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## COMMENTARY ON "ARBITRATION OF EMPLOYMENT DISPUTES WITHOUT UNIONS"

MATTHEW W. FINKIN\*

Professor Samuel Estreicher contemplates the prospect, in an increasingly nonunionized world of work, of a broadened use of arbitration to resolve employment disputes: in bilateral contracts of employment; in unilaterally promulgated employer policies; and as mandated by a state law of wrongful dismissal.<sup>1</sup> In this, he has performed a masterful and meticulous anatomy of the issues. Nevertheless, some comment on the former two questions in particular may place what Professor Estreicher has so assiduously and helpfully explored in a somewhat different light.

### I. THE UNHELPFUL ROLE OF THE FEDERAL ARBITRATION ACT (FAA)

I start with what Professor Estreicher terms a "first cut"<sup>2</sup> on the question, that of a written bilateral contract of employment between two relatively sophisticated parties. Let us assume that K has been hired for a key corporate position of Vice President for Transportation.<sup>3</sup> The position is a "sophisticated" one involving a large salary, a package of benefits, severance pay, deferred compensation, and stock options; accordingly, the employment contract was negotiated and drafted with the advice and assistance of experienced legal counsel and signed by both parties. The contract stated *inter alia* that K agreed to arbitrate "any dispute, claim or controversy arising out of my employment or the termination of my employment." Some months later, K was diagnosed as having breast cancer and was hospitalized. When she sought to return to work she was summarily discharged. She has sued her former employer in state court (all administrative prerequisites having been exhausted) for: (1) termination in breach of her contract of employment; (2) termination in violation of Title VII of the Civil Rights Act of 1964, on the ground that a discharge because of breast cancer constitutes a form of sex discrimination; (3) termination in violation of the state's Human Rights

\* Professor of Law, University of Illinois.

1. Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990).

2. *Id.* at 763.

3. The hypothetical is based, if loosely, on *DeSapio v. Josephthal & Co.*, 143 Misc. 2d 611, 540 N.Y.S.2d 932 (N.Y. Sup. Ct. 1989).

Law, which forbids discrimination on grounds of disability; and, (4) the tort of intentional infliction of emotional distress. Her erstwhile employer has moved to stay the judicial proceeding and refer all claims to arbitration.

If her contract of employment evidenced "a transaction involving commerce" under section 2 of the Federal Arbitration Act, and was not exempt under section 1 of that Act, then federal law would govern the disposition of the employer's motion. Accordingly, Professor Estreicher explains why the first claim, of wrongful dismissal, should be submitted to arbitration: The parties have freely agreed to substitute the arbitral forum for a jury trial; arbitration is swifter and potentially cheaper than a lawsuit; and the parties jointly select the decision maker, perhaps on grounds of special competence. There are, to be sure, disadvantages: There is no pre-trial discovery in arbitration; the arbitrator may be biased by his or her desire for future selection, especially where the employer is likely to be a "repeat player" with respect to future arbitrations involving other employees; and the scope of arbitral remedial power remains fully to be seen. But Professor Estreicher argues that these disadvantages—of which one would expect K to have been fully informed by counsel—should not override the freely chosen forum of the parties.

What of the remaining claims of violation of federal and state labor protective legislation, and what of a departure from the norms of civilized behavior ordinarily to be ascertained by the community's sense of outrage by means of a civil jury? On the remaining claims Professor Estreicher finds that the FAA, as interpreted by the United States Supreme Court, beclouds the analysis of the federal claim and unjustifiably preempts the state claims. As he explains:

The difficulty arises because the Supreme Court has given the FAA a rather broad sweep. The FAA, according to the Court, is not a narrowly-conceived statute simply repudiating the anti-arbitration premises of state common law. The FAA also overrides any contrary state policy in favor of preserving access to the courts for particular claims; and, on the federal level, acts as a kind of meta-statute enforcing arbitration of claims under federal statutes that do not expressly or by implication insulate forum-choice decisions from private bargaining.<sup>4</sup>

His argument seems to me irrefutable. One cannot discern any federal interest in having individual employees arbitrate state public law claims, grounded in tort or statute, despite the state's policy to the contrary, which is exactly what the Court's reading of the FAA has required. Nor does the Act's strong presumption of arbitrability, which

