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MAKING EMPLOYMENT ARBITRATION FAIR AND ACCESSIBLE

*Theodore J. St. Antoine**

Abstract: Mandatory arbitration agreements require employees, as a condition of employment, to agree to arbitrate all employment disputes instead of filing court suits. The Supreme Court has approved such agreements but many labor experts oppose them. The U.S. House of Representatives has passed a bill to prohibit pre-dispute agreements, the common form for mandatory arbitrations. This article argues that the House bill would have the practical effect of virtually eliminating employment arbitration. Instead, proposals are presented for either legislative or judicial steps to ensure that employment arbitration is fair and accessible. Requirements would include: (1) voluntary agreements on the part of all parties; (2) an arbitrator knowledgeable in the law, jointly selected by the parties; (3) a representative of the employee's choice; (4) no waiver of class actions; (5) all arbitration costs payable by the employer except for a modest filing fee; (6) simple but adequate discovery; (7) due process in the hearing, with cross-examination; (8) public law followed when applicable; (9) all remedies that are available under law; (10) a written award with reasons; (11) limited judicial review; and (12) incorporation of "unconscionability" as an element of federal arbitration law.

I. INTRODUCTION

The hottest legal issue in employment relations over the last three decades has been nonunion employers' use of so-called "cram-down" or "mandatory" arbitration agreements. As a condition of getting or keeping a job, employees have had to agree to resolve any employment disputes through an arbitration system established by the employer instead of taking their cases to court. That includes statutory claims, even those involving civil rights. In *Gilmer v. Interstate/Johnson Lane Corp.*,¹ the Supreme Court approved such contractual arrangements, emphasizing that there was no loss of substantive rights but only a change of forum. *Gilmer* does not prevent the Equal Employment Opportunity Commission from seeking victim-specific relief in court, including reinstatement, back pay, and damages.² But EEOC lacks the resources to pursue many meritorious individual cases.³

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¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer's* decision under the Federal Arbitration Act, 9 U.S.C. §§ 1-6 (2018), was reaffirmed in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

² *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

³ See, e.g., Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995).

Surveys indicate that employees are subject to mandatory arbitration in over half of American workplaces.⁴ The primary reason for employer resort to arbitration was the judicial modification of the traditional American doctrine of “employment at will” in almost every state in the country during the 1980s.⁵ According to that principle, as starkly set forth in a classic Nineteenth Century case, employers could lawfully “dismiss their employees at will ... for good cause, for no cause or even for cause morally wrong.”⁶ To limit this doctrine, courts generally relied on such theories as public policy (a tort)⁷ and implied contract.⁸ Once the door was open to jury trials, victims of wrongful discharge reaped a harvest. Single individuals during that period received jury awards for actual and punitive damages as high as \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, and \$1.5 million.⁹ For an employer, the fees and expenses even for a successful defense of a discharge case before a jury could range between \$100,000 and \$150,000 in major Midwestern cities, and amount to around \$200,000 on the coasts.¹⁰ Fast, informal, and cheaper arbitration was a highly attractive alternative.

In this article I shall discuss the divergent reactions to mandatory arbitration, the merits and defects of the system as it now operates, and the legislative or judicial actions that are needed to ensure all parties a fair and accessible arbitral procedure for resolving employment disputes. The timeliness of all this is heightened by the passage of the FAIR bill¹¹ by the U.S. House of Representatives in September 2019. If enacted, this would prohibit all pre-dispute agreements to arbitrate employment disputes and certain other types of disputes. The practical effect could be the elimination of most such arbitration.¹²

⁴ Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 23 (2019).

⁵ 9A LAB. REL. REP. (BNA) 505:51 (2004) (Louisiana and Rhode Island were the exceptions).

⁶ *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884). See also HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT at 272-73 (1877).

⁷ *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (employee refused to join price-fixing conspiracy); *Sheets v. Teddy's Frosted Foods*, 427 A.2d 385 (Conn. 1980) (whistleblower); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (whistleblower).

⁸ *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980) (oral commitment to employee when hiring); *Pugh v. See's Candies*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) (same); *Woolley v. Hoffmann-LaRoche, Inc.*, 499 A.2d 515 (N.J. 1985) (policy statement in personnel manual).

⁹ Kenneth Lopatka & Julia Martin, *Developments in the Law of Wrongful Discharge*, in ABA NATIONAL INSTITUTE ON LITIGATING WRONGFUL DISCHARGE AND INVASION OF PRIVACY CLAIMS vii, 13-18 (1986).

¹⁰ Conversations between author and management attorneys at 1992 midwinter meeting of the ABA Labor and Employment Law Section's Committee on Individual Rights and Responsibilities in the Workplace on April 8-9, 1992.

¹¹ FAIR (Forced Arbitration Injustice Repeal) bill, H.R. 1423, 116th Cong. (2019).

¹² See *infra* text at note 30.

