Ethical Issues in Employment Arbitration

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Introduction

Arbitration has gained widespread support and legitimacy over the years as a forum for dispute resolution, providing an alternative forum to parties who want to avoid the formal litigation process.[1] Touted as a cheaper, faster, informal alternative to litigation, what once was a practice reserved for a narrowly defined category of contractual disputes has become a frequently used dispute mechanism in many different industries. [2] And the characteristics that once attracted parties to submitting their claims to formal litigation have now started to disappear because of the growing similarities to the formal judicial process found in arbitration.[3] Arbitrators are now able to provide relief to injured parties in a vast array of contractual disputes, including commercial disputes, employee-employer grievances, and international disputes.[4] Virtually everyone today is subjected to at least one mandatory arbitration agreement—in cell phone contracts, in Uber user agreements, in credit card contracts—to the point that the modern arbitration process has practically become an extension of litigation.[5] Parties to a contract or collective bargaining agreement electing to subject disputes to arbitration are not the only parties who benefit: the courts also benefit from arbitration.[6] Alternate dispute resolution mechanisms prevent an already overloaded judiciary from being bogged down with contract disputes that can be solved outside a courtroom through an arbitrator.[7] But at what cost does this cheaper, less formal dispute resolution mechanism come to parties compelled to arbitrate their disputes, rather than submit their claims to the formal litigation process?

While arbitration has its benefits, it is not the perfect route to achieve fair administration of justice. With an ever-growing, ever-changing legal system

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1. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. Ill. L. Rev. 1, 4 (2010).

2. *See id*.

3. *Id*. at 8 ("By the beginning of the twenty-first century . . . it was common to speak of U.S. business arbitration in terms similar to civil litigation—'judicialized,' formal, costly, time-consuming, and subject to hardball advocacy").

4. *See id*. at 4-5.

5. *See* Jay Folberg, *Arbitration Ethics*, 9 Disp. Resol. Mag. 5, 5 (2002).

6. *See* Stipanowich, *supra* note 1, at 4. Here, Stipanowich posits that part of the reason courts have seen a decrease in litigation could be because of the appealing aspects of binding arbitration.

7. Michael H. LeRoy, *Jury Revival or Jury Reviled - When Employees are Compelled to Waive Jury Trials*, 7 U. Pa. J. Lab. & Emp. L. 767, 768 (2005).

constantly facing new legal issues, arbitration also deals with significant procedural and substantial changes.[8] These changes affect how individuals access the legal system to resolve their issues.[9] To ensure fair access to equitable relief for all parties subjected to arbitration and to ensure no party is deprived of their constitutional right of due process, legitimacy of arbitration must be protected by ensuring that arbitrators, who have the responsibility of deciding the fate of the disputes before them, remain impartial and unbiased when making their decisions.[10]

This Note explores the background of arbitration and its growth in popularity in the American judicial system. It then discusses policy issues that often negatively impact arbitration and prevent fair and equitable administration of justice. It then discusses the need to resolve these policy issues in a way that achieves fairness and impartiality in the arbitration system and public trust in the arbitration system, while also maintaining the independence required to prevent unnecessary judicial review. Finally, it discusses a potential resolution—expanded self-governance by the arbitration associations in the form of a more extensive sanctions process in instances of bias or misconduct—as a way to address these policy issues.

I. BACKGROUND OF ARBITRATION

Arbitration existed as an alternative dispute resolution mechanism long before Congress enacted legislation governing the arbitration process. In fact, arbitration was a "well known and actively practiced" dispute resolution system in America's early years[11] and accepted as an alternative to formal litigation by many of the nation's founding fathers.[12] However, arbitration did not receive notable, widespread approval in the U.S. until Congress enacted the Federal Arbitration Act ("FAA") in 1925 to enforce arbitration agreements related to commerce and maritime transactions.[13] The FAA was enacted to clarify any misunderstanding that the judiciary had a negative attitude towards arbitration clauses.[14] This misunderstanding is exemplified by cases such as *Tobey v. County of Bristol*, in which Judge Story delivered a critical opinion about a case in which a contractor, Tobey, tried to compel arbitration against the County of Bristol after

8. Stipanowich, *supra* note 1, at 8-9.

9. *Id*. at 8.

10. *See* Ahmed Mohammad Al-Hawamdeh, Noor Akief Dabbas & Qais Enaizan Al-Sharariri, *The Effects of Arbitrator's Lack of Impartiality and Independence on the Arbitration Proceedings and the Task of Arbitrators under the UNCITRAL Model Law*, 11 J. POL. & L. 64, 64 (2018).

11. James Oldham, Presidential Address: Historical Perspectives on the Judicial Enforcement of Arbitration Agreements, *in* ARBITRATION 2014: THE TEST OF TIME: PROCEEDINGS OF THE SIXTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 2 (Richard N Block et. al. eds., 2014).

12. *Id*. at 7.

13. 9 U.S.C. §1 (1994).

14. Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 87-90 (1996).

the county breached its highway construction contract with him.[15] Story asserted that arbitration could not be compelled against a party because arbitration requires mutual consent of all subjected parties.[16] He then went on to express his concerns about arbitrators' abilities to effectively administer justice because, in his eyes, they were "not ordinarily well enough acquainted with the principles of law or equity," and therefore lacked expertise to handle complicated cases.[17]

While Story's opinions showed hesitance to compel arbitration agreements, it was not the common judicial attitude towards arbitration at the time.[18] Arbitration was a widely used dispute resolution mechanism in certain industries when Story issued this opinion in 1845.[19] However, because of perceived widespread judicial hostility and doubts regarding arbitral authority, as illustrated in *Tobey*, arbitration agreements contained in contracts were often not specifically enforced by courts.[20] Instead of mandating specific performance of arbitration clauses in instances when parties breached these clauses, courts would often award nominal damages to the parties who wished to enforce the arbitration clause.[21] By awarding damages but refusing to compel the parties to arbitrate their disputes as explicitly stated in the arbitration agreement, the courts interpreted the parties' contract in a manner contrary to the original intent of the involved parties.

A. FEDERAL ARBITRATION ACT

State and federal legislatures took notice of judicial hostility towards arbitration, like *Tobey*, and courts' refusal to enforce arbitration on parties, and decided to take matters into their own hands. New York was the first state to create a statute that enforced arbitration agreements through specific performance.[22] The Federal Arbitration Act (FAA) was then implemented as a way to show federal legislative support for the use of arbitration as a replacement for litigation, making arbitration agreements legally enforceable and binding.[23] Seeking a more equitable remedy to parties injured by breach of an arbitration agreement than just nominal damages, the FAA made commercial and maritime contracts' arbitration agreements enforceable by specific performance, so long as the agreement met the other requirements to be a legally binding, enforceable contract.[24] Even after

15. Tobey v. City of Bristol, 23 Fed. Cas. 1313, 1318-19 (1845).
16. *Id*. at 1322-23.
17. *Id*. at 1321.
18. Oldham, *supra* note 11, at 3.
19. *Id*.
20. *See* Ware, *supra* note 14, at 88.
21. *Id*.
22. *Id*. at 89.
23. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.").
24. 9 U.S.C. § 2 (1947).

