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# Employment Arbitration at the Crossroads: An Assessment and Call For Action

*Stephen L. Hayford,\* Jamie Darin Prenekert,\*\* & Anjanette H. Raymond\*\*\**

## ABSTRACT

The use of arbitration in every sector has grown substantially in recent decades. This is nowhere truer than in the employment arbitration field. Reflecting this growth, the U.S. Supreme Court has fielded numerous attacks upon arbitration, ranging from state laws targeting arbitration for differential treatment to parties attempting to challenge specific agreements and awards on a variety of legal theories. Nonetheless, to date all of these attempts have failed. The U.S. Supreme Court has taken a consistent, literal approach to section 2 of the Federal Arbitration Act (FAA), finding arbitration agreements “shall be valid, irrevocable, and enforceable, save such grounds as exist at law or in equity for the revocation of any contract.” The time has come to recognize the end of this stage of the debate. Arbitration agreements must be on equal footing with all types of contracts. This stark reality demands that the various stakeholders in the arbitration community converge in the interest of designing and institutionalizing arbitration mechanics and processes that, as a start, exceed the minimum requirements to avoid arguments of substantive unconscionability and, more broadly, provide the fair, just, and accountable alternative dispute resolution system the FAA and the U.S. Supreme Court have indicated it can be.

This paper seeks to guide this next stage of the debate by first reviewing the doctrinal developments over the past thirty years that led to a settled state of arbitration law. We then exhort the various stakeholders to collectively take up the challenge of this next stage. In particular, we hope to prompt that cooperation by laying out the essential elements of a fair and just employment arbitration mechanism.

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I. INTRODUCTION

Employment arbitration in the non-union sector is governed by the remarkably consistent and doctrinally focused body of commercial arbitration law created by the U.S. Supreme Court over the last three decades.<sup>1</sup> Since 1983, the Court has effectively reinvented the law of commercial arbitration, giving full voice and effect to the command of section 2 of the Federal Arbitration Act in that contractual agreements to arbitrate future controversies “shall be valid, irrevocable, and enforceable, save such grounds as exist at law or in equity for the revocation of any contract.”<sup>2</sup> The harsh truth created by the U.S. Supreme Court’s broad and unequivocal embrace of the rule of section 2 is that otherwise valid adhesion arbitration agreements forced upon individual employees as a condition of their employment are enforceable as a matter of federal law under the FAA, provided those agreements are fair in their substantive terms.

Understandably, this state of affairs is the source of great alarm and consternation among the anti-arbitration forces in the plaintiffs’ and public interest bars and their allies in the scholarly community. At the end of their long-standing crusade to exempt the employment and consumer sectors of the economy from the sweeping rule of enforceability found by the U.S. Supreme Court in the straightforward words of section 2, those vocal opponents of employer-imposed arbitra-

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1. See, e.g., *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991); *Green Tree Fin. v. Randolph*, 531 U.S. 79 (2001). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001) (holding that employment arbitration agreements are not exempted from the reach of the FAA).

2. 9 U.S.C. § 2 (2012).

tion find themselves without recourse. Their recent unsuccessful efforts to consecrate the class arbitration device as the antidote for adhesion arbitration agreements—soundly rejected in *AT&T Mobility v. Concepcion*<sup>3</sup> and *American Express v. Italian Colors Restaurant*<sup>4</sup>—was the last stand in a thirty-year anti-arbitration crusade that met defeat at virtually every turn before the U.S. Supreme Court. Given the stark legal reality created by unwavering pro-arbitration stand of the current conservative majority of the U.S. Supreme Court and the virtually zero chance that Congress will enact the adhesion arbitration agreement proscription of the oft-introduced Arbitration Fairness Act (AFA),<sup>5</sup> what is the wisest path going forward for everyone in the employment law community who is truly concerned with workplace due process and employee rights? That query is the focus of this commentary.

This article briefly recaps the sea change in the law of commercial arbitration that began with the U.S. Supreme Court's 1983 opinion in *Moses H. Cone Memorial Hospital v. Mercury Creek Construction Corp.*<sup>6</sup> Next, the ramifications of that comprehensive, now essentially complete, legal framework for employment and commercial arbitration will be described. In the final substantive element of this article, the authors propose a model employment arbitration mechanism that will both pass legal muster under the current FAA regime, and also secure due process and substantive rights for employees required to agree to adhesion arbitration agreements as a condition of employment.

