Arbitration Agreements and the Enforcement of Federal Labor Laws

INTRODUCTION

Each year, droves of employees file claims in state or federal court to challenge workplace discrimination, suppression of union activity, and wage theft. The federal laws that underlie these claims were designed to curb the control that employers have traditionally exercised over their employees, so it is ironic that many claimants are ultimately turned away by courts, learning for the first time that, as a condition of their employment, they agreed to arbitrate all employment-related disputes before an informal tribunal rather than litigating those claims in court.[1] Employees frequently fight to stay in court, but few win.[2]

Mandatory arbitration agreements, which now affect more than half of U.S. workers, stymie the effective enforcement of labor protection laws by giving employers control over how those laws are enforced. Employers can, and often do, use these agreements to preclude "collective judicial and arbitral proceedings of any kind."[3] "By reducing the unit to an individual," these employers effectively "diffuse[] and dissolve[]" disputes such that the result is "no process."[4] Few employees file claims, even though "violations of basic workplace laws are everyday

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[1] *See, e.g.,* Douglas v. Pflueger Hawaii, Inc., 135 P.3d 129, 141 (Haw. 2006) ("Douglass argues that he could not have known about the purported arbitration agreement"). *See also*, Campbell v. General Dynamics Government Systems Corp, 407 F.3d 546, 559 (1st Cir. 2005). ("[The employer] has not supplied any evidence to contradict the plaintiff's claim that he never read or saw the brochure, the handbook, or the [arbitration agreement] Policy prior to his termination.")

[2] *See generally*, Jay Zhang, *All for One and One for All: The Case for Invalidating Collective Action Arbitration Waivers Under Section 7 of the NLRA*, 55 HOUS. L. REV. 1027 (2018). *See, e.g.,* Britto v. Prospect Chartercare SJHSRI, LLC, 909 F.3d 506, 513 (1st Cir. 2018). *See also*, Soto v. State Industrial Products, Inc., 642 F.3d 67 (1st Cir. 2011). *See also*, Tenet Healthcare v. Cooper, 960 S.W.2d 386 (Ct. App. Tex. 1998).

[3] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

[4] Judith Resnick, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and The Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1051 (2017).

occurrences."[5] Moreover, employers can hire arbitration firms whose informal proceedings ultimately make it difficult for employees to gather and present meaningful evidence. So, by controlling the enforcement of federal labor laws, employers can often escape punishment for their abusive behaviors and thus exert greater control over employees in the workplace.

On the basis of these enforcement issues, labor advocates have argued that mandatory arbitration agreements should not be enforceable in the employment context. Most notably, in Epic Systems v. Lewis, the plaintiff-employees challenged the frequent inclusion of class action waivers in arbitration agreements as violative of the National Labor Relations Act (NLRA).[6] The employees argued the class action process was essential to the protection of employee rights and that the NLRA, in creating a general right to collective action, endorsed the premise that only the workforce as a whole could contend with employer power.[7] Thus, the employees proffered, the NLRA's protections extended beyond the context of collective bargaining to the litigation of employee complaints. [8]

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[5] Janice R. Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 552 (2010).
[6] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018).
[7] *Id.* at 1625. ("Seeking to demonstrate an irreconcilable statutory conflict . . . the employees point to Section 7 of the NLRA. That provision guarantees workers 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' 29 U.S.C. § 157. From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs").
[8] *Id*. ("The employees direct our attention to the term [in the NLRA] "other concerted activities for the purpose of . . . other mutual aid or protection.' This catchall term, they say, can be read to include class and collective legal actions" (modification in original)).

Notwithstanding the merits of the plaintiff-employees' arguments in *Epic Systems*, the Supreme Court held that the Federal Arbitration Act (FAA) precluded a finding for the employees.[9] The FAA, passed in 1925, requires courts to treat arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] The Court interpreted this latter clause, known as the "savings clause," to mean that arbitration agreements cannot be attacked as unconscionable or illegal simply because they are arbitration agreements or because they waive class proceedings.[11] Rather, to invalidate an arbitration agreement, one would have to point to particular flaws in the formation or substance of the agreement that could apply to any contract, such as a lack of consideration or mutual assent.[12]

The holding in *Epic Systems* has placed employees in a double bind. On the one hand, arbitration agreements and class action waivers prevent employees from enforcing their rights and thus allow employers to exert unfettered control in the workplace. On the other hand, arbitration agreements can only be invalidated upon traditional contract grounds; but, as will be discussed below, traditional contract grounds have long failed to prevent employers from unilaterally imposing unwanted contracts on their employees, largely because of how courts have interpreted the common law doctrine of at-will employment. In fact, it was this very inability of contract law to protect employees from one-sided, perhaps even unconscionable, contracts that inspired Congress to pass federal labor laws in the first place.

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[9] *Id.* at 1623 (holding that individual proceedings are a fundamental attribute of arbitration and that, as such, arbitration agreements cannot be invalidated on the ground that they prohibit class process).
[10] 9 U.S.C. § 2.
[11] *Epic Systems*, 138 S.Ct. at 1623.
[12] *Id.* at 1622 ("The [savings] clause 'permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (quoting AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339 (2011)).

To regain some level of control over their employment relationships, workers must somehow break this cycle. The last section of this paper examines what employee-friendly courts have tried to do to protect employees from unwanted arbitration agreements while remaining within the bounds of traditional contract law and the Supreme Court's FAA precedent. Namely, some courts have adopted a creative interpretation of at-will employment that has allowed them to provide employees with some measure of control over whether or not to enter into arbitration agreements. However, as I will show, this doctrine is only applicable in a limited set of factual scenarios, which employers can largely work around. In other words, even in the most employee-friendly jurisdictions, employers can effectively guarantee that all of their employees have submitted to arbitration agreements. The result is that employers, not the federal government, control the enforcement of federal labor laws. I therefore suggest that Congress take legislative action to restore its rightful role in enforcing workers' rights.

