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Employee Voice in Arbitration

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EMPLOYEE VOICE IN ARBITRATION

BY
ANN C. HODGES*

I. INTRODUCTION	235
II. THE PROBLEMS WITH EMPLOYER-IMPOSED ARBITRATION.....	237
III. THE BENEFITS OF A NEGOTIATION REQUIREMENT.....	241
IV. IMPLEMENTATION OF THE NEGOTIATION REQUIREMENT ...	247
A. <i>Selecting the Representative</i>	247
B. <i>Negotiating the Agreement</i>	250
V. FEASIBILITY OF THE BARGAINING REQUIREMENT.....	254
V. CONCLUSION.....	256

I. INTRODUCTION

On May 21, 2018, in *Epic Systems Corp. v. Lewis*, the Supreme Court rejected the argument that the protection for concerted activity in the National Labor Relations Act bars employers from requiring employees to waive their right to class and collective actions as a condition of employment.¹ While the decision is wrong for many reasons,² employee advocates must move forward to explore other

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1. 138 S. Ct. 1612 (2018). For two years I had the pleasure of working with Doug Scherer on the Supreme Court review for the Employee Rights and Employment Policy Journal. Accordingly, it is fitting to address another Supreme Court case in this tribute issue to Professor Scherer and his invaluable work on the journal since its inception.

2. See Brief Amici Curiae of Law Professors in Support of Petitioners in 16-285 & 16-300 and in Support of Respondents In 16-307, *Epic Sys. Corp.*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307) (arguing that Norris-LaGuardia prohibits conditioning employment on waivers of section 7 rights); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?*, 38 WAKE FOREST L. REV. 173 (2003) (arguing that section 7 bars mandatory arbitration); see also Deepak Gupta, *Symposium: For Decades, Court Has Built “an Edifice of Its Own Creation” in Arbitration Cases — It’s Time to Tear It Down and Rebuild*, SCOTUSBLOG (May 24, 2018, 4:13 PM), <<http://www.scotusblog.com/2018/05/symposium-for-decades-court-has-built-an-edifice-of-its-own-creation-in-arbitration-cases-its-time-to-tear-it-down-and-rebuild/>>; Moshe Marvit & Leo Gertner, *Supreme Court Decision Greatly Reduces Worker Protections*, CENTURY FOUND. (May 30, 2018), <<https://tcf.org/content/commentary/>>

avenues to address the problems created by employer-imposed arbitration. There are many issues with individual arbitration compelled by employers, which is often imposed on unwitting employees, making it difficult if not impossible to vindicate their statutory rights. Yet arbitration is not all bad. Labor unions and employers have successfully used arbitration for many years to resolve contract disputes.

Employee advocates and unions have some options in the aftermath of the *Epic Systems* decision to encourage a fairer arbitration system. One solution is for labor unions to provide representation for individual employees in their arbitration cases.³ As I have argued elsewhere, compulsory arbitration provides an opportunity for unions to demonstrate their value to beleaguered workers.⁴ Another possibility is congressional action. Advocates are already pushing in Congress for legal limits on arbitration.⁵ An alternative to restricting or banning arbitration for particular disputes is to require employers who want to institute arbitration for their employees to negotiate an agreement regarding the terms of the arbitration with a representative chosen by their employees. Such a requirement would provide employees with both input into and knowledge about any required arbitration agreement. Employers would be free to use arbitration if they deem it beneficial, but only after engaging in good faith negotiations about the terms. If arbitration is indeed of value to both employers and employees, the parties should be able to reach agreement on acceptable terms. Employers using arbitration only to diminish employee rights may abandon it if required to negotiate its terms. While the requirement would not solve all the problems with arbitration, it would at least offer employees a voice in this vital term of their employment.

In addition, a negotiation requirement would flip some of the

supreme-court-decision-greatly-reduces-worker-protections/?agreed=1> (criticizing the Court's decision on several grounds); Katherine Stone, *Symposium: Majority Gives Short Shrift to Worker Rights*, SCOTUSBLOG (May 23, 2018, 2:43 PM); <<http://www.scotusblog.com/2018/05/symposium-majority-gives-short-shrift-to-worker-rights/>> (same).

3. See Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1683 (2014); see also Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 108-10 (2004) (encouraging unions to bring race discrimination claims for non-union employees in litigation or arbitration).

4. Hodges, *supra* note 3, at 1703.

5. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); Restoring Justice for Workers Act, H.R. 7109, 115th Cong. (2018).

incentives in the administrative process in an interesting way. Currently, in the union representation process before the National Labor Relations Board (NLRB), employers have every incentive to delay to discourage employees from choosing a union to represent them. Further, once a representative is chosen, they have every incentive to delay negotiations to avoid a collective bargaining agreement which binds them to negotiated terms and conditions of employment. If they were barred from arbitrating employee claims until they negotiated an agreement with their employees' chosen representative, the incentives would be reversed, protecting the interests of the employees rather than allowing the more powerful employer to use the bureaucratic process to its advantage.

This article proceeds as follows. First, it briefly surveys the documented concerns about employer-imposed arbitration. Then it assesses how a negotiation requirement might address some of those concerns and highlights other possible benefits of the proposal. The article then sketches out the rough contours of a negotiation requirement, considering some of the challenges to implementation. Finally the article assesses the likelihood of enactment. While a negotiation mandate would not solve all the problems of compulsory arbitration agreements, it would provide employees with a voice in their employment terms and perhaps encourage employee involvement in other aspects of employment. In addition, it may discourage some employers from using arbitration if their only purpose is to restrict employee rights.

II. THE PROBLEMS WITH EMPLOYER-IMPOSED ARBITRATION

Employers are increasingly adopting arbitration as the exclusive method of resolving disputes with their employees.⁶ Predictions are that more employers will require arbitration after the Supreme Court's decision in *Epic Systems*, in order to preclude class actions.⁷ Examining the advantages for employers reveals the concerns of compulsory arbitration's critics.

Initially, as noted in Justice Ginsburg's dissent, many cases that

6. Alexander J.S. Colvin & Kelly Pike, *Saturns & Rickshaws Revisited: What Kind of Arbitration System Has Developed*, 29 OHIO ST. J. ON DISP. RESOL. 59, 81-82 (2014); Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic* 3 (Econ. Pol'y Inst. Briefing Paper No. 414, 2015), <<https://www.epi.org/files/2015/arbitration-epidemic.pdf>>.