## II. THE CURRENT LEGAL REALITY DESCRIBED

For all practical purposes, the doctrinal outlines of the modern law of commercial arbitration are now complete. Beginning with its seminal opinions from 1983 to 1985,<sup>7</sup> and continuing through the 2013 opinion in *Italian Colors*,<sup>8</sup> the Supreme Court has fashioned a body of law pertaining to the enforceability of arbitration agreements falling within the reach of the interstate commerce clause that is remarkable in both its clarity and its consistency. At every significant turn, the Court has rejected efforts to limit the reach of the rule of section 2. The analysis below describes the manner in which the Court has dispensed with each of the five avenues of legal attack upon the enforceability of commercial arbitration agreements mounted by the anti-arbitration bar and scholarly community.

These thirty years of decision by the Supreme Court were driven by its sweeping view of the preemptive effect of the FAA.<sup>9</sup> Time and again the Court

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3. 131 S. Ct. 1740, 1753 (2011).

4. 133 S. Ct. 2304, 2312 (2013).

5. Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

6. 460 U.S. 1, 2 (1983) (creating a body of federal substantive law that is applicable in both state and federal courts).

7. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (holding that employment contracts fall within the FAA); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (holding that antitrust claims are arbitrable); *Moses H. Cone*, 460 U.S. at 24 (noting the “liberal federal policy favoring arbitration”).

8. 133 S. Ct. 2304, 2312 (2013) (holding that the “effective vindication” exception does not guarantee class arbitration simply because an individual claim is expensive to prove).

9. See *Southland Corp.*, 465 U.S. at 16-17 (holding that states may not require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration).

has relied upon the preemptive effect of the FAA to reject efforts by states to limit the reach of section 2.<sup>10</sup> Thus, both the federal and the state courts are now bound by the “liberal federal policy favoring arbitration,”<sup>11</sup> and the “fundamental principle that arbitration is a matter of contract.”<sup>12</sup>

Despite clear enumerations of the importance of contract by the Supreme Court, hostility toward arbitration led the states to restrict the use of arbitration. Using their power to regulate contracts,<sup>13</sup> states attempted to restrict the use of arbitration in two ways: (1) by limiting the issues that can be resolved in arbitration,<sup>14</sup> and/or (2), by restricting the ability of certain parties to agree to arbitration,<sup>15</sup> especially when arising within a contract of adhesion.<sup>16</sup> The Supreme Court, relying on federal preemption and the command of section 2 prohibited the states from singling out arbitration agreements for differential treatment.<sup>17</sup> Even state-created prohibitions on class-action waivers have been preempted by the strong federal policy favoring arbitration.<sup>18</sup>

As arbitration has made further inroads into the civil justice arena, states grew concerned that arbitration awards would not provide the same legal certainty and consistency provided by the judiciary. Such concerns resulted in state efforts to expand judicial review of arbitration awards. Ultimately, these backdoor attempts failed when the Supreme Court held that a party could not contractually create a broader scope of review for state and federal courts<sup>19</sup> than the narrow scope of scrutiny permitted by sections 10 and 11 of the FAA.<sup>20</sup>

Even attempts to ensure legally correct outcomes have failed. The Court has held that parties cannot fall back on the judiciary as a means to overcome an arbitration award that contains inaccurate, misapplied, or incorrect law, because the parties “bargained for the arbitrator’s construction of their agreement.”<sup>21</sup> Thus, the sole question on judicial review is whether the arbitrator interpreted the parties’ contract, not whether he construed it correctly.<sup>22</sup> The most recent attack on the ability of arbitration to be used as an alternative to the judiciary ultimately failed when the U.S. Supreme Court determined that concerns about the cost of

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10. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

11. *Moses H. Crone*, 460 U.S. at 24.

12. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

13. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] § 2.”).

14. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006) (holding that the arbitrator is the appropriate party to determine the validity of the contract as a whole).

15. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that California could not invalidate arbitration clauses in franchise agreements).

16. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citing *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005)).

17. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (“The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the [FAA’s] language and Congress’ intent.”).

18. *Concepcion*, 131 S. Ct. at 1748.

19. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

20. 9 U.S.C. §§ 10-11 (2012).

21. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013).