it was enacted, courts in the United States were often still hostile to the use of arbitration in lieu of litigation in many circumstances.[25] Many courts still refused to uphold arbitration agreements that required arbitration for *any* dispute of the contract.[26] Courts interpreted these broad agreements to be an illegitimate waiver of a party's substantive rights to sue in a court of law, resulting from unequal bargaining power between parties to a contract.[27]

B. THE NATIONAL LABOR RELATIONS ACT, TAFT-HARTLEY ACT AND EARLY LABOR ARBITRATION

While the FAA was the first step to legitimizing the arbitration process in the judicial system for commercial and maritime disputes, it was not initially used as an enforcement mechanism for arbitration in the labor or employment context.[28] Rather, when Congress enacted the National Labor Relations Act (NLRA) in 1935 to protect the rights of workers to form or join labor unions and collectively bargain for workplace rights, it ignited the spark that led to the widespread use of alternative dispute processes in unionized employment industries.[29] Although the NLRA was the piece of legislation that encouraged and legitimized arbitration between labor unions and employers, Congress also enacted the Taft-Hartley Act ("LMRA") as a means of supporting collective bargaining between unions and employers to establish rights and expectations of both parties in an employment relationship.[30] In the LMRA, Congress included § 301, which allows either party of the collective bargaining agreement to bring suit in federal district court against the other party if they attempt to breach the bargaining agreement.[31] Under § 301, parties are allowed to bring suit before the court to compel arbitration if the opposing party tries to breach the arbitration agreement by submitting the claim to the formal litigation process.[32] .

In the LMRA, Congress also encouraged parties to bargain for alternative dispute resolution agreements to settle any issues that arise in the course of the unionized employment relationship.[33] It was the LMRA, not the FAA, that the Supreme Court used to initially uphold labor arbitration in three key decisions for

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25. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435 (1953).

26. *See, e.g.*, *id.*

27. *See, e.g.*, *id.* ("When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.").

28. *See* Ware, *supra* note 14, at 90-91.

29. *Id*; 29 U.S.C. §§ 156, 159 (1935).

30. See Labor Management Relations (Taft-Hartley) Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

31. *Id.*

32. *Id.*

33. 29 U.S.C § 171(b) (1975).

labor arbitration, now known as the *Steelworkers Trilogy*.[34] In these three cases, the court interpreted § 301 of the LMRA as a means of enforcing labor arbitration clauses contained in collective bargaining agreements, acknowledging them as the preferred dispute mechanism in interpreting and enforcing these agreements.[35] By enforcing the arbitration agreements in each case, the Supreme Court set an example for lower courts to enforce arbitration agreements in collective bargaining agreements.[36] With an increasing public interest in ensuring fair employment practices—as noted in the LMRA—courts felt the pressure to uphold the contractual terms of collective bargaining agreements between labor unions and employers, including arbitration agreements that are a "speedy, efficient, conclusive, and privately negotiated system for the resolution of union-management grievance disputes."[37] As courts followed the precedent set by the *Steelworkers Trilogy* to mandate specific performance of collective bargaining agreements, they also clung to the LMRA as the appropriate statutory justification for enforcing arbitration clauses in collective bargaining agreements instead of trying to expand the FAA's authority to labor arbitration.[38]

C. ARBITRATION'S EXPANSION INTO NONUNIONIZED EMPLOYMENT

While the courts warmed up to labor arbitration in the early 1960s, they still limited enforcement of arbitration agreements to unionized employment settings to interpret the contractual terms contained in collective bargaining agreements.[39] While the Supreme Court encouraged labor arbitration and enforcing arbitration agreements in labor arbitration under the LMRA, judges also interpreted the FAA as a "liberal federal policy favoring arbitration agreements" and applying the FAA to a broader spectrum of arbitration agreements.[40] One of the ways in which courts broadened the scope of the FAA was by interpreting § 1 in a way that opened the doors for employment arbitration between nonunionized employees and their employers.[41]

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34. *See* United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

35. *Warrior & Gulf Navigation Co*., 363 U.S. 582-83 ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.").

36. *American Mfg. Co*., 363 U.S. at 567-68.

37. Jeffrey F. Levine, Ian P. Gunn, Anita M. Moorman, *Peterson, Brady, and Elliot: Analyzing "The Trilogy" in Light of the NFL Commissioner's Discipline Authority*, 29 J. LEGAL ASPECTS SPORT 223, 230 (2019) (citing LeRoy, M. H., & Feuille, P. (1991) *The Steelworkers Trilogy and grievance arbitration appeals: How the federal courts respond*, 13 BERKELEY J. EMP. AND LAB. L. 79, 79 (1991)).

38. *See* Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 457-58 (1957).

39. *See* Laura J. Cooper, Dennis R. Nolan, Richard A. Bales, Stephen F. Befort, Lise Gelernter & Michael Z. Green, *ADR in the Workplace,* Fourth Edition, West Academic Publishing, 668 (2020).

40. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

41. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001).

Initially, when enforcing arbitration agreements in an employment context, courts worked to enforce labor arbitration agreements and seldom dealt with nonunionized employment arbitration agreements.[42] This rarity of a nonunionized employment arbitration agreement was a result of an initially broad interpretation of § 1 of the FAA, which states that the FAA did not govern "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[43] Courts initially interpreted this provision as making any arbitration agreement contained in an employment contract that dealt with interstate commerce unenforceable.[44] Under this broad interpretation, nonunionized employees were forced to pick from two options: 1) submit their dispute to litigation and bear the heavy cost inherent to the litigation process,[45] or 2) participate in a class action lawsuit with other injured employees, sharing any potential damages awards with the class of plaintiffs and not receiving individualized redress for the employee's grievance.[46]

Since individual employment contracts were perceived as unenforceable under the FAA, judges were able to justify enforcement of mandatory arbitration agreements in collective bargaining agreements under the LMRA without having to dig into the intent of the FAA.[47] However, since the LMRA does not apply to nonunionized employment settings, when the courts were presented with the issue of arbitration clause enforcement in individual employment contracts, they could not apply this same rationale. Instead, they had to reinterpret § 1 to narrowly define which employees fell into the "interstate commerce" exclusion, and they successfully did so in *Circuit City Stores, Inc. v. Adams*.[48] Justice Kennedy wrote a decision asserting that the legislative intent was not to bar *all* employment contracts from utilizing arbitration, but rather to specifically exclude employers in the transportation industry from mandating employees to submit disputes to arbitration.[49] While courts still do not use the FAA to enforce arbitration agreements contained in collective bargaining agreements, courts have since interpreted the FAA as a valid, appropriate enforcement mechanism for arbitration agreements in nonunionized employment contracts.[50] Since *Circuit City*, courts are extremely deferential to arbitration agreements in employment

42. *See* Cooper, *supra* note 39, at 669.

43. 9 U.S.C.A. § 1 (1947).

44. *See Circuit City*, 523 U.S. at 115.

45. *See* Lorin Dale-Pierce, *Ethics in Employment Arbitration: An Analysis of the Feasibility of a Code of Ethics for Employment Arbitrators*, 26 GEO. J. LEGAL ETHICS 613, 614 (2013).

46. *See* Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1637 (Ginsburg, J., dissenting).

47. *See* Ware, *supra* note 14, at 93-94.

48. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001).