7. See *Epic Sys. Corp.*, 138 S. Ct. at 1644-47 (Ginsburg, J., dissenting); Marvit & Gertner, *supra* note 2; see also Stone, *supra* note 2.

cannot be brought as class actions will not be brought at all.⁸ For low value claims, the expenses of individual arbitration will often outweigh the potential recovery.⁹ Fear of retaliation may also deter individual claims.¹⁰ Thus, the employer escapes claims and, where there is a violation of the law, liability.

It is not only the unavailability of class actions that deters claims. Arbitration can be more expensive than litigation and often includes discouraging upfront costs.¹¹ Additionally, employees win fewer arbitrations and when they do win, they recover less than they would in court.¹² These factors, along with other limitations common to arbitration such as reduced discovery and limited damages, dissuade attorneys from representing workers in arbitration.¹³ And employees who are unrepresented are less likely to prevail in arbitration.¹⁴ Thus a vicious cycle is created. The factors that make it more difficult to prevail in arbitration discourage attorneys from representing workers, and the lack of representation makes it even less likely that employees will prevail.¹⁵

In addition, arbitration avoids a jury trial which is available for many employment claims.¹⁶ Juries are traditionally perceived as more sympathetic to employees than to employers.¹⁷ The absence of a jury trial is another factor that reduces the ability of employees to find

8. *Epic Sys. Corp.*, 138 S. Ct. at 1646 (“The inevitable result of today’s decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”).

9. *Id.* The Supreme Court has dismissed this concern in enforcing arbitration agreements that preclude class claims. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

10. *Epic Sys. Corp.*, 138 S. Ct. at 1647.

11. Colvin & Pike, *supra* note 6, at 81-82 (stating that based on the empirical research often “bringing cases in employment arbitration will not be economically viable and the system will not be readily accessible to employees”).

12. *Id.* at 79; see also ALEXANDER J.S. COLVIN & MARK D. GOUGH, *COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES* 21-22 (2014), available at <<https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1059&context=reports>>.

13. Jean Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 *BROOK. L. REV.* 1309, 1334-40 (2015). As Sternlight notes, empirical research comparing arbitration and litigation is challenging, but what is important is that the belief that employees will fare poorly in arbitration discourages claims. *Id.* at 1322-23. And attorneys clearly have a negative view of mandatory arbitration. COLVIN & GOUGH, *supra* note 12, at 12-20.

14. Colvin & Pike, *supra* note 6, at 80.

15. *Id.* at 78 (showing attorney representation is a significant predictor of employee win rates and higher damage recoveries in arbitration).

16. Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 *U.S.F. L. REV.* 17, 34-35 (2003).

17. RICHARD BALES, *COMPULSORY ARBITRATION* 148 (1997); see also Colvin & Pike, *supra* note 6, at 77.

legal representation.¹⁸

Other factors may affect employee win rates and damage recoveries. Arbitration plans promulgated by employers may include shortened statutes of limitations that preclude employee claims.¹⁹ The employer may have substantial control or even exclusive choice of the arbitrator.²⁰ This raises the possibility that the employer may choose either an unqualified arbitrator²¹ or one more likely to rule in its favor. Also, limits on discovery may make it difficult to prove employee claims where much of the evidence is in the control of the employer.²² And limits on damages may prevent an employee from obtaining relief that would have been available in court.²³ Some arbitration systems even allow the employer to change the rules or the arbitrator mid-stream.²⁴

Another employer advantage in arbitration is the repeat player phenomenon. In employment arbitration, unlike labor arbitration, the employer is a repeat player but the employee is not. Research indicates that repeat players fare better in arbitration. Employers who have arbitrated previously prevail more often and when they have arbitrated other cases before the same arbitrator, they are even more likely to win.²⁵ Additionally, when the employer is a repeat player, employee recoveries diminish even further.²⁶

The way employers obtain agreements to arbitrate poses another problem. Employers use a variety of methods to get agreement from

18. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over PreDispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-66 (2001).

19. 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, 395 (2007); see also Stone & Colvin, *supra* note 6, at 4.

20. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999); see also Stone & Colvin, *supra* note 6, at 17.

21. See Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 298, 309 (1999). This concern about arbitrator quality has abated in the courts but not among arbitration's critics.

22. Malin, *supra* note 19, at 397-98.

23. Stone & Colvin, *supra* note 6, at 4.

24. *Hooters of Am., Inc.*, 173 F.3d at 939.

25. Douglas M. Mahony & Hoyt N. Wheeler, *Adjudication of Workplace Disputes*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 361, 389-90 (Kenneth G. Dau Schmidt et al. eds., 2009); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 234, 238 (1998); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUD. 1, 9 (2011). But see Estreicher, *supra* note 18, at 566 (citing later research by Bingham finding a substantially reduced benefit from being a repeat player).

26. Bingham, *supra* note 25, at 234.

their employees, some employed to obscure their intent.²⁷ The agreement might be emailed to employees, contained in an employee handbook, placed on the employment application, or provided to the employee in hard copy.²⁸ The employee might be asked to sign an acknowledgement of receipt and/or an agreement to arbitrate, or might be told that continued employment constitutes acceptance.²⁹ The details of the agreement may or may not be provided to the employee at the time of signing.³⁰ Typically the agreement is a condition of employment, but some employers allow employees to opt out.³¹ Many employees do not opt out, however, whether that is due to fear of retaliation or rescission of a job offer, lack of knowledge of the agreement or its consequences, lack of concern, or some other reason.³²

27. See *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 60 (2d Cir. 2007) (refusing to enforce waiver of class action in arbitration program where “[t]he timing, the language, and the format of the presentation of the Program obscured, whether intentionally or not, the waiver of class rights”); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 106 (S.D.N.Y. 1995) (describing process by which employees had to sign seventy-five documents, including the arbitration agreement, in a two-hour period without any explanation, without adequate opportunity to read the documents, and in a pressured atmosphere).

28. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1636 n.2 (2018) (Ginsburg, J., dissenting) (describing how employers in *Epic Systems Corp. v. Lewis* and *Ernst & Young v. Morris* emailed arbitration agreements to their employees); *Lorenzo v. Prime Commc'ns L.P.*, 806 F.3d 777, 781-82 (4th Cir. 2015) (involving arbitration provision contained in employee handbook); *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67 (1st Cir. 2011) (enforcing agreement where employee was provided and signed a copy although she claimed she did not understand it because it was in English); *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 971-73 (6th Cir. 2007) (enforcing agreement where letter sent to employees indicating that continued employment would constitute acceptance of agreement to arbitrate); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005) (refusing to enforce agreement contained in employment application for lack of consideration).