II. CONTRASTING APPRAISALS OF MANDATORY ARBITRATION

The initial reaction to mandatory arbitration, especially when statutory rights are the issue, was generally very hostile. Numerous scholars, two federal agencies, and two prestigious private bodies (one was government-sponsored) went on record as opposed to mandatory arbitration of statutory employment claims.¹³ To many critics it seemed an outrageous violation of public policy that the price for obtaining a job could be the required surrender of access to the judge-and-jury procedure for enforcing statutory rights that was established by Congress or a state legislature. The employer as a “repeat player” in arbitration was also said to have an advantage over the individual employee, both in knowledge about particular arbitrators and in familiarity with the process.¹⁴

A variety of empirical studies present evidence against mandatory arbitration. Professors Alexander J.S. Colvin of Cornell and Mark D. Gough of Penn State take the lead in this empirical work, either in collaboration or writing separately. Exact findings naturally vary from survey to survey. For example, one study saw a win rate of 21.4 percent for employees in arbitration versus 36.4 percent in federal court litigation, with median damages of \$36,500 in arbitration versus \$150,500 in federal court.¹⁵ Another study found a win rate in arbitration of 45 percent against 63 percent in litigation, and median damages

¹³ See, e.g., Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L. J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: the Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; EEOC, *Alternative Dispute Resolution Policy*, 8 LAB. REL. REP. (BNA) FEP 405:7301-7302, (1997). In July 1997 the EEOC issued a longer and even stronger condemnation of compulsory arbitration or pre-dispute agreements to arbitrate, declaring that “even the best arbitral systems do not afford the benefits of the judicial system.” EEOC, *Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 LAB. REL. REP. (BNA) FEP 405:7511, 405:7520 (1997). According to the court in *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1479 (D.C. Cir. 1997), the NLRB General Counsel was apparently prepared at one point to issue unfair labor practice complaints on the issue. See also [DUNLOP] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF COMMERCE AND LABOR, FINAL REPORT AND RECOMMENDATIONS 33 (Dec. 1994) [hereinafter DUNLOP COMMISSION, FINAL REPORT]; National Academy of Arbitrators, *Statement on Condition of Employment Agreements*, in ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE 50th ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 312 (Joyce M. Najita ed. 1998). Over time the NAA has softened its opposition, with its most recent resolution stating that “voluntary arbitration is always preferable,” and “it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration.” See National Academy of Arbitrators, *Policy Statement on Employment Arbitration* (May 20, 2009), <https://naarb.org/employment-arbitration-policy-and-guidelines/>.

¹⁴ Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997); Alexander J.D. Colvin & Mark D. Gough, *The Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR Rev.-J. Work & Pol’y 1019, 1023-25 (2015).

¹⁵ Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 (2011).

of \$187,000 in arbitration against \$225,000 in litigation.¹⁶ Professor Colvin sums up this negative case by asserting that “mandatory arbitration exacerbates inequality in access to justice in the workplace.”¹⁷ A subhead for the opening article in a series denouncing arbitration in *The New York Times* puts it even more sharply: “Vast Trend Locks Americans Out of Court – Rulings Greatly Favor Business.”¹⁸

As I have argued more extensively elsewhere,¹⁹ there is still something to be said on behalf of mandatory arbitration, even in its flawed current state. Different empirical studies provide a different perspective from those mentioned earlier. Perhaps most significant is the matter of accessibility. In comparing arbitration and court suits, Professor Christopher Drahozal of the University of Kansas concluded: “The empirical evidence suggests that arbitration may be a more accessible forum than courts for lower income employees and consumers with small claims.”²⁰ Another survey of American Arbitration Association (AAA) cases found, as of the early 2000s, that employees having an annual income less than \$60,000 (or an equivalent claim) generally could not bear the cost of court litigation, but arbitration remained a viable option.²¹ Lewis Maltby, President of the National Workrights Institute, has been opposed in principle to mandatory arbitration. Yet in light of the available data he concluded that twice as many employees could afford to go to arbitration as could afford court suits.²²

It is undeniable that winning plaintiffs in court suits generally receive more than winning parties in arbitration.²³ But that calls for a whole set of cautionary words. First,

¹⁶ Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 105 (2014).

¹⁷ Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014).

¹⁸ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2016, at A1.

¹⁹ E.g., Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J. L. REFORM 783 (2008).

²⁰ Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 840 (2008).

²¹ Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RES. J., May-Jul. 2003, at 8, 10-11. See also Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RES. J., Nov. 2003-Jan. 2004, at 44.

²² Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F.L. REV. 105, 117 (2003). In 2015 Maltby surveyed two leading plaintiffs' law firms. Of 301 employees seeking representation who had seemingly *valid* claims, 112 (37%) were rejected because their damages were inadequate or they could not pay counsel fees. The 112 were asked about later developments. Of the 26 who responded, 16 (62%) were unable to get other counsel. Maltby declared: “A significant number of people with legitimate cases are denied access to justice because their cases do not have high enough damages to interest the private bar.” (Reports are on file with the author.)

²³ See *supra* notes 15 and 16 and articles cited.

from what has just been seen, it is the plaintiffs with the larger claims who are able to get into court, and so larger judgments should naturally follow, without casting any discredit on arbitration. Second, the assumption seems to be that the larger recovery is the superior, fairer recovery. That may not be true in any given case. Employers too have rights. The judgment of an experienced, professional decision-maker may well be sounder on occasion than that of an emotionally aroused lay jury. Third, while the “repeat player” phenomenon is often said to show that arbitrators are favoring employers in order to ensure future business, a more innocent explanation exists. Employers are not uneducable, and over time they learn what discipline arbitrators will sustain. An old arbitrator adage, instilled by the veterans into newcomers, is also apropos: “Decide every case as if it’s the last case you are ever going to decide.” Fourth, in looking at comparative figures, evaluators usually focus only on cases going to a final decision, paying no heed to summary dismissals. The latter are common in court cases but rare in arbitrations. Counting summary dismissals would lower the median recovery disproportionately more in court litigation than in arbitration. Fifth, there is a comparison that I think could be even more relevant than court litigation, and that is comparing nonunion employment arbitration with collectively bargained *labor* arbitration. For about a decade I served on a panel of arbitrators for U.S. Steel and the United Steelworkers. This could be regarded as a “gold standard” for arbitration, with “repeat players” of the highest quality on both sides and with nationally recognized arbitrators deciding the cases. I studied the 200 discharge cases last handled by these arbitrators before I resigned from the panel because of the press of other duties. The union won, in the sense of getting *some* relief for the terminated employees, in only 23 percent of the cases. That puts a different light on the employee win rates of 21.4 percent and 45 percent in the major studies of nonunion employment arbitrations cited earlier.²⁴ Professors David Sherwyn and Michael Heise of Cornell University and Samuel Estreicher of New York University concluded from the various empirical studies they examined that “there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration].”²⁵

