In the Federal Arbitration Act, 9 U.S.C. §§ 1-16, Congress has limited the grounds upon which an arbitral award can be vacated.²¹³

Several courts have emphasized that judicial review of an arbitration award is “very narrowly limited” because the “purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.”²¹⁴

b. *The Importance of Limited Review of Judicial Class Actions by Unnamed Class Members*

Turning next to judicial class actions, the right of an unnamed class member to appeal has generally been limited, although there

213. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (citations and internal quotations omitted).

214. *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) (citations omitted); *Hicks v. Bank of America, N.A.*, 218 Fed.Appx. 739, 745 (10th Cir. 2007) (“[W]e must give extreme deference to the determination of the [arbitrator] for the standard of review of arbitral awards is among the narrowest known to law.”) (citation omitted); *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) (“Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.”); see also 4 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 39.1.1 (Supp. 1999) (“If parties could, without restraint, litigate in other forums the same dispute resolved by an arbitrator, arbitration would lose one of its chief advantages as an alternative to traditional court adjudication.”); 18B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 4475.1 (2007) (“If any party dissatisfied with the award were left free to pursue independent judicial proceedings on the same claim or defenses, arbitration would be substantially worthless.”).

has been some disagreement regarding the appellate rights of unnamed class members. Some courts have taken a restrictive approach regarding an appeal of a final judgment by an unnamed class member, and these courts reason that allowing such an appeal is fundamentally inconsistent with the purpose of class procedure:

A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. A class cannot even be certified unless its members are so numerous that joinder is impracticable. If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court would defeat the very purpose of class action lawsuits.²¹⁵

In addition to this rationale that individual appeals would make class actions “unmanageable” and “nonproductive,” courts restricting appeals from unnamed class members have also reasoned that such appeals would improperly circumvent Rule 23 of the Federal Rules of Civil Procedure, the class action rule, which does not expressly provide for an appellate procedure for individual class members.²¹⁶ This restrictive view regarding appellate rights has also been justified on the grounds that adequate procedures already exist within a class proceeding to protect unnamed class members.²¹⁷

On the other end of the spectrum are courts that have concluded it is permissible under certain circumstances to allow an unnamed class member in judicial class actions to appeal.²¹⁸ Two justifications for this more permissive approach are that the rights of unnamed class members are affected by a judicial decree, and some courts have reasoned that there is no evidence demonstrating such individual appeals would render class actions unmanageable.²¹⁹

Prior to 2002, a majority of the federal circuits followed a restrictive approach regarding appeals from unnamed class members, and a minority followed a more lenient position regarding such appeals.²²⁰

215. *Guthrie v. Evans*, 815 F.2d 626, 629 (11th Cir. 1987) (citations omitted), *abrogated on other grounds by Devlin v. Scardelletti*, 536 U.S. 1 (2002).

216. *Id.* at 628.

217. *Id.*

218. *In re PaineWebber Inc. Ltd. P'ships. Litig.*, 94 F.3d 49, 53 (2d Cir. 1996) (non-named class members who object at the fairness hearing may appeal); *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 710 (3d Cir. 1993) (same).

219. *Scardelletti v. Debarr*, 265 F.3d 195, 214-15 (4th Cir. 2001) (Michael, J., concurring in part and concurring in the judgment).

220. *Debarr*, 265 F.3d at 208 (explaining majority and minority views).

In 2002, these different views regarding appeals from unnamed class members in judicial class actions came before the United States Supreme Court in *Devlin v. Scardelletti*.²²¹

The Supreme Court in *Devlin* held that class members who have objected at a fairness hearing may appeal the court's approval of a settlement.²²² The Supreme Court reasoned that "nonnamed class members are parties to the proceedings in the sense of being bound by the settlement," and as a result, class members who objected at the fairness hearing must be allowed to appeal the approval of a settlement.²²³

The Supreme Court, addressing concerns that individual appeals would render class actions unmanageable, concluded that its particular ruling permitting individual appeals would not be problematic because the right of appeal does not apply broadly to all class members, but instead "is limited to those non-named class members who have objected during the fairness hearing."²²⁴

A pre-*Devlin* court has explained that the conflicting views regarding appellate rights for unnamed class members reflected differing views in balancing fairness and efficiency in class procedures:

A crucial difference between the approach of the majority of [pre-*Devlin*] courts . . . and that of the minority of [pre-*Devlin*] courts . . . is the way in which the courts balance class management concerns against fairness concerns. A majority of courts . . . place a greater emphasis on the need for efficiency and effective class management, whereas a minority of courts place a greater emphasis on the need to ensure the fairness and adequacy of class action settlements.²²⁵

The Supreme Court in *Devlin* appears to have tilted the fairness/efficiency balance towards concerns over fairness. However, there is some uncertainty regarding *Devlin's* reach.

Some courts have limited *Devlin* to situations involving mandatory or non-opt out class actions because *Devlin* involved such a class action.²²⁶ The Eighth Circuit has explained that "*Devlin* drew

221. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

222. *Id.* at 13.

223. *Id.* at 10, 13.

224. *Id.* at 11.

225. *Scardelletti v. Debarr*, 265 F.3d 195, 208 (4th Cir. 2001) (citations omitted).

226. *Devlin*, 536 U.S. at 10-11 ("Particularly in light of the fact that petitioner had no ability to opt out of the settlement, see Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.").

its strength from the mandatory character of the class action,” and thus *Devlin* only applies to non-opt-out classes.²²⁷ Although the Eighth Circuit believed this “limited reading of *Devlin* has considerable merit,” the court found it unnecessary to resolve this issue.²²⁸

Even though *Devlin* opened the door for some appeals from class members, the right of an unnamed class member to appeal is arguably still limited. Because the applicability of *Devlin* beyond mandatory class actions is not entirely clear, the pre-*Devlin* majority view that unnamed class members in a judicial class action cannot appeal may still have some validity. A justification for this pre-*Devlin* majority view is that the utility of the class device to help render manageable numerous claims would be undermined if the individual members of a class could file individual appeals.²²⁹ Allowing every member broad appellate rights may undermine the purpose of the class device.²³⁰ The Supreme Court in *Devlin* did not express disagreement with this concern that a lenient right of appeal for class members would undermine the efficiency of class actions. Instead, the Supreme Court explained that this concern was not significant in

227. *In re Gen. Am. Life Ins. Co. Sales Practice Litig.*, 302 F.3d 799, 800 (8th Cir. 2002).

228. *Id.*; see also *Snell v. Allianz Life Ins. Co. of N. Am.*, 327 F.3d 665 (8th Cir. 2003) (“*Devlin* does not apply because this is an opt-out class action.”); *Ballard v. Advance Am.*, 79 S.W.3d 835, 837 (Ark. 2002) (“[T]he petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.”); *Gautreaux v. Chicago Housing Authority*, 475 F.3d 845, 851-52 (7th Cir. 2007) (recognizing that other courts have limited *Devlin* to the context of a non-opt out class action); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1185 n.2 (10th Cir. 2002) (recognizing there is doubt regarding the scope of *Devlin*, but leaving the issue for another day). *But see Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 572 (9th Cir. 2004) (*Devlin* allows an objector to appeal in connection with an opt-out class settlement).

229. *Guthrie v. Evans*, 815 F.2d 626, 629 (11th Cir. 1987) (citations omitted).

230. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (recognizing that a “principle purpose” of the class action rule is “efficiency and economy” in resolving disputes); *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 458 (7th Cir. 1997) (“If class members can file their own appeals, the coherence of the class is destroyed, the scope of the class action becomes unclear, and the control over the action becomes divided and confused.”); *Gottlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993) (individual appeals from class members would “directly conflict with the goals of Rule 23” and cause the class action device to lose its “utility” and “break down under the burden of unpredictable and unlimited individual actions”); see also CONTE & NEWBERG, *supra* note 98, § 1:3 (recognizing that a principal objective of the class device is economy and efficiency arising from the resolution of claims of numerous individuals in a single proceeding).

the situations where *Devlin* is applicable because *Devlin* allows appeals from a class member only when the class member objects during the fairness hearing.²³¹ Moreover, even when *Devlin* does allow an objector to appeal, the appeal must relate to the objections,²³² and the standard of review is narrow.²³³ So, in sum, appellate review of judicial class actions pursuant to a challenge brought by an unnamed class member, even after *Devlin*, appears to be limited.

c. *The Importance of Limited Review of Labor Arbitration*

As explained above, there is limited judicial review of non-class arbitration proceedings under the FAA.²³⁴ Narrow review helps promote arbitration as an efficient, expedient alternative to formal litigation, and permitting broad challenges would create inefficiency by “reduc[ing] arbitral proceedings to the status of preliminary hearings.”²³⁵ Similarly, concerns about efficiency have been raised in connection with broad appellate rights for class members in the judicial class action context. Broad individual appellate rights could make the class device “unmanageable” and “nonproductive,” potentially frustrating a purpose of the class device.²³⁶ When arbitration combines with a class or representative device, it is no surprise that review would similarly be limited, as illustrated by labor arbitration.

In the labor arbitration context, similar to the non-class, consumer arbitration context, courts have recognized that judicial review of labor arbitration awards should be limited in order to preserve the utility of the arbitration process as a valid alternative to litigation:

The singular importance of arbitration as a method for resolving labor disputes has been recognized repeatedly by the courts and Congress. By submitting a dispute to arbitration, labor and management can secure a decisive resolution of their differences without the delay inherent in litigation or the disruption of a

231. 232 *Devlin*, 536 U.S. at 11 (explaining that under its ruling, the “power to appeal is limited to those nonnamed class members who have objected during the fairness hearing. This limits the class of potential appellants considerably”).

232. *Id.* at 14 (objectors can appeal “the District Court’s decision to disregard their objections”).