29. See, e.g., *Epic Sys. Corp.*, 138 S. Ct. at 1636 n.2 (describing how employers in *Epic Systems v. Lewis* and *Ernst & Young v. Morris* emailed arbitration agreements to their employees telling them continued employment constituted acceptance of the agreement); *Lorenzo*, 806 F.3d at 781-82 (refusing to enforce arbitration provision contained in employee handbook where employee signed acknowledgement form for receipt of handbook that disclaimed any intent to create a contract).

30. See *Hergenroder v. Bickford Senior Living Grp. LLC*, 656 F.3d 411, 418 (6th Cir. 2011) (finding no agreement to arbitrate where employee signed acknowledgement of receipt of handbook which referred to separate dispute resolution procedure but did not require her to review it or indicate that she was assenting to it).

31. The opt-out process often involves the timely filing of a designated form. See, e.g., *Branco v. S. Operations LLC*, No. 17-23289-CIV, 2018 U.S. Dist. LEXIS 121784, at *5-6 (S.D. Fla. July 19, 2018); *Sellers v. Macy's Retail Holdings, Inc.*, No. 12-cv-02496-SHL-tmp, 2014 U.S. Dist. LEXIS 85879, at *4-6 (W.D. Tenn. June 5, 2014); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1280-81 (N.D. Ala. 2000).

32. See *Branco*, No. 17-23289-CIV, 2018 U.S. Dist. LEXIS 121784, at *4-5, *9-13 (noting employee fear and confusion over arbitration agreement and failure to opt out). Another court referenced a general reluctance of employees to opt out, even if given the choice. See *Tigges v. AM Pizza, Inc.*, No. 16-10136-WGY, 2016 U.S. Dist. LEXIS 100366, at *38-39 n.19 (D. Mass. July 29, 2016) (citing Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCI.

Proponents of arbitration have argued that a speedy forum³³ that doesn't require hiring an attorney offers an opportunity for workers who cannot obtain representation or afford a lengthy legal battle.³⁴ While this argument has superficial appeal, the data do not show widespread use of arbitration by employees generally,³⁵ or by low wage employees in particular.³⁶

Among other criticisms of arbitration are concerns that it will limit public exposure of legal violations, decreasing the deterrent effect of the laws and allowing patterns of violations of employee rights to continue.³⁷ A related worry is that development of the law may be suppressed, with fewer judicial opinions interpreting statutes.³⁸

III. THE BENEFITS OF A NEGOTIATION REQUIREMENT

While the foregoing details a variety of problems for employees compelled to arbitrate rather than litigate claims, not all arbitration is the same. Some arbitration providers limit the amount that employees can be charged and require the agreement to contain provisions designed to ensure fairness.³⁹ Providers may refuse to administer arbitration that does not comply with these provisions.⁴⁰

1338 (2003)); see also Byron R. Goldstein & William C. Jhaveri-Weeks, *The Opt-Out Trap*, PLAINTIFF MAG., Nov. 2016, at 24.

33. Colvin & Pike, *supra* note 6, at 73 (finding arbitration cases took about one year to hearing while court cases average two years). Although arbitration is quicker than litigation, it is still time consuming.

34. Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 91 (2001).

35. Sternlight, *supra* note 13, at 1329.

36. See Mahony & Wheeler, *supra* note 25, at 385, 390; Colvin & Pike, *supra* note 6, at 80; Mark Gough, *The High Cost of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 110 (2014).

37. See, e.g., Katherine Van Wczel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1042-43, 1047 (1996).

38. *Id.* at 1047.

39. See Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 294-95, 302-03, 305-06 (2012) (describing protocols of major arbitration providers and finding that the American Arbitration Association enforced the protocol for consumer disputes); Sternlight, *supra* note 13, at 1309 n.3; see also AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2017) <http://go.adr.org/rs/294-SFS-516/images/EmploymentRules_Web.pdf>; Employment/Workplace Fee Schedule Costs of Arbitration, AM. ARBITRATION ASS'N (Oct. 1, 2017), <<http://info.adr.org/employmentfeeschedule/>> (limiting employee's fee to \$ 300 unless the agreement provides that the employee pays less).

40. Drahozal & Zyontz, *supra* note 39, at 303.

Also, the most egregiously unfair provisions will not be enforced by the courts,⁴¹ allowing the employee to litigate the claims instead. Litigating the enforceability of the arbitration agreement, however, adds to the cost of litigation and may deter both employees and attorneys from bringing claims.

In contrast to employment arbitration, labor arbitration has received relatively little criticism.⁴² The difference is that labor arbitration provisions are negotiated by unions representing the interests of workers, who then represent those workers in the arbitration itself.⁴³ Further the union operates as a repeat player in the arbitration system, eliminating the one-sided repeat player problem.⁴⁴ Arbitrators are jointly selected by the parties and in order to insure continuing work must not be perceived to favor either labor or management.⁴⁵

Some commentators have suggested that employee attorneys could serve the repeat player function.⁴⁶ But the evidence shows that employees often arbitrate without representation and even when they do hire attorneys, they are often not specialists in employment law,⁴⁷ significantly reducing the likelihood that the attorneys will share information about arbitrators in ways that make them effective repeat players.

Another way to make employment arbitration more like labor arbitration would be to require that employers who want to use arbitration reach agreement with their employees first. The Fair Labor Standards Act contains a provision requiring agreement with employees if a public employer wants to substitute compensatory time for overtime pay.⁴⁸ A similar mandate has the potential to respond to some of the criticisms of employment arbitration.

41. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); Drahozal, *supra* note 39, at 298-99; *see also* Stone & Colvin, *supra* note 6, at 9.

42. Some commentators, however, have argued that labor arbitration has been detrimental to employee rights by focusing on contractual enforcement of rights by experts rather than encouraging employee activism. *See, e.g.*, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 629-31 (1992).

43. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 196-97 (1997).

44. Stone & Colvin, *supra* note 6, at 22; *see also* Bingham, *supra* note 25, at 234, 238.

45. LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 22-24, 31 (3d ed. 2014).

46. *See* Bingham, *supra* note 43, at 197-98.

47. Colvin & Pike, *supra* note 6, at 69-70.

48. 29 U.S.C. § 207(o)(2)(A) (2012) (allowing compensatory time in lieu of overtime pay for public employees if negotiated with the representative of the employees or by agreement or understanding with individual employees before the overtime work).