Finally, another critical factor should be taken into account. While I was a part-time *labor* (union-management) arbitrator for fifty years, I served in only about half a dozen nonunion employment cases. With the exception of one case referred to me by a court, the primary basis for the employees’ claims in all those cases was *contractual*, usually stemming from a personnel manual “just cause” provision, and not statutory. Although “[a]round half” of the AAA cases in one of Professor Colvin’s studies were said to involve employment discrimination claims,²⁶ another AAA study by Cornell Professor Theodore Eisenberg and Elizabeth Hill found that only 19.5 percent dealt with statutory civil rights claims.²⁷ At issue in most cases were individual contracts or personnel manuals. Two important points should be noted. First, most cases in these arbitrations were not concerned with statutory rights, which have been the major focus of opponents of mandatory

²⁴ See Colvin, *supra* note 15; Gough, *supra* note 16.

²⁵ David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN L. REV. 1557, 1578 (2005).

²⁶ Colvin, *supra* note 17, at 80.

²⁷ Eisenberg & Hill, *supra* note 21, at 49.

arbitration. Second, and perhaps of even more practical significance, the substantial majority of these cases apparently involved *new* contractual rights, ordinarily based on personnel manuals. Along with imposing mandatory arbitration, the employers had simultaneously provided “just cause” substantive contract rights for their workers that previously did not apply. Of course this linkage with arbitration is not legally required, but it is very common and it is often a job saver for employees.

I do not intend a blanket endorsement of mandatory employment arbitration as it now exists. There are deficiencies and they should be remedied. But it is most important to recognize that even the current system frequently benefits employees, especially the lower income rank-and-file workers who cannot find lawyers to take their cases to court.²⁸ We do not want to wind up with a “cure” that is worse than the current ills. I now turn to a discussion of appropriate measures for improving employment arbitration.

III. ELIMINATION OR IMPROVEMENT OF EMPLOYMENT ARBITRATION?

As mentioned earlier,²⁹ the Democratic-controlled U.S. House of Representatives has already passed the so-called FAIR bill by a vote of 225 to 186.³⁰ Section 2(a) would “prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes.” An agreement to arbitrate that is negotiated after a dispute has arisen is undoubtedly fairer to all parties than a pre-dispute agreement. A post-dispute agreement is more likely to be truly voluntary because the facts and legal issues are now mostly known, and the parties can make an informed judgment about the relative merits of an arbitration instead of a court action. Furthermore, if an employee has been discharged, the worker need not worry much about offending the employer, as might be true in rejecting the employer’s offer of arbitration at the time of hiring.

All that makes good sense, theoretically. There is a practical obstacle. Post-dispute arbitration agreements are much harder to obtain. If employees have a large potential monetary claim, they and their lawyers will want to get the case before the supposedly more sympathetic jury.³¹ On the other hand, if the claim is relatively small, the employer will wait it out, assuming the employee will not be able to find a lawyer to bring suit. Thus, management representatives testified before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate.³² Experience bears this out. The vast majority of reported employment arbitration cases are

²⁸ Cf. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 418-64 (2000).

²⁹ See Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

³⁰ See 165 CONG. REC. H7848-H7852 (daily ed. Sept. 20, 2019).

³¹ See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1265 (2009).

³² See U.S. DEP’T OF COMM. AND LABOR, REP. ON THE FUTURE OF WORKER-MGMT REL. 118 (1994); see also Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WILLIAM MITCHELL L. REV. 2 (2003).

based on pre-dispute agreements. To outlaw such agreements is in effect to terminate nearly all employment arbitration. For me the person most in need of protection here is the rank-and-file worker with a relatively modest monetary claim, like a dischargee seeking only reinstatement and back pay. Such employees can seldom secure good legal representation. They are able to invoke the rather informal process of arbitration *pro se*, on their own, or with a friend, or even with a less experienced lawyer charging lower fees. I have personally seen this occur, and it can work. My objective, then, is to see how best to remedy the defects of employment arbitration, not destroy it.

IV. ENSURING A FAIR EMPLOYMENT ARBITRATION SYSTEM

A. *General Principles*

1. Legal Developments

Initially it appeared that the courts would be prepared to oversee the fairness of employer-promulgated arbitration systems by applying standards of public policy and unconscionability. Thus the D.C. Circuit in *Cole v. Burns International Security Services*³³ looked to *Gilmer's*³⁴ requirements for “effectively ... vindicat[ing]” statutory rights. *Cole* concluded an arbitration procedure could be sustained when it: (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.³⁵

Professor Martin Malin of Chicago-Kent College of Law was one of the disinterested observers who felt that decisions like *Cole* meant the courts would play a “strict judicial policing” role and apply “bright-line” rules in reviewing the fairness of employment arbitration systems.³⁶ But the U.S. Supreme Court's next steps dashed those hopes.³⁷

In effect the Court used a three-pronged approach under the Federal Arbitration Act (FAA)³⁸ to stymie judicial oversight of arbitration. First, in a series of cases beginning

³³ See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (2-1 decision).