22. *Id.* (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671 (2010)).

the proceedings shall not overcome the strong federal policy supporting arbitration and honoring agreements as written.<sup>23</sup>

Adhesion contracts are a central feature of the relationship between employers and employees, as well as between businesses and consumers. If such contracts are otherwise valid under relevant state contract law principles those adhesion arbitration agreements can be evaded only if they are unconscionable.<sup>24</sup> The absence of voluntary employee consent likely renders every adhesion employment arbitration agreement *per se* procedurally unconscionable. Nonetheless, the overwhelming weight of authority demonstrates that a showing of procedural unconscionability must be accompanied by proof of substantive unconscionability for an agreement to be invalidated on unconscionability grounds.<sup>25</sup> As a result, the traditional focus on the procedural unfairness of forced employment arbitration agreements is largely for naught.<sup>26</sup> As a practical matter, unless a challenged arbitration mechanism is proven to be substantively unconscionable, the arbitration agreement creating that mechanism will be deemed valid and enforceable.

The pivotal nature of the substantive unconscionability inquiry was confirmed by the U.S. Supreme Court's 2011 opinion in *AT&T Mobility LLC v. Concepcion*,<sup>27</sup> and also in the recent opinion of the California Supreme Court in *Sonic-Calabasas A, Inc. v. Moreno*.<sup>28</sup> Both decisions affirm that in the current legal

23. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

24. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (noting that arbitration agreements are subject to "generally applicable contract defenses, such as fraud, duress, or unconscionability").

25. Most states insist on at least a minimum amount of evidence on both prongs. See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003) (applying Ohio law); *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005); *Bland ex rel. Coker v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 257 (Fla. Dist. Ct. App. 2006) ("Having concluded that the trial court properly determined that the Agreement was not procedurally unconscionable, we need not address the issue of substantive unconscionability."); *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.*, 127 P.3d 138, 141-42 (Idaho 2005) (applying Michigan law); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003); *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 799 (Neb. 2006); *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 194-95 (S.D. 2007). Others employ a sliding scale and let a strong showing on the substantive prong make up for a weak showing on the procedural prong. See *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 971-72 (Mo. App. W.D. 2005); *Vockner v. Erickson*, 712 P.2d 379, 381-82 (Alaska 1986); *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 350 (Cal. Ct. App. 2007); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 818 (Ill. App. Ct. 2005); *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004); *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 923 (N.J. Super. Ct. Ch. Div. 2002); *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983); *Kucan v. Advance Am.*, 660 S.E.2d 98, 102 (N.C. Ct. App. 2008) ("[W]hile the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa." (quoting *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008))); *Woodhaven Apartments v. Washington*, 942 P.2d 918, 925 (Utah 1997); *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 246-47 (Wyo. 2000). A few courts have opined that substantive unconscionability alone can be sufficient. See *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) ("[A] claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies."); *Am. Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 888-89 (N.H. 1964); *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985) ("Gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability."); *Adler v. Fred Lind Manor*, 103 P.3d 773, 782 (Wash. 2004).

26. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (noting that "the times in which consumer contracts were anything other than adhesive are long past").

27. *Id.* (overruling *Discover Bank* which held class-action waivers to be unconscionable).

28. See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 203 (Cal. 2013).

milieu, the substantive unconscionability inquiry is the fulcrum for determining the enforceability of otherwise valid adhesion employment arbitration agreements.<sup>29</sup>

This brief overview of relevant Supreme Court jurisprudence reveals the Court's consecration of employment arbitration, a subset of commercial arbitration, as an alternative to traditional litigation of employment-related claims. If employees agree to arbitrate their future employment related claims against the employer, they will be held to that bargain as long as those agreements are not substantively unconscionable.

### III. THE RAMIFICATIONS OF THE CURRENT LEGAL REALITY FOR THOUGHTFUL SCHOLARS, EMPLOYERS, EMPLOYEE ADVOCATES, AND PUBLIC POLICY MAKERS

Stakeholders in the employment arbitration arena must come to terms with legal reality. As the foregoing section details, the Supreme Court has been unambiguous in its endorsement of arbitration agreements, treating the FAA as sacrosanct in employment to the same degree as any other context. Pre-dispute adhesive arbitration agreements between employers and employees that cover all manner of potential disputes and that disavow class action procedures are likely to become ubiquitous in the coming years. This article argues that parties on all sides of the debate over the propriety and reach of employment arbitration agreements are obliged to emerge from their long-held, entrenched positions on now-resolved foundational questions of law, and instead focus on ensuring that arbitral forums provide just and efficient alternatives to the civil justice system, as the FAA and courts envisioned. In particular, stakeholders should converge around their shared interests in the design and implementation of arbitration mechanisms that steer clear substantive unconscionability and are worthy of the trust that Congress and the Court have bestowed on arbitration.