The FLSA allows employers to bypass employee representatives and to present agreements to the individual employee as a condition of employment, however.⁴⁹ This concession makes the FLSA rights far less valuable to employees, who are less likely to enforce their rights in the absence of collective representation.⁵⁰ To achieve the purpose of making employment arbitration more like labor arbitration, the mandate envisioned here would require the employer to negotiate with a representative of all of the employees covered by the agreement. Representatives for negotiation could be an employee or group of employees, a labor union, an attorney, a nonprofit organization, or any other option freely chosen by the employees.⁵¹

In addition to the FLSA's negotiation requirement, examples from other countries offer models facilitating employee voice distinct from traditional labor unions and collective bargaining.⁵² For example in Germany, works councils can be created by employees in facilities with or without unions to deal with the employer on issues such as work rules, work schedules, and safety.⁵³ Unions may play a role in works councils in unionized facilities, but the works council is a separate organization to provide employee voice.⁵⁴ Similarly, the

49. See, e.g., *Morcau v. Klevenhagen*, 508 U.S. 22, 34 (1993) (interpreting the law to allow individual bargaining although the employees had chosen a representative, because Texas did not authorize collective bargaining for public employees); 29 C.F.R. § 553.23 (2018) (stating that where there is no representative “the agreement or understanding to provide compensatory time off . . . may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of [the law]”); *Baker v. Stone Cty., Mo.*, 41 F. Supp. 2d 965, 994-95 (W.D. Mo. 1999) (finding agreement where employees were informed of the policy of paying for compensatory time and either did not expressly object or if they did object, did not either refuse employment or refuse to accept compensatory time).

50. See David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 124 (1999).

51. Employees might also choose an organization like a worker center, but such organizations may be reluctant to deal with employers out of concern for being deemed a labor organization for purposes of labor laws, which imposes a variety of requirements and limitations. David Rosenfeld, *Worker Centers: Emerging Labor Organizations – Until They Confront the National Labor Relations Act*, 27 BERKELEY J. LAB. & EMP. L. 469, 482-86, 499-504 (2006). Implementing legislation should provide that representation for the limited purpose of negotiating an arbitration provision does not render an organization, employee, or group of employees a labor union under the National Labor Relations Act or any other law regulating labor unions. This would avoid requiring compliance with various reporting and registration requirements that might discourage representation.

52. Monika Schlachter & Achim Seifert, *Employee Voice Outside Collective Bargaining*, in *COMPARATIVE LABOR LAW 330* (Matthew W. Finkin & Guy Mundlak eds., 2015).

53. *Id.* at 336-37. Some have proposed similar works councils in the United States. See, e.g., Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 607-10 (2004).

54. Schlachter & Seifert, *supra* note 52, at 336.

representative body in arbitration negotiations could be distinct from any union in the workplace if the employees so desired.⁵⁵

Other countries also have statutes that provide for employee representation regarding particular issues. For example, many countries have health and safety representatives elected by the employees.⁵⁶ Others have representatives for particular groups with unique issues such as young workers and/or apprentices or workers with disabilities.⁵⁷ These systems provide models that can be followed for arbitration representation.

A negotiation mandate would provide employees with a voice regarding the terms of arbitration. Currently only high level employees who negotiate individual arbitration agreements have any say in the terms of arbitration agreements. Other employees are forced to accept the terms established unilaterally by the employer, often with little or no knowledge regarding the agreement or its implications.

At the very least, implementation of a negotiation requirement would make employees aware before a dispute arises that their rights to litigate have been eliminated. Even better, employees might be able to negotiate away some of the most egregious terms of employer-imposed arbitration mandates. Additionally, imposition of the negotiation requirement approximates creation of employees as a repeat player in the system. If employees are dissatisfied with the arbitration process or results, they can insist on a different arbitration provider in the next negotiation.

The benefits of providing employees voice in their working conditions have been well-documented.⁵⁸ Increasing employee voice

55. Alternatively, an existing union could negotiate for the unionized employees, and all other employees could choose their representative.

56. Schlachter & Seifert, *supra* note 52, at 345-46; *see also* HUGH COLLINS, EMPLOYMENT LAW 30 (2d ed. 2010) (describing health and safety committees required in each workplace in the EU, which identify risks and agree on ways to reduce such risks). Some U.S. states also require workplace health and safety committees, but the requirements are not commonly enforced in the absence of union representation. Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration and Workplace Committees*, 5 U. PA. J. LAB. & EMP. L. 75, 90-91 (2002).

57. Schlachter & Seifert, *supra* note 52, at 346-47.

58. Befort, *supra* note 53, at 610-13 (summarizing benefits of providing voice to employees regarding their working conditions). Indeed, even management consultants encourage employers to provide opportunities for employee voice. *See, e.g.*, Christine Comaford, *How to Propel Employee Engagement to Sky-Rocketing Levels*, FORBES (July 14, 2018), <<https://www.forbes.com/sites/christinecomaford/2018/07/14/want-to-better-engage-your-tribe-heres-the-secret/#54dabc1c9dc4>> (promoting the value of engaging employees to minimize destructive behavior and foster high productivity and collaboration); Sneh Kadakia, *The Business Value of*

can improve morale, creativity, and productivity, lengthen employee job tenure, and encourage and train employees for participation in the larger community.⁵⁹ These benefits will inure to both the employer and the community. To achieve them, the negotiation requirement should be structured to facilitate employee voice.

All employees working for the employer who might be subject to arbitration should be in the negotiation unit, including the high-level executives with whom some employers already negotiate arbitration agreements.⁶⁰ A unit composed of all employees will increase their power, making it far more likely that the terms of the negotiated agreement will be fair to employees. While executives might prefer to negotiate their own agreements, it seems only fair that their employees receive the same agreement that executives have.

One concern may be more that the more powerful employees will dominate negotiations, limiting the voice of rank and file employees.⁶¹ This valid concern is minimized because negotiations are limited to arbitration agreements. In addition, the powerful employees have an incentive to negotiate an agreement that is fair to employees, since they themselves will be bound to the agreement. The concern could also be addressed by permitting non-managerial, non-supervisory employees to vote to negotiate separately, similar to the vote that professional employees have under the National Labor Relations Act to opt to form separate bargaining units.⁶² Negotiating separately from managers and supervisors would facilitate employee

Leveraging Your Employees' Collective Voice, MEDIUM: THE ART & SCI. OF PEOPLE SUCCESS (Apr. 25, 2017), <<https://medium.com/glint-od-science/the-business-value-of-leveraging-your-employees-collective-voice-fc91aa62c6ef>>; Pat Lynch, *Employee Voice: A Critical Element of Organizational Success*, BUS. ALIGNMENT STRATEGIES, INC., <<http://www.businessalignmentstrategies.com/research/employee-voice.php>> (last visited Sept. 23, 2018).