233. 234 On remand, the Fourth Circuit in *Devlin* applied an abuse of discretion standard to the objector’s challenge. See *Scardelletti v. Debarr*, 43 F. App’x 525, 528 (4th Cir. 2002) (examining “whether there is a clear showing that the district court abused its discretion” (citation omitted)).

234. See *supra* notes 213-215 and accompanying text.

235. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994).

236. *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987).

strike or lockout. Arbitration cannot accomplish these purposes, however, if the courts do not afford finality to the arbitrator's decision. Moreover, finality must follow swiftly if arbitration is to continue to afford an efficient resolution of disputes. In order to further these goals, judicial review of an arbitration award is among the narrowest known to the law.²³⁷

The Seventh Circuit, in a labor arbitration case, has recognized that the "idea of arbitration . . . is to provide an alternative to judicial dispute resolution, not an echo of it," and thus for a court to review the correctness of a labor arbitration would "judicialize[] the arbitration process."²³⁸ The United States Supreme Court has also stated in the context of labor arbitration that "[i]f the courts were free to intervene [in labor arbitrations because they simply disagreed with a labor arbitrator's decision], the speedy resolution of grievances by private mechanisms would be greatly undermined."²³⁹

Limited review of labor arbitration has been justified based on concerns relating to arbitration, namely that limited review of arbitration helps promote the efficiency and expediency of arbitration as an alternative to litigation. However, labor arbitration also involves group representation, and courts have recognized that if an individual employee could easily seek judicial review of a labor arbitration award, the utility of the representative nature or representative device in labor arbitration would be substantially undermined, "thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."²⁴⁰

Limited review is well established in connection with non-class arbitration and judicial class actions, as well as in labor arbitration

237. 238 Dist. 17, *United Mine Workers v. Apogee Coal Co.*, 13 F.3d 134, 137-38 (4th Cir. 1993) (internal quotations and citations omitted).

238. *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184 (7th Cir. 1985); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1293 (9th Cir. 1987) (recognizing in a labor arbitration case that "[b]ecause arbitration is an *alternative* to the judicial resolution of disputes, this extremely low standard of review is necessary to prevent the 'judicialization' of the arbitration process" (citation omitted)); *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996) (noting that judicial review of labor arbitration must be highly deferential in order to avoid "undermin[ing] the congressional policy of promoting speedy, efficient, and inexpensive resolution of labor grievances" (citation omitted)).

239. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

240. *Mitchell v. Cont'l Airlines, Inc.*, 481 F.3d 225, 232-33 (5th Cir. 2007) (quoting *Vaca v. Sipes*, 386 U.S. 171, 191 (1967)).

where arbitration and group representation combine. Similarly, limited review should also be justified when arbitration combines with class procedure in the context of class arbitration.

2. *Judicial Review of Labor Arbitration by Individual Employees*

This section of the Article explores labor arbitration law, and more particularly, judicial review of labor arbitration by individual employees. This labor arbitration law is relevant to the next section of the Article, which discusses how labor arbitration law may be used in connection with judicial review of class arbitration by individual class members.

a. *The Duty of Fair Representation*

It is well-established that when a union acts in a representative capacity during a labor arbitration, an individual employee's right to challenge an arbitration award is limited and requires a showing that the union breached its duty of fair representation:

In the case of an employee seeking to vacate the outcome of an arbitration at which he was represented by his union, judicial review will be granted only if the employee can show that the union breached its duty of fair representation, and then the arbitration award will be vacated only if the court finds that the union's breach of its duty substantially contributed to an erroneous outcome in the arbitration.²⁴¹

The United States Supreme Court first recognized a duty of fair representation in 1944 in *Steele v. Louisville & Nashville R.R.*, a case involving a labor organization serving as the exclusive bargaining

241. *Kirkland v. Benova*, No. 90 Civ. 4239 (MGC), 1992 WL 79304, at *2 (S.D.N.Y. Apr. 7, 1992) (citations omitted); *see also* *Payne v. Giant Food, Inc.*, 346 F.Supp. 2d 15, 19 (D.D.C. 2004) ("It is well-settled that an employee who is bound by arbitration procedures in a collective bargaining agreement will be bound by the result of an arbitration according to the agreement's finality provisions, subject to very limited judicial review. The Supreme Court has described an exception to this general rule: an employee may obtain judicial review of an arbitrator's award if the union as bargaining agent breached its duty of fair representation." (citations and internal quotations omitted)); *Katir v. Columbia Univ.*, 15 F.3d 23, 24-25 (2d Cir. 1994) ("If there is no claim that the union breached its duty of fair representation, an individual employee represented by a union generally does not have standing to challenge an arbitration proceeding"); *Bryant v. Bell Atlantic Md., Inc.*, 288 F.3d 124, 131 (4th Cir. 2002); *Nicholls v. Brookdale Univ. Hosp.*, 204 F. App'x 40, 41-42 (2d Cir. 2006).

agent of employees pursuant to the Railway Labor Act.²⁴² The Supreme Court held that a duty of fair representation was implicit in the union's authority to act as the exclusive representative of the employees:

It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.²⁴³

The Supreme Court also suggested that the Railway Labor Act created a relationship of principal and agent between the represented employees and the labor organization, and the Supreme Court compared a labor organization serving as an exclusive representative of employees to a legislature, "which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."²⁴⁴ Labor organizations serving as representatives have "as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."²⁴⁵ The Supreme Court held that in light of a union's status as an exclusive representative, a union has a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts," "without hostile discrimination, fairly, impartially, and in good faith," and for a breach of this duty, injunctive relief and damages are available.²⁴⁶

Later, in 1953, the Supreme Court extended the duty of fair representation to unions organized under the National Labor Relations Act in *Ford Motor Co. v. Huffman*.²⁴⁷ The Supreme Court, citing *Steele*, explained that a labor organization's statutory obligation to represent all employees of a unit "requires them to make an honest effort to serve the interests of all of those members, without hostility

242. FAIRWEATHER'S PRACTICE & PROCEDURE IN LABOR ARBITRATION 690 (Ray J. Schoonhoven ed., 4th ed. 1999) (citing *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944)); LABOR ARBITRATION, *supra* note 99, at 295; ELKOURI & ELKOURI, *supra* note 100, at 252.

243. See *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202 (1944).

244. *Id.* at 198.

245. *Id.* at 202.

246. *Id.* at 203, 204, 207.

247. LABOR ARBITRATION, *supra* note 99, at 295 (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)); ELKOURI & ELKOURI, *supra* note 100, at 252-53.

to any,” and such an organization “is responsible to, and owes complete loyalty to, the interests of all whom it represents.”²⁴⁸ A duty of fair representation grants a labor organization serving as an exclusive representative a “wide range of reasonableness . . . , subject always to complete good faith and honesty of purpose in the exercise of its discretion.”²⁴⁹ The Supreme Court has repeatedly confirmed that a duty to represent fairly all employees of the bargaining unit applies to labor organizations serving as the exclusive representative of such employees.²⁵⁰ The duty of fair representation exists because of a policy “to allow a single labor organization to represent collectively the interests of all employees within a unit.”²⁵¹ Under this statutory system of exclusive representation, individual employees generally lose the right to bargain individually or resolve disputes individually with the employer, and the duty of fair representation exists in order to protect individual employees who are “stripped of traditional forms of redress by the provisions of federal labor law.”²⁵²

The duty of fair representation broadly extends to “all levels of a union’s representation, from contract negotiations to enforcement and grievance proceedings.”²⁵³ Courts have held that, generally speaking, the duty applies to unions when they are acting in a “representative capacity,”²⁵⁴ including when unions are representing employees in arbitration.²⁵⁵

248. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953).

249. *Id.* at 338; see also *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 n.14 (1983) (“The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” (citations and quotations omitted)).

250. See, e.g., *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998).

251. *DelCostello*, 462 U.S. at 164 n.14.

252. *Id.* (citations omitted).

253. *Payne v. Giant Food, Inc.*, 346 F.Supp.2d 15, 20 (D.D.C. 2004) (citations omitted).

254. *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 77 (1991) (duty of fair representation applies in “instances in which a union is acting in its representative role”); *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers*, 132 F.3d 824, 830 (1st Cir. 1997); *Higdon v. United Steelworkers of America*, 537 F.Supp. 653, 657 (S.D. Ga. 1982) (duty of fair representation “extends to all union dealings in its representative capacity” (citations omitted)).

255. *Breninger v. Sheet Metal Workers Intern. Ass’n Local Union No. 6*, 493 U.S. 67, 88 (1989) (“[A] union has a duty of fair representation in grievance arbitration.” (citing *Vaca v. Sipes*, 386 U.S. 171 (1967))).

Fair representation is a significant issue when an employee represented by a union seeks to challenge the finality of labor arbitration. Typically, collective bargaining agreements establish grievance procedures concluding with final and binding arbitration,²⁵⁶ and individual employees are generally bound by an arbitration award according to the collective bargaining agreement's finality provisions.²⁵⁷

Subject to very limited judicial review, [individual employees] will be bound by the result [of an arbitration proceeding] according to the finality provisions of the [collective bargaining] agreement. . . . [H]owever, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, . . . [an employee-plaintiff] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. The suit is thus not a straightforward breach of contract suit under § 301, . . . , but a hybrid § 301/fair representation claim, amounting to a direct challenge to the private settlement of disputes under [the collective-bargaining agreement].²⁵⁸

256. 20 SAMUEL WILLISTON & RICHARD LORD, A TREATISE ON THE LAW OF CONTRACTS § 56:7 (4th ed. 1993 & Supp. 1999) ("Nearly every labor agreement concludes the grievance machinery in a collective bargaining agreement with final and binding arbitration."); ELKOURI & ELKOURI, *supra* note 100, at 214; *id.* at 8 ("There is a general disposition on the part of labor and management to provide, as the final grievance step, for the arbitration of contract interpretation and application disputes."); Labor Arbitration Rules, *supra* note 102 (labor and management enter into "thousands" of collective bargaining agreements every year, and "[v]irtually all of these agreements provide for arbitration of unresolved grievances").