49. *Id.*

50. *Id.* at 119. The court explained that the only exception for which the FAA cannot govern employment contracts is for transportation workers.

contracts, and there is an almost automatic conclusion that arbitration must be used for employment disputes.[51]

In these kinds of disputes, employees are not protected by a collective bargaining agreement inherent in labor union membership.[52] Unlike the collective bargaining agreements, which have a very specific, uniform grievance process through which all employees bring their claims against the employer,[53] individual employment contracts in nonunionized employment contracts generally have a clause specifying that employees must bring all claims to arbitration.[54] In many instances, employees at will who do not have any other form of contractual agreement with the employer are required by their employer to sign an arbitration agreement with their employer.[55] These agreements, which must be signed for the employee to continue to work for the employer, force the employee to agree to arbitrate any grievances that arise during the course of employment.[56] Courts today are substantially more deferential to an arbitrator's decisions and rarely overturn or fail to enforce an arbitration agreement.[57] In the rare circumstances in which a court does, in fact, refuse to enforce an arbitration agreement, it is because of either a lack of consideration[58] or because the arbitration is not "mutually binding" upon both parties.[59]

Further, labor arbitration is conducted with the mutual understanding that the only authority which the arbitrator should use to resolve grievances is the collective bargaining agreements, thus making labor arbitration solely a matter of contractual interpretation.[60] Employment arbitration, on the other hand, has been accepted as a legitimate forum in which statutory violations may be resolved by an arbitrator, so long as the arbitrator personally believes they have the expertise to apply external law.[61] The courts also allow arbitration of statutory issues where parties agree to submit such statutory disputes to arbitration instead of litigation,

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51. Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 212-13 (2014).

52. *See* Ware, *supra* note 14, at 91.

53. *Id*. at 92.

54. Green, *supra* note 51, at 207.

55. *See* Jonathan H. Peyton, *What Arbitration Clause?: The "Appropriate" Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 757-759 (2003).

56. *See* Green, *supra* note 51, at 216.

57. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); LeRoy, *supra* note 7, at 778-89 (2005).

58. *See* Kummetz v. Tech Mold, Inc., 152 F.3d 1153, 1155 (9th Cir. 1998). Here, the employee signed a form affirming that he consented to the changes in the employee handbook. The court determined his signature was not sufficient consideration to bind employee to the arbitration agreement because the form itself did not indicate that the change included a mandatory arbitration agreement.

59. *See* Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (1985), in which the court refused to uphold an arbitration agreement that allowed employers, but not employees, to ignore the arbitration agreement and instead submit the claim to a formal adjudication process.

60. *See* United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

61. *See* Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc., 473 U.S. 614, 633-34 (1985) (holding an arbitrator was just as competent to decide an antitrust issue as a judge).

presuming there is no congressional intent in the statute that would prevent arbitrating the statutory issue.[62] Because of the large net of statutory protections cast in employment law, the external law applied in employment arbitration can range from proper payment of wages,[63] to noncompliance with the American Disabilities Act,[64] to age or race discrimination.[65] Because arbitrators can hear so many different issues, rather than just contractual issues, arbitration has taken the place of individual and class action litigation for many employment disputes.[66]

II. POLICY ISSUES IN EMPLOYMENT ARBITRATION

Although the widespread approval of arbitration has many benefits to providing an alternative form of dispute resolution, arbitration is not a perfect system. Just like any other dispute resolution mechanism, arbitration has its risks, downsides, and policy implications. The use of arbitration continues to grow as the courts are bogged down with a caseload that seems to grow exponentially as new laws and regulations are introduced and interpreted.[67] This growth in claims submitted to arbitration has made it more important than ever to protect arbitration from potential corruption or injustice,[68] and it has presented the arbitration system with a heightened need to protect impartiality and independence so that people continue to utilize arbitration and its convenience as a substitute.[69]

To be a legitimate dispute resolution mechanism that can actually replace litigation in certain situations, arbitration needs to consistently administer fair and equal justice and provide effective relief to subjected parties.[70] All types of arbitration need a system of accountability checks to ensure fair access to justice, but there are characteristics of employment arbitration that specifically require accountability to ensure that arbitration is actually a legitimate, independent substitute to litigation. Without proper, consistent safeguards, the arbitration system cannot expect the public to trust arbitration as a legitimate substitute to litigation for their employment disputes when there are so many underlying issues that hurt

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62. *Id*. at 628.

63. *See* Dixon v. NBCUniversal Media, LLC, 947 F. Supp. 2d 390, 405 (S.D.N.Y. 2013), where employee was compelled to arbitrate her claim seeking unpaid overtime pursuant to the FLSA.

64. *See* Kummetz v. Tech Mold, Inc., 152 F.3d 1153, 1156 (9th Cir. 1998). While the court did not compel arbitration is this case, it noted that employees who knowingly submit grievances to arbitration in employment contracts will be compelled to submit ADA claims to arbitration.

65. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

66. *See* Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1616 (2018), where the court upheld a clause in an employment agreement in which the employee waived his right to class action litigation and instead was required to submit his individual claim to arbitration.

67. *See* LeRoy, *supra* note 7, at 768.

68. 9 U.S.C. § 10 (2002).

69. *See* Al-Hawamdeh, Dabbas & Al-Sharariri, *supra* note 10, at 64 (2018).

70. *See* Michael William Fires, *Regulating Conduct: A Model Rule against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 751 (2017), which discusses the American Bar Association's "interest in equal justice for all" in the legal profession.

public trust in the system—specifically, unequal bargaining power; application of external law; and lack of fair and impartial representation.[71]

A. UNEQUAL BARGAINING POWER BETWEEN EMPLOYER AND EMPLOYEE

Arbitration agreements, like any other term or provision in an agreement between two parties, are governed by the principles and requirements of contract law.[72] One concern regarding arbitration agreements, like concerns arising from any other contract, is that arbitration agreements may be a result of unequal bargaining power between parties. One of the underlying common law requisites for an enforceable contract in any circumstance is that the parties were able to bargain for the terms included in the agreement. The ability to arbitrate a claim is a matter of contract, and not a constitutional right.[73] Thus, courts will refuse to compel arbitration if it is not clear that both parties intended to arbitrate the issue upon which a party seeks to compel arbitration.[74]

Because of increased pressure to use arbitration when possible instead of formal litigation, most arbitrators today will arbitrate any dispute regarding at least some sort of substantive issue, even when contracts are silent on what kind of disputes are supposed to be subjected to arbitration.[75] Unless there is a strict provision in a contract indicating that both parties do *not* consent to arbitration, arbitrators will hear the dispute and issue a binding decision upon the parties.[76] These kinds of provisions, however, usually only exist where there is equal bargaining power among the parties to the contract.[77] Where issues of arbitration often arise, such as consumer contracts and employment contracts, bargaining power is often far from equal, with parties such as large employers and corporations having significantly more resources—and therefore more bargaining power—than the other parties to the contract, like individual employees and common consumers.[78] If there is significantly unequal bargaining power, courts are hesitant to enforce provisions of a contract which are not equitable to both parties.[79] For example, courts in the past refused to enforce arbitration agreements if they perceived

71. *See* Shari Maynard, *The Current State of Arbitrator Ethics and Recourse Against Grievances*, 8 Y.B. ARB. & MEDIATION 204, 210 (2016).