Among academics, much ink has been spilled decrying the U.S. Supreme Court's systemic march toward full implementation of the FAA's endorsement of arbitration, including employment arbitration,<sup>30</sup> and strategizing ways to halt the doctrinal developments we have described.<sup>31</sup> Much less common are articles focused on ensuring fair, reasonable, and efficient arbitration procedures, as well as protections starting with baseline indicators of substantive unconscionability. This article steps into that gap.

Employee advocates, and the plaintiffs' bar, have likewise looked elsewhere to thwart the arbitral forum as the dispute resolution mechanism of choice. With state-law-based collateral attacks on arbitration agreements foiled by the U.S. Supreme Court and with the rejection of arguments that employment should be the

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29. *Concepcion*, 131 S. Ct. at 1747; *Sonic*, 311 P.3d at 203.

30. See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009) (attacking the notion that arbitration is fair and egalitarian); *id.* at 1255 n.17 (collecting examples of the scholarly attack on mandatory arbitration); Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795, 795 (2012) (criticizing the Supreme Court for having "a serious attachment to arbitration").

31. See, e.g., Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 3-4 (2007) (introducing a symposium that was focused on proposals to revise the FAA).

exception to overarching arbitration jurisprudence, anti-arbitration advocates have focused on legislative change.<sup>32</sup> Advocates of the Arbitration Fairness Act [AFA] and other reformist legislation denunciate the arbitration process, dismissing the notion that arbitration, if properly done, can provide an adequate measure of justice to the vast numbers of unorganized American workers who presently have no meaningful guarantee of workplace due process.<sup>33</sup> They have done so largely to the exclusion of working in concert with arbitrators and arbitration service providers.

And, yet, all of these efforts perversely valorize a civil justice system that continues to be hostile and unforgiving to a broad swath of employee claims. For instance, Clermont and Schwab have described how employment discrimination plaintiffs have fared far worse than employment discrimination defendants and comparatively worse than other plaintiffs who pursue a broad range of other claims, both at trial<sup>34</sup> and on appeal.<sup>35</sup> Moreover, recent Supreme Court opinions suggest that providing a full hearing for such claims is far from a priority. Indeed, both *Vance v. Ball State University*<sup>36</sup> and *University of Texas Southwestern Medical Center v. Nassar*<sup>37</sup> justify their decidedly employee-unfriendly holdings at least in part on how they will allow more cases to be resolved prior to trial, particularly at the summary judgment stage (where we know employees are at a decided disadvantage).<sup>38</sup> In short, the courts are no panacea for the employee-plaintiff. A carefully designed and substantively just arbitration system is unlikely to be less employee friendly than the courts and would trump the courts in terms of affordability, efficiency, and timeliness. Thus, our goal in this effort is to encourage the refocusing of advocacy and reformist energies from critique and obstructionism to positive institutional design: to make arbitration the best it can be.

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32. The most important efforts have focused on the AFA. Nonetheless, there have been piecemeal legislative efforts (and successes) at curbing forced arbitration, particularly of whistleblower claims. See, e.g., Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009) (banning employment contracts of defense contractors exceeding \$1 million from including predispute agreements to arbitrate sexual harassment claims); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 748(n)(2), 124 Stat. 1376, 1739 (2010) (codified at 7 U.S.C. § 26(n)(2)); *id.* at §§ 922(b), (c), 124 Stat. at 1841 (codified at 18 U.S.C. §§ 1514A(e)(1), (2)) (prohibiting predispute agreements to arbitrate whistleblower claims).

33. *But see* Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289 (2012) (arguing for a “middle ground” on the issue of legislative reform, involving legislation to curb potential employer abuses of mandatory arbitration without an outright ban and arbitration industry self-policing).

34. Kevin M. Clermont & Stuart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 112 (2009). *Cf.* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013) (showing empirically that courts are finding more ADA plaintiffs unqualified in post-ADA Amendments Act cases, even as they dismiss fewer cases on a finding of lack of disability—one purpose of the ADA Amendments Act).

35. Clermont & Schwab, *supra* note 34, at 111.

36. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

37. *Univ. of Tex. Sw. Med. Ctr v. Nassar*, 133 S. Ct. 2517 (2013).