I. EMPLOYMENT CONTRACTS: THE AT-WILL DOCTRINE AND FEDERAL LABOR LAWS

By their stated terms, the traditional contract principles of mutual assent, good faith dealing, and the exchange of adequate consideration would seem to protect employees from unwanted—and certainly from unknown—contractual provisions, including arbitration agreements. On the contrary, this Part will show how the application of contract law to the employment context has exacerbated rather than remedied the inherent power imbalances that plague employee-employer relationships. I begin this Part by discussing how the rule of at-will employment shapes the interpretation of employment contracts, then discuss how this interpretation interacts with existing power imbalances to render employees vulnerable to unwanted contractual provisions. Finally, I describe the way that federal labor laws were used to address the problems raised by the at-will doctrine.

a. The Traditional Interpretation of Employment Contracts Under the At-Will Rule

Employment relationships are, fundamentally, contractual. However, interpretation of these contracts has long been subject not just to traditional contract principles but also to the common law presumption that, unless otherwise specified, all employment contracts are for "at will" employment. Most famously, this doctrine provides that both employer and employee can terminate the employment relationship "at will . . . for good cause, no cause or even for cause morally wrong, without thereby being guilty of legal wrong,"[13] thus providing flexibility to both parties in deciding with whom to have an employment relationship. But, just as importantly, the at-will employment doctrine governs the workings of the employment relationship while it is still intact, again with the goal of providing flexibility to the parties. The idea is to make the employment relationship easy to modify, thus accommodating employers' needs to react to changing markets and employees' needs to react to changing life circumstances; if employer and employee had to undergo traditional contractual negotiations every time market prices fluctuated, a new technology came onto the market, or an employee needed to change their work hours, enormous inefficiencies would be introduced into the employment relationship that could ultimately be a detriment to both parties.[14]

Crucially, the at-will doctrine does not create its own set of contractual rules to achieve ease of modification. Rather, ease of modification flows directly from the fact that employer and employee can terminate the relationship at will. The *Demasse* court explains this traditional

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[13] Paul C. Weiler, Governing The Workplace: The Future of Labor And Employment Law 48 (1st ed. 1990) (alteration in original) (internal quotation markets omitted) (citation omitted).
[14] *Id.*

approach well, though ultimately the scenario in that case was more complex. As the court describes it, the at-will rule allows either party to terminate the relationship at any time because the contract is, essentially, a series of one-day contracts, each contract consisting of "a day's work for a day's wages."[15] Each contract begins with the "employer's [unilateral] offer of a wage in exchange for work performed[, and] subsequent performance by the employee provides consideration to create the contract."[16] Thus, "[a]s a practical matter[,] every day is a new day for both employer and employee in an at-will relationship . . . [There] is no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to 'day one.'"[17] So, when one party decides to terminate the employment relationship, that party merely declines to renew the contract for another day.

This interpretation of at-will employment has direct implications for how courts interpret the valid "modification" of such a contract. In typical contractual relationships, "[o]nce an employment contract is formed – whether the method of formation was unilateral, bilateral, express, or implied – a party may no longer unilaterally modify the terms of that relationship."[18] However, by viewing at-will employment as a series of one-day contracts, employers can unilaterally offer a different wage, different work hours, or different conditions of employment, and the employee "accepts" by performing the assigned labor. In other words, the contract has not so much been modified, as an entirely new contract has been offered and accepted; it is the "same

[15] Demasse v. ITT Corp., 984 P.2d 1138, 1143 (Ariz. 1999) (en banc).
[16] *Id.*
[17] Copeco, Inc. v. Caley, 632 N.E.2d 1299, 1301 (1992).
[18] *Demasse*, 984 P.2d at 1144.

as new employment."[19] Thus, "whatever may have been the employment arrangement before, it [is] succeeded and superseded by the [new] contract."[20]

The result of this analysis is that employers can present "modifications" of the at-will employment contract, and the "new" employment will constitute both consideration and consent, despite the fact that, under traditional contract law doctrine, any modification of a contract "must rest upon a new and independent consideration."[21] Thus, the modification process merely consists of the employer announcing a new policy. As the *Hathaway* court describes, "[g]enerally, when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law."[22] Such modifications might include the introduction of a non-compete clause,[23] reduction of an employee's commission rate,[24] a salary change, changes to employee benefits, a reduction or increase in hours worked, or, as contemplated by this paper, introduction of an arbitration agreement. The fact that these changes may be materially worse than those an employee previously enjoyed will not undermine a finding of adequate consideration. In the courts' eyes, the "the hiring itself . . . [is] sufficient consideration," even when the "hiring" is a "rehiring."[25] After all, employers are "under no . . . obligation to continue or renew the employment."[26]

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[19] Higdon Food Service, Inc. v. Walker, 641 S.W.2d 750, 751 (Ky. 1982).
[20] *Id.*
[21] Levine v. Blumenthal, 186 A. 457, 458 (N.J. 1936).
[22] Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986).
[23] *See, e.g.*, Symphony Diagnostic Services No. 1 Inc. v. Greenbaum, 828 F.3d 643 (8th Cir. 2016) (holding that, under Missouri law, non-compete agreements are enforceable against at-will employees without their consent).
[24] *See Hathaway*, 711 S.W.2d at 227.
[25] *Higdon Food Service*, 641 S.W.2d at 751.
[26] *Id.*