72. *See, generally*, Ware, *supra* note 14, for further criticism of arbitration agreements regarding other contractual principles, including mutual assent, unconscionability and duress.

73. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

74. Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration . . . is a matter of consent, not coercion").

75. R.W. Fleming, *Arbitrators and Arbitrability*, 1963 WASH. U. L. Q. 200, 220 (1963).

76. *Id.*

77. *Id.*; Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting).

78. *Lamps Plus*, 139 S.Ct. at 1420-21 (2019) (Ginsburg, J., dissenting) (criticizing the application of the FAA to employment contracts where one parties has little bargaining power compared to the other party).

79. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435 (1953), in which the court refused to compel arbitration because of perceived unequal bargaining power between buyer and seller.

the agreement to be the result of coercion from a party with more bargaining power than the other party.[80]

Bargaining power is not a pressing issue in unionized employment settings.[81] In such settings, individual employees do not have to separately negotiate terms with the employer.[82] Instead, a union representative represents the employees to negotiate for terms of the collective bargaining agreement with an employer.[83] Because unionized employees are guaranteed representation in the collective bargaining process, and unions have significant resources and experience in negotiating terms in collective bargaining agreements, "parties to a collective bargaining agreement are . . . presumed to have equal bargaining power" to their employer.[84]

The equal bargaining power presumed in unionized environments, however, cannot be equally assumed in nonunionized environments.[85] Unionized employees are subjected to labor arbitration as a result of collective bargaining agreements created between employers and the employees' union who have presumed equal bargaining power.[86] Individual employment contracts, unlike collective bargaining agreements, are agreements made directly between an individual employee and the employer.[87] Unlike unionized employees, nonunionized employees do not get a union representative to negotiate the terms of their contract.[88] Many skeptics of arbitration have pointed out that voluntary consent required to sustain an employment arbitration agreement is, in most cases, actually not voluntary.[89] Rather, the consent to these terms is usually coerced because these employment contracts are more contracts of adhesion—if the employee does not agree to the terms, they are simply out of a job opportunity with that employer.[90] Employees who desperately need a job are probably not able to run the risk losing out on a job opportunity because they don't accept the employer's terms and conditions for the job.[91] And employees who enter into an employment relationship as a last resort of a job search often do not have the resources to hire an attorney

80. *Id.*

81. Thomas Riske, *Interest Arbitration Clauses in S8(f) Pre-Hire Agreements: Effective for Achieving Genuine Collective Bargaining or Enabling Parties to Underhandedly Gain Majority Bargaining Power?*, 2008 J. DISP. RESOL. 333, 344-45 (2008) (citing 29 U.S.C. § 158(a)(3); 28 U.S.C. § 159(a) (2006)).

82. *Id.* at 335.

83. *Id.*

84. *See* Employee Painters' Trust v. J & B Finishes, 77 F.3d 1188, 1192 (9th Cir. 1996).

85. Peyton, *supra* note 55, at 757-759 ("new hires have little or no bargaining power and simply take the terms of their employment contracts as they are proposed").

86. *See* Riske, *supra* note 81, at 344-45.

87. *See* Peyton, *supra* note 55, at 757-759.

88. *See* Ware, *supra* note 14, at 100-01, discussing policy concerns with a lack of voluntary consent in nonunionized employment arbitration.

89. Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1420 (2019) (Ginsburg, J., dissenting); *Gilmer*, 500 U.S. at 42-43 (1991) (Stevens, J., dissenting) ("I doubt that any legislator who voted for [the FAA] expected it to . . . form contracts between parties of unequal bargaining power").

90. *See* Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1636 n. 2 (2018) ("[E]mployees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs").

91. *Id.*

to review the provisions of their contract or employment manual and bargain with the employer for better terms.[92] Since an employer usually has significantly more resources and substantially higher bargaining power than their employees in bargaining for specific terms in an employment contract, employees often enter into contracts that significantly favor the employer in dispute resolution options, consider the employer's own needs and motives over the best interests of the employee, and disproportionately disadvantage the employee.[93]

The mere existence of unequal bargaining power, however, is not usually sufficient on its own for a court to refuse to enforce employment arbitration as a whole process.[94] Instead, courts must instead look to enforce arbitration agreements that adhere to the requirements of a valid contract.[95] Recent courts have recognized voluntary consent as a prerequisite to enforcing an employment arbitration agreement and recognize that silence or ambiguity cannot be assumed to be voluntary consent.[96] In situations of involuntary consent, it is important that arbitral fairness and impartiality is ensured for employees required to arbitrate their disputes, especially when such disputes apply external law, such as Title VII and other anti-discriminatory statutes.[97]

B. EMPLOYMENT ARBITRATION OFTEN INVOLVES STATUTORY INTERPRETATION

It is also necessary that employment arbitration receives more extensive oversight by arbitration associations because of the increasing demand for arbitrators to handle matters of external law.[98] Employment arbitrators are often not just hired just to interpret employment contracts.[99] Employment contract arbitration agreements often require the arbitrator to apply external law to the grievance before him.[100] In recent decades, there has been persistent support from the judicial system that employment arbitrators also resolve statutory claims—including employment discrimination claims arising under Title VII.[101] For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, the court determined that arbitration

92. *See id.*

93. *Lamps Plus*, 500 U.S. at 1420 (Ginsburg, J. dissenting).

94. *Gilmer,* 500 U.S. at 33.

95. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415-16 (refusing to enforce a class action arbitration agreement in an employment contract because class arbitration is markedly different from normal individual arbitration that enforcing the agreement requires more than ambiguous consent to these terms contained in an employment contract); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347-48 (2011) (refusing to enforce a class arbitration agreement in a commercial contract because silence of one party did not manifest assent).

96. *Lamps Plus*, 500 U.S. at 1417 ("Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.").

97. *See* Al-Hawamdeh, Dabbas & Al-Sharariri, *supra* note 10, at 64.

98. *See* Green, *supra* note 51, at 206.

99. *Id.*

100. *Id.*

101. *Id.* at 203.

was a legitimate forum in which an employee could resolve a dispute under the Age Discrimination in Employment Act with his employer.[102]

While courts have determined that employees cannot contract away their statutory protections, courts do recognize arbitration as a fair substitute to litigation of statutory disputes, as long as 1) the statute does not expressly indicate a congressional intent that the statute not be arbitrated, 2) the employee voluntarily consents to arbitration and 3) the arbitrator believes himself to be capable of interpreting these statutes.[103] Therefore, in contracts that allow arbitrators to apply external law to the dispute, whether or not an arbitrator can interpret and apply external law in their decision is ultimately at the discretion of the arbitrator himself.[104] Courts are generally deferential to arbitral decisions that apply external law, based on the assumption that arbitrators are fair and impartial.[105] Unless an arbitrator is blatantly and obviously biased, such that a court would have to overturn the arbitration decision, there is essentially no barrier to prevent arbitrators who are unqualified to interpret these federal statutes from settling these disputes.[106]

This judicial support of mandatory arbitration for statutory claims has resulted in tremendous pushback from employee's right advocates.[107] The Equal Employment Opportunity Commission ("EEOC") has been particularly outspoken about their critical reception of the court's recent attitude to mandatory arbitration, asserting in 1997 that agreements mandating arbitration of statutory issues "are inconsistent with the civil rights laws" meant to protect employees from workplace discrimination.[108] Despite such pushes for the courts to not mandate arbitration for statutory employment issues, they continue to compel parties to arbitrate such claims.[109]

C. LACK OF FAIR AND IMPARTIAL REPRESENTATION

Another distinguishing factor between labor arbitration and employment arbitration is that, unlike unionized employees who receive union representation in arbitration proceedings, nonunionized employees who are compelled to submit grievances to employment arbitration do not receive guaranteed representation.[110] Instead of having representation provided for them as a part of their union

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102. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991). *But cf.* Alexander v. Gardner-Denver, 415 U.S. 36, 56 (1974), in which the court determined that a labor arbitrator could not interpret disputes about an employee's statutory disputes because the arbitration agreement granting the labor arbitrator authority to resolve disputes was limited to the terms of the collective bargaining agreement.