³⁴ See *Gilmer*, 500 U.S. at 28.

³⁵ See 105 F.3d at 1482.

³⁶ Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 366-67 (2007); see also Richard A. Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 301 (2007).

³⁷ See, e.g., Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L. J. 289, 302-11 (2012).

³⁸ See 9 U.S.C. §§ 1-16 (2018); see also *Circuit City Stores v. Adams*, 532 U.S. 105, 124 (2001) (The FAA applies to employment arbitration agreements except those in the transportation industry).

with *Green Tree Financial Corp. v. Randolph*,³⁹ the Court generally made the question of whether arbitral procedures impair a claimant's effective vindication of statutory rights an issue for the arbitrator and not the court. These particular cases involved commercial and not employment claims but the Court's reasoning would certainly seem to apply to employees' cases.

A second step was to make the FAA preemptive of a state's law regarding unconscionability. The leading case, *AT&T Mobility LLC v. Concepcion*,⁴⁰ involved another commercial claim. Cell phone customers brought a class action in federal court to prevent an allegedly fraudulent sales tax charge of \$30. The company moved to compel arbitration, although its mandatory arbitration agreement prohibited class actions. Lower courts denied the motion for arbitration on the grounds that prevention of class actions in these circumstances was unconscionable under California law. Pursuing \$30 claims was financially unfeasible without grouping them. Section 2 of the FAA makes arbitration agreements valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."⁴¹ California would apply the rule against class action waivers to any contract involving small monetary claims, not just arbitration agreements.⁴² Despite that, the Supreme Court held (5-4) that the FAA preempted the state law because of "the overarching purpose of the FAA," described as "the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."⁴³ Finally, a third step was to prefer the FAA even against the competing provisions of federal statutes, including labor and employment law. In *D.R. Horton, Inc.*,⁴⁴ and *Murphy Oil USA, Inc.*,⁴⁵ a divided National Labor Relations Board sought to distinguish employment cases

³⁹ *Randolph* seemed to assume courts had the authority to decide the question presented, but the subsequent decisions clearly appear to designate the arbitrator as the authority in the usual case. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000) (objecting party has burden of showing likelihood that arbitration would be prohibitively expensive); see also *PacificCare Health Sys. v. Book*, 538 U.S. 401, 406 (2001) (arbitration enforceable even though agreement precluded "punitive" damages and claim was under federal statute authorizing treble damages; arbitrator must resolve "ambiguity"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003) (silence of arbitration agreement on permissibility of class actions left the question for arbitrator rather than court); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (validity under state law of contract containing arbitration clause was issue for arbitrator).

⁴⁰ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

⁴¹ 9 U.S.C. § 2 (2018).

⁴² See *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100, 1117 (2005).

⁴³ *AT&T Mobility*, 563 U.S. at 344, 352.

⁴⁴ 357 N.L.R.B. 2277, 2293 (2012), *enforced in part and enforcement denied in part*, 737 F.3d 344, 364 (5th Cir. 2013).

⁴⁵ 361 N.L.R.B. 774 (2014), *enforced in part and enforcement denied in part*, 808 F.3d 1013 (5th Cir. 2015).

from commercial cases⁴⁶ regarding class-action waivers. The Board held (3-2 in *Murphy*) that employees’ right under Section 7 of the National Labor Relations Act⁴⁷ to engage in “concerted activities” included the right to file group or class actions in arbitration. Ultimately, the Supreme Court resolved a split in the circuits by deciding, in *Epic Systems Corp. v. Lewis*,⁴⁸ that the NLRA did not clearly manifest an intent to displace the FAA and outlaw waivers of class actions in arbitration. Justice Gorsuch declared for the majority: “This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board.”⁴⁹ Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan.⁵⁰

In my view, there should be a *federal* theory of unconscionability under the FAA, prohibiting the waiver of class actions, which are often the only practical way of vindicating some vital substantive rights through arbitration. According to an esteemed authority, the doctrine of unconscionability has “deep roots both in law and equity.”⁵¹ As the accepted grounds for not enforcing unfair contracts, unconscionability is now a pervasive and almost universally accepted legal concept. It ought to be a central feature of both federal and state arbitration law.

2. Existing Nonlegal Standards

Three different groups have promulgated rather similar procedural standards for protecting employees’ rights in employment arbitration. They are the so-called Dunlop Commission;⁵² the Task Force on Alternative Dispute Resolution in Employment, which drafted the widely adopted but somewhat outdated Employment Due Process Protocol;⁵³

⁴⁶ In addition to cases already discussed, see *Am. Express Corp. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (federal antitrust claim; 5-3 decision). Justice Sotomayor did not participate.

⁴⁷ See 29 U.S.C. § 157 (2018).

⁴⁸ 138 S. Ct. 1612 (U.S. 2018).

⁴⁹ *Id.* at 1619.

⁵⁰ *Id.* at 1633.

⁵¹ CORBIN ON CONTRACTS § 29.2 (Joseph M. Perillo rev. ed. 2002). See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965) (Congress adopted the Uniform Commercial Code with its § 2-302 on unconscionability for the District of Columbia); RESTATEMENT (SECOND) OF CONTRACTS § 234 (AM. L. INST. 1981).

⁵² DUNLOP COMMISSION, FINAL REPORT, *supra* note 13.