Presumably, the at-will arrangement is also meant to bestow flexibility on employees, who can terminate their employment at any time and theoretically make demands for different wages, benefits, or working conditions in exchange for their continued labor.[27] However, as will be discussed below, employees have not traditionally enjoyed the same flexibility under the at-will rule as employers have, necessitating the enactment of federal labor laws in order to put employers and employees on equal footing.

b. THE NLRA AND ANTI-DISCRIMINATION LAWS AS A RESPONSE TO THE TRADITIONAL INTERPRETATION OF EMPLOYMENT CONTRACTS

Formally, the at-will employment regime endows employers and employees with equal authority to terminate or modify the nature of the employment relationship.[28] However, in 1935, Congress formally recognized through the NLRA what labor advocates had long known: that employees did "not possess full freedom of association or actual liberty of contract" due to "[t]he inequality of bargaining power between employees . . . and employers . . . ."[29] Simply put, at-will employment could not provide workers with flexibility because they relied on their jobs for their very survival, but employers did not similarly rely on any given employee. Employers could therefore reject employee demands for higher wages or safer conditions, knowing employees likely would not quit.[30] By contrast, at-will employment *did* provide flexibility to employers, who could risk losing any given employee as the result of a new policy. Additionally, employers knew that

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[27] Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 108 (1997).
[28] *See* Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1633-34 (2018) (Ginsburg, J., dissenting).
[29] 29 U.S.C. § 151.
[30] *Epic Systems*, 138 S.Ct. at 1634 (Ginsburg, J., dissenting).

few employees would actually exercise their right to quit, artificially increasing employer flexibility beyond that which the at-will rule was meant to protect.[31]

As the first major labor law, the NLRA sought to address the inequity of the at-will rule by guaranteeing employees' rights to bargain collectively, form unions, strike, and "engag[e] in other concerted activities for the purpose of . . . mutual aid or protection." In so doing, the NLRA made employers vulnerable to the sudden loss of their entire workforce, thus incentivizing employers to take employee demands more seriously and to forgo the imposition of unreasonable contract terms. The NLRA therefore reduced employer flexibility and increased employee flexibility. Notably, though, the protection of collective action did not fundamentally change the at-will doctrine or its interpretation. It merely sought to improve employee standing under that doctrine.

The NLRA *did* include an additional provision, however, that significantly impacted the applicability of the at-will doctrine in unionized workplaces. That provision, the "obligation to bargain collectively," required employers to negotiate in good faith with union representatives. This requirement barred employers from "unilaterally impos[ing] changes in the terms and conditions of employment" before reaching a final agreement with the union or a legitimate "bargaining impasse."[32] The NLRA therefore restricted the extent to which continued employment could constitute an employee's assent to new contractual terms. Furthermore, in creating an obligation to negotiate in good faith, the NLRA forced employers to engage with employees' counter-demands, thus undermining the assumption that continued employment was, in itself, sufficient consideration. The NLRA therefore sought to disrupt a main source of employer control: the right under the at-will doctrine to unilaterally impose new contractual terms.

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[31] *See id.*

[32] Wayneview Care Center v. N.L.R.B., 664 F.3d 341, 348 (D.C. Cir. 2011) (quoting TruServ Corp. v. NLRB, 254 F.3d 1105, 1113 (D.C. Cir. 2001)) (modification not in original).

Congress further curbed employer flexibility under the at-will doctrine by providing employees with a number of protections against discrimination. Rather than giving employees greater bargaining power, these protections explicitly altered the substantive terms of at-will employment contracts. Specifically, Congress passed Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination and Employment Act (ADEA), which collectively prohibited employers from terminating or discriminating against applicants and employees on the basis of race, color, sex, religion, nationality, disability, or age. The most obvious effect of these laws on the at-will relationship was that they restricted the reasons for which an employer could terminate or refuse to hire an employee, thereby decreasing employer control over with whom to have an employment relationship. Additionally, the anti-retaliation provisions in these laws provided employees with protection from termination for asserting their other rights under these laws.

Anti-discrimination laws also restricted employers' control over the employment relationship and the workplace. For instance, the ADA empowered disabled employees to seek workplace accommodations and required employers to grant those accommodations when reasonable.[33] This provision marked a dramatic shift from the pure at-will doctrine, under which employers could offer employment on whatever terms they deemed fit. Similarly, anti-discrimination laws allowed employees to demand that employers address instances of workplace harassment and remedy workplace policies that had a disparate impact on a protected group. If the employer failed to take reasonable steps, the employee could bring a hostile work environment

[33] *See* E.E.O.C. v. Chevron Phillips Chemical Co., LP, 570 F.3d 606, 622 (5th Cir. 2009) ("Under the ADA, once the employee presents a request for an accommodation, the employer is required to engage in [an] interactive process to that *together* they can determine what reasonable accommodations might be available").

claim or a disparate impact claim, respectively. For example, in Sheriff v. Midwest Health Partners, the plaintiff complained to her employer several times about sexual harassment by a colleague.[34] Under a pure version of the at-will doctrine, the employer could have rejected Sheriff's requests to do something about the situation; by continuing to show up for work, Sheriff would have agreed to whatever terms the employer offered. Yet, under Title VII, the employer was required to take steps to end the harassment, and its failure to do so resulted in a judgment for Sheriff.[35]

Together, these federal labor laws have created a number of restrictions on the at-will doctrine, in each case seeking to curb employers' control over employees. The efficacy of these laws, however, depends on their effective enforcement, as will be discussed below.