103. *See* Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc., 473 U.S. 614, 626-28 (1985).

104. *Id.*

105. *Id.* at 633-34.

106. *Id.*

107. *See* Green, *supra* note 51, at 209.

108. *Id.*

109. *Id.* at 210.

110. *See* Stipanowich, *supra* note 1, at 37-38.

membership fees, nonunionized employees essentially have two options when they submit their claims to arbitration: pay for legal representation or represent themselves.[111] Unless these employees have sufficient resources to obtain representation, they are stuck representing themselves against powerful, knowledgeable representation from the employer's legal department.[112] The attorneys representing the employer are often more experienced in the arbitration process than employees, who are generally one-time players in the arbitration system.[113] This disproportionate access to legal representation, just like unequal bargaining power when forming the employment contract, leads to an inherent bias against the disadvantaged employee, and heavily favors the intentions of the employer who probably chose to submit the issue to arbitration in the first place.[114] This bias significantly lowers the chances of an employee representing themselves in an arbitration winning their case.[115]

Proponents of employment arbitration may point out that this issue can also arise in litigation, where employees who cannot afford representation will have to represent themselves *pro se*.[116] However, unlike arbitration, a jury of peers provides a safeguard in litigation; this jury may be more sympathetic to employees and thus pass down more employee-friendly decisions.[117] Employers recognize the benefits that employees reap when they can share the costs of class action litigation, and therefore prefer to require employees to submit claims to arbitration.[118] Employers recognize that a class bringing a suit against the employer gives the plaintiffs an upper hand, because each individual employee is not required to individually bear the immense costs of the formal litigation process.[119] By requiring arbitration for disputes, and thus also barring class action disputes from employees, employers require their employees to lay the fate of their disputes—and often the fate of their continued employee-employer relationship—in the hands of an arbitrator who is supposed to be fair and impartial.[120]

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111. *See* David Horton & Andrea Cann Chandrasekher, *Employment Arbitration after the Revolution*, 65 DEPAUL L. REV. 457 (2016), for an empirical analysis of success rates of different types of representation in arbitration.

112. *See id*. at 484, which provides probabilities of an employee winning their arbitration case when up against a first-time employer representative and repeat-player representative.

113. *Id*.

114. *Id*.

115. *Id*. at 485. In this empirical analysis of arbitration success rates, the researchers found that only 7% of *pro se* employers saw arbitration decisions in favor of their case.

116. *Id*.

117. *See* LeRoy, *supra* note 7 (criticizing the Court's decision to uphold jury waivers in employment contracts despite employees' unequal bargaining power).

118. *See id*. for a discussion of jury trial waivers. *See also* Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1632 (2018). Here, the court upheld that arbitration agreements are an acceptable, effective way for employers to prevent employees from bringing class action disputes against the employer.

119. *See id*. at 1637 (Ginsburg, J., dissenting); Horton & Chandrasekher, *supra* note 111, at 466.

120. *See id*.

III. ANALYZING SOLUTIONS TO ARBITRATION ISSUES

For arbitration to continue to be a widely accepted, widely used alternative to litigation, the public needs to have faith that the arbitration process is just as legitimate and fair as if they submitted their claim to formal litigation.[121] Public trust and legitimacy of arbitration relies on two crucial characteristics: impartiality and independence.[122] An arbitrator must remain impartial to ensure the fair administration of justice to all parties involved in the arbitration matter.[123] The arbitration must also remain as independent as possible from the judiciary, as well as independent from any external forces that may improperly influence their ultimate decision-making.[124] These two characteristics rely on each other to ensure public trust in the arbitration process: an arbitrator must be impartial to ensure that the courts do not intervene in the arbitral proceeding.[125] Without impartiality and independence, the arbitration process fails to achieve its ultimate goal of administering fair and equitable justice.[126]

Moreover, impartiality is necessary because it ultimately ensures the independence of the arbitration system.[127] If arbitrators are perceived as partial or biased towards a certain party to the arbitration, any unfavorable decision will immediately be questioned by the losing party and parsed for potential bias, "corruption, fraud, or undue means" that impacted the arbitrator's decision.[128] One of the most appealing factors to supporters of arbitration is that its independence from the formal litigation process "conserv[es] the time and resources of the courts and contracting parties."[129] However, if parties feel any such distrust and suspicion in the arbitration process as it exists today, arbitration decisions will inevitably end up in court, which is exactly what arbitration exists to prevent: costly and time-consuming litigation.[130]

Ethical conduct from arbitrators is a crucial component to maintaining public trust in the process.[131] When questions regarding an arbitrator's impartiality arise during an arbitration proceeding, or as a result of a suspicious arbitration agreement, parties who feel cheated of justice because of a biased arbitrator may look to an investigation of the arbitrator's motives or underlying biases that resulted in

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121. *See* Maynard, *supra* note 71, at 210. *See also, generally,* Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897 (2019), which asserts that all adjudicators, not just judges in the formal litigation process, should be held to the same standard of fairness and impartiality.

122. *See* Al-Hawamdeh, Dabbas & Al-Shareriri, *supra* note 10, at 64.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 9 U.S.C. § 10 (2002).

129. Nationwide Gen. Ins. Co. v. Inv'rs Ins. Co. of Am., 37 N.Y.2d 91, 95 (1975).

130. *See id.*

131. *See* Maynard, *supra* note 71, at 210; Robert A. Holtzman, *The Role of Arbitrator Ethics*, 7 DEPAUL BUS. & COMM. L.J. 481, 483 (2009).

the unfair decision.[132] The normal course of action when questions of arbitrator partiality arise is to request judicial review of the opinion.[133] Courts, however, generally have a "hands off" approach, assuming that an arbitrator came to his or her decision in good faith, and "will strictly enforce arbitration agreements on the front-end of the arbitration process . . . afford[ing] a high degree of deference to the arbitrator's award at the back-end of the process."[134] Generally, it takes a blatantly wrong action by an arbitrator for the court to refuse to enforce the arbitration agreement or remand the case for re-arbitration, such as failing to "disclose a substantial personal or financial relationship with a party, a party's agent, or a party's attorney that a reasonable person would conclude was powerfully suggestive of bias" in the arbitrator.[135] Because courts are so deferential to arbitral decisions, an arbitrator's impartiality is mainly governed by social norms and expectations of proper conduct, rather than actual institutional accountability checks or sanctions processes like attorneys and judges are subjected to in instances of legal malpractice.[136] Although judicial deference should be the norm to help arbitration maintain its positive reputation, faith in the arbitration will dwindle if arbitrators are seen as biased and unfair.[137]

If the process of arbitration is to continue as a legitimate alternative to the formal adjudicatory process, the public needs to have confidence that participants in the arbitration process are acting fairly and properly carrying out their responsibilities.[138] The current system, in which arbitration is mostly checked by ever-changing social norms, is too unstable to ensure continued faith in the arbitration system.[139] There instead needs to be a reliable, solidly established system of accountability checks upon arbitrators to ensure consistent consequences to instances of partiality and bias.