257. *Payne*, 346 F.Supp. 2d at 19.

258. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164-65 (1983) (citations and quotations omitted).

Thus, an individual employee who wishes to avoid the effects of a labor arbitration must demonstrate a breach of the union's duty of fair representation within the context of a hybrid § 301/fair representation claim.²⁵⁹ In addition to showing a breach of the duty of fair representation, the individual employee must generally establish that the employer breached the collective bargaining agreement,²⁶⁰ and that the union's breach of the duty of fair representation "seriously undermine[d] the integrity of the arbitral process."²⁶¹

b. *What Constitutes a Breach of the Duty of Fair Representation*

In determining whether a union has breached the duty of fair representation, courts generally examine whether a union's actions are "arbitrary, discriminatory, or in bad faith," a tripartite standard.²⁶² To demonstrate bad faith conduct, courts generally require

259. *Acosta v. Northrop Grumman*, No. Civ.A. 02-3206, 2003 WL 22872104, at *10 (E.D. La. Dec. 1, 2003) ("The hybrid suit is typically brought by an employee against both his employer and the union in order to set aside a final and binding determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. It is, therefore, a direct challenge to the private settlement of disputes under the collective bargaining agreement." (citation omitted)).

260. *Patton v. Budd Co.*, 229 F. App'x 380, 385 (6th Cir. 2007) ("A plaintiff asserting a hybrid § 301 action brings two claims: breach of a collective bargaining agreement by the employer and breach of the duty of fair representation by the union." (citation omitted)).

261. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976); *Rennie v. Glass Workers Int'l Union*, 38 F.Supp. 2d 209, 215 (D.Conn.1999) (breach of duty of fair representation requires, *inter alia*, that the breach "must have seriously undermined the arbitral process" (citation omitted)). In such hybrid lawsuits, "[t]he governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca v. Sipes*, 386 U.S. 171, 197 (1967). The employer is typically liable for damages caused solely by its breach of the collective bargaining agreement, and the union is liable for any increase in damages arising from its breach of the duty of fair representation. *Sparks v. UAW*, No. 94-3951, 1996 WL 487252, at *4-*5 (6th Cir. Aug. 26, 1996) (unpublished table decision); *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1245 (10th Cir. 1998) ("In light of this principle, we have held that the apportionment of damages must serve the following purposes: (1) damages must be apportioned according to each party's fault, (2) the union must be held responsible for any increases in the employee's damages, which were caused by the union, and (3) the employee must be made whole." (citations and internal quotations omitted)).

262. *Vaca* 386 U.S. at 190 (1967) (citations omitted); *Gray v. Champion Int'l Corp.*, No. 96-3762, 1997 WL 809969, at *2 (6th Cir. Dec. 18, 1997) (unpublished table decision) ("[T]he three named factors are three separate and distinct possible routes by which a union may be found to have breached its duty. In other words, a plaintiff need only show that the union's actions could be characterized in any one of these three ways." (citations omitted)); *Griffin v. Air Line Pilots Ass'n*, 32 F.3d 1079, 1083 (7th Cir. 1994) ("This is a tripartite standard; a court should look to each element when determining whether a union violated its duty." (citation omitted)).

“substantial evidence of fraud, deceitful action or dishonest conduct.”²⁶³ Courts treat union conduct as discriminatory if it involves “invidious” discrimination, such as discrimination “based upon impermissible or immutable classifications such as race or other constitutionally protected categories, or [discrimination arising] from prejudice or animus.”²⁶⁴ Union conduct is considered arbitrary if the conduct is “so far outside a wide range of reasonableness that it is wholly irrational or arbitrary.”²⁶⁵

When analyzing conduct under the arbitrariness prong of the tripartite standard, courts have required more than mere negligence in order to find a breach of the duty of fair representation:

Mere negligence on the part of a union does not satisfy this requirement. Moreover, ordinary mistakes, errors, or flaws in judgment also will not suffice. That is, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision. In essence then, to prevail, a plaintiff has the difficult task of showing that the union’s actions were wholly irrational.²⁶⁶

Pursuant to the tripartite standard regarding fair representation, including its arbitrariness prong, courts have a deferential relationship with unions with respect to their representation of employees.²⁶⁷

An employee may believe that a union’s particular arguments or strategies utilized during an arbitration or grievance process are flawed, but such challenges to a union’s actions are not likely to succeed under the deferential arbitrariness standard unless the union’s

263. *Perez v. N.Y. Presbyterian Hosp.*, No. 05 Civ. 5749 (LBS), 2006 WL 695691, at *2 (S.D.N.Y. Mar. 20, 2006) (citations omitted).

264. *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1359-60 (10th Cir. 1994) (citations omitted).

265. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45 (1998) (citations and quotations omitted).

266. *Garrison v. Cassens Transport Co.*, 334 F.3d 528, 538-39 (6th Cir. 2003) (citations and internal quotations omitted); *see also* *United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990) (“The courts have in general assumed that mere negligence . . . would not state a claim for breach of the duty of fair representation, and we endorse that view today.”); *Vincent v. Local No. 14*, No. 90-5834, 1991 WL 100581, at *2 (6th Cir. June 11, 1991) (unpublished table decision) (“Arbitrary is not synonymous with negligence.”).

267. *Emmanuel v. Local Union No. 25, International Brotherhood of Teamsters*, 426 F.3d 416, 420 (1st Cir. 2005) (when evaluating a union’s conduct under the duty of fair representation, “the reviewing court must accord the union’s conduct substantial deference” (citations omitted)); *Williams v. Air Wisconsin, Inc.*, 874 F.Supp. 710, 715 (E.D. Va. 1995) (“The judiciary’s evaluation of a union’s performance must be highly deferential.” (citation and internal quotations omitted)).

actions are wholly irrational.²⁶⁸ For example, in *Emmanuel v. International Brotherhood of Teamsters*, an employee preferred that the union rely on one particular argument during an arbitration proceeding.²⁶⁹ However, the union instead focused on an alternative argument based on an apparently untested reading of the collective bargaining agreement, and the arbitrator rejected the union's argument.²⁷⁰ The First Circuit found that the collective bargaining agreement arguably supported the union's position, and it was rational for the union to rely on this losing argument.²⁷¹ Accordingly, there was no breach of the duty of fair representation, and the employee's challenge failed.²⁷²

Similarly, in *Garcia v. Zenith Electronics Corp.*, an employee challenged a union's "strategy" and "presentation" during an arbitration hearing.²⁷³ The Seventh Circuit recognized that although the union's "strategy and presentation may not have been [the employee]'s preferred approach," and although the union may not have been as "thorough" as possible, the union's strategy for the arbitration was rational.²⁷⁴ The Seventh Circuit, reaffirming the deferential standard applied when reviewing union conduct challenged by an employee, explained that "[c]ourts should not substitute their judgment for that of the union, even if, with the benefit of hindsight, it appears that the union could have made a better call."²⁷⁵

In *Moore v. Duke Power Co.*, an employee attempted to avoid the effect of an adverse arbitration ruling by arguing that the union breached the duty of fair representation by failing to make a particular argument regarding disability discrimination.²⁷⁶ The employee desired the union to make arguments based on discrimination law, and the union did not raise such arguments during the arbitration

268. See *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45 (1998).

269. 426 F.3d 416, 419, 421 (1st Cir. 2005).

270. *Id.* at 421.

271. *Id.*

272. *Id.*

273. 58 F.3d 1171, 1179 (7th Cir. 1995).

274. *Id.*

275. *Id.* at 1176 (citation and quotations omitted); see also *Benson v. Potter*, 210 Fed. App'x. 530, 532 (7th Cir. 2006) (finding an employee's objections to union's conduct in connection with an arbitration proceeding amounted to a "disagreement with its strategy" and a union's strategic choices are entitled to deference unless they are irrational, discriminatory, or in bad faith" (citations omitted)).

276. 971 F.Supp. 978, 984 (W.D.N.C. 1997).

despite allegedly informing the employee that discrimination arguments would be raised.²⁷⁷ The court found that the union either forgot to raise the employee's suggested arguments regarding discrimination or "instead made a strategic decision not to pursue" such arguments during the arbitration, and "[a]t best," such evidence demonstrated the union's negligence or merely a "strategic error."²⁷⁸ Because there was no evidence the union handled the arbitration "perfunctorily or in bad faith," the court held that the employee could not avoid the adverse arbitration award.²⁷⁹ The union's failure to raise certain arguments during the arbitration was not a breach of the duty of fair representation.²⁸⁰

Under this standard of arbitrariness which requires more than mere negligence, courts have held that the following alleged failures of a union in connection with an arbitration proceeding did not constitute a breach of its duty of fair representation:

277. *Id.* at 980, 984.

278. *Id.* at 985.