II. THE EXPANSION OF EMPLOYER CONTROL: ARBITRATION AGREEMENTS AND THE FEDERAL ARBITRATION ACT

Despite the admirable substance of the statutes described in Part I, "violations of basic workplace laws are everyday occurrences,"[36] especially for low-wage workers. As Janice R. Fine and Jennifer Gordon describe, the current enforcement of these statutes relies on employee complaints, not affirmative investigations by federal agencies, but many employees cannot risk the chance that they will be terminated in retaliation for filing suit; even though anti-discrimination laws make retaliation illegal, employers and employees both know that litigation can take months or years, while the negative consequences of termination are immediate.[37] Moreover, low-wage

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[34] 619 F.3d 923, 927 (8th Cir. 2010).
[35] *Sheriff*, 619 F.3d at 930-33.
[36] Janice R. Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 552 (2010).
[37] *Id.*

employees are more likely to have low-value claims because certain monetary damages, like backpay, are tied to an employee's income.[38] As a result, the most desperate employees are the least likely to complain about workplace abuses.[39] For the same reason, they are also the most likely to be abused.[40]

Class action litigation can help mitigate these barriers to litigation and can further deter labor violations by imposing more meaningful penalties on employers. Unfortunately, "to block such concerted action . . . employers [increasingly] require[] [their employees] to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind."[41] And, "[d]espite the heralding of arbitration as a speedy and effective alternative to courts,"[42] these arbitration agreements actually place control of the employment relationship back in the hands of employers; "[b]y reducing the unit to an individual," arbitration greatly diminishes the chances that an employee will complain and, if they complain, that they will succeed on the merits of their case.[43] Thus, to the extent that the law gives employers the authority to impose such agreements on employees, employers can effectively manipulate labor law enforcement to increase their own control over workplace relationships. In this Part, I will discuss

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[38] *See* Jordan Laris Cohen, *Democratizing the FLSA Injunction: Toward a Systemic Remedy for Wage Theft*, 127 YALE L.J. 706, 735 (2018) ("[T]he [Fair Labor Standards Act] 'systematically tends to generate low-value claims' due to the low-income nature of those covered by the statute.") (quoting J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1184 (2012)).
[39] Janice R. Fine & Jennifer Gordon, *supra* note 27, at 556.
[40] *Id*.
[41] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).
[42] Judith Resnick, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and The Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1051 (2017).
[43] *Id.*

the Supreme Court's interpretation of the Federal Arbitration Act (FAA) and how that interpretation has so far supported the enforceability of arbitration agreements.

a. THE SUPREME COURT'S INTERPRETATION OF THE FEDERAL ARBITRATION ACT

The FAA, passed in 1925, requires courts to treat arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[44] Congress enacted this statute primarily because "courts were unduly hostile to arbitration,"[45] even when parties had legitimately contracted to resolve their disputes by arbitration. In the courts' view, arbitration could not properly protect the interests of aggrieved parties, so they often refused to enforce such agreements. "But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved."[46]

Until the 1980s, the FAA was a relatively obscure statute. Then, in 1983, "the [Supreme] Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a 'liberal federal policy favoring arbitration.'"[47] Because of this "favored place,"[48] the Court announced "a presumption of arbitrability in the sense that '[a]n 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.'"[49] The Court also held in the

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[44] 9 U.S.C. § 2.
[45] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1621 (2018).
[46] *Id.*
[47] *Id.* at 1644 (Ginsburg, J., dissenting) (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).
[48] Douglas v. Pflueger Hawaii, Inc., 135 P.3d 129, 141 (Haw. 2006)
[49] AT & T Technologies, Inc. v. Communications Workers of America, et al, 475 U.S. 643, 650 (1986) (quoting United Steelworkers of America v. Warrior & Gulf Nav. Co 363 U.S. 574, 582–83 (1960)) (modification in original).

1980s that the FAA applied to agreements to arbitrate statutory claims, not just contractual claims.[50] This last holding opened up the possibility that disputes arising under federal labor laws would be subject to arbitration. However, the presumption of arbitrability did not apply to statutory claims, such that courts would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking [was] explicitly stated."[51]

These holdings led to the proliferation of arbitration agreements in the employment context, as employers realized that arbitration would allow them to design enforcement proceedings to their own benefit. In turn, labor advocates made their first attempts to argue that such agreements were unenforceable against employees. As a preconditional matter, the plaintiffs in Circuit City Stores, Inc. v. Adams contended that the FAA exempted employment contracts altogether, but the Supreme Court rejected that argument.[52] Though "the chairman of the ABA committee that drafted the legislation emphasized at a Senate Judiciary Subcommittee hearing that '[i]t is not intended that this shall be an act referring to labor disputes, at all,'" [53] the court focused instead on the actual text of Section 1, which excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[54] The Court held that the enumeration of several specific types of employees and "workers," foreclosed the possibility that the FAA was meant to exempt the contracts of all employees.[55]

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[50] *Epic Systems*, 138 S.Ct. 1612 at 1644 (Ginsburg, J., dissenting) ("[T]he Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well.")
[51] Wright v. Universal Maritime Service Corporation, 525 U.S. 70 (1998).
[52] 532 U.S. 105, 113 (2001) (reasoning that, if all employment contracts were excluded from the FAA's coverage, the exclusion of certain workers in § 1 of the Act would be superfluous).
[53] *Id.* at 1315.
[54] 9 U.S.C. § 1.
[55] *Circuit City*, 532 U.S. at 113 (reasoning that, if Congress had meant to exclude all employees from the FAA, it would not have enumerated specific categories of exempted workers).

Then, noting that the Supreme Court's expansive reading of the Commerce Clause post-dated the FAA, the Court held that the term "interstate commerce" in the FAA must be given a narrow meaning.[56]

Having lost at this initial stage, labor advocates turned to the FAA's savings clause, which stipulates that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[57] Drawing on this language, the plaintiffs in Epic Systems Corp. v. Lewis used the traditional contract defense of illegality to argue that class action waivers were unenforceable in the employment context.[58] Specifically, the plaintiffs contended that collective action was necessary to the effective enforcement of employee rights, and the NLRA, in creating a broad right to collective action, endorsed that premise. Thus, the employees proffered, the NLRA's protections extended beyond the context of collective bargaining to the litigation of employee complaints.