⁵³ TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf (hereinafter DUE PROCESS PROTOCOL). The Task Force consisted of management, union, and plaintiffs’ attorneys from the American Bar Association and the National Employment Lawyers Association, and representatives of the American Arbitration Association, the American Civil Liberties

and the National Academy of Arbitrators (NAA), which produced two separate sets of Guidelines.⁵⁴ If the courts will not or cannot adopt such protections, Congress should amend the FAA to provide them. A composite of the basic rights set forth in these various formulations, with some emendations by me that are duly noted, would include the following:

- A. As a matter of principle, critics are correct that arbitration should be the voluntary choice of both parties at any time, pre-dispute or post-dispute, especially when statutory rights are at stake.⁵⁵ But when an employer has provided, through a personnel manual or otherwise, that there will be no discharge or discipline except for “just cause,” I personally would allow the employer to require arbitration as the means of enforcing those new and highly valuable *contractual* rights.
- B. The arbitrator must be a neutral person who knows the law and is jointly selected by the parties. The arbitrator must make written disclosure of all personal, social, professional, financial, or other interests that might raise reasonable doubts about the arbitrator’s independence or impartiality. Conflicts of interest cannot be waived even with the knowing consent of all parties.
- C. Class actions or group grievances must be available and cannot be waived when they are necessary to effectively vindicate employees’ rights.
- D. The arbitrator has the initial responsibility for ensuring that all parties are accorded due process. That includes seeing that the arbitrator is not selected by one party or from a panel created by one party.⁵⁶
- E. The parties are entitled to representation by a person of their choice, attorney or otherwise.
- F. There must be simple, adequate discovery, as needed for a full and fair exploration of the issues in dispute, but consistent with the expedited nature of arbitration.

Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution.

⁵⁴ NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES FOR EMPLOYMENT

ARBITRATION, <https://naarb.org/employment-arbitration-policy-and-guidelines/>; NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES FOR STANDARDS OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS IN MANDATORY EMPLOYMENT ARBITRATION, <https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/>. See generally Barry Winograd, *Developing Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration Proceedings*, 35 BERKELEY J. EMP. & LAB. L. 61 (2014). The Academy Guidelines are precatory, not binding and enforceable. There is also a CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES, <https://naarb.org/code-of-professional-responsibility/>, jointly administered by the Academy, the American Arbitration Association, and the Federal Mediation and Conciliation Service. The Code is legally binding on arbitrators in the *unionized* context. Amendments to the Code would appear to make it equally applicable to *employment* arbitrators (see the Code’s “Foreword” and “Preamble – Background, Scope of Code”) but that has not been officially established by the three administering parties.

⁵⁵ See *supra* note 13, and authorities cited.

⁵⁶ See, e.g., *McMullen v. Meijer, Inc.*, 355 F.3d 485, 487 (6th Cir. 2004). Cf. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (arbitrator panel invalid when established solely by employer).

- G. Arbitrators must make a reasonable effort to address and follow public law whenever public law is at issue in a case. I personally would let the parties narrow the issues in arbitration and insist that the arbitrator stick to interpreting and applying the contract. The parties could then have a court deal with any statutory issues, if necessary. Increasingly, however, especially in public-sector cases and certainly in federal cases, it is generally assumed that the arbitrator will apply public law.
- H. All remedies provided by public law must be available in the arbitration of the same substantive rights.
- I. There must be a written arbitration opinion and award, with reasons.
- J. Judicial review should be limited, concentrating on the law.

B. *Applying New Legal Standards*

Some elaboration is appropriate concerning the proposed new legal standards set forth summarily above.

1. Voluntariness

As I have acknowledged,⁵⁷ post-dispute agreements are best calculated to ensure a genuinely voluntary acceptance of arbitration by employees. Yet I have ruled out that facially attractive option because it means the virtual elimination of arbitration, the most feasible resort for the lower-income worker with a small monetary claim. There are nonetheless viable ways to increase the likelihood that an employee's agreeing to arbitration will be knowing and voluntary. Employers now are explicitly forbidden to inquire about an applicant's disability before making a conditional job offer, and pre-hire inquiries about race, color, sex, national origin, religion, or age may be evidence of unlawful discrimination in the absence of a justifiable business purpose.⁵⁸ Similarly, Congress could prohibit any pre-employment offers of arbitration. Arbitration could only be proposed once the employee was on the job. A further assurance of voluntariness would be a statutory requirement that employees have some stipulated period of time, perhaps a week, to consider the offer. That would enable a worker to consult some more experienced person, or even an attorney, about the advisability of agreeing to arbitrate all employment disputes. Finally, the FAA could expressly forbid an employer to retaliate because of an employee's refusal to arbitrate.

I still believe there is a practical case to be made, on an analysis of the real-world pros and cons, for allowing employers to impose mandatory arbitration, so long as essential procedural safeguards are maintained.⁵⁹ But if the Democrats win the Senate (and retain the House), the well-intentioned but misguided impetus will be so strong for outlawing all

⁵⁷ See *supra* text accompanying note 29.

⁵⁸ See U.S. Equal Employment Opportunity Commission, *Prohibited Employment Policies/Practices*, <https://www.eeoc.gov/laws/practices/>.

⁵⁹ See also Malin, *supra* note 37, at 311-15.

pre-dispute agreements to arbitrate that the most sensible compromise course would seem to be the voluntary approach outlined above.