279. *Id.*

280. *Id.*; see also *Williams v. Air Wisconsin, Inc.*, 874 F.Supp. 710, 716-17 (E.D. Va. 1995) (union's unsuccessful strategy of focusing on one argument during arbitration instead of another argument favored by employee did not amount to breach of duty of fair representation because a union's "mistake in judgment" is insufficient to establish breach); *Mains v. LTV Steel Co.*, 89 F. App'x 911, 920-21 (6th Cir. 2003) (employee's claim that union improperly failed to advance a certain argument during arbitration was insufficient to demonstrate breach of duty of fair representation because courts must defer to a union's "reasonable strategic choices during the arbitration"); *Truesdell v. S. Cal. Permanente Med. Group* 37 F. App'x 945, 946 (9th Cir. 2002) (union's failure to argue employee's particular interpretation of the collective bargaining agreement was within the "wide range of reasonableness" permitted unions and even if employee's interpretation was correct, a union may make errors of judgment without breaching the duty of fair representation); *Parker v. BASF Corp.*, No. Civ.A. 97-2100, 1998 WL 185224, at *5 (E.D. La. Apr. 17, 1998) (rejecting employee's challenge to union's strategy during arbitration because "[a]n arbitration proceeding, like any adversarial proceeding, requires advocates to make tactical and strategic decisions. While some decisions may prove ill-advised in hindsight, that does not make them arbitrary, discriminatory, irrational, or in bad faith"); *Cox v. Johnson Controls Battery Group, Inc.*, No. 97-286-Civ.-T-17C, 1997 WL 724411, at *4 (M.D. Fla. Nov. 17, 1997) (rejecting employee's challenge to union's focus on a particular argument during arbitration); *Hague v. United Paperworkers Intern. Union*, 949 F.Supp. 979, 987 (N.D.N.Y. 1996) (union attorney's failure to challenge validity of agreement "negligent at worst" but insufficient to constitute arbitrary or bad faith conduct; attorney believed it would have been counterproductive to offer such an argument); *Agate v. General Motors Corp.*, No. K81-324 CA, 1985 WL 5852, at *4 (W.D. Mich. June 18, 1985) (error in judgment in interpreting contract is not a breach of the duty of fair representation without a showing that it was the result of arbitrary or perfunctory conduct).

- failure to offer certain evidence or testimony;²⁸¹
- failure to cross-examine a witness;²⁸² and
- failure to undertake a proper investigation, such as collecting evidence or interviewing witnesses.²⁸³

The prior examples involve the context of a union handling the grievance of an individual employee, as opposed to a group of employees. However, courts have recognized that even when a union is handling the grievance of an individual employee, a union may consider the interests of the broader group of employees.²⁸⁴ Also, a union is

281. *Mains v. LTV Steel Co.*, 89 Fed.Appx. 911, 919-20 (6th Cir. 2003) (union's strategic decision not to have employee testify and clarify prior statement did not constitute a breach of the duty of fair representation); *Barr v. United Parcel Serv., Inc.*, 868 F.2d 36, 43 (2d Cir. 1989) (tactical error in failing to present witnesses was insufficient to demonstrate breach of duty of fair representation); *Arteaga v. Bevona*, 21 F.Supp. 2d 198, 207 (E.D.N.Y. 1998) ("In hindsight, [the union lawyer's] determination that it was unnecessary to call any other witnesses at the arbitration hearing appears to have been harmful to plaintiff's case. . . . However, decisions that appear in hindsight to be mere tactical errors are [not] nearly sufficient to make out a prima facie case that the Union breached its duty of fair representation." (citations and internal quotations omitted)); *Parker v. BASF Corp.*, No. Civ.A. 97-2100, 1998 WL 185224, *5 (E.D. La. Apr. 17, 1998) (challenge to union's "decisions on the witnesses to call and the questions to ask" did not amount to breach of duty of fair representation); *Robinson v. Dinner Bell Meats*, No. C87-571, 1988 WL 215405, *7 (N.D. Ohio Dec. 1, 1988) ("[T]he Union attorney's decision not to call [certain employees as witnesses] was rationally based," and "[t]his decision was a strategic one based on counsel's judgment that another witness . . . had better recollection of the facts Even assuming, arguendo, that this tactical decision was erroneous, such error would have been merely an error in judgment, and is insufficient to constitute a breach of the duty of fair representation."); *Id.* ("[C]ourts will not interfere with honestly made tactical decisions of union representatives including the determination of which witnesses to call at hearing.").

282. *Smith v. United Parcel Serv., Inc.*, 96 F.3d 1066, 1069 (8th Cir. 1996) (concluding that the hiring of an expert witness is "within the wide range of reasonableness afforded a union in pursuing grievances on behalf of its members"); *Tomney v. Int'l Ctr. for Disabled*, 357 F.Supp. 2d 721, 736 (S.D.N.Y. 2005) (inadequate cross-examination of witnesses "would merely amount to tactical errors or lapses in representation, not a violation of its DFR" (citation and internal quotations omitted)).

283. *Smith v. United Parcel Serv., Inc.*, 96 F.3d 1066, 1069 (8th Cir. 1996) (employee argues that [the union] failed to obtain additional reports that could be used to challenge employer's conduct, but "[w]hether the union should have obtained more records is a matter within the wide range of reasonableness afforded to a union in pursuing a grievance"); *Williams v. Air Wisconsin, Inc.*, 874 F.Supp. 710, 717 (E.D. Va. 1995) (union's failure to interview certain witnesses was not a breach of the duty of fair representation where union offered legitimate reasons for not doing so); *Emanuel v. Int'l Broth. of Teamsters*, 426 F.3d 416, 420 (1st Cir. 2005) (union's strategy of requiring potential witnesses to come forward did not breach duty of fair representation); *Tucker v. American Bldg. Maint.*, 451 F.Supp. 2d 591, 596 (S.D.N.Y. 2006) (failure to obtain certain documentary evidence [is] insufficient to constitute breach of duty of fair representation).

284. *See, e.g., Garcia v. Zenith Elec. Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995) ("[A union] may consider the interests of all its members when deciding whether or not to

bound by the duty of fair representation, regardless of whether the context involves the grievance of an individual employee or group of employees. In the group grievance context, if an individual employee is unsatisfied with the union's representation, the individual employee must still show a breach of the duty of fair representation in the context of a hybrid § 301/fair representation claim in order to avoid the effect of the arbitration.

For example, the case of *Cleveland v. Porca Co.* involved individual employees who challenged the actions of a union in connection with a labor arbitration proceeding involving a group grievance.²⁸⁵ In this case, a labor dispute involving a successorship provision in a collective bargaining agreement was submitted to arbitration, and the arbitrator found that the employer had violated the successorship provision.²⁸⁶ However, the arbitrator's remedy was ambiguous.²⁸⁷ The employer and union met several times to discuss the ambiguity in the arbitration award, and eventually they entered into a settlement agreement that resolved the ambiguity.²⁸⁸ Four individual employees who were dissatisfied with the settlement filed suit against the employer to enforce the original arbitration award, and they also sued the union, alleging the union breached the duty of fair representation by entering into the settlement agreement.²⁸⁹ The district court granted summary judgment in favor of the defendants, and the Seventh Circuit affirmed the dismissal.²⁹⁰

After recognizing that the union was bound by the duty of fair representation and that arbitrariness exists "only if . . . the union's behavior is so far outside a wide range of reasonableness, as to be irrational," the Seventh Circuit held that the union did not breach the duty of fair representation by negotiating and entering into the settlement agreement following the ambiguous arbitration award.²⁹¹ The union recognized the risk that an arbitrator could ultimately

press the claims of an individual employee. The union may also consider the merits of the case or the effect on the larger collective bargaining unit in making various strategic decisions during the grievance procedure. The union represents the majority of employees, even while it is representing a single employee in a grievance process." (citations and quotations omitted); *Ayala v. Union de Tronquistas de Puerto Rico*, Local 901, 74 F.3d 344, 346 (1st Cir. 1996) (a union may consider the interests of all its members when handling the grievance of an employee).

285. 38 F.3d 289 (7th Cir. 1994).

286. *Id.*

287. *Id.*

288. *See id.*

289. *See id.*

290. *See id.* at 297

291. *See id.* at 295, 296 (citations and quotations omitted).

agree with the employer's interpretation of the arbitration award, which would mean that certain employees would not receive any compensation.²⁹² It was reasonable for the union to avoid this risk by entering into a settlement providing a different award covering all employees.²⁹³ Thus, the Seventh Circuit rejected the individual employees' challenge to the settlement covering the entire group.²⁹⁴

Regarding union conduct that violates the arbitrariness prong of the duty of fair representation, courts have held that "[p]roof of recklessness or gross negligence on the part of the union may suffice to establish arbitrary conduct."²⁹⁵ In *Webb v. ABF Freight System, Inc.*, the Tenth Circuit found there was sufficient evidence to support a finding that "the union acted without concern or solicitude, or gave a claim only cursory attention" and thereby breached its duty of fair representation.²⁹⁶ The union "made no serious effort to investigate the facts" and failed to review evidence before the arbitration hearing.²⁹⁷ The union also failed to rebut the employer's depiction of important evidence, and the union representative failed to present a retaliatory discharge claim despite the representative's belief that the situation involved a retaliatory discharge.²⁹⁸ Similarly, the Eighth Circuit found that a union breached its duty of fair representation in the case of *Thomas v. Bakery, Confectionery and Tobacco Workers Union*.²⁹⁹ The "major issue at the arbitration . . . turned primarily on the terms of [a purchase agreement]," but the union's attorney "never asked for or looked at a copy of the purchase agreement before the arbitration" and failed to introduce the agreement during the arbitration.³⁰⁰ Instead, the only evidence produced by the

292. *See id.* at 296.

293. *See id.* at 296.

294. *See id.* at 296; *see also* *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522 (6th Cir. 1993) (applying duty of fair representation in connection with challenge to settlement of group grievance); *Baker v. General Mills, Inc.*, No. 90-3036, 2004 U.S. App. WL 177205, at *5 (6th Cir. Nov. 14, 1990) (applying duty of fair representation in connection with challenge to settlement of group grievance and holding that local and international unions "clearly had a rational basis for making their decision" to accept a compromise offer rather than pursue arbitration).

295. *Hoskins v. Local 1853 Intern. Union*, No. 98-5321, 1999 U.S. App. WL 618074, *3 (6th Cir. Aug. 2, 1999) (citations omitted).

296. *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1240-41 (10th Cir. 1998) (citations and quotations omitted).

297. *See id.* at 1241.

298. *See id.* at 1236.

299. 826 F.2d 755 (8th Cir. 1987).