The Court ultimately rejected the idea that the NLRA protected such a right; but, even accepting the notion for the sake of argument, the Court held that the savings clause did not embrace "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," including defenses that target "fundamental attributes of arbitration."[59] Individual proceedings were, according to the Court, such a "fundamental attribute,"[60] so employees could not attack arbitration agreements on the basis that they included

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[56] *Id.* at 117 ("The Court has declined in past cases to afford significance, in construing the meaning of the statutory jurisdictional provisions 'in commerce' and 'engaged in commerce,' to the circumstance that the statute predated shifts in the Court's Commerce Clause cases.")
[57] 9 U.S.C. § 2.
[58] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting) ("At issues is [the] application of the ordinarily superseding rule that illegal promises will not be enforced" (internal quotation marks omitted)).
[59] *Id.* at 1622 (quoting AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339 (2011)).
[60] *Id.* (quoting *Concepcion*, 563 U.S. at 339).

class waivers, even if employees couched those arguments in the language of traditional contract law. In other words, advocates could use the concepts of unconscionability or illegality to invalidate *particular* arbitration agreements but not to invalidate all arbitration agreements in the employment context, even if they could show that arbitration agreements systematically disadvantaged employees.

The holdings in *Epic Systems*, *Concepcion*, and *Circuit City* together foreclose any wholesale invalidation of mandatory arbitration agreements in the employment context. Instead, employees who wish to invalidate their agreements must do so on an individual basis—they must admit that arbitration agreements are *generally* enforceable but challenge enforceability in their particular case. For most employees, that means arguing that they never validly entered into the agreement in the first place, which, in light of the at-will doctrine, can be an extremely hard claim to make.

III. INVALIDATING ARBITRATION AGREEMENTS UNDER TRADITIONAL CONTRACT LAW

According to the Supreme Court's FAA jurisprudence, employees can invalidate their arbitration agreements only by relying on a "generally applicable contract defense."[61] For at-will employees, this doctrine potentially creates a double bind, given that courts have traditionally given employers broad discretion to impose unwanted contracts on their employees, as described in Part I. In this Part, I show that, under the traditional at-will doctrine, there is simply no room for courts to find "fraud," "duress," "or unconscionability," except in the most extreme cases, effectively giving employees no room to reject arbitration agreements. I will then present an alternative interpretation of the at-will rule, which many courts have used to give employees some

[61] *Epic Systems*, 138 S.Ct. 1612 at 1132.

measure of control over whether or not to enter into such agreements. But, as I will show, even this approach is limited in what it can do, especially when an arbitration agreement is presented at the start of employment rather than mid-employment. The result is that, even in the most employer-friendly states, any given employer can affirmatively guarantee that all of its employees will be subject to arbitration agreements, essentially allowing the employer to exempt itself from federal labor law.

a. TWO APPROACHES TO INTERPRETING ARBITRATION AGREEMENTS

"When deciding whether . . . parties have agreed to arbitrate," courts apply "ordinary state law principles that govern the formation of contracts."[62] Though presumably "[t]he basic principles of contract formation at issue . . . (e.g., meeting of the minds, adequate consideration) do not vary from state to state,"[63] states have, in reality, approached the issues of consideration and consent very differently in their analyses of arbitration agreements. The first of the two approaches relies on the traditional view of at-will employment contracts, introduced in Part I, which endorses the view that continued employment constitutes both consideration and consent.[64] The second approach, which tends to give employees greater control over whether or not to enter into arbitration agreements, relies on an understanding of at-will contracts as contracts of "indefinite length" rather than a series of single-day contracts. The result of this slight shift in language is that "modifications" of the contract are *actually* modifications, which must be "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."[65] Such

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[62] Phox v. Atriums Management Co., Inc., 230 F.Supp.2d 1279, 1282 (D. Kan. 2002).
[63] *Id.* (citations omitted).
[64] *See, e.g.,* Aldrich v. University of Phoenix, Inc., 661 Fed.Appx. 384, 390 (6th Cir. 2016) (referring to an arbitration agreement, the court reasoned that "plaintiffs' continued acceptance of at will employment constitutes consideration under Kentucky law.")
[65] Restatement (2d) Contracts § 89.

unanticipated circumstances might include, say, changes in the market, which could justify a reduction in an employee's wages. But any contractual change *not* justified by unanticipated circumstances would, per general contract principles, have to be contained in subsequent contracts supported by new consideration and consent.[66] Because arbitration agreements fall under this latter category, courts that adopt the "indefinite length" view of at-will employment treat arbitration agreements as freestanding contracts that must be supported by independent consideration and consent.

To illustrate how these two different approaches impact courts' analyses of arbitration agreements, I will present several fact patterns in turn, in each case showing how the two sets of courts approach these situations differently. Under the first fact pattern, an at-will employee is presented with an arbitration agreement mid-employment. She has actual notice of the terms of the arbitration agreement, and she must sign that agreement to manifest her assent. The agreement states the continued employment is consideration to support the contract. Additionally, the arbitration agreement is written such that the parties are mutually bound to arbitrate claims arising during the time for which the arbitration agreement is in effect.