2. Arbitrator Selection

Professor Malin rightly declares: “The enormous importance of the identity and impartiality of the arbitrator appointing agency is obvious.”⁶⁰ This assumes that an outside designating agency like the American Arbitration Association or JAMS, rather than a panel created by the employer, will be required by law. There is much to commend that procedure and a number of disinterested experts support it. But I would at least raise the question of whether the parties, in order to save time and administrative costs, should be allowed to compile their own list of candidates for appointment. The employer would undoubtedly take the lead in this but I would append three conditions: (1) the employer’s candidates would have to be established arbitrators, such as members of the National Academy of Arbitrators or persons on a reputable designating agency’s panel; (2) the employee could add candidates to the list; and (3) the employee would be entitled ultimately to resort to an outside panel if dissatisfied with the internal options. Ordinarily it is the employee who is most concerned about getting a timely decision in arbitration, and that factor should impel the employee to give reasonable consideration to the internal panel before going outside. Use of an outside designating agency does not automatically guarantee fairness to the parties in any given arbitration. The standards applied by the agency in accepting persons onto its roster of arbitrators are naturally important, but most important are the criteria employed in selecting the panel of candidates offered the parties in a particular dispute. The agency can tailor the type of arbitrators listed on the basis of its knowledge of the parties involved, or in response to the stipulated requests of the parties themselves. The law should make clear that any “tailoring” in an employment arbitration case must be entirely neutral and responsive only to the joint request of both employer and employee. Special attention should be paid to full disclosure about proposed arbitrators, especially their repeated handling of cases with the current employer or similar employers.

3. Costs of Arbitration

Heeding the maxim that “the person who pays the piper calls the tune,” the widely adopted Due Process Protocol sought to ensure arbitrator impartiality by requiring employers and employees to share the arbitrator’s fees and expenses.⁶¹ But the D.C Circuit in its *Cole* decision,⁶² speaking through Chief Judge Harry Edwards, himself a former labor arbitrator, doubted that arbitrators cared who paid their fees as long as they were paid. Instead, the court of appeals took the more realistic position that imposing costly arbitration fees (now in the range of \$1,000-\$2,500 per day) on employees could block their access to

⁶⁰ *Id.* at 312.

⁶¹ *See* DUE PROCESS PROTOCOL, *supra* note 53.

⁶² *See supra* note 33, 105 F.3d at 1485.

arbitration and should thus be invalid.⁶³ Section 2.A.4 of the latest set of Guidelines of the National Academy of Arbitrators (NAA), applicable to mandatory arbitrations, declares simply: “One party may be made solely responsible for arbitrator fees pursuant to applicable law, agency rules, or agreement of the parties.”⁶⁴ In the absence of dealings between parties of equivalent bargaining power (the TV anchor, the company CEO), that “one party” has to be the employer.

As a practical matter, the cost of employment arbitration has not been a major problem for most employees. Employers have generally borne the total expense of the arbitration proceedings, though usually not the employee’s attorney fees or other representational costs. To guard against frivolous claims, however, it would seem entirely fair to impose a modest filing fee on employees, not to exceed the amount of the filing fee for a civil action in the relevant federal district court.

4. Class Actions

As discussed earlier, the Supreme Court relied on the Federal Arbitration Act to overturn rulings under state law and the National Labor Relations Act that would have prohibited contractual waivers of class actions in both consumer⁶⁵ and employment⁶⁶ arbitrations. In *AT&T Mobility*, the consumer case, Justice Scalia for the 5-4 majority criticized class actions in arbitration as overly formal, slower, costlier, and riskier for defendants.⁶⁷ He concluded: “Arbitration is poorly suited to the higher stakes of class litigation.”⁶⁸ Professor Malin agrees that “[c]lass actions do not belong in arbitration,” primarily on the ground there is no cure for the appearance of bias on the part of an arbitrator who has been chosen by the named claimants and the respondent.⁶⁹ Absent class members may have legitimate objections to the positions of the named claimants. These are genuine concerns but I believe they are outweighed by other considerations.

If one sets aside individual discipline and discharge cases, a very substantial percentage of collectively bargained or *labor* arbitrations have always been based on group claims or so-called “policy” grievances. They can relate to such important matters as pay rates, job classifications and assignments, overtime, seniority, vacations, safety and health, and so on. These issues may sometimes raise divisions or create factions within the workforce. Part of the union’s responsibility is to reconcile these differences to present a united front against the employer in an arbitration. True, in this institutional setting, the

⁶³ See *supra* note 35 and accompanying text.

⁶⁴ See *supra* note 54.

⁶⁵ See *AT&T Mobility*, *supra* note 40.

⁶⁶ See *Epic Systems Corp.*, *supra* note 48.

⁶⁷ *AT&T Mobility*, *supra* note 40, at 344-51.

⁶⁸ *Id.* at 350.

⁶⁹ Malin, *supra* note 37, at 313-14.

union is subject to the legal obligation of fair representation of all members of the “class” in the bargaining unit.⁷⁰ But the alternative to arbitral class actions in the nonunion workplace is to leave most small individual claims totally without remedy. Professor Malin is worried about the “appearance” of arbitrator bias in these cases. I have enough confidence in the integrity of established arbitrators that I would accept that risk. At the worst the risk of bias in some few cases is better than a waiver and loss of recourse in all cases. And in many if not most of these class actions there is no problem anyway. The interests of the named claimants and of the rest of the class are identical. They all want the same pay raise or retirement benefit.

Finally, consideration should be given to imposing a statutory duty of fair representation on the named claimants in nonunion arbitrations. This would be analogous to the duty of fair representation borne by unions under the National Labor Relations Act and the Railway Labor Act.⁷¹ That duty as applied by the courts and administrative agencies has generally proved to be flexible and effective. I see no reason why it could not be a feasible safeguard in the nonunion class action context as well.