300. *Id.* at 761, 762.

union attorney regarding the agreement was the employer's testimony regarding the employer's interpretation of the agreement.³⁰¹

In *Samuels v. Air Transport Local 504*, the Second Circuit reinstated a jury verdict finding a union breached its duty of fair representation.³⁰² The union failed to investigate, and the union representative at the arbitration hearing merely read an opening statement and asked one or two questions unrelated to the substance of the grievance.³⁰³ The court explained that the duty of fair representation requires "an honest, thorough effort to present [an employee's] claims throughout the arbitral process," and the representation at issue "was a cursory one prepared at the last minute and proffered with an obvious lack of conviction in its merit."³⁰⁴

Other union conduct held to violate the duty of fair representation includes:

- failing to call an important witness that could corroborate testimony regarding a "vital" matter;³⁰⁵
- refusing to call an expert witness whose testimony was "crucial";³⁰⁶
- failing to investigate prior similar incidents which could have provided valuable evidence;³⁰⁷
- recklessly failing to conduct a thorough investigation of a claim;³⁰⁸
- failing to appear for a hearing;³⁰⁹
- telling the arbitrator of concerns that the union and employer would lose business if the grievances were sustained;³¹⁰
- inexplicably ignoring a strong substantive argument necessary to prevail on the merits of a grievance;³¹¹ and

301. See *id.* at 762-63.

302. 992 F.2d 12 (2d Cir. 1993).

303. See *id.* at 16.

304. *Id.*

305. *Lipp v. Shue & Voeks, Inc.*, No. 90-2203, 1992 WL 92677, *6 (6th Cir. Apr. 23, 1992) (unpublished table decision).

306. *Schoonover v. Consolidated Freightways Corp. of Del. Local 24*, 147 F.3d 492, 496 (6th Cir. 1998).

307. See *id.* at 496.

308. See *Wilson v. Int'l Bhd. of Teamsters*, No. 94-3837, 1996 U.S. App. WL 441029, at *1 (6th Cir. July 16, 1996).

309. See *Boga v. Temco Serv. Indus.*, 145 F.Supp. 2d 310, 311 (S.D.N.Y. 2001) (denying motion to dismiss).

310. See *id.*

311. See *Peters v. Burlington N. R.R.*, 931 F.2d 534, 540-41 (9th Cir. 1990) (recognizing that "[i]f a union provides an explanation for having ignored a particularly strong argument during a grievance procedure that is based on reasoning," this amounts to "mere negligent decision making," but here the union failed to explain

- settling arbitration matter on terms unfavorable to the employees for a meager \$750,000 while accepting a \$20.5 million payment that solely benefited the union.³¹²

To summarize, when an individual employee is seeking to avoid the effect of a labor arbitration, judicial review is governed in part by the tripartite standard of the duty of fair representation.³¹³ Under the bad faith prong, courts require “substantial evidence of fraud, deceitful action or dishonest conduct,”³¹⁴ and union conduct is discriminatory if it involves “invidious” discrimination.³¹⁵ As for the arbitrariness prong, “[s]imple negligence, ineffectiveness, or poor judgment,” and “honest, mistaken conduct” are insufficient to amount to arbitrary conduct.³¹⁶ Instead, arbitrary union conduct is generally “grossly deficient or in reckless disregard of the member’s rights.”³¹⁷ As explained in the next subsection, the deferential standards developed in connection with the duty of fair representation may be instructive in the context of judicial review of a class member’s challenge to class arbitration.

3. *A Proposed Standard for Judicial Review of Class Arbitration by Unnamed Class Members Based on Labor Arbitration*

The legal framework erected by the FAA was likely never intended to facilitate class arbitration.³¹⁸ In order to support class arbitration when it is voluntarily agreed to, a clearer relationship among courts, class arbitration tribunals, and unnamed class members should be defined through amendments to the FAA. Our legal system already has a well-developed relationship among courts, labor arbitration tribunals, and individual employees, and this section of

why it did not make an argument during the arbitration based on certain terms of an agreement).

312. See *Mui v. Union of Needletrades, Indus. and Textile Employees*, No. 97 Civ. 7270(HB), 1998 WL 513052, at *5 (S.D.N.Y. Aug. 19, 1998) (denying motion to dismiss).

313. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 -65 (1983).

314. *Perez v. N.Y. Presbyterian Hosp.*, No. 05 Civ. 5749, 2006 WL 695691, at *2 (S.D.N.Y. Mar. 20, 2006).

315. *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1359-60 (10th Cir. 1994).

316. *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986); *Smith v. United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987).

317. *Ash*, 800 F.2d at 411 (citations omitted).

318. See *supra* Part II, p. .

the Article examines how labor arbitration law may be used in connection with class arbitration.

The FAA currently does not contain provisions specifically tailored to address the context of consumer class arbitration, such as how an individual class member can challenge a final settlement or award in class arbitration. With respect to non-class consumer arbitration, judicial class actions, and labor arbitration, only limited appeals are permitted, which suggests that when class procedure and arbitration proceedings combine in the class arbitration context, there should similarly be limited judicial review for class members.³¹⁹ Labor and class arbitration have significant differences, but both labor and class arbitration in a broad sense share an important similarity in that both involve group representation in the arbitration context. To help maintain a narrow scope of review and preserve the value of both group representation and arbitration, labor arbitration rejects negligence as a basis for judicial review. Similarly, as explained below, the FAA already rejects negligence as a basis for judicial review in connection with traditional, non-class arbitration. When reviewing an individual class member's challenge to class arbitration, courts can perhaps apply existing general principles from the FAA regarding limited judicial review and look for guidance to already well-developed law regarding labor arbitration.

Section 10 of the FAA currently provides the following statutory grounds for vacating an arbitration award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³²⁰

It is unlikely that any of these grounds for vacating an award were specifically designed for class arbitration or the specific situation involving an unnamed member of a represented class who is harmed by a flawed representation. Grounds 2, 3, and 4 for vacating an award

319. See *supra* Part III.A.1, p. .

320. 9 U.S.C. § 10 (2006).

are not directly applicable to a situation where an individual class member was harmed by a flawed representation because these grounds involve the wrongdoing of an arbitrator. Although the first statutory ground involving “where the award was procured by corruption, fraud, or undue means” was likely not intended to cover problems with group representation in class arbitration, these broadly drafted terms may arguably provide a basis for vacating a class arbitration award where an individual class member was improperly represented. One may argue that if a class member was not adequately represented by a class representative and if there is a sufficient nexus between the inadequate representation and the arbitration award, then such award was procured through undue means.

Section §10(a)(1) of the FAA provides for vacatur “where the award was procured by corruption, fraud, or undue means.”³²¹ However, before vacating an award pursuant to §10(a)(1), courts have developed some additional requirements in order to help “protect the finality of arbitration decisions.”³²² As explained by the Seventh Circuit and other courts, there are additional requirements a party must demonstrate in order to vacate an award pursuant to §10(a)(1):

[T]he [party wishing to vacate] must demonstrate that the corruption, fraud, or undue means was (1) not discoverable upon the exercise of due diligence prior to the arbitration; (2) materially related to an issue in the arbitration; and (3) established by clear and convincing evidence.³²³

Also, “it is not enough simply to show corruption, fraud, or undue means by one of the parties, however serious in itself,” and instead, the party seeking vacation must demonstrate a nexus between the alleged corruption, fraud, or undue means and the basis for the arbitrator’s decision.³²⁴

In *A.G. Edwards & Sons, Inc. v. McCollough*, the Ninth Circuit addressed the term “undue means” in §10(a)(1) and explained that “the term has not been defined in any federal case of which we are

321. *Id.*

322. MACNEIL, *supra* note 214, §40.2.2 (citing *Dogherrra v. Safeway Stores, Inc.*, 679 F.2d 1293 (9th Cir. 1982)).

323. *Gingiss Int'l., Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) (citing *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir.1992)); *see also* *Pontiac Trail Medical Clinic, P.C. v. PaineWebber, Inc.*, No. 9201972, 1993 WL 288301, at *3 (6th Cir. Jul. 29, 1993); *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988); *Liberty Sec. Corp. v. Fetcho*, 114 F.Supp. 2d 1319, 1322 (S.D. Fla. 2000).

324. MACNEIL, *supra* note 214, §40.2.1 (citing *Forsythe International, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990)).

aware.”³²⁵ The Ninth Circuit believed that the term “undue means” should be interpreted consistently “with the extremely limited scope of judicial review of [arbitration] awards,” and the term required some showing of “wrongfulness or immorality.”³²⁶ Accordingly, the Ninth Circuit held that “mere sloppy . . . lawyering” is insufficient to constitute “undue means,” indicating that negligent conduct does not amount to undue means under the FAA.³²⁷

Courts have recognized that the term “undue means” is not to be interpreted lightly. As explained by the First Circuit, “[t]he phrase ‘undue means’ in the statute follows the terms ‘corruption’ and ‘fraud,’” and “[i]t is a familiar principle of statutory construction that a word should be known by the company it keeps.”³²⁸ Particularly in light of the narrow judicial review traditionally afforded arbitration awards, the term “undue means” should not be given a lop-sided interpretation compared to the terms “fraud” or “corruption” that appear in the same provision. Undue means should be interpreted to mean conduct that is “equivalent in gravity to corruption or fraud,”³²⁹ and should not be interpreted to cover mere negligence.

In *Matter of Arbitration Between Trans Chemical Ltd. and China Nat. Machinery Import and Export Corp.*, the court analyzed whether an arbitration award was procured by undue means, and the court held that mere negligence does not satisfy this standard.³³⁰ A party allegedly failed to use due diligence to produce a report, and the court explained that “[a]ccidentally (or even negligently) failing to discover the complete ChemCon report” was insufficient to constitute undue means under the FAA.³³¹ Instead, in order for undue means to exist, evidence was needed that the document was “recklessly” or “intentionally” withheld or withheld in “bad faith.”³³² In sum, in order to vacate an arbitration award pursuant to the FAA’s standard of undue means, courts have required a showing that the award was procured through reckless, bad faith, or intentional conduct, not merely negligent conduct.

325. 967 F.2d 1401, 1403 (9th Cir. 1992).