This need for arbitral fairness is especially prevalent in the employment arbitration context. As long as the judiciary continues to hold an attitude of liberal judicial deference to employment arbitration in spite of the aforementioned policy concerns, there are going to be parties compelled to arbitrate disputes even when they did not *actually* voluntarily consent to the arbitration agreement contained in their employment contract.[140] Because so many employees today are subjected to

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132. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) ("a party 'aggrieved' by the failure of another party 'to arbitrate under a written agreement for arbitration' may petition a federal court 'for an order directing that such arbitration proceed in the manner provided for in such agreement.'").

133. *See id.*

134. Gregg Weiner, Christian Reigstad, & Dielai Yang, *Recent Rulings Reaffirm Courts' High Degree of Deference to Arbitration Process*, N.Y. LAW JOURNAL (Mar. 15, 2019), https://www.law.com/newyorklawjournal/2019/03/15/recent-rulings-reaffirm-courts-high-degree-of-deference-to-arbitration-process/ [https://perma.cc/ZQT4-F3D4] (last visited April 16, 2021).

135. Delaware Transit Corp. v. Amalgamated Transit Union Local 842, 34 A.3d 1064, 1072 (Del. 2011).

136. *See* Thomas W. Merrill, *supra* note 121, at 920.

137. *See* Holtzman, *supra* note 13, at 483.

138. *See id.*

139. *See* Merrill, *supra* note 121, at 920.

140. *See* Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1420 (2019) (Ginsburg, J., dissenting).

arbitration rather than the formal adjudicatory process,[141] employees need to be able to trust that submitting a claim to the arbitration process will lead to an administration of justice that is just as fair and impartial as if the claim were submitted to litigation.[142] If employment arbitration is not protected from bias, partiality and corruption, public trust in the fair and equitable administration of justice could dwindle in devastating proportions.[143] Since public trust is a crucial component of a properly functioning adjudicatory system, there need to be well-functioning, reliable checks in place to prevent any negative influences that inhibit the proper function of the arbitration process, without further involving the judicial branch.[144]

Judicial deference may not initially seem like the best approach to arbitration. It may seem that, by not stepping in when there are questions of bias, the court is not achieving its goal of administering fair and equal justice.[145] This issue is especially concerning in employment arbitration when it seems that an arbitrator is biased *against* an unrepresented employee with limited access to resources and biased *towards* the well-represented employer.[146] However, judicial deference is necessary in such instances to ensure that the arbitration process stays independent from the formal adjudicatory process.[147] It should not be the courts who have to decide whether or not the arbitrator "got it right" in arbitration.[148] Getting the courts involved to give the final say in the legitimacy of the arbitration process undermines the whole idea that the arbitration process be independent from formal adjudication.[149] Furthermore, since courts are already bogged down with an ever-increasing caseload despite increases in arbitration, those looking to reform arbitration should discourage further judicial intervention in the arbitration system, and instead explore options that avoid placing an even heavier burden on the courts.[150]

California's unsuccessful attempt to enforce a policy focused on preventing arbitral bias and partiality shows how judicial intervention in arbitral ethics investigations may not be the best policy.[151] California's Judicial Council, who is charged with the role of setting and administering policy for the state's judicial system,[152] acknowledged that the current system of accountability checks for

141. *See* Stipanowich, *supra* note 1, at 37.
142. *See* Holtzman, *supra* note 131, at 483.
143. *See id.*
144. *See* Maynard, *supra* note 71, at 210.
145. *See* Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).
146. *See id.* at 1420 (Ginsburg, J., dissenting).
147. *See* Al-Hawamdeh, Dabbas & Al-Sharariri, *supra* note 10, at 64.
148. *See id.*
149. *See id.*
150. *See* LeRoy, *supra* note 7, at 768.
151. *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Judicial Council 2021).
152. *Judicial Council*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA (2021), https://www.courts.ca.gov/policyadmin-jc.htm [https://perma.cc/WF7N-JBDQ](last visited April 16, 2021).

arbitrators is insufficient to eliminate bias.[153] To address partiality issues in California's arbitral process, the Judicial Council has taken matters into their own hands to promote impartiality and ensure fair access to equitable relief among all involved parties.[154] They established the Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("Ethics Standards") as a way to hold their arbitrators to higher standards.[155] These Ethics Standards set forth certain expectations of participants in the arbitration process, such as an arbitrator's disclosure of any relationship with a party which would cause bias.[156] However, California's judiciary is still hesitant to find that an arbitrator has violated the code of ethics and overturn an agreement for abuse of arbitral authority and has instead chosen to interpret the Judicial Council's Ethics Standards very narrowly to discipline only the worst, most obvious instances of partiality.[157] In *Shaffer v. Merrill Lynch*, for example, an arbitrator's decision was under investigation for using two privately hired research attorneys for the arbitration proceeding.[158] Even though the arbitrator didn't disclose the names of the attorneys to the parties in compliance with California's disclosure policy for arbitrators, the court determined that the arbitrator did not violate the Ethics Standards because the legal research conducted by the attorneys did not prejudice a specific party.[159] Rather, their research ensured that the arbitrator had a better understanding of the external law that applied to the case before him.[160]

Understandably, the court did not want to interpret the Ethics Standards so broadly as to discourage arbitrators from doing their jobs.[161] However, it misses the mark when it comes to ensuring arbitral independence.[162] By creating these standards, California has opened the door to even further judicial intervention into the arbitration process, since courts are now required to determine just how far these Ethics Standards can reach.[163] By following advice of the Judicial Council and their proposed legislation, rather than seeking advice from the arbitration associations themselves, California's legislature has taken away independence from the arbitration process.[164]

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153. *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Judicial Council 2021), for California's code of ethics for its arbitrators.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See* Shaffer v. Merrill Lynch, 779 F. Supp. 2d 1085, 1090 (N.D. Cal. 2011).

158. *Id.* at 1087-88.

159. *See id.* at 1090.

160. *See id.*

161. *See id.*

162. *See* Jay Folberg, *Arbitration Ethics-Is California the Future?,* 18 OHIO ST. J. ON DISP. RESOL. 343, 359 (2003), for a note on arbitration associations' criticism of California's Ethics Standards.