59. Befort, *supra* note 53, at 610-13.

60. Colvin & Pike, *supra* note 6, at 60.

61. The National Labor Relations Act excludes supervisors from the coverage of the statute, both to protect employees from the subversion of their interests by their supervisors and to permit employers to maintain loyal supervisors in their disputes with employees. 29 U.S.C. § 152(3) (2012).

62. *See id.* § 159(b)(1). In union representation elections in units composed of both professional and nonprofessional employees, the professional employees vote whether to be represented by the union and also whether to be included in the same unit with the nonprofessional employees. *See* David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals under the NLRA*, 89 COLUM. L. REV. 1775, 1797-99 (1989) (citing legislative history of the professional vote). Some public sector jurisdictions allow nonprofessional employees a similar vote on whether to be included in a unit with professional employees. *See, e.g.*, 5 ILL. COMP. STAT. § 315/9 (a)(2)(b) (2016) (requiring a majority vote of both professional and nonprofessional employees for inclusion in a joint bargaining unit in Illinois).

collective action on other issues should the negotiation requirement for arbitration inspire them to do so.

Requiring negotiation with employee representatives to establish an arbitration procedure offers other benefits as well. Over time, negotiations may produce models of fair arbitration procedures that can be used by other organizations. Of course, the same result could be achieved by legislatively mandating certain fair procedures. The advantage of the negotiation approach is that it allows the employer and workers to adopt the best model for their particular workplace. Some might prefer elaborate procedures that approximate litigation, while others might choose quick, cheap, and easy processes.⁶³ More workplaces might establish comprehensive dispute resolution procedures that include such features as mediation.⁶⁴ The choice of system may depend on the type of disputes that are common in the workplace. These preferences might change with experience of the parties, and negotiation would allow modification as desired. Additionally, employee representatives and employers might create processes that allow consolidation of claims without the extensive procedures of class actions, saving time and money for both sides, which arbitration was originally designed to do.⁶⁵

Requiring negotiations offers the possibility of a fair, but quicker and cheaper method of dispute resolution. If, however, employers are choosing arbitration only because it offers them an advantage, then the negotiation requirement may reduce or substantially eliminate the use of arbitration. Thus, critics of the arbitration system may achieve their desired result without the necessity of legislatively ending arbitration. Arbitration, when used, will be truly a creature of agreement between the parties as intended by the Federal Arbitration Act (FAA).

63. Labor arbitration procedures vary widely depending on the needs and desires of the parties. COOPER ET AL., *supra* note 45, at 19-29.

64. See, e.g., *Dispute Resolution Program*, HALLIBURTON, <<http://www.halliburton.com/en-us/employees/drp/dispute-resolution-program-drp.page?node-id=hhdx6tlw>> (last visited Sept. 23, 2018).

65. Lawyers representing employees may bring multiple identical claims in arbitration on behalf of employees who would otherwise join together in a class action, imposing substantial costs on employers that preclude class claims. See Scott Flaherty, *Plaintiffs Attys Turn Employee Arbitration Pacts Into Weapons* (July 9, 2014), <https://www.outtengolden.com/plaintiffs-attys-turn-employee-arbitration-pacts-into-weapons> (describing use of such a strategy by lawyers representing employees after earlier decisions limiting class actions); Mark Tabakman, *The Epic Systems Case—Note To Employers—Don't Wish For Something Because You May Get It!* (May 30, 2018), <https://wagehourlaw.foxrothschild.com/2018/05/articles/class-actions/the-epic-systems-case-note-to-employers-dont-wish-for-something-because-you-may-get-it/> (expressing employer fears of multiple individual arbitration cases after the decision in *Epic Systems*).

It might be argued that providing employee voice has anti-union roots and this proposal might discourage unionization.⁶⁶ Given the low unionization rate in the United States, other mechanisms for voice may offer a positive alternative, however.⁶⁷ Additionally, the proposal may in fact encourage more collective activity, if not unionization. As employees gain experience and see benefits from working together, they may choose to do so with respect to other issues. And unions may offer representation in negotiations for arbitration agreements, as well as representation in arbitration, providing an opportunity to demonstrate the value of union representation generally.⁶⁸ To further explore the benefits and challenges of this proposal, it is helpful to describe the proposal in more detail, which will be done in the following section.

IV. IMPLEMENTATION OF THE NEGOTIATION REQUIREMENT

A requirement that employers negotiate any arbitration requirement with their employees would require the enactment of legislation. As interpreted by the courts, the FAA requires agreement, but that agreement can be made a condition of employment. Congress should amend the FAA to prohibit conditioning employment on agreement to arbitration unless the arbitration agreement was negotiated with a representative of the employees. This will enable employees to have a voice in their arbitration agreements by selecting a representative with their fellow employees and setting the terms of the arbitration agreement.

A. Selecting the Representative

The existing machinery of the NLRB could be used for implementation, minimizing startup costs, and eliminating the need for an additional enforcement agency. The NLRB already conducts elections for union representation,⁶⁹ so it could conduct representation elections for arbitration negotiations as well.⁷⁰ The

66. Schlachter & Seifert, *supra* note 52, at 333 & n.8.

67. *Id.* at 334.

68. Hodges, *supra* note 3, at 1692.

69. *Conduct Elections*, NLRB, <<https://www.nlr.gov/what-we-do/conduct-elections>> (last visited Sept. 23, 2018). For detailed description of the procedures, see THE DEVELOPING LABOR LAW § 10.III (John E. Higgins, Jr. ed., 7th ed. 2018).