4. Estreicher, *supra* note 1, at 776.

potentially reaches the federal statutory claim, clarify analysis of the real issue presented. Thus Professor Estreicher finds it "tempting"<sup>5</sup> to read section 1 as exempting employment contracts altogether from the reach of the FAA. He shrinks from that temptation, however, in part because it is not always clear that "unsophisticated" and relatively weak employees would invariably be "better off with a rule requiring resort to the civil courts rather than arbitration to pursue their statutory claims," and in part because,

A broad exclusion of employment contracts from the reach of the FAA and cognate state laws would not be confined to workers seeking to enforce minimum-wage obligations under the Fair Labor Standards Act (FLSA); it would also include highly-placed management officials suing under express contracts and the mid-level management employees who are typical claimants under ADEA.<sup>6</sup>

The assumption seems to be that the exemption of employment contracts from the reach of the FAA would drive a similar exemption from "cognate state laws" so to require all statutory claims to be heard judicially. That may or may not be a sound result—more on that later—but I do not think that it would be compelled by reading employment contracts out of the FAA.

The FAA exemption speaks not at all to "cognate" state laws. Some state laws do exempt employment contracts,<sup>7</sup> though even here such language has been read on occasion as referring only to collective agreements.<sup>8</sup> But most state laws, I suspect, following the Uniform Arbitration Act, do not exempt employment contracts.<sup>9</sup> Most state laws require the enforcement of written agreements to arbitrate future disputes *simpliciter*.<sup>10</sup> Thus the removal of the FAA as generally controlling federal law on arbitration would say nothing at all to whether the federal labor protective claim is amenable to arbitration under an individual contract of employment, in the sense of arbitration as preclusive of a later *de novo* judicial determination.

Let us return to K. Assume that her contract, as Vice President for Transportation, is exempt under the prevailing reading of section 1 of the

5. *Id.* at 782.

6. *Id.* at 782-83.

7. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1517 (1982); ARK. STAT. ANN. § 16-108-201 (1987); IOWA CODE ANN. § 679A.1(2)(b) (West Supp. 1986); KAN. STAT. ANN. § 5-401 (c)(2) (Supp. 1990); KY. REV. STAT. ANN. § 417.050 (Michie/Bobbs-Merrill Supp. 1990); WIS. STAT. ANN. § 788.01 (West 1981).

8. *See, e.g.*, *Wilson v. McGrow, Pridgeon & Co., P.A.*, 298 Md. 66, 467 A.2d 1025 (1983).

9. UNIFORM ARBITRATION ACT § 17 U.L.A. 5 (1985).

10. As does Illinois, which has adopted the Uniform Act, ILL. STAT. ANN. ch. 10, para. 101 (Smith-Hurd Supp. 1990); and, New York, which has not, N.Y. CIV. PRAC. L. & R. § 7501 (McKinney 1980).

FAA, as for work in the interstate transportation industry.<sup>11</sup> The arbitration provision in her contract would *not* be governed by the FAA. Consequently, the FAA would have nothing to say to the employer's motion to refer her Title VII, state Human Rights Law, contract, and tort claims to arbitration. The latter three would be—as they properly are—questions of state law. But whether the Title VII claim should be so referred (in the sense adverted to above) would be a question of federal law; that is, if the state reads the employment contract's "arising out of" clause to sweep in the Title VII claim, then whether Title VII itself permits the claim to be so swept, or rather, the consequences of an arbitration for a subsequent lawsuit would ultimately have to be decided by the United States Supreme Court.

In other words, Professor Estreicher rightly concludes that the current state of FAA doctrine, at least as applied to individual contracts of employment, is indefensible: the contemporary reading of the scope of the exemption, as limited to transportation workers, is the least persuasive of the available statutory readings; the strong presumption of arbitrability as to federal statutory claims is unhelpful; and the Act's preemptive effect vis-a-vis state employment law is unjustifiable. The necessary conclusion, I submit, is that the Act ought to be read as inapplicable to contracts of individual employment.

First, that conclusion best comports with the text. The Act exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>12</sup> This seems plain on its face.