38. See *Vance*, 133 S. Ct. at 2444, 2449 (noting that a positive attribute of the definition of “supervisor” adopted by the court for purposes of determining an employer’s potential for vicarious liability for supervisory harassment is that “it can be applied without undue difficulty at both the summary judgment stage and at trial” and “supervisor status will generally be capable of resolution at summary judgment”); *Nassar*, 133 S. Ct. at 2532 (“Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage.”).

To do that, other stakeholders must come on board as well. Employers, the management bar, arbitrators and arbitration providers, and even courts have roles to play in this process. First, while employers and the management bar have accomplished a comprehensive series of legal victories over past several decades, certainly those victories have their limits. These wins do not signal that there is an open season for predatory practices and sham arbitration proceedings.<sup>39</sup> Over-reaching invites backlash from official channels and, in the interim, harms employees while undermining the legitimacy of the arbitral forum. Thus, employers and the management bar would be well served at this point to throw their influence, resources, and efforts into making arbitration the co-equal, reasonable alternative the courts have always argued it is. In other words, we argue that this is a money-where-your-mouth-is moment in the history of workplace arbitration. Our goal in the next section is to provide some guidance about where those efforts should be focused.

Arbitrators, including their professional organizations—like the National Academy of Arbitrators<sup>40</sup> and the College of Commercial Arbitrators,<sup>41</sup> and arbitration service providers such as the American Arbitration Association,<sup>42</sup> JAMS,<sup>43</sup> and the Section of Dispute Resolution of the American Bar Association—should adopt a proactive posture and take the lead in designing, promoting, and institutionalizing the kinds of procedures and measures we outline in Part IV, collectively and individually. If employment arbitration is to reach full potential, a core cadre of unquestionably neutral, fully qualified employment arbitrators must lead its evolution. As the most consistent repeat players, arbitrators and their organizations simply must be on the leading edge of creating an arbitration standard that is in line with the expectations of Congress and the Supreme Court.

Finally, state and federal judges and legislators play a less obvious but nonetheless vital role in the process of ensuring forced workplace arbitration is fair, efficient, and effective for all involved. Given the central role the doctrine of substantive unconscionability plays in setting the parameters of legally sufficient arbitration procedures, judges should provide clear and consistent guidance in the development and refinement of the doctrine.<sup>44</sup> The characteristics we describe below are only valid and valuable to the extent that they are met with relative certainty that they pass muster under standards of substantive unconscionability. Incentives to invest in and endorse these initiatives are only present to the extent that the doctrine has some meaningful structure. Carefully crafted and elucidated legislation and judicial opinions are essential.

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39. Courts *will* set limits. *See, e.g., Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (refusing to enforce an agreement that resulted in the arbitrator chair being drawn from a list essentially created and populated by the employer).

40. NAT'L ACAD. ARB., <http://www.naarb.org/> (last visited Jan. 17, 2015).

41. C. COM. ARB., <http://www.thecca.net/> (last visited Jan. 17, 2015).

42. AM. ARB. ASS'N, <http://www.adr.org/> (last visited Jan. 17, 2015).

43. JAMS: THE RESOLUTION EXPERTS, <http://www.jamsadr.com/> (last visited Jan. 17, 2015).

44. Notably, this calls for more practical guidance than a series of pithy phrases that courts have used to describe substantively unconscionable contract terms. *See, e.g., Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 202 (Cal. 2013) (listing the particularly unhelpful phrases such as “overly harsh,” “unduly oppressive,” “so one-sided as to shock the conscience,” and “unfairly one-sided”) (internal quotation marks and citations omitted). *Cf. Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57 (2006) (holding that a standard of proving pretext under Title VII that required showing a “disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face” was “unhelpful and imprecise”).

#### IV. THE FRAMEWORK FOR BUILDING AN ADEQUATE EMPLOYMENT ARBITRATION MECHANISM

It is abundantly clear that waiting for the courts to determine the precise parameters of legally defensible, adequate employment arbitration procedures through piecemeal application of the substantive unconscionability doctrine is not an effective means for bringing employment arbitration to a mature state.<sup>45</sup> In order to accelerate that evolution, this section identifies and briefly explicates the key elements of an efficacious employment arbitration mechanism.

The proposed model of employment arbitration procedure takes its starting point in the relevant case law pertaining to the substantive unconscionability doctrine, most particularly the 2000 opinion of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*<sup>46</sup> and the U.S. Supreme Court's 2011 opinion in *AT&T Mobility, LLC v. Concepcion*.<sup>47</sup> The model procedure outlined below embraces several dimensions not addressed in the substantive unconscionability case law which are necessary if employer-promulgated arbitration mechanisms are to truly secure the essential workplace due process rights of employees.