326. *Id.* at 1404.

327. *Id.* at 1403.

328. *National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 499 (1st Cir. 2005).

329. *American Postal Workers Union v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995); *see also PaineWebber Group, Inc. v. Zinsmeyer Trusts P’ship*, 187 F.3d 988, 991 (8th Cir. 1999).

330. 978 F.Supp. 266 (S.D. Tex. 1997).

331. *Id.* at 305.

332. *Id.*

Similarly, the other statutory grounds set forth in §10 of the FAA for vacating an arbitration award, which generally deal with the actions of the arbitrator, do not lightly permit an award to be vacated, and overall, all the grounds for vacatur set forth in § 10 appear to require more than mere error or negligence:

Congress declined to authorize judicial reversal of challenged awards for arbitral error of fact, contract interpretation, or law. Clearly, it was the intent of Congress that the parties to a valid arbitration agreement who have had the benefit of a full and fair arbitration proceeding are not to be permitted to escape that bargain at the back end of the process, just because they are displeased with its result.³³³

The limited judicial review of arbitral decisions, which generally rejects negligence as a basis for vacatur of an arbitration award, has been recognized as necessary to promote arbitration as an efficient, alternative form of dispute resolution.³³⁴ This narrow scope of review helps prevent arbitration proceedings from becoming “junior varsity” preliminary hearings leading to prolonged, expensive litigation.³³⁵ These same concerns regarding limited judicial review apply in the labor arbitration context and may also arise in connection with class arbitration. Limited review of class arbitration proceedings arguably would help prevent such arbitration proceedings from becoming preliminary hearings leading to more litigation. Moreover, limited judicial review in the class arbitration context is also warranted because of the representative nature of class arbitration. Broad rights of judicial review may possibly frustrate goals of the class device, economy and efficiency arising from the resolution of claims of numerous individuals in a single proceeding, as recognized in both judicial class actions and labor arbitration.³³⁶

This Article proposes that the limited standard of judicial review which has already developed in the context of labor arbitration for challenges brought by individual employees may provide guidance in the class arbitration context. Both labor arbitration’s hybrid claim

333. Hayford, *supra* note 38, at 890; *see also* Prudential-Bache Securities, Inc. v. Tanner, 72 F.3d 234, 239 n.6 (1st Cir. 1995) (in light of very limited basis for judicial review of arbitral awards, courts “do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts” (citation and internal quotations omitted)).

334. *See supra* notes 212-214 and accompanying text.

335. Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994).

336. *See supra* notes 215-240 and accompanying text.

involving the duty of fair representation and the FAA's provision allowing for vacatur due to fraud, corruption, or undue means are consistent in the sense that both require more than mere negligence of a party or representative in order to avoid the finality of an arbitration award. Negligence is generally not enough to overturn the finality of a non-class arbitration award under the FAA,³³⁷ and negligence is insufficient in the labor context for an individual employee to overturn the finality of a labor arbitration award.³³⁸ In the class arbitration context, if an individual member of a class wishes to challenge an arbitration award, courts can apply §10(a)(1) of the FAA and examine whether the award was procured through the "corruption, fraud, or undue means" of the class representative. This FAA provision should be amended to make clear that absent class members, and not just a named "party" to the class arbitration, are able to seek vacatur. Similar to the standard of fair representation applied in labor arbitration and consistent with existing FAA case law involving non-class arbitration, courts construing "undue means" in connection with class arbitration can continue to require recklessness and reject a showing of mere negligence.

Allowing absent class members to attack class arbitration based on "undue means" and based on a showing of more than mere negligence is also consistent with the traditional view for collateral attack in connection with judicial class actions. As recognized by § 41 of the Restatement (Second) of Judgments, a class member is generally "bound by and entitled to the benefits of a judgment as though he were a party," subject to exceptions found in § 42.³³⁹ Section 42, in turn, establishes that a class member is not bound by a judgment in a class action when the member is inadequately represented.³⁴⁰ The Restatement recognizes that inadequately represented class members must be permitted to avoid a class judgment because such a rule helps keep class representatives in check:

In actions by . . . the representative of a class, the thoroughness and vigor of the representation is properly subject to particular

337. See *supra* note 330-334 and accompanying text.

338. See *supra* note 266 and accompanying text.

339. RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982).

340. See *id.* §42(e); see also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., joined by Stevens & Souter, JJ., concurring in part and dissenting in part) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement." (citations omitted)).

scrutiny because the bonds of responsibility between the representative and those for whom he acts are transitory and ordinarily not otherwise readily enforceable.³⁴¹

In addition, the Restatement affirms that “[t]actical mistakes or negligence on the part of the representative” is insufficient to make a class judgment vulnerable, and “[t]he failure of a representative to invoke all possible legal theories or to develop all possible resources of proof” will not ordinarily suffice to avoid the binding effect of a judgment.³⁴² Instead, the representative’s management of the class litigation must be “grossly deficient” in order for a judgment not to bind a class member.³⁴³ Such a rejection of ordinary negligence and strategic mistakes in connection with judicial class actions is consistent with the standard discussed above in connection with labor arbitration as well as the FAA’s vacatur provisions.

To summarize, the limited standard of judicial review which has already developed in the context of labor arbitration for challenges brought by individual employees is consistent with both the standard for vacatur under the FAA for non-class arbitration as well as the standard regarding collateral attacks brought by absent class members in connection with judicial class actions in that mere negligence is insufficient to avoid a judgment or award in all three contexts. Instead, gross negligence, recklessness, or gross deficiency is required. For class arbitration, courts should similarly require absent class members to demonstrate recklessness or gross deficiency in connection with challenging a class arbitration award on the basis of inadequate representation.

In the class arbitration context, if a class member tries to challenge the conduct of a representative, courts attempting to apply a standard of “undue means” or recklessness will not have many FAA cases to look to for guidance. As recognized by at least one court, there are not many FAA decisions construing undue means.³⁴⁴ Moreover, the existing FAA cases addressing “fraud, corruption, or undue means” involve one party trying to vacate an undesirable award by challenging the conduct of the *opposing party*. For example, a typical petition for vacatur pursuant to §10(a)(1) may argue that the opposing party submitted false evidence or committed perjury and thereby, through such fraud or undue means, wrongfully procured an arbitral

341. RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. f (1982).

342. *Id.*

343. *Id.*

344. A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992).

award that should be vacated.³⁴⁵ But in the class arbitration context, the class member will be challenging his or her own representative's actions, not the opposing party's actions. Thus, there would be a dearth of FAA cases applying undue means or recklessness to this particular setting involving a class member. Moreover, in the judicial class action context, although it has been recognized that inadequately represented class members must be permitted to avoid a class judgment, and although the Restatement (Second) of Judgments sets forth a general standard rejecting negligence and requiring a grossly deficient representation, scholars have explained there is a lack of content regarding this standard and no "clear answer to what constitutes adequate representation."³⁴⁶

Nevertheless, in the class arbitration context, courts hearing challenges to adequate representation brought by absent class members can perhaps look, to a certain degree, to labor arbitration cases for some guidance in order to help determine whether the conduct of a representative amounts to recklessness. In connection with labor arbitration, there is already a body of case law applying a recklessness standard. For example, if a class member in class arbitration believes that the class representative should have made certain arguments or presented certain witnesses or testimony, there is analogous law from labor arbitration analyzing whether the representative breached the duty of fair representation.³⁴⁷

However, there are some limits to using labor arbitration cases in the context of class arbitration. With judicial class actions, there are safety valves if there are divergent interests in a class or if a particular individual wants to be excluded from a class. Rule 23, the class action rule applicable in federal court for judicial class actions,

345. MACNEIL, *supra* note 214, §40.2.2 ("Many of the cases interpreting FAA §10(a) involve either falsified evidence that was submitted to or material evidence that was withheld from the arbitrator.").

346. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1945 (1998) (noting that the Supreme Court in *Hansberry v. Lee* "announced a rationale for determining when class suits should be given preclusive effect—only upon adequate representation," but the *Hansberry* Court "provided little guidance . . . concerning the content of that standard"); Susan P. Koniak, *How Like A Winter? The Plight Of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1788 n.9 (2004) (citing Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 387 (2000) (finding that "the law remains remarkably unsettled with respect to what qualifies as inadequate representation")); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 289 (2003) (arguing that "[t]he uncertainty over what makes for inadequacy in class representation . . . casts a shadow over the finality of any class judgment").

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

generally provides for opt-out opportunities and the possibility of creating subclasses.³⁴⁸ However, these safety valves of opting-out and creating subclasses do not exist in connection with labor arbitration. As explained by the Supreme Court:

[National labor policy] extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . The employee may disagree with many of the union decisions but is bound by them. The majority-rule concept is today unquestionably at the center of our federal labor policy. The complete satisfaction of all who are represented is hardly to be expected.³⁴⁹

A court reviewing a challenge brought by a class member in class arbitration should be careful when relying on labor arbitration cases because a lack of safety valves like opt-out opportunities and subclasses in labor arbitration may limit the utility of some labor arbitration cases. It appears that if certain conduct of a representative is considered egregious in the context of labor arbitration, such conduct perhaps may also be considered egregious in the class arbitration context. Also, if the class member's arguments regarding adequacy of representation are common to the entire class or do not relate to divergent interests significant enough to warrant subclasses, perhaps certain labor arbitration cases may be instructive. For example, if a class member in class arbitration believes that the representative failed to rely on certain evidence or make particular arguments, and if the class member's arguments do not raise issues of divergent interests, then a court may look for guidance to labor arbitration cases

348. FED. R. CIV. P. 23; AAA's Class Arbitration Rules, *supra* note 44, R. 6 (when a class is certified, class members must be provided with the best notice practicable, and the notice must state that "the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded"). However, the AAA's Class Arbitration Rules do not expressly provide for the creation of subclasses. Presumably, if there are divergent interests warranting the creation of subclasses in class arbitration, the arbitrator will not certify the originally proposed class, and perhaps new class arbitration matters can be filed proposing narrower class definitions without the problem of divergent interests.

349. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (citations and quotations omitted); *see also* *Benson v. Commc'ns Workers of Am.*, 1996 U.S. App. LEXIS 5292, at *8 (4th Cir. March 25, 1996) ("Prior cases have recognized the inevitability of disputes between interests of the union as a whole and interests of individual members. It is well-established that the interests of individual members may sometimes be compromised for the sake of the collective entity. The complete satisfaction of all who are represented is hardly to be expected." (citations and internal quotations omitted)).

involving similar fact patterns. However, if the class member's arguments challenging adequate representation relate to issues of divergent interests within a class that are significant enough to warrant the creation of subclasses, labor arbitration cases may not be helpful. In sum, labor arbitration cases may be instructive to a certain degree for courts in connection with a challenge brought by a class member in class arbitration, but courts should be sensitive to divergent interests that may arise in connection with class arbitration.

As mentioned above, in order to protect the finality of arbitration decisions, courts confronting an undue means challenge have developed and imposed three additional requirements beyond the requirements set forth in the FAA. Generally, the party wishing to vacate an arbitration award under the FAA must demonstrate that the corruption, fraud, or undue means was (1) not discoverable upon the exercise of due diligence during the arbitration; (2) materially related to an issue in the arbitration; and (3) established by clear and convincing evidence.³⁵⁰ Under this judicially-created rule developed in connection with non-class arbitration, if the information regarding corruption, fraud, or undue means was available during the arbitration proceeding, this information could not be used to subsequently attack the arbitration award. This requirement may be reasonable for a two-party arbitration, but as explained in more detail below, this requirement arguably should not apply to class members in connection with class arbitration.

In their leading treatise on federal procedure, Wright, Miller, and Cooper explain the importance of preclusion in class actions, and preclusion can exist only if the class members are adequately represented:

Preclusion by representation lies at the heart of the modern class action developed by such procedural rules as Civil Rule 23. The central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court. . . . The efficient, consistent, and fair determination of indistinguishable claims is a paramount goal. That goal requires preclusion. Preclusion is appropriate, however, only if the class action provides a suitable substitute for

350. *Gingiss Int'l., Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) (citing *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992)).

individual litigation. The most important requirement of preclusion is that the named parties afford adequate representation. . . .³⁵¹

According to Wright, Miller, and Cooper, under a view “clearly required by long tradition,” “only adequate representation can justify preclusion against nonparticipating class members,” and “absent class members are not precluded from litigating the adequacy-of-representation issue by the efforts of other class members who do appear as unsuccessful objectors to the class-action settlement.”³⁵²

This particular issue of preclusion involves an independent collateral attack by a class member and is different from the issue already discussed above in connection with the *Devlin* case and whether an absent member can appeal a judgment in a class action.³⁵³ This issue of preclusion and collateral attack does not involve an appeal to the appellate court which has jurisdiction over a lower court involved in a judicial class action. Instead, this issue of preclusion and collateral attack involves individuals who were purportedly bound by a judicial class action and subsequently file suit, arguing they are not precluded by a prior class action judgment because of a lack of adequate representation.³⁵⁴

The Ninth Circuit has addressed this issue of preclusion and collateral attack in two opinions, which reflect conflicting views on this topic. An initial panel of the Ninth Circuit expressed the traditional view in a lengthy opinion,³⁵⁵ but on rehearing in the same case, a different panel held that a finding of adequate representation in an earlier proceeding is generally not subject to collateral review.³⁵⁶ Wright, Miller, and Cooper are critical of this unorthodox view of the rehearing panel, explaining that an absent class member is under no

351. WRIGHT, *supra* note 214, § 4455.

352. *Id.*; *cf.* *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983) (binding an employee to the results of a labor arbitration “works an unacceptable injustice” where the union breached the duty of fair representation).

353. *See supra* notes 215- 233 and accompanying text.

354. Henry Paul Monaghan, *Antisuit Injunctions And Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 389 n.17 (2000).

355. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997); Woolley, *supra* note 354, at 384 (“May an absent class member who has been inadequately represented attack the class judgment in subsequent litigation? The traditional answer, enunciated by the Supreme Court in *Hansberry v. Lee*, has been a clear ‘yes.’ This answer still governs the availability of collateral attack in courts around the country” (citations omitted)); WRIGHT, *supra* note 214, § 4455 (describing this initial decision as representing the traditional view).

356. *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999).

duty to intervene in the class action proceeding and can instead bring a subsequent, collateral attack on an adequate representation finding.³⁵⁷

Several other scholars have argued in favor of the traditional view of permitting collateral attacks.³⁵⁸ Professor Patrick Woolley has observed that “[t]he fundamental characteristic of a class suit is its representative nature,” and citing the Supreme Court’s decision in *Phillips Petroleum Co. v. Shutts*, he explained that “class members traditionally have not been viewed as having an obligation to participate in a class suit to protect their interests. . . . [A class member] may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”³⁵⁹ Professor Woolley explains that if collateral attack on an adequate representation finding were not permitted, class members would then be required to monitor the class proceeding and raise adequacy objections in the class proceeding itself.³⁶⁰ Such a requirement “would shift the responsibility of protecting the interests of class members from the court and named plaintiffs, where *Shutts* stated it lay, to the class members themselves.”³⁶¹ Also, it has been recognized that “[a] fairness hearing on a proposed class settlement may consist of nothing more than a rehearsed joint presentation by class counsel and defense counsel,”³⁶² and the availability of collateral

357. WRIGHT, *supra* note 214, § 4455 (explaining that allowing collateral attacks on adequate representation is the traditional rule and “[a]ctual notice, the opportunity to opt out (when it is afforded), the opportunity to appear and participate, and the opportunity to object to settlement [in the initial proceeding], are opportunities. They are not obligations. Representative class members, class counsel, the court, and a class adversary who wishes the security of preclusion, are responsible for ensuring actually adequate representation”).

358. See generally Koniak, *supra* note 346; Monaghan, *supra* note 354; Woolley, *supra* note 354; see also Brief of the Law Professors as Amicus Curiae in Support of Respondents at 2, *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (No. 02-271) (prior to Epstein, it was the well-settled rule that any absentee could collaterally attack a class action settlement if the absentee could show a lack of adequate representation in the original action).

359. Woolley, *supra* note 354, at 397-98.

360. *Id.* at 398.

361. *Id.* at 398-99.

362. Koniak, *supra* note 346, at 1862 (citing *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (“Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can’t vindicate the class’s rights because the friendly presentation means that it lacks essential information.”)).

attack may help provide a check on collusion that can occur in class settings.³⁶³

There are critics of a broad collateral attack rule. Some have argued that “the unchecked opportunity for collateral attack . . . will impede both state and federal class action settlements, will create the potential for multiple and wasteful litigation of the issue of ‘adequacy of representation,’ and will result in a new kind of forum shopping in the class action context [where class counsel will shop around for jurisdictions that are receptive to collateral attacks, leading to wasteful litigation].”³⁶⁴

This issue of collateral attack was before the United States Supreme Court in *Dow Chemical Co. v. Stephenson*, but unfortunately this issue was not resolved because the Justices evenly split.³⁶⁵ However, the better approach appears to be the traditional approach. Allowing some form of collateral attack would help keep in check and

363. Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More Than Merely “Adequate” Representation In Class Actions*, 38 GA. L. REV. 927, 941 (2004) (concerns about collusion can be addressed through collateral attack (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396-99 (1996)).

364. Marcel Kahan & Linda Silberman, *The Inadequate Search For “Adequacy” In Class Actions: A Critique Of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 766, 784 (1998); Marcel Kahan & Linda Silberman, *Matsushita And Beyond: The Role Of State Courts In Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 264 (“[A]s long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue [of adequate representation], adequacy of representation should be raised directly, and not be permitted to be raised collaterally.”). *But see* Monaghan, *supra* note 354, at 1195-96 (“Kahan and Silberman’s claim lacks support. They acknowledge that their description of existing preclusion law is inconsistent with the Restatement (Second) of Judgments. Contrary to their assertion, their claim is also inconsistent with *Hansberry v. Lee*, and ignores the language with which the Court begins its opinion in *Richards v. Jefferson County*: ‘In *Hansberry v. Lee* we held that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented.’ Finally, their claim is inconsistent with a considerable body of lower court case law, existing interpretations of Rule 23, and the understanding of commentators.” (citations omitted)); WRIGHT, *supra* note 214, §4455 (“[The nontraditional view barring collateral attack] is uncertain even in the Ninth Circuit” because “[a] subsequent opinion in a different case denied preclusion in part on the ground that the representatives of the class in the earlier action failed to provide adequate representation.”).

365. 539 U.S. 111 (2003); Koniak, *supra* note 346, at 1791 (“[L]ast term, the Supreme Court [in *Dow Chemical Co. v. Stephenson*] seemed unable to answer the question that Wright, Miller, and Cooper had seen as simple enough for a student. Having granted certiorari to decide whether absent class members may raise the adequacy of the representation they had received in a class action suit through a collateral proceeding, the Supreme Court, with Justice Stevens not participating in the case, was evenly divided. What I and others had thought so obvious and so right was apparently neither, at least not for the Supreme Court.”).

ensure that adequate representation is satisfied in connection with the original proceeding.³⁶⁶ Under this traditional view, “[r]epresentative class members, class counsel, the court, and a class adversary who wishes the security of preclusion, are responsible for ensuring actually adequate representation.”³⁶⁷ Concerns have been raised in connection with collusion in judicial class actions, which can also appear in class arbitration, and collateral attack can help address these concerns regarding collusion.³⁶⁸

In connection with traditional, non-class arbitration, courts have developed a rule that if the information regarding corruption, fraud, or undue means was available during the arbitration proceeding, this information could not be used to subsequently attack the arbitration award.³⁶⁹ However, this judicially-created rule should not apply in the class arbitration context because absent class members should not be forced to monitor a proceeding, and a collateral attack on adequate representation can help ensure that adequate representation exists and protect absent class members. Absent class members should be able to attack a class arbitration on the basis of inadequate representation pursuant to the FAA’s provision regarding vacatur where an award was procured through fraud, corruption or undue means.