70. Michael Oswalt has proposed automatic elections for union representation. His proposal considers some of the same issues that arise with the proposal for elections for arbitration representation, and his solutions would work well here also. See Michael M. Oswalt,

agency could determine the appropriate voting group, as it currently does for union representation elections.⁷¹ The employer should not be permitted to manipulate the voting group by limiting the application of the arbitration provision.⁷² The smallest possible group for application should be a single location of the employer, but there should be an option to combine multiple locations that have similar categories of employees. As noted *supra*, representation options could include organizations, individuals, or groups of workers, and employees could vote on their preference as among the groups or individuals interested. As in other elections conducted by the NLRB,⁷³ a majority of valid votes counted should determine the representative. Where there are multiple representation options on the ballot, the NLRB has current rules that could be used to determine the winner and whether a run-off is necessary.⁷⁴

In order to facilitate representation, an employer would have to notify the NLRB of its intent to negotiate an agreement in advance.⁷⁵ The NLRB could then post this information on its web site for a short period of time, perhaps thirty days. Following the posting, the NLRB would initiate the determination of the appropriate voting group. This posting would allow any union or other worker representation group to offer its services to the employees. The employees, however, could choose an employee group or individual instead. Initially a default option might be necessary, although the posting of a notice might obviate the need by prompting interest from worker representatives. The simplest default option would be a group of workers.⁷⁶ The NLRB could be authorized to determine the appropriate representational formula, one representative for a certain number of workers. In organizations with powerful workers included in the group, it seems likely that at least some will want a voice in the procedure that will affect their legal rights and thus will choose to compete for a position as representative.

Automatic Elections, 4 U.C. IRVINE L. REV. 801, 842-45 (2014).

71. 29 U.S.C. §159(b) (2012).

72. As indicated *supra* notes 60-62, and accompanying text, high level employees should not be excluded from the group as their presence may lead to fairer procedures.

73. *Conduct Elections*, *supra* note 69 (indicating that representation elections are decided by a majority of votes cast).

74. Oswalt, *supra* note 70, at 843.

75. The NLRB could determine that appropriate timing of the election. *Id.* at 842, 845.

76. Oswalt's suggestion that employees submit to the Regional Director of the NLRB prior to the election names of those willing to serve as a bargaining team would work for this purpose. *Id.* at 842-43.

Employers that have existing arbitration agreements at the time the legislation passes should be given a reasonable time for a representation election to be conducted and negotiations to occur to replace the old agreement. Unlike NLRB elections, the employer would have little reason to delay the election for arbitration representation. Indeed it might be unions that benefit by delay, giving them more time to convince employees to choose a union for representation, an interesting reversal of the current situation.⁷⁷

There are challenges to the proposed system that must be considered. The inclusion of management employees in the negotiation unit may threaten the freedom of all employees to choose their representative without coercion. Under the NLRA, employers are permitted to campaign in union representation elections so long as they do not engage in conduct unlawfully interfering with employee choice.⁷⁸ Rules should prohibit anyone who is not subject to the arbitration agreement from taking any position on the employees' choice of representative. While employers might have a preference to negotiate with an employee committee rather than a union, for example, there seems to be little reason to privilege the employer to voice this preference. Any violation of the rule should invalidate the election, requiring a new election.⁷⁹ This penalty should discourage employer interference, as the employer desiring to use arbitration would be delayed in implementing it.

In union representation elections, conduct interfering with employee free choice by supervisors and managers is attributable to the employer and thus prohibited.⁸⁰ In arbitration elections, however, these personnel would be subject to the arbitration policy. Therefore, they should be permitted to campaign for the representative of their choice. Their participation, however, raises the risk of coercing the employees that they supervise and manage. For example, the employees might prefer a union representative to negotiate while the managers might prefer an employee committee and try to convince the employees not to choose the union.

To preserve free choice for all employees, one possibility is to regulate the campaigning to prohibit conduct that interferes with free

77. Implementation of this proposal might encourage employers to support more funding and staff for the NLRB, another benefit for workers.

78. THE DEVELOPING LABOR LAW, *supra* note 69, § 9.I.A.

79. *See id.* § 9.III (describing similar remedy for elections for union representation).

80. *See id.* § 6.I.

choice as the NLRB does in representation elections.⁸¹ Such regulation brings the potential for long delays in finalizing election results, however. The delay would prevent implementation of the arbitration program, which offers the potential for opportunistic behavior on the part of managers who want to avoid arbitration. On the other hand, managers may not resist arbitration if the employer wants to implement it. And as noted above, higher level managers are likely to negotiate in their own interest as they do in bargaining for their individual arbitration agreements.⁸²

Instead, allowing supervisors and managers to campaign, either without limitation or with restrictions only on egregious conduct is a better option. While there is potential for coercion of free choice, the employees will have an opportunity to choose another representative in three years if they are dissatisfied. This seems preferable to the extensive regulation that exists for union representation elections, which causes long delays and often does not lead to a different election outcome when the tainted election is repeated.⁸³

B. Negotiating the Agreement

Arbitration agreements should be time limited, requiring the parties to renegotiate them periodically. Three years offers sufficient time for the parties to assess the current agreement and determine whether changes should be made. A new representation election should be held six months before the three-year expiration to ensure sufficient time for renegotiation. The employees could choose the same representative, if satisfied, or change representation.

Some mechanism would be required to resolve disputes between the employer and employee representative if they could not agree on arbitration terms. There are several possible options. One would be to simply prohibit arbitration without an agreement, making litigation of disputes the default option. This would force the employer to offer reasonable terms to the employees. This potentially gives the

81. *See id.* §§ 6.II, 9.I.

82. *See supra* notes 60-62 and accompanying text.

83. *See generally* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010) (discussing the impact of employer actions, lawful and unlawful, in union organizing campaigns and consequent delays); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (same); *see also* Daniel H. Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C. L. REV. 209, 212 (1963) (finding that objecting unions won only 30 percent of re-run elections in 1960-62).

employees the power to prevent arbitration by insisting on terms the employer would not conceivably accept. Given the employer's inherent power over all employees, however, this does not seem to be a significant risk. Further, some employees might prefer a fair arbitration system rather than litigation, including those executives who currently negotiate such agreements.

A second alternative would allow the NLRB to develop model arbitration agreements that would be the default if the parties could not reach agreement.⁸⁴ The NLRB could develop such models through rulemaking which offers employers, unions, and employees the opportunity for input, leading to a model that balances the interests of the employer and the employees. The parties would know the possible alternatives to agreement, which might provide an incentive to negotiate an agreement acceptable to both.⁸⁵

Instead of the NLRB template, the law could provide arbitration as the final step of negotiations if the parties cannot reach agreement.⁸⁶ Interest arbitration, as it is known, is used in many public-sector collective bargaining negotiations where economic weapons are disallowed.⁸⁷ The arbitration contemplated here would be relatively simple compared to arbitration of an entire collective bargaining agreement.⁸⁸ An employer seeking to impose arbitration on its employees should not complain if an arbitrator is used to determine what should be included in the agreement. While interest arbitration does differ from grievance arbitration in its impact, the employer would only be bound to use the imposed system for three years. And who should know better than an arbitrator what works in arbitration and what does not? If a safety valve is deemed desirable, the employer could be empowered to reject the imposed arbitration system and return to the litigation default.