##### *A. The Nature of the Arbitration Agreement*

The procedure must be set out in clearly stated, straightforward terms that are decipherable to those unfamiliar with arbitration and the vernacular of the legal world. Any employee with the ability to read should be able to understand the terms of the employment arbitration agreement he/she is being asked to accept.

##### *B. The Requirement of a Mutually Binding, Bilateral Procedure*

Employment arbitration agreements should require both the employer and the employee to submit all employment-related claims within the agreement's scope to arbitration and should bind both equally to the results of the arbitration.

##### *C. The Scope of the Employment Arbitration Mechanism*

It is unrealistic to expect that employers will open their unilaterally promulgated arbitration procedures to the full range of employment-related decisions. It is therefore unrealistic to propose that matters pertaining to disputed personnel actions like promotions, demotions, transfers, performance appraisal and the like be made subject to these devices.<sup>48</sup> However, if employers are in fact committed to creating an alternative dispute resolution device that goes to the core of employee workplace due process, they must extend the scope of their employment

45. That more practical, objective and holistic guidance is necessary to accelerate and discipline the evolution of employment arbitration is demonstrated by the frequent failure of the courts to provide adequate, objective guidance as to the parameters of the substantive unconscionability doctrine.

46. 6 P.3d 669 (Cal. 2000).

47. 131 S. Ct. 1740 (2011).

48. Of course, claimant employees would be able to challenge these non-disciplinary, employment-related actions if their claims are founded on an alleged violation of some state or federal statutory fair employment practices law.

arbitration procedures to reach issues pertaining to discharge and disciplinary actions that may eventually lead to discharge. Those employers must also be willing to embrace the well-established arbitral principle of just cause for discipline drawn from the some 70 years of experience in labor-management arbitration in the unionized sector.<sup>49</sup> Otherwise, the purported guarantee of workplace due process offered by the employer-promulgated employment arbitration mechanism will be of little value to employees.<sup>50</sup>

*D. Mutual Selection of the Arbitrator from a Well-Vetted Array of Qualified, Neutral Candidate Arbitrators*

The linchpin of a fair, effective employment arbitration mechanism is the assurance that arbitration awards will bind employers and employees, and also that the arbitrators themselves will be qualified to do the work and will be truly neutral.<sup>51</sup> This can be achieved most expeditiously by an alternate-striking arbitrator selection device from odd-numbered lists of candidate arbitrators (e.g., five or seven candidates) provided by bona fide neutral bodies like the American Arbitration Association or the Federal Mediation and Conciliation Service.<sup>52</sup> Furthermore, because their neutrality is suspect from the outset, attorneys or other individuals who actively represent either employers or employees should not be permitted to serve as employment arbitrators. Of course, the arbitration agreement should call for full disclosure of any potential conflicts of interest that might prompt a reasonable, objective person to question a candidate arbitrator's impartiality because of a known, existing substantial relationship with one of the parties.

*E. A Fair Allocation of the Employee's Costs in Arbitration*

This element of a fair employment arbitration mechanism is difficult to define precisely. Ideally, claimant employees should not be required to bear any costs they would not incur if their claims were adjudicated in a court of law.<sup>53</sup> Obviously, the "fail-safe" position is for the arbitration agreement to provide that the employer will pay all forum costs and arbitrator fees.<sup>54</sup> It must be emphasized that nothing in substantive unconscionability doctrine requires that arbitration be cost-free for claimant employees.

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49. See ELKOURI & ELKOURI: HOW ARBITRATION WORKS 15-1 to 15-82 (Kenneth May et al. eds., 7th ed. 2012).

50. The authors acknowledge that this element of our proposed model mechanism would require employers to effectively surrender their discretion to terminate employees for any reason, or for no reason secured to them by the ubiquitous employment-at-will doctrine. That is a step we believe necessary to adequately secure the workplace due process rights of employees who are forced to agree to employment arbitration as a condition of their employment.

51. *Cole v. Burns Int'l Sec. Serv., Inc.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

52. For an example of a selection process that ran afoul of basic indicators of fairness, see *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (selecting arbitrator from a list essentially created and populated by the employer).

53. *Cole*, 105 F.3d at 1484.