Some employers are discovering that it is not all to their advantage to have foreclosed class actions in arbitration by extracting waivers from employees. There are now reports that some savvy plaintiffs’ lawyers have filed a host of claims in a veritable fusillade of separate arbitrations against the same employer, raising the specter of huge defense costs.⁷²

5. Shortening Limitations Periods

As I have discussed elsewhere,⁷³ the courts have taken at least three different positions on whether the parties can agree to shorten the relevant statutory period for filing a claim in arbitration. The issue does not yet appear to be resolved. In workplace disputes, there are good, practical reasons for allowing a waiver and not letting a dispute fester, especially when a watchful, knowledgeable union is involved. In the nonunion situation, however, I would take the position that if a statutory *substantive* right is at issue, the statutory limitations period should prevail. But if the claim concerns a *contractual* matter, I would permit the parties to set a shorter time for filing than the statutory limitation on contract actions, as long as the parties’ period is reasonable.

6. Choice of Representative

⁷⁰ See, e.g., *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944) (Railway Labor Act); *Vaca v. Sipes*, 386 U.S. 171 (1967) (National Labor Relations Act); Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

⁷¹ *Id.*

⁷² See, e.g., Michael Corkery & Jessica Silver-Greenberg, ‘Scared to Death’ by Arbitration: Companies Drowning in Their Own System, N.Y. TIMES, April 7, 2020, at B1 (nytimes.com).

⁷³ St. Antoine, *supra* note 19, at 803-05.

Any compendium of worker rights will include a provision that employees are entitled to their free choice of the persons to represent them in dealings with their employer. In arbitration that is often an attorney but not necessarily so. It may be a friend or a fellow worker. Any statute should be explicit that nonunion employees may also be represented in arbitrations by an organization, including a labor organization.⁷⁴ The latter is not a common practice in the United States, but trade unions in the United Kingdom have used it as a recruitment and organizing tactic, demonstrating forcefully the advantages of union representation for workers in a dispute with their employer. On occasion the American Federation of Government Employees and other public-sector unions have represented nonunion employees in arbitration.⁷⁵ Moreover, it is well known that even if unrepresented employees are reinstated in arbitration, they seldom remain employed for long. There are subtle ways to displace unwanted workers. They could use the strength of an organization behind them.

If employees in an arbitration are “*pro se*,” or representing themselves, Section 2.A.5.a of the NAA Standards applicable to mandatory arbitrations states: The arbitrator must inform unrepresented parties that the arbitrator is not representing either party.... While the arbitrator may not assist either party in the presentation of its case, the arbitrator may explain the arbitration process to an unrepresented party.⁷⁶ That is a delicate balance to maintain. Arbitrators must exercise extreme caution to be fair to both parties while recognizing the considerable handicap under which the *pro se* employee is proceeding.

7. Discovery

Discovery is a special problem in nonunion employment arbitrations. In the usual collectively bargained arbitration, the established union starts with a close working knowledge of the employer’s structure, management, operations, and past practices. Then there is a prescribed multi-step grievance procedure preceding the arbitration in which a wide array of facts can be secured. None of this obtains in most employment arbitrations. Colleagues who do much more employment arbitration than I tell me that handling prehearing discovery may be the single most significant – and difficult – procedural function they perform. The strong-minded say they must simply “take charge.” After hearing out the parties on their desires and objections, these arbitrators “lay down the law.” The objective is to elicit the necessary facts, especially for the uninformed employee, but without unduly burdening the employer with excessive inquiries or overwhelming the employee with a mountain of indecipherable data. And all this must be done within a reasonable period of time. To accomplish that, the arbitrators often spell out exactly the number and time limits on depositions and interrogatories, including even the maximum

⁷⁴ See, e.g., Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1683n. 4 and authorities cited (2014).

⁷⁵ See, e.g., Joseph E. Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, 5 ADVANCE [J. AM. CONST. SOC.] 58 (2011).

⁷⁶ See *supra* note 54. Under § 10(a)(2) of the Federal Arbitration Act, a federal court may vacate an arbitral award if there was “evident partiality or corruption in the arbitrators.” 9 U.S.C. § 10(a)(2) (2018).

number of questions to be asked. Legislation or judicial rulings should allow arbitrators much latitude in supervising discovery.

8. Due Process

Section 10(a) of the Federal Arbitration Act authorizes a federal court to vacate an arbitral award if there was a refusal to hear “pertinent and material” evidence or “any other misbehavior” prejudicing a party’s rights.⁷⁷ That certainly should include such acts as a denial of appropriate cross-examination during the hearing. How about unduly rushing the proceedings so the arbitrator can catch an early plane? “Misbehavior” may connote rather serious misconduct, and more innocent denials of parties’ rights can occur. Statutes cannot be expected to delineate all aspects of fair procedure. Indeed, too much specification could lead to unintended exclusions by overly literal courts in interpreting and applying the law. Nonetheless, it would be well to include an express reference in the FAA to such broad and well-recognized legal standards as “due process” and “unconscionability.” Unconscionability should be unacceptable not only in the parties’ agreement but also in an arbitrator’s performance under it.

9. Opinions and Awards

In considering an award in a collectively bargained arbitration, the U.S. Supreme Court has stated: “Arbitrators have no obligation to the court to give their reasons for an award.”⁷⁸ Nevertheless, all three of the prestigious private groups cited earlier who have dealt with this question in the context of nonunion employment arbitration have called for a written opinion setting forth the rationale for the award.⁷⁹ That is necessary and desirable both to inform the parties exactly why a particular decision was reached, which can be critical in securing mutual acceptance of the result, and to enable any reviewing court to determine the fairness and validity of the award itself.