163. *See id.*

164. *See id.*

IV. EXPLORING POTENTIAL IMPROVEMENTS TO THE ARBITRATION ACCOUNTABILITY SYSTEM

If arbitration is to be as fully independent as possible, while also ensuring fair administration of justice, there needs to be another process to investigate ethical dilemmas within the arbitration process and provide people who feel cheated of justice to hold arbitrators accountable. The FAA has provided a solid foundation for preventing blatantly unfair arbitration agreements from being enforced against parties[165] and adequate mechanisms for vacating arbitration decisions that resulted from bias or corrupt practice.[166] However, since courts narrowly interpret circumstances that would result in overturning an agreement or decision, there needs to be another layer of protection implemented to prevent arbitral unfairness in less obvious instances of bias or corruption. One possible additional layer of protection is for the arbitration associations to provide a more structured and formalized accountability system for arbitrators. Doing so will also provide an extra layer of independence to the arbitration process, which is crucial to protecting the legitimacy of arbitration.[167]

The difficulty with creating new rules and policies for arbitration, however, is determining who is in the best position to enforce these rules against arbitrators.[168] Since arbitration is a private form of dispute resolution and is supposed to be mostly independent from judicial oversight, there is not one centralized law-making body responsible for regulating every aspect of the arbitration process.[169] Instead, there are two main routes by which rules can be implemented against arbitrators: through state or federal regulation, or through policies passed independently by a given arbitration association.[170]

When creating new policies for arbitrators, rule makers must find a way to enforce their policies while also ensuring that the arbitration process remains independent from the judicial branch.[171] For example, proposing new legislation may seem like the most consistent, authoritative method of ensuring arbitral impartiality.[172] But who would enforce the legislation? The same courts who show extreme deference to the arbitral process.[173] The best alternative to judicial intervention, therefore, is intervention by the arbitration associations, whose job is to oversee the arbitration process and ensure the legitimacy of this alternative

165. *See* 9 U.S.C. § 2 (1947).

166. *See* 9 U.S.C. § 10 (2002).

167. *See* Al-Hawamdeh, Dabbas & Al-Sharariri, *supra* note 10, at 64.

168. *See* Maynard, *supra* note 71, at 205.

169. *See id.*

170. *But see* Folberg, *supra* note 162, at 359, for a discussion of arbitration associations' critical reception of state and federal legislative reform of arbitration policies, as well as their unwillingness to create new rules that impose undue burden on arbitral independence.

171. *See* Al-Hawamdeh, Dabbas & Al-Sharariri, *supra* note 10, at 64.

172. *See* Folberg, *supra* note 162, at 353 ("Arbitrators argue that . . . if any regulation of provider organizations is necessary, it should come from the legislature.").

173. *See* LeRoy, *supra* note 7, at 778-79.

form of dispute resolution.[174] Rather than waiting for legislation or judicial intervention, the arbitration associations can independently provide a stronger system of accountability for employment arbitrators, independent of the judiciary.[175] Given that arbitration associations are generally governed by fellow arbitrators, or former arbitrators, they know best where to strike the proper balance when creating accountability checks that provide clear expectations from arbitrators, while not impeding on arbitral independence.[176] They should be held responsible for overseeing the arbitration process and ensuring that arbitrators and party representatives are fully and properly serving their roles to ensure proper justice is served.

Arbitration associations can provide guidance and prevent arbitral bias without involving the courts in investigations about an arbitrator's ethical issues.[177] By implementing stronger administrative investigations into questions of partiality, the associations can take the lead and do their part to ensure that these parties receive fair justice in the same way that parties to a formal adjudicatory system receive.[178] The National Academy of Arbitrators ("NAA"), for example, is a highly acclaimed group of labor arbitrators.[179] Not just any arbitrator can be a member of the NAA—membership is limited to the best and brightest labor arbitrators in the industry.[180] Recognizing the immense impact that arbitration has in today's adjudicatory system, as well as the need to hold their arbitrators to high standards, the NAA has implemented the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" ("Code") to hold their arbitrators accountable for any bias or partiality when making arbitration decisions.[181] This Code was developed by the NAA and details the "standards of professional behavior for arbitrators who are subject to its provisions" as part of their membership in the NAA.[182] The Code includes a mix of best practices and standards that comprise "the general expectations of the ethical arbitrator" from these institutions.[183] These expectations include disclosing any information that may result in a biased decision; obtaining consent to use assistants in the arbitration process; ensuring confidentiality, impartiality, and independence throughout the entirety

174. *See* Perry A. Zirkel & Peter D. Winebrake, *Legal Boundaries for Partiality and Misconduct of Labor Arbitrators*, 1992 DET. C.L. REV. 679, 707-09 (1992), for a critical analysis of courts' deferential attitude to issues of bias and misconduct in labor arbitrators as well as an argument in favor of arbitration associations implementing stricter rules to eliminate arbitral misconduct.

175. *See id*.

176. *See* Maynard, *supra* note 71, at 210-211.

177. *See* Zirkel & Winebrake, *supra* note 174, at 708-09.

178. *See id*.

179. *See* National Academy of Arbitrators, *Membership Guidelines* (2020).

180. *See id*.

181. *See* NATIONAL ACADEMY OF ARBITRATORS, AMERICAN ARBITRATION ASSOCIATION, FEDERAL MEDIATION AND CONCILIATION SERVICE, *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, p. 5 (2007).

182. *Id*. at 4.

183. Maynard, *supra* note 71, at 205.

of the arbitration process; and charging fair and proper fees for their services.[184] The American Arbitration Association and Federal Mediation and Conciliation Service, two other major arbitration associations, recognized the benefits of the NAA's efforts to prevent arbitral misconduct, and now also apply these same rules to members of their associations.[185]

While implementing this Code was a step in the right direction for these three associations, the Code still has its deficiencies that should be addressed to further prevent instances of bias and partiality.[186] For example, the Code declines to draw any "rigid lines of distinction" between what is actually an ethical rule and what is an example of best practices.[187] Instead, the Code "leaves the gravity of alleged misconduct and the extent to which ethical standards have been violated to be assessed in the light of the facts and circumstances of each particular case."[188] The accountability system as it currently exists in arbitration is not wholly sufficient to ensure that arbitrators are fair and impartial without judicial intervention.[189]

It makes sense that the Code's writers and editors did not want to set such rigid, authoritarian rules that may encroach on an arbitrator's autonomy to use their best judgment when electing to hear a case, during the arbitration proceeding, or while writing the decision for the case.[190] Arbitration associations do not want to create rules that unduly impose on the arbitrators' duties of independently delivering a decision on disputes before them.[191] However, it would be more beneficial to the arbitrators who are subjected to these rules and best practices if they had a more formal structure of sanctions or consequences that result from a certain impropriety.[192] A more structured code of conduct, like the sanctions process for attorneys and judges who break their state's code of professional responsibility and legal ethics, would present arbitrators with a clearer understanding of their expectations as arbitrators and what happens when a grievance is filed against them.[193]

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184. *Id.*

185. *Is there a Code of "Ethics" for arbitrators?*, UNIVERSITY OF MISSOURI SCHOOL OF LAW (Oct. 11, 2015), https://law.missouri.edu/arbitrationinfo/2015/10/11/is-there-a-code-of-ethics-for-arbitrators/ [https://perma.cc/6PCZ-D58Q] (last visited April 16, 2021).

186. *See* Zirkel & Winebrake, *supra* note 174, at 708-9 (1992).

187. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 181, at 5.

188. *Id.*

189. *See* Zirkel & Winebrake, *supra* note 174, at 708-9 (1992).