84. A variation on the requirement could allow an employer to avoid negotiations if it adopted one of the NLRB template arbitration agreements. This variant would lose some of the benefits of encouraging employee voice, however. Nevertheless, it might still lead unions or other workers' organizations to engage in representation in arbitration through the notice and representation procedure.

85. In interest arbitration in the public sector some states structure the arbitration to encourage the parties to reach agreement. MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT 840-41 (3d ed. 2016). For example, when the arbitrator must choose the final offer of one of the parties, as opposed to a compromise between them, it encourages the parties to make their final offers reasonable which may, in fact, lead to agreement rather than arbitration. *Id.*

86. *Id.* at 803.

87. *Id.* at 799.

88. *See id.* at 803-04, 814-42 (illustrating the length and complexity of interest arbitration proceedings in the public sector).

A third alternative, although the least desirable, is to allow the parties to use economic weapons such as the strike and lockout to resolve the dispute, like those allowed by the National Labor Relations Act (NLRA). If the parties are unable to reach agreement each side would be free to use economic pressure in support of its proposals. Nonsupervisory, nonmanagerial employees would be protected from retaliation for such conduct by the NLRA so long as they act together,⁸⁹ but the law would need to protect employees not covered by the NLRA. Under this rule, as in labor negotiations, the employer could unilaterally implement its proposed arbitration agreement if good faith negotiations reached impasse.⁹⁰

This alternative may provide too much power to the employer, but several factors mitigate this concern. To the extent that highly skilled employees are included in the group, the employer must be wary of discouraging such employees from accepting or retaining employment. Reputational disadvantage may thus restrain the employer from adopting a decidedly unfair agreement.⁹¹ In some cases, however, there may be no powerful employees in the group subject to arbitration. For example, a single location retailer, such as a discount store or a coffee shop may have no truly high-level, highly paid employees.⁹² In that case, an employer that imposed an unfair agreement would only be able to do so for three years before subsequent negotiations would occur. Employees subject to the agreement would be incentivized to choose a more powerful representative and use their own forms of economic pressure for the following agreement. Of course, in some cases the employees would be unable to exert much effective pressure, but it is hard to see how this is worse than the current system, which allows the employer to

89. 29 U.S.C. § 157 (2012) (protecting the right to engage in concerted activities for mutual aid or protection).

90. See THE DEVELOPING LABOR LAW, *supra* note 69, § 13.II.A; see also Terrence H. Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1, 24-26 (1977) (describing circumstances in which unilateral employer action may be the most productive way to break an impasse); Peter Guyon Earle, Note, *The Impasse Doctrine*, 64 CHI.-KENT L. REV. 407, 407-08 (1988) (outlining the history and scope of the impasse doctrine).

91. See Kathryn Rubino, *Which Biglaw Firms Still Require Summer Associates To Sign Mandatory Arbitration Agreements?*, ABOVE THE LAW (June 12, 2018), <<https://abovethelaw.com/2018/06/which-biglaw-firms-still-require-summer-associates-to-sign-mandatory-arbitration-agreements/>> (reporting on law firms that revoked arbitration requirements for summer associate after publicity and resulting backlash).

92. See, e.g., *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1249-57 (11th Cir. 2008) (describing duties of store managers and assistant managers who spent 80-90 percent of their time on non-managerial duties, including janitorial duties, with average pay of less than \$ 10 per hour).

impose arbitration with any terms it desires as a condition of employment. Ultimately, as is currently the case, the courts could refuse to enforce an agreement that is unconscionable or does not otherwise meet the requirements of the FAA.⁹³ In light of these concerns, however, as well as the fact that this alternative may lead to disruptive strikes and lockouts, the first two options are preferable.

Another concern about the proposal may be the limits it poses on individual negotiation of arbitration agreements by employees. The exclusive representation requirement, which prevents individuals from negotiating their own agreement where a representative has been chosen by a majority of workers, has been upheld as constitutional under the NLRA.⁹⁴ The Supreme Court imposed on labor unions a duty to fairly represent all workers as a corollary to the exclusive representation requirement to avoid a constitutional question.⁹⁵ The circumstances of the case that led the Court to impose the duty involved egregious race discrimination in negotiations⁹⁶ at a time prior to the enactment of Title VII of the Civil Rights Act, which prohibits race discrimination by employers and unions.⁹⁷

The risk of discrimination or bad faith conduct by the representative is much reduced when the same arbitration agreement must be negotiated for all employees. It is possible, however, that an agreement could cover some claims while allowing others to be litigated. In making such a determination, race, gender, or other bias could infect the negotiations. One way to deal with the problem is to impose the duty of fair representation. Such a duty might discourage employees from serving as representatives, however, unless some sort of insurance protected them from the costs of litigation and liability. The ability to have discriminatory arbitration agreements set aside by a court in the same way that any other unconscionable agreement would be under the FAA provides another solution.⁹⁸ This removes the discouraging effect of imposing liability on representatives, while

93. See, e.g., *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (refusing to enforce unconscionable arbitration agreement); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-40 (4th Cir. 1999) (refusing to enforce arbitration agreement with "egregiously unfair" arbitration rules).

94. *NLRB v. Jones & Laughlin Steel*, 301 U.S.1, 43-45 (1937); see also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944) (holding that individual contracts must yield to the collective agreement and did not bar enforcement of the duty to bargain collectively).

95. *Steele v. Louisville & Nashville R.R.*, 323 U.S.192, 198, 202-04 (1944).

96. *Id.* at 194-96.