This fact pattern describes Soto v. State Industrial Products [67] and *In re* 24R, Inc.[68] In both cases, the courts ultimately upheld the arbitration agreement at issue but using very different lines of reasoning. The *Soto* court represents the first approach to arbitration agreements, in which courts rely on the traditional view of at-will employment contracts (as a series of one-day contracts) to

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[66] *See, e.g.,* Demasse v. ITT Corp., 194 Ariz. 500, (1999). *See also*, *Margeson v. Artis*, 776 N.W.2d 652 (Iowa 2009).
[67] Soto v. State Industrial Products, Inc., 642 F.3d 67, 75 (1st Cir.2011).
[68] *In re* 24R, Inc., 324 S.W.3d 564 (Tex. 2010).

assess the validity of consideration and consent.[69] Pursuant to that traditional reasoning, the *Soto* court easily held that continued employment was valid consideration, writing, "[the plaintiff] concedes that new employment is valid consideration for the execution of an arbitration agreement but argues that continued employment is different. For at-will employees, it is hard to see why."[70] The court went on to explain its position by noting that "[t]he continued employment of [the plaintiff] by [her employer] under the new arrangement . . . was not obligatory on the part of [the employer]" and was, therefore, "sufficient consideration to render the agreement enforceable."[71] The court then concludes its analysis by noting that, in addition to continued employment, the employee received consideration in the form of a "bilateral obligation" to arbitrate.[72]

The court in *In re 24R, Inc.* used strikingly different reasoning to reach the same result. Instead of viewing the arbitration agreement as a new offer of employment, the court referred to the arbitration agreement as a "stand-alone" contract "subsequent" to the employment contract,[73] a view that accords with the "indefinite length" approach to at-will employment. And, because the court interpreted the arbitration agreement as a contract subsequent to, not in replacement of, the original employment contract, the contract could only be valid "so long as neither party relie[d] on continued employment as consideration for the contract."[74] Thus, unlike the *Soto* court, the court in *In re 24R, Inc.* had to determine whether there was other consideration sufficient to support the arbitration agreement, namely a mutual agreement to arbitrate. In conducting this assessment, the

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[69] *See, e.g., Aldrich*, 661 Fed.Appx. at 390 (6th Cir. 2016) (Referring to an arbitration agreement, the court reasoned that "plaintiffs' continued acceptance of at will employment constitutes consideration under Kentucky law.")
[70] *Soto*, 642 F.3d 67, 75 (1st Cir. 2011).
[71] *Id.*
[72] *Id.* at 76.
[73] *In re 24R, Inc.*, 324 S.W.3d at 556.
[74] *Id.* at 556-567 (quoting *J.M. Davidson Inc., v. Walker*, 128 S.W.3d 223, 228 (Tex.2003)).

court considered disclaimers in the employee handbook giving the employer the right to "revoke, change or supplement guidelines at any time without notice."[75] The court admitted that, if this language in the manual applied to the arbitration agreement, it would render the arbitration agreement unenforceable. The employer's promise to arbitrate would not be consideration because the employer could revoke that promise at any time, and the remaining "consideration"—continued employment—would not be consideration at all.[76] Thus, the court's finding that the manual's disclaimers did *not* apply to the arbitration agreement were dispositive in holding the arbitration agreement to be enforceable.[77]

The comparison of these two cases naturally leads one to wonder how the *Soto* court would have ruled had *that* arbitration contract been modifiable. Would the court have actually rested consideration entirely on continued employment? The court in Britto v. Prospect Chartercare SJHSRI, LLC answers that question:

> The parties spend a lot of time debating whether the judge correctly rejected [Plaintiff's] first multistep illusory-consideration claim, a claim (to repeat) that goes like this: (a) the offer letter's rights reservation—giving [the employer] the unfettered discretion to change employment terms—covers the arbitration agreement, (b) making [the employer's] arbitration promise illusory and thus (c) rendering the agreement unenforceable from the get-go for lack of consideration. Ultimately, though, we need not join the fray, because—even assuming (*arguendo* in [Plaintiff's] favor) that one must read the offer letter and the arbitration agreement together—the judge properly ruled that [the employer's] promise of continued employment provided sufficient independent consideration to make the agreement enforceable.[78]

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[75] *Id.* at 567.
[76] *Id.* at 567-68 (holding that, because the arbitration agreement did not incorporate the handbook's disclaimer, the arbitration agreement's consideration was not illusory).
[77] *Id.* at 568. ("Although language in the employee manual recognizes the existence of the arbitration agreement, this does not diminish the validity of the arbitration agreement as a stand-alone contract. Therefore, the contract is not illusory and does not require a *Halliburton*-type savings clause.")
[78] 909 F.3d 506, 513 (1st Cir. 2018).

The court therefore makes perfectly clear that it need not engage in the kind of analysis in which the *In re 24R, Inc.* court engaged to ensure that the arbitration agreement in that case rested on a mutual obligation to arbitrate. It is also worth noting that the *Britto* court reached this conclusion despite noting that "[a]ccording to Rhode Island law, the essential elements of a validly-formed bilateral contract" include "mutuality of agreement[] and mutuality of obligation."[79] Thus, as suggested in Part I, the traditional approach to at-will employment seems to explicitly change what contract law typically requires.