B. *Other Proposals for Class Arbitration Based on an Examination of Labor Arbitration*

There are some other features of labor arbitration that are interesting to consider for class arbitration. The bipartisan nature of the National War Labor Board and the multiple steps involved in a grievance procedure suggest some possibilities for the future development of class arbitration.

As explained above, representatives from both management and labor came together to develop and administer the National War Labor Board.³⁷⁰ They jointly developed core principles that would help govern disputes brought before the board. During the formation of

366. Monaghan, *supra* note 354, at 1161 (“Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism . . . [collateral attack] is integral to the constitutionality of the class action procedure.” (quoting *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989))).

367. WRIGHT, *supra* note 214, §4455.

368. See *supra* note 362-363 and accompanying text.

369. See *supra* notes 350 and accompanying text.

370. See *supra* notes 116-125 and accompanying text.

the National War Labor Board, it was recognized that the “success of principles formulated to guide war labor arbitration would be conditioned upon their acceptance by both capital and labor and . . . it was therefore essential that both parties should formulate them.”³⁷¹ A significant purpose in creating the board was to provide a means of dispute resolution in which parties could trust that their “differences would be adjudicated fairly and honestly on the basis of principles formulated by both sides and guaranteeing fundamental justice to both sides.”³⁷² Perhaps a joint effort regarding class arbitration would similarly be helpful. Consumer advocacy groups and business interests can perhaps jointly develop and refine principles or guidelines for class arbitration to create an aggregate dispute resolution process that is acceptable to all involved.

Also, in labor arbitration, there are different types of arbitration tribunals available.³⁷³ For example, in the labor context, there are temporary, ad hoc arbitrators selected to handle a specific dispute after the dispute arises, as well as permanent arbitrators who are selected by labor and management to serve for a period of time, subject to call when needed.³⁷⁴ A particular labor-management relationship is probably more cohesive and longer-lasting than the contractual relationships between a business and a diverse group of consumers, and thus it may be easier for labor and management to select and establish permanent arbitrators. However, certain industries involved with class arbitration, such as the cell phone industry or credit card industry, may be able to collaborate with consumer advocacy groups to develop more permanent arbitration tribunals designed to handle class arbitration. The tribunals can be specifically tailored to handle the class disputes arising in the particular industry, and permanent arbitrators can be chosen who are familiar with the industry. Such tribunals may be less objectionable to those involved if the particular industry members and consumer advocacy groups jointly design the tribunal. Also, the very dialogue and collaboration that may occur between business interests and consumer groups in connection with establishing class arbitration tribunals may help the parties identify and anticipate future disputes before they arise. Such early identification of future problems may encourage the parties to develop mutually-acceptable resolutions before future disputes even arise.

371. LABOR BULLETIN, *supra* note 107, at 10.

372. *Id.* at 19

373. ELKOURI & ELKOURI, *supra* note 100, at 163.

374. *Id.* 163-171.

Another interesting feature of labor arbitration is that arbitration is generally the last step of a multi-step dispute resolution process under a collective bargaining agreement.³⁷⁵ The machinery typically “consists of a series of procedural steps to be taken within specified time limits,” and although the nature of the procedural steps may depend on the particular needs of the parties, the grievance steps established in a collective bargaining agreement tend to follow a basic pattern.³⁷⁶ An aggrieved employee generally takes a dispute to an immediate supervisor, and if there is no resolution, the grievance can be appealed through a management hierarchy. When the multiple steps are exhausted, then the dispute can generally be taken to arbitration.

The grievance machinery commonly involves three steps prior to arbitration,³⁷⁷ but “[t]here is such variation in multistep procedures that no one plan may be said to be really typical.”³⁷⁸ As an illustration, a first step may involve a meeting of a union steward, the aggrieved employee, and the employee’s supervisor to discuss the grievance. If resolution does not occur in this first step, collective bargaining agreements may require the grievance be filed in writing within a certain number of days. The second step of a general grievance process may be a meeting to discuss the grievance at a higher level of management authority, possibly between a union’s grievance committee members and designated management officials. The third step may involve discussions between full-time union officers or representatives and high-level management. If all the steps fail, arbitration is the final step. Shorter procedures usually exist in small plants or retail or wholesale establishments, and multistep procedures are more common in larger plants and manufacturing in general.³⁷⁹

One possibility for the future development of class arbitration would be to incorporate multiple steps into the dispute resolution process in order to help resolve claims prior to the final step of arbitration on a classwide basis. The class arbitration rules of the American Arbitration Association are patterned after Rule 23 of the Federal Rules of Civil Procedure.³⁸⁰ If parties to a class arbitration proceed in the same manner as parties to judicial class actions under

375. *Id.* at 214.

376. *Id.* at 232.

377. *Id.* at 233.

378. *Id.*

379. Grievances, [Labor Relations Expediter] Lab. Rel. Rep. (BNA) 540:306 (2008).

380. AAA’s Class Arbitration Rules, *supra* note 44.

Rule 23, the parties in class arbitration may be tempted to focus on class certification issues. Instead of immediately focusing on and contesting class certification issues, the process of class arbitration perhaps can be improved by requiring prior steps like in labor arbitration.

There is a flexibility that is possible in connection with private class arbitration that may not be possible in connection with traditional judicial class actions, and this flexibility should be explored. Similar to the labor arbitration context, perhaps multiple dispute resolution steps should be utilized in connection with class arbitration. In connection with class arbitration, consumer advocacy groups, business interests, and arbitration associations should explore the development of creative, multiple steps that parties could be required to follow or that perhaps could be available for the parties to utilize in good faith, in an effort to resolve claims before reaching a final stage of classwide arbitration. Cybersettle, Inc. (www.cybersettle.com) has developed an online, double-blind bid system for settling disputes that perhaps could be utilized or modified for use as a step in connection with settling disputes prior to classwide arbitration. Cybersettle allows parties to submit offers and demands confidentially online, and cases settle automatically when the demand is less than the offer.³⁸¹ Cybersettle allows either party in a dispute to initiate a settlement opportunity by submitting three confidential demands or offers, and Cybersettle then notifies the opposing party that the case is online and ready to settle.³⁸² The opposing party has three opportunities to settle the case.³⁸³ One demand or offer is entered for each round, and Cybersettle compares the demand and offer for each round.³⁸⁴ If the demand is less than or equal to the offer, the case settles, and such settlement amount will always be equal to or greater than a party's demand, depending on the opposing party's offer.³⁸⁵ If a claim is settled, only the amount of settlement is disclosed, and unsuccessful online offers and demands are never

381. Press Release, Cybersettle, New York City to "Cybersettle" More Cases Online (July 30, 2007), <http://www.cybersettle.com/info/news/pressreleases.aspx?id=36>.

382. Cybersettle Attorney Brochure, <http://www.cybersettle.com/info/news/media kit/AttorneyBrochure.pdf> (last visited Aug. 30, 2007).

383. *Id.*

384. *Id.*

385. *Id.*

disclosed.³⁸⁶ It appears that Cybersettle is utilized for two-party disputes, but perhaps it can be modified for use in connection with aggregate dispute resolution. When a purported class arbitration claim is initiated, perhaps certain claims or all claims can be sent to an online dispute resolution process similar to Cybersettle after there has been some evaluation of potential claims that would be suitable for such a system of resolution. A time period could be established for entry of confidential demands and offers. The aggrieved parties could be instructed to enter a demand amount they would be satisfied with to settle their individual claims, and the respondent could perhaps make individual offers or the same offer for all aggrieved parties. Perhaps the respondent may even set a condition that the offer will only be effective if a certain critical mass of individuals accepts the offer. This is just one example of a potential step that can be utilized. Labor arbitration utilizes multiple steps in a grievance process before the final step of arbitration, and perhaps before the named representative and respondent become entrenched in class arbitration and focused on disputing class certification issues, some absent class members may be able to resolve their claims successfully and efficiently with the opposing party through utilizing other forms of dispute resolution prior to classwide arbitration. Moreover, even if the initial steps do not result in many claims being resolved prior to class arbitration, perhaps going through preliminary steps may have benefits of its own, such as clarifying the main issues for the class arbitration.

CONCLUSION

Looking to the past, there are some interesting connections between labor arbitration and commercial arbitration. Experiences of business interests with labor arbitration during World War I possibly may have influenced their later views regarding the enactment of the FAA and its legal framework to support arbitration. However, there is no indication in the FAA's legislative history that the FAA was intended to facilitate group or representative arbitration of the type sanctioned by the government during World War I for labor disputes.

Representative arbitration involving a union as the representative of a group of employees flourished during the prior century, but supported by the Supreme Court's *Circuit City* decision in 2001, a general trend has developed towards two-party arbitration between

386. Attorney Frequently Asked Questions, <http://www.cybersettle.com/info/support/faq.aspx?type=atty#EOA> (last visited Aug. 30, 2007).

an employer and an individual employee.³⁸⁷ With respect to commercial arbitration, there has been an opposite trend towards representative arbitration following the Supreme Court's *Bazze* decision in 2003. In light of these general trends, it appears that arbitration involving the American workforce and commercial arbitration have been in the process of converging to some extent during the past few years. Through such a convergence, there is a potential for improving private dispute resolution. For example, class arbitration in the commercial context can experiment with different features of labor arbitration. However, the laws of the past that were enacted to support private dispute resolution were not designed for such a convergence. The FAA was simply never intended to facilitate class arbitration, and it is time to revisit our laws to ensure that there is a proper legal framework supporting private dispute resolution for the future.

387. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