190. *See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 181, at 5.

191. *See id.*

192. *See* Zirkel & Winebrake, *supra* note 174, at 708-9 (1992).

193. *See generally* MODEL CODE OF JUDICIAL CONDUCT (2020) (judges); MODEL RULES OF PROFESSIONAL CONDUCT (2009) [hereinafter MODEL CODE] (lawyers).

While it is admirable that these arbitration associations have decided together to apply the same code of ethics to all of their members,[194] perhaps the best way to approach a solution to the issue of arbitral fairness should be tailored to individual associations. For example, in the issues presented here, the best way to ensure fairness in arbitration that affects people nationwide is by focusing on the arbitration association that is nationally recognized and has the most profound impact on the arbitration process. Of the three arbitration associations who apply the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, the American Arbitration Association ("AAA") is the most highly regarded association on a national level.[195] The AAA does not have a structured form of a sanctions process for arbitrators who breach their professional responsibility expectations. [196] Rather, the AAA prefers to make determinations for disciplinary action on a case-by-case basis, depending on the specific facts surrounding the unethical practice in question.[197] Furthermore, there is no real progressive discipline process for arbitrators who commit unethical practices—the options for disciplinary actions are essentially no discipline, disqualification from hearing a certain case, or removal of the arbitrator's name from the AAA roster.[198]

While the current method of disciplinary action is a step in the right direction, this minimalist approach to disciplinary action may actually do more harm that it first appears. Arbitrator disqualification from hearing a case *does* prevent unfair arbitration procedures when an instance of bias is apparent, such as an arbitrator's personal relationship with a party or when the arbitrator has a personal or financial interest in a certain outcome.[199] To truly combat issues of bias, however, there need to be more sanctions available for the AAA to choose to impose for instances of bias that are not so blatant and abhorrent that an arbitrator should be removed from the roster.[200] For example, look at the sanctions available for state bars when lawyers breach their ethical duty to their client.[201] There *is* always the option to completely disbar an attorney who has committed an act so egregious that it ruins trust that the attorney will be able to commit their job competently and adequately in the interests of their client.[202] However, there are also several

194. *See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 181, at 5.

195. *See* Lindsey Rubinstein, *Solving the Problem-Solver Problem: How A Revamp of Arbitral Ethics Will Encourage Plaintiffs and Benefit Defendants*, 20 CARDOZO J. CONFLICT RESOL. 647, 649 (2019).

196. *See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 181, at 5.

197. *See id.*

198. *See* AMERICAN ARBITRATION ASSOCIATION, *Employment Arbitration Rules and Mediation Procedures* 6, 17-18 (2009).

199. *See id.* at 17.

200. *See id.*

201. *See generally* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 (2002).

202. *See id.* at 10(a)(1).

other disciplinary misconduct: probation, suspension, or reprimand.[203] This progressive discipline allows different bars' disciplinary boards to impose different punishments on the attorney committing an unethical act without simply banning him or her from ever practicing law again.[204]

A wider variety of disciplinary options also provide the opportunity for reprimanding smaller indiscretions, making it clear to attorneys that all forms of misconduct, not just the most egregious unethical conduct, will be punished.[205] It also reassures clients that they can trust that their attorney will exercise the utmost care in handling the client's matter.[206] Initiating a similar system of sanctions for arbitrators to ensure they do not breach their duty to be impartial and independent could similarly solidify public trust in the arbitrators.[207] Having a clearly articulated disciplinary process with distinct steps and multiple disciplinary options may also provide a greater peace of mind for parties to an arbitration conducted by an AAA arbitrator. By knowing their arbitrator will be subject to a disciplinary violation proportional to the arbitrator's misconduct, these parties can be assured that their arbitrators will exercise their utmost care to remain impartial and unbiased in their decision-making process.[208] It would also provide arbitrators with a clearer explanation of the AAA's expectations of arbitral conduct, as well as the AAA's course of disciplinary action when the arbitrator is found guilty of bias or misconduct. Furthermore, by taking on the responsibility of issuing sanctions, the AAA would be able to independently resolve unfair arbitration practices without having to involve the judicial system. Stronger self-governance also allows arbitration to further distance itself from judicial intervention, thereby strengthening its independence from the court.[209]

Critics of implementing such a sanction system may argue that the AAA's close monitoring process might prevent arbitrators from independently using their best judgment to determine the outcome of a case.[210] However, it seems like such a process will actually result in a *better*, more cautious judgment process from the arbitrators, as they will ensure that their decisions are free from any bias or partiality that would prevent fair and equitable administration of justice, while also keeping unnecessary arbitration award review out of the judiciary.[211] Also, with the ever-expanding use of arbitration in lieu of formal litigation, there is more at stake if an arbitrator makes a somewhat questionable determination when deciding a case.[212] While it is desirable that arbitrators feel they can use their own

203. *Id.* at 10(a).
204. *Id.*
205. *See id.*
206. *See* MODEL RULES pmbl.; MODEL RULES scope.
207. Maynard, *supra* note 71, at 210.
208. *See id.*
209. *See* Al-Hawamdeh, Dabbas & Al-Sharariri, *supra* note 10, at 64.
210. *See id.*
211. *See* Nationwide Gen. Ins. Co. v. Invs Ins. Co. of Am., 37 N.Y.2d 91, 95 (1975).
212. *See* Folberg, *supra* note 5, at 5.

judgment when hearing and deciding a case, there is also a high concern about protecting the rights of individuals subjected to mandatory arbitration.[213] If the courts are going to continue compelling arbitration in cases where both parties did not have equal bargaining power, or where one party did not actually voluntarily consent to submitting their claims to arbitration, the next step to prevent injustice is to ensure that the arbitrators are making their decisions free of any undue influence.[214]

CONCLUSION

Arbitration allows parties to resolve disputes in a cheaper, faster process that has made it a popular alternative to the formal litigation process.[215] While arbitration has appealing characteristics that make it a favorable dispute resolution mechanism, there are still kinks that must be worked out in the arbitration process to ensure that everyone exposed to the arbitration process has fair and equal access to justice. This assurance of fairness is especially important in the field of employment arbitration, where employees are often forced to sign mandatory arbitration agreements as a condition of employment because their employers prefer arbitration over lengthy, expensive class action litigation or a never-ending caseload of individual employment claims.[216] To ensure that the rights of individuals forced into arbitration agreements as a result of unequal bargaining power are protected, arbitration associations should consider restructuring the accountability system for their arbitrators. Doing so can further prevent impartiality or unfair arbitral practices from arbitrators, and allows each party submitted to arbitration to feel like they truly have their "day in court" to make their case in front of an unbiased, impartial arbitrator.[217] By assuaging any negative attitudes or perceptions of the arbitration process by holding arbitrators to higher standards of professional responsibility, the arbitration associations can perpetuate public trust in the arbitration process, and in the individuals that they believe are capable of deciding cases.

213. *See* Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1421-22 (2019) (Ginsburg, J., dissenting).
214. *See id.*
215. *See* Stipanowich, *supra* note 1, at 4.
216. *See Lamps Plus*, 139 S.Ct. at 1421-22 (Ginsburg, J. dissenting).
217. *See Stipanowich, supra* note 1, at 38-39.