Finally, to close out the comparison of views on employment as consideration, Baker v. Bristol Care, Inc., provides an example of a case in which the arbitration agreement was modifiable and the court at bar adopted the "indefinite length" view of at-will employment.[80] The court easily concluded that there was no consideration to support the arbitration agreement, noting as a preliminary mater that "Baker's continued at-will employment does not provide consideration for the arbitration agreement," then going on to reason that "the fact that [the employer] retroactively could modify, amend or revoke the agreement means that Bristol's promise to arbitrate is illusory and does not constitute consideration for Baker's agreement to arbitrate."[81] Like the court in *In re 24R, Inc.*, the Missouri Supreme Court supported these holdings by drawing on the reasoning of the "indefinite length" view of at-will employment. In rejecting continued employment as valid consideration, the Court reasoned that the employer did not make any "legally enforceable promise to do or refrain from doing anything it [was] not already entitled to do."[82] Though technically the employer refrained from terminating Baker, that restraint was not actually a "detriment" to the

[79] *Id.* at 512.
[80] Baker v. Bristol Care, Inc. 450 S.W.3d 770 (Mo. 2014) (en banc).
[81] *Id.* at 772-773.
[82] *Id.* at 775.

employer given that "[t]he employer still [could] terminate the employee immediately for any reason."[83] To support a finding of consideration, then, the Court would have needed to view continued employment as "new" employment, like the *Soto* court. Instead, it highlighted that the employee's contract would "continue indefinitely" until she or the employer decided to terminate the relationship, so continued employment could not logically be construed as "new" employment.[84]

The way that courts interpret at-will employment also has implications for their analyses of consent. Consider the following fact pattern: An at-will employee is being subjected to allegedly discriminatory behavior under Title VII. That employee files a complaint with the EEOC. The employer has no arbitration agreement in place. *After* the complaint has been filed, the employer institutes an arbitration agreement policy that states, by its terms, that continued employment constitutes consent. The employee, through word or writing, indicates that she will *not* agree to the arbitration agreement. The above fact pattern describes, generally, Berkley v. Dillard's, Inc.[85] and Bailey v. Federal National Mortgage Association.[86] These cases reach opposite results on whether the employee validly consented to arbitrate.

Berkley represents the traditional approach to at-will employment. In that case, the employee, Berkley, filed a complaint with the EEOC on May 23, 2001, alleging racial harassment. Then, on June 16, 2001, the employer, Dillard's, implemented an arbitration agreement which stated that, by "accepting or continuing employment with Dillard's, you have agreed to accept the Program known as the Agreement to Arbitrate Certain Claims."[87] Several days later, Dillard's

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[83] *Id.*
[84] *Id.*
[85] 450 F.3d 775 (8th Cir. 2006).
[86] 209 F.3d 740 (D.C. Cir. 2000).
[87] *Berkley*, 450 F.3d at 776.

presented all employees with an "acknowledgement form," asking the employees to sign to acknowledge that they had received the arbitration agreement. "Berkley refused to sign."[88] Despite this refusal to sign—and the fact that Berkley had already filed a complaint with the EEOC—the court found that the dispositive issue was that the arbitration agreement was "part of a larger offer of a unilateral contract of at-will employment," because it explicitly stated that continued employment was consent.[89] In other words, Dillard's had offered *new* employment, which happened to include an arbitration agreement, so Berkley's choice to continue working *had* to be consent. The court also found persuasive that Dillard's had informed the employee that "her refusal [to sign] did not affect the arbitration agreement, which applied automatically to all employees who continued their employment."[90]

The court in *Bailey* was faced with nearly identical facts. There, the employee, Bailey, filed a complaint with the EEOC on March 12, 1998, and his employer, Fannie Mae, instituted an arbitration agreement on March 16, 1998.[91] The agreement stated that, "by starting or continuing work for Fannie Mae on or after [March 16, 1998], each employee is indicating that he or she accepts the Policy as a condition of employment and agrees to be bound by it."[92] After the implementation of the arbitration agreement, Bailey's lawyer reaffirmed by letter that the employee did not agree to the arbitration agreement. Like the employer in *Berkley*, Fannie Mae responded by informing Bailey that it "considere[d] Mr. Bailey to be bound by that Policy with

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[88] *Id.* at 776.
[89] *Id.* at 777.
[90] *Id.*
[91] Bailey v. Federal Nat. Mortg. Ass'n, 209 F.3d, 740, 742 (D.C. Cir. 2000).
[92] *Id*.

respect to the complaint that he made on March 12, 1998,"[93] despite Bailey's own contentions that he was not bound.[94]

Instead of viewing the arbitration agreement as an offer of "new employment," the *Bailey* court examined the issue of consent from the perspective of contract modification, consistent with the "indefinite length" approach to at-will employment. Thus, in the court's view, the employee's decision to continue working was not evidence of assent; the employee "had no obligation to even respond to [the employer's] proposal."[95] Rather, there had to be some affirmative evidence of a "meeting of the minds," and continued performance under an existing contract could not constitute that evidence. The court therefore held that, even absent Mr. Bailey's explicit rejection of the arbitration agreement, he would not have been bound because "Mr. Bailey never executed any written agreement with Fannie May to arbitrate[,] . . . the parties never purported to reach an understanding by oral agreement[,] . . . [and] Mr. Bailey never said or wrote anything after Fannie Mae issued its new arbitration policy, either to rescind what he had said in his written complaint or to otherwise indicate that he subscribed to the Dispute Resolution Policy."[96]

b. PRACTICAL IMPLICATIONS OF THE "INDEFINITE LENGTH" APPROACH TO ARBITRATION AGREEMENTS

As the forgoing cases demonstrate, courts have analyzed the issues of consideration and consent according to two very different theories of at-will employment and have, as a result, sometimes come to very different results in cases with strikingly similar facts. But does the "indefinite length" approach actually protect employees from unwanted arbitration agreements? If

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[93] *Id.* at 742.
[94] *Id*.
[95] *Id.* at 743.
[96] *Id.* at 745.

so, then opponents of arbitration agreements might try to expand the use of this approach to the interpretation of at-will employment contracts. If not, it is important that labor advocates highlight the fact that even the most employee-friendly courts cannot truly prevent the imposition of unwanted employment contracts.