97. Title VII, 42 U.S.C. §§ 2000e-2(a), (c) (2012).

98. See, e.g., *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916 (9th Cir. 2013).

still allowing challenges to unfair or discriminatory agreements. And as noted, *supra*, unless the representative body or individual is actually a labor union that represents workers in collective bargaining, it should not be deemed a union for purposes of other regulation of labor unions like the duty of fair representation.⁹⁹

V. FEASIBILITY OF THE BARGAINING REQUIREMENT

Opponents of mandatory arbitration in employment have thus far failed to convince Congress to outlaw it. It is certainly possible that legislation allowing arbitration only if the process is negotiated with a representative of the employees will suffer the same fate. If arbitration is truly a valuable alternative to litigation, however, then this proposal would allow it to serve that role without enabling employers to use it as a weapon to preclude employee legal claims unfairly or diminish their chances of winning their cases as compared to court. An alternative to amending the FAA would be to amend specific statutes such as the FLSA or Title VII to preclude arbitration of legal claims without an agreement negotiated with employee representatives. Legislation limiting arbitration of particular claims may be more likely to pass.¹⁰⁰

The proposal also has the value of increasing employee voice in the workplace. Employee participation in the workplace increases the likelihood of their involvement as citizens in the community.¹⁰¹ This

99. See *supra* note 51. Although many unions hold membership votes to ratify collective bargaining agreements once negotiated, contract ratification is not required by law, THE DEVELOPING LABOR LAW, *supra* note 69, § 25.III.C, and should not be mandated for arbitration agreements either.

100. For example, currently the Me-Too movement is leading to pressure to bar arbitration of sexual harassment claims, which has been successful in New York. SUMMARY OF NEW YORK SENATE LEGISLATIVE ACTION 5, available at <https://www.scribd.com/document/383666745/2018-NYSenate-Session-Highlights#from_embed> (last visited Sept. 23, 2018) (describing budget bill that prohibits mandatory arbitration of sexual harassment complaints); Susan Gross Shlinsky et al., *New York Enacts Sweeping Sexual Harassment Laws*, EPSTEIN BECKER GREEN (Apr. 20, 2018) <<https://www.ebglaw.com/news/new-york-state-enacts-sweeping-sexual-harassment-laws/>> (describing the New York legislation which applies to employers with four or more employees and to agreements entered into after the effective date of the legislation); see also Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <<https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html>> (reporting that Microsoft ended mandatory arbitration for sexual harassment claims for its employees and was supporting federal legislation to do the same in the wake of the publicity regarding sexual harassment claims against powerful men).

101. See CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 134-39 (2003); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 83-84, 102, 105-06 (1970); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1596 (1996); Lisa Schur et al., *High*

has traditionally been viewed as a benefit of the workplace democracy created by the NLRA.¹⁰² With the decline of unions, providing for employee involvement in other ways will enhance citizenship in the community, an essential ingredient of a democratic society.¹⁰³

In addition to encouraging community involvement, the proposal may encourage more active employee involvement in workplace governance.¹⁰⁴ One might envision employee groups collectively addressing issues such as harassment or discrimination.¹⁰⁵ The employees might designate a representative to accompany Occupational Safety and Health Administration (OSHA) inspectors.¹⁰⁶ Indeed the employees may even develop more efficient and effective methods of operation, increasing the employer's bottom line.

The proposal might have the added consequence of increasing unionization by providing an opportunity for unions to demonstrate their value to employees. Further, the requirement may discourage employers from using the administrative process to defeat employee desire for voice in the workplace. The possibility of this result, in

Involvement Work Systems and Political Efficacy: A Tale of Two Departments, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE 56TH ANNUAL MEETING 9, 9-10 (Adrienne E. Eaton ed., 2004); Paula B. Voos, *Democracy and Industrial Relations*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE 56TH ANNUAL MEETING, *supra* at 1, 3, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1822-23 (1983).

102. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423-27 (1993); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 502-03 (1993). Some supporters of the NLRA thought that providing workers with a voice in the workplace would reduce the chances of worker rebellion against the existing social order. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C.L. REV. 939, 950 (1996). Senator Wagner, the primary sponsor of the NLRA, relied on the vision of Louis Brandeis, who asserted the importance of workers' participation in the conduct of business as a "daily experience of 'responsibility' . . . necessary to their intellectual, moral and spiritual development" Barenberg, *supra*, at 1426 (quoting PHILIPPA STRUM, LOUIS D. BRANDEIS 192 (1984)).

103. While employers might not see encouraging citizen involvement as an important goal, maintenance of our democratic society should motivate society at large and our legislators. For employers, the value of voice is increasing productivity and creativity of employees.

104. See generally CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010) (discussing the potential for co-regulation).

105. See COLLINS, *supra* note 56, at 75-76 (encouraging "participatory self-regulation" in general and in particular in the area of discrimination because it enhances inclusion and the likelihood of effective practices); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 530-35 (2001) (describing the potential for employee groups to address entrenched patterns of discrimination in workplaces).

106. See 29 C.F.R. § 1903.8 (2018).

addition to the restriction that it imposes on employers, may doom the legislation in a Congress dominated by corporate interests. In truth, however, the proposal does nothing more than insure that the FAA is accomplishing its goal of enforcing voluntarily negotiated arbitration agreements. The negotiation requirement adds structure to what proponents of arbitration say is already happening, agreement to arbitration, providing an added safeguard to insure that is the case.

As for opponents of arbitration, they may also oppose this proposal because it allows arbitration to continue. Labor unions are a natural constituency, but their support will increase employer opposition. In the end, politics may make the proposal a difficult sell.

If arbitration has value, however, as a cheaper, quicker method of dispute resolution, then trying a negotiated version may be worthwhile. If it does not, a negotiation requirement may hasten its elimination. While this solution to forced arbitration is unlikely to work for consumers, who do not have the ability to choose representation and negotiate in a similar manner,¹⁰⁷ it does offer an option for preserving arbitration in the workplace while insuring a fairer system for workers.

V. CONCLUSION

Arbitration in employment law appears here to stay for awhile, at least absent some dramatic shift in the political landscape. Requiring employers to negotiate the terms of arbitration agreements with representatives chosen by their employees offers an opportunity for employees to have some voice in the arbitration procedure that governs their work life and determines their legal rights.

Employers assert that both arbitration and employee voice have value. If that is the case, they should not oppose this proposal. Congress has an opportunity to create a system that actually offers the opportunity for a cheaper, quicker, and fair alternative to litigation as contemplated by the FAA. The alternatives, continuing the current unfair system, precluding arbitration altogether, or mandating fair procedures provide some benefits to some participants

107. Those interested in eliminating or ensuring fair arbitration for consumers will have to rely on legislation or other mechanisms. See generally Sarah Rudolph Colc, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011); Sarah Rudolph Cole, *Uniform Arbitration: One Size Fits All Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001).

in the system but a negotiation option allows continued use of arbitration while increasing the likelihood that it fairly resolves employment law disputes. More employer support for the NLRB may be an added benefit. Further, negotiation encourages employee participation in both the workplace and the community. Given these benefits, it is a system worth testing.