Section 2.J.2.a of the National Academy of Arbitrators’ Guidelines for mandatory arbitrations introduces an innovative requirement: “If the arbitrator concludes the case should be decided on the basis of a rationale or position not presented or argued by any party, the arbitrator must first give all parties an opportunity to respond.”⁸⁰ Courts of course frequently wind up adopting their own novel theory that neither party espoused, much to the dismay of even experienced attorneys. Yet one can see how this practice could be especially hurtful in an arbitration, particularly for the *pro se* claimant who might have failed to articulate initially a wholly legitimate position that, once spelled out, would have led the arbitrator to go in a quite different direction. The NAA’s provision is the sort of detail that one would hesitate to include in a statute, but it could be a sound cautionary

⁷⁷ *Id.* § 10(a).

⁷⁸ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

⁷⁹ *See supra* notes 13, 53, and 54 and authorities cited.

⁸⁰ *See supra* note 54.

word for arbitrators. In an extreme case – a unilateral arbitral rationale leagues distant from either party’s position or arguments – a reviewing court might well conclude there was a denial of due process.

10. Arbitrator’s Post-Award Conduct

It may also be unnecessary for a statute to deal with an arbitrator’s post-award conduct but certain actions should be out of bounds in any event. Both the Code of Professional Responsibility,⁸¹ applicable to labor arbitration and I believe applicable to employment arbitration as well, and the NAA Guidelines⁸² for mandatory arbitrations prohibit an arbitrator from clarifying or interpreting an issued award without the consent of all parties. Each of these sets of rules has an exception. An arbitrator may retain remedial jurisdiction for the specific purpose of resolving any disputes that may arise concerning the interpretation or implementation of the *remedy* provided by the award.

A couple of other restrictions imposed by these private regulations would seem natural but hardly worth legislative attention. An arbitrator is forbidden to have an opinion and award published without the advance approval of the parties. And arbitrators may not voluntarily participate in legal proceedings to enforce an award. But that would not prevent an arbitrator from responding to a valid subpoena.

11. Judicial Review

The variegated groups of experts who produced the Dunlop Commission Report and the Due Process Protocol are in accord that judicial review of arbitration awards should be limited, primarily concentrating on matters of law rather than the arbitrator’s contractual interpretations or findings of fact.⁸³ In *Eastern Associated Coal Corp. v. United Mine Workers District 17*,⁸⁴ the Supreme Court stated: “[W]e must treat the arbitrator’s award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract’s words....” In effect, absent fraud or an exceeding of authority under the parties’ submission, the notion of an “arbitrator’s misinterpretation” of a contract is a contradiction in terms. The parties to an arbitration almost invariably agree that the award shall be “final and binding,” and their stipulation should be honored. Of course, if the parties’ contract itself, or the arbitral award implementing it, calls for the performance of actions that are contrary to law or “explicit, well-defined” public policy, then the award must be vacated.⁸⁵

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See supra* notes 13 and 53.

⁸⁴ 531 U.S. 57, 62 (2000).

⁸⁵ *Id.* at 62-63; *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983). But the “very limited” judicial review that is allowed would not apply to an arbitrator’s “factual errors,” *see Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001), or even to mere “error” in “interpretations of the law” not amounting to “manifest disregard” of the law, *see Hall Street Assocs., L.L.C. v. Mattel, Inc.*

V. CONCLUSION

The proposal to ban pre-dispute agreements to arbitrate is understandable because at that stage the job applicant or employee is the most vulnerable, under the most pressure to accept the employer's offer. In addition, a more informed and voluntary decision is most likely after the issue arises and the facts are known. But then comes the reality check. If the monetary claim is substantial, the employee will want to get before a jury. If the claim is modest, the employer will believe the employee probably cannot find a lawyer to go to court and can safely be left remediless. And thus the most likely time for both parties to agree on arbitration is when neither knows what the future holds, before the dispute occurs. Insisting solely on post-dispute agreements could be the death-knell for most private employment arbitration.

I myself do not consider so-called mandatory arbitration – that is, when agreement to arbitrate is made a condition of employment – all that bad, as long as all due process safeguards are provided.⁸⁶ But I also believe that the opponents of mandatory arbitration are so adamant that if Democratic majorities prevail in both houses of Congress, the political realities probably require an acceptance of voluntarism as a fundamental standard. As discussed above,⁸⁷ there are ways for the FAA to ensure a voluntary employee agreement to arbitrate even in a pre-dispute situation. These could include an express statutory prohibition of an employer's retaliation against an employee for refusing to arbitrate.

The FAA should also be amended to authorize class actions in arbitration, and to prohibit their waiver, at least when that is necessary for the effective vindication of employees' statutory or contractual rights. It is always possible that there will be differences in the positions of the named claimants and absent members of the class. A duty of fair representation could be imposed on the named members. And a capable, reputable arbitrator should be able to sort out those differences – or find that the differences are so substantial that the various claimants belong in separate classes.

Lastly, the FAA should expressly adopt the vital, pervasive principle of unconscionability as an element of federal law.⁸⁸ One of the worst failures of the current Supreme Court was to deny the applicability of state law on unconscionability in deference to the supposedly superior preemptive authority of the existing FAA.⁸⁹ The doctrine of unconscionability should apply to the agreement to arbitrate, to the conduct of the parties throughout, and to the handling of the arbitration proceedings by the arbitrator. That would be a highly important and salutary development in both substantive and procedural federal law.

552 U.S. 576, 584 (2008), quoting *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). See generally Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ARB. & MEDIATION 56 (2014).

⁸⁶ See St. Antoine, *supra* note 19.

⁸⁷ See *supra* text at note 55.

⁸⁸ See *supra* note 51 and accompanying text.

⁸⁹ See *AT&T Mobility*, *supra* note 40, and accompanying text.