Unfortunately, a thorough account of the case law indicates that the "indefinite length" approach *cannot* protect most employees. First, with respect to consideration, it is illuminating to reexamine Baker v. Bristol Care, Inc., the case in which the court held an arbitration agreement to be unenforceable because the employer retained the right to modify that contract at any time.[97] Crucially, the court's holding depended on the fact that modifications would be *retroactive*. Employers can therefore work around such holdings by simply stipulating that any modifications would apply only prospectively. For instance, in *In re* Halliburton Co., the seminal Texas Supreme Court case on this issue, the Court distinguished between retrospective and prospective changes to arbitration agreements and held that, because the right to modify in that case was prospective only, the arbitration agreement was supported by consideration.[98] The court in Seawright v. American General Financial Services, Inc. similarly found that an arbitration agreement was supported by consideration when the employer had to give 90-days' notice of any changes to the agreement.[99]

Similar issues arise in the context of consent. The primary issue here is that employers can condition employment on consent to arbitrate, meaning they can refuse to hire or can terminate employees who refuse to consent to arbitration.[100] Employers can therefore work around the issue

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[97] *Id.* at 772-73.
[98] 80 S.W.3d 566, 569 (Tex. 2002).
[99] 507 F.3d 967 (6th Cir. 2007).
[100] *See, e.g.,* Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004) ("A person who accepts a "non-negotiable" offer of $50,000 salary would be laughed out of court if she filed suit for an extra $10,000, contending that the employer's refusal to negotiate made the deal

of consent by requiring an actual signature, then extracting that signature by making a credible threat of termination—then terminating any employees who refuse. And, to the extent that employers do not want to terminate good employees, they can take the long approach of only hiring employees who will sign the arbitration agreement, thus ensuring in the long run that the entire workforce is covered by the arbitration agreement.

Clearly, the benefits of the "indefinite length" approach are quite limited, applying only to a narrow set of factual circumstances that employers can easily avoid. Together with the Supreme Court's FAA jurisprudence, this doctrine therefore still allows employers to ensure that all of their employees are subject to arbitration agreements. This fact indicates that, even if advocates could convince courts to apply the "indefinite length" view of contract law, it would not be enough to prevent employers from controlling the enforcement of federal labor laws.

IV. CONCLUSION: THE NEED FOR A POLICY-BASED SOLUTION

By creatively using the at-will doctrine, some courts have found ways to invalidate arbitration agreements in a limited set of circumstances. Unfortunately, in most cases, this approach falls woefully short of preventing unwanted arbitration agreements. This fact suggests that a jurisprudential solution to mandatory arbitration is unlikely to come. Moreover, even if creative jurisprudence *could* protect employees, many courts would not see the need to. For instance, in the *Oblix* court's view,

> [e]mployees fare well in arbitration with their employers—better by some standards than employees who litigate, as the lower total expenses of arbitration make it feasible to pursue smaller grievances and leave more available for compensatory awards. Perhaps this is why unions find arbitration so attractive and insist that employers agree to this procedure. How

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'unconscionable' and entitled her to better terms. Well, arbitration was as much a part of this deal as [the employee's] salary and commissions").

> could one call it unconscionable when an employer treats unrepresented workers such as Winiecki the same as it treats its organized labor force?[101]

To these courts' minds, there simply is no problem to be solved, despite all evidence to the contrary. [102, 103]

Congress cannot allow this current doctrinal regime to stand. Quite simply, if employers can condition employment on an employee's agreement to arbitrate, they can control the enforcement of federal labor laws. And, as alluded to above, employer control of labor law enforcement does *not* benefit employees, particularly because it precludes access to class action process.[104] Thus, Congress must either preempt the Supreme Court's holding in *Circuit City*, which made the FAA applicable to employment contracts, or it must alter the rules of at-will employment such that employers cannot condition employment on an employee's agreement to arbitrate. The former option is already before Congress; the Forced Arbitration Injustice Repeal Act (FAIR Act), which would explicitly exempt employees from the reach of the FAA, has passed the House and is currently stalled in the Senate.

The second option has not been proposed in Congress but has, interestingly, been implemented by the California legislature. As the Ninth Circuit explained in Chamber of Commerce of the United States v. Bonta, the California Labor Code has "declare[d] that compelling an unwilling party to arbitrate is an unfair labor practice."[105] And, crucially, the court held that the FAA did not preempt the provision because "[t]he first principle that underscores all

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[101] *Id.* at 491 (citations omitted).
[102] Janice R. Fine & Jennifer Gordon, *supra* note 3, at 552 (describing systemic underenforcement of federal and state labor laws).
[103] Judith Resnick, *supra* note 2, at 1051 (explaining that individual lawsuits and arbitration disadvantages workers in labor disputes).
[104] *Id.* (noting that, when employers mandate individual arbitration of employee complaints, the number of complaints drops dramatically).
[105] 13 F.4th 766, 771 (9th Cir. 2021).

of our arbitration decisions is that arbitration is strictly a matter of consent," and the California Labor Code merely "assure[s] that entry into an arbitration agreement by an employer and employee is mutually consensual."[106] Explained another way, the FAA's "policy favoring arbitration . . . does not apply to the determination of whether there is a valid agreement to arbitrate between the parties," so a provision that simply ensures that a valid agreement has been made will not be subject to FAA preemption.[107] Given the Senate's slow movement on the FAIR Act, states would do well to follow California's example.

Low-wage workers have long been one of the most vulnerable factions of our population, and mandatory arbitration currently allows them to remain so. There is no reason to believe that, in passing the NLRA, ADA, FLSA, Title VII, and ADEA, Congress meant to allow employers to use the very power that necessitated those laws to shape their enforcement. It is therefore past time to correct the unjust results wrought by the confluence of the at-will doctrine and the FAA.

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[106] *Id*. at 770.
[107] Nelson v. Watch House Intern., L.L.C., 815 F.3d 190, 193 (2016).