54. A major concern of fully employer-paid arbitration is raised by the oft-cited fears of pro-employer arbitrator bias stemming from the "repeat player effect." See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

While it may not be necessary for employers to bear the full costs of arbitration,<sup>55</sup> including the payment of arbitrator fees and expenses and attorneys' fees for claimant employees, any cost allocation formula must contemplate the relative economic standing of the employer and its employees. At a minimum, the procedure should permit the arbitrator to allocate the costs of arbitration including fees, and to award attorney's fees to the successful claimant employee.

#### *F. Adequate Pre-Hearing Discovery*

Arbitration works best when the preliminaries are kept to a minimum, only that which is necessary to ensure a fair contest at the hearing, based on relevant facts. A fair, well-drawn employment arbitration procedure will set reasonable bounds on the discovery process<sup>56</sup> (e.g., by appropriately cabinning the number of depositions, interrogatories, and requests for production permitted both of the parties<sup>57</sup>) and guarantee the sufficiency of the process by granting the arbitrator authority to direct the discovery that is necessary given the circumstances.<sup>58</sup>

#### *G. Ensuring that Claimant Employees Get Their Day in Court*

One of the key aspects of a fair, effective employment arbitration procedure is that it satisfactorily safeguards the right of claimant employees to have their "day in court."<sup>59</sup> At the same time, employment arbitration does not need to incorporate the full range of pre-trial procedures emblematic of traditional litigation, most particularly the summary judgment device that will so often preclude plaintiff employees from securing a full hearing on their claims of wrongful conduct by the employer.<sup>60</sup> Granted, this would be a concession for the typical "lawyered-up" employer, but that concession would fully demonstrate the employer's commitment to a full and fair airing and decision of its employees' claims of unfair or illegal treatment in the workplace.

#### *H. Specification of the Arbitrator's Authority*

It is essential that an agreement grant the arbitrator the authority necessary to oversee both the pre-hearing aspects of the arbitration tribunal and the ability to conduct a full and fair search for the truth at the arbitration hearing. Instructive here is § 15(a) of the Revised Uniform Arbitration Act, which states:

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55. *But see* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 684-89 (Cal. 2000).

56. *Id.* at 683-85; *Cole*, 105 F.3d at 1482.

57. Most often courts find preferable those forms of discovery approved by the Supreme Court in *Gilmer*, which include "document production, information requests, depositions, and subpoenas." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

58. *Shubin v. William Lyon Homes, Inc.*, 101 Cal. Rptr. 2d 390, 399 (Cal. Ct. App. 2000) (stating that when "employer agreed to arbitrate the FEHA claim, it implicitly consented to discovery sufficient for Shubin to adequately arbitrate her statutory claim").

59. An attribute of arbitration is the existence of "efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); *see also* *Sonic-Calabasas A, Inc. v. Moreno*, 121 Cal. Rptr. 3d 58, 72 (Cal. 2011) ("[A]rbitration . . . still generally bears the hallmark of a formal legal proceeding . . .").

60. *See supra* notes 34-38.

[The] arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.<sup>61</sup>

In addition, the arbitration agreement should expressly delegate to arbitrators the authority to make substantive arbitrability determinations;<sup>62</sup> to administer oaths and subpoena witnesses; and to modify or correct an award upon the request of one or both parties. Finally, to ensure symmetry between the remedies available to claimant employees in arbitration and a court,<sup>63</sup> arbitrators should be granted full remedial authority, including the discretion to grant punitive damages, attorneys' fees, award expenses to prevailing claimant employees where appropriate, and to retain jurisdiction regarding the effectuation of any remedy directed by the award.

### *I. The Requirement of Reasoned Written Awards*

The best way to ensure a full and fair process and objective, defensible outcomes in employment arbitration is to require that arbitrators provide the parties with written awards<sup>64</sup> adequately demonstrating their key findings of fact; interpretation and application of relevant law, personnel policies, and any other relevant promulgations; and their reasoning in reaching the decision.<sup>65</sup> The requirement of reasoned awards of this nature also serves as a disincentive to those aspiring arbitrators who are not willing to demonstrate their competence by revealing the rationale underpinning their awards. Given the Supreme Court's current position with regard to the very narrow grounds for vacatur of commercial arbitration awards—centering on, and likely exclusively limited to, the exceedingly narrow grounds articulated in section 10(a)(2) of the FAA<sup>66</sup>—arbitrators and employers are no longer justified in fearing that opinions provide fodder for appeal or increase the risk of vacatur.<sup>67</sup>

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61. Unif. Arbitration Act § 15(a) (2000).

62. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2775 (2010) (holding a delegation clause “clearly and unmistakably [sic]” conferred upon the arbitrator authority to decide the validity of the arbitration agreement).

63. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 759-60 (Cal. 2000).

64. *Cole v. Burns Int'l Sec. Serv., Inc.*, 105 F.3d 1465, 1481 (D.C. Cir. 1997).

65. *Armendariz*, 99 Cal. Rptr. 2d at 762 (“[I]n order for judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based.”).

66. See *supra* notes 19-20 and accompanying text.

67. Although not directly linked to the scope of the current analysis, the authors also urge a new, expanded transparency in the employment arbitration sphere whereby arbitration awards are gathered and made accessible to interested parties. Such a development would be a key to establishing a very useful and instructive “common-law of the shop of employment arbitration” similar to that upon which the guiding principles relied upon by labor arbitrators have evolved as a result of the long-time publication of selected labor arbitration awards by Bloomberg BNA and Commerce Clearing House, and the emergence of and continuing revision of the seminal work by Frank and Edna Elkouri. ELKOURI & ELKOURI, *supra* note 49.

The above roadmap to the key elements of a defensible and optimally effective employment arbitration mechanism may well not be exhaustive and may not constitute the optimal endpoint in the conversation as to what it will take to make arbitration work in the non-union employment sector. However, it is certainly an adequate starting point for a meaningful dialogue directed toward the goal of making employment arbitration a viable, widely-acceptable alternative to the often frustrating and futile end game that employees find in traditional litigation of their employment-related claims. The concluding section below contains a call to action for all of those truly concerned with ensuring that employees be granted superior alternative than the one being provided by the current legal milieu.

## V. A CALL FOR ACTION

The arguments of those who oppose employer-imposed employment arbitration center on the essential unfairness of employees being forced to arbitrate their employment-related claims without being given any real choice in the decision to arbitrate, or to the terms of those arbitration agreements.<sup>68</sup> Arbitration agreements unilaterally imposed on employees as a condition of their employment are by definition procedurally unconscionable. That fact notwithstanding, courts will deem adhesion employment arbitration agreements unenforceable only if their terms are substantively unconscionable.

This legal reality leaves all stakeholders in the employment arbitration process (the plaintiffs' and public interest bar, legal scholars opposed to adhesion arbitration agreements, employers, employment arbitrators and their professional associations, and bona fide neutral arbitration service providers) with only one logical avenue of pursuit going forward. The substantive unconscionability doctrine is the ultimate test for determining the enforceability of adhesion employment arbitration agreements, but it is only a starting point for constructing employment arbitration devices that adequately secure the workplace due process rights of employees. Consequently, parties who are truly concerned with ensuring the workplace due process rights of unrepresented, at-will employees should focus their efforts on building employment arbitration mechanisms that will pass muster under the substantive unconscionability rubric and that, as a result, will allow arbitration to rightfully occupy the preferred status the FAA grants it.

The time has passed for idealistic, shortsighted, and arguably self-centered posturing by the opponents of employment arbitration, and for overreaching by employers advised by counsel who seek to "win" at all cost by incorporating objectively unfair, one-sided terms in arbitration agreements. The parameters of the legal playing field for employment arbitration are now clear. This piece sets out a concise, straightforward template that articulates the key elements that serve to

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68. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857; Margaret L. Moses, *Privatized "Justice"*, 36 LOY. U. CHI. L.J. 535 (2005); Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, (Mar. 1997), available at <http://www.nytimes.com/1997/03/10/business/in-fine-print-customers-lose-ability-to-sue.html>; Jane Spencer, *Signing Away Your Right to Sue*, WALL ST. J., Oct. 1, 2003, at D1. In fairness, the anti-arbitration forces have not exhibited an explicit opposition to all forms of commercial and employment arbitration. The focal point of their attacks has always been on adhesion arbitration agreements forced upon powerless, non-union, rank-and-file employees (and unsuspecting consumers).

define the character of employer-mandated, adhesion employment arbitration agreements that will both be deemed enforceable pursuant to section 2 of the FAA, and provide the employees required to enter into those agreements as a condition of their employment with adequate protections against most forms of unfair treatment in the workplace. This solution is offered as a reliable starting point for a recalibrated conversation regarding employment arbitration.

The gauntlet has been thrown down. It is up to those who truly seek workplace justice for American employees to respond affirmatively to the challenge.