Second, as Archibald Cox has observed, the language was chosen at a time when the commerce power—the limit of the Act's reach—extended to the employment of seamen and railroadmen, but not to employees engaged for the manufacture of goods for shipment in interstate commerce.<sup>13</sup> Though, as Professor Estreicher's review of the legislative history suggests, the exemption may well have been intended to reach collective agreements or industrial disputes, the means chosen to effect that end made no reference to industrial disputes or "trade agreements,"

11. This reading of the exemption has been acquiesced in by the United States Supreme Court. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967). See *Wilder v. Whittaker Corp.*, 169 Cal. App. 3d 969, 215 Cal. Rptr. 536 (1985), *cert. denied*, 475 U.S. 1046 (1986) (contract of employment of "travel supervisor" for assignment abroad is *not* covered by the FAA). But see *Hydrick v. Management Recruiters Int'l, Inc.*, 738 F. Supp. 1434 (N.D. Ga. 1990) (work in personnel placement, affecting the employment of people in interstate commerce, is not "tantamount to transportation of goods in foreign or interstate commerce," *id.* at 1435, and so is governed by the FAA).

12. 9 U.S.C. § 1 (1988).

13. Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 598 (1954).

as collective bargaining agreements were then called,<sup>14</sup> but took the form of a partial retreat from the full scope of the then understanding of the commerce power. From this perspective, a court proceeded in historical ignorance when it recently observed, in affirming the exemption as limited to transportation workers, that, “[I]f Congress had intended to exclude all employment contracts from the Act, it would have been unnecessary to identify specific categories of workers.”<sup>15</sup> What the exemption says is not that “seamen, railroad and others engaged in *like work*” are exempt, but that “seamen, railroad and other like workers”—those in foreign and interstate commerce—are exempt; that is, all those over whom Congress could have exercised commerce power jurisdiction if it chose, but prudentially declined so to do.

Third, this reading achieves the objectives Professor Estreicher desires, and with the least difficulty: it would not require the Court to abandon the FAA’s strong presumption in favor of arbitration; it would not require that employment contracts be distinguished from commercial contracts in terms of sweeping in federal statutory claims or to abandon that sweeping effect generally; it would not require the Court to abandon the preemption of state claims or to distinguish employment from commercial transactions for the purposes of that preemptive effect. The abandonment or modification of these larger doctrines might well be desirable but a close reading of the text for employment contracts reserves those questions for another day.

Finally, the withdrawal of the FAA from individual employment contracts would say nothing at all to what controlling federal law should be when a claim of violation of a federal labor protective provision confronts the arbitration clause in an employment contract. It is to that question that attention should turn.

## II. THE PRIVATIZATION OF PUBLIC LAW

Estreicher argues that if a sophisticated employee can waive her rights by substituting an arbitrator for a jury (or judge) to hear a common-law claim, such as breach of contract, why should she not be able voluntarily to substitute a private for a public forum for the disposition of statutory claims that are for her benefit, so long as the process is subject to judicial scrutiny to assure that the result is within statutory bounds? Even here one can entertain doubts. An effective waiver of constitutional due process rights has been conditioned upon a finding that

14. See F. SAYRE, LABOR LAW ch. XIII (1923).

15. *Hydrick*, 738 F. Supp. at 1435.

the waiver is "knowing and voluntary."<sup>16</sup> One would think the waiver of a judicial forum in which to vindicate one's statutory civil rights would be conditioned upon no lesser standard. Yet Professor Estreicher does not address the question of the extent to which the individual must be made aware of the full purport of a general "arising out of" clause before such a clause may sweep in federal labor protective law; whether, for example, in the course of negotiations—or in the contract itself—the precise provisions the individual is agreeing to arbitrate must have been expressly enumerated so to work a "knowing" waiver. Nor does he address whether any assessment of the relative bargaining positions of the parties needs to be made, in order to account for the "voluntariness" of the waiver.

More important, Professor Estreicher would draw no distinction for less sophisticated employees, so long as the individual is employed under a bilateral contract. As he explains, "[T]he terms of the agreement may be the same for all employees in a given job category,"<sup>17</sup> that is, a form contract that all employees, or all employees of a particular class, must sign as a condition of employment. Professor Estreicher would enforce this contract by analogy to the paradigm of an arms length bargained for contract of employment between sophisticated parties:

There are, of course, circumstances calling for invocation of the contract-law doctrines of unconscionability and duress. But there are costs to depriving parties to an employment contract from freely shaping the terms of their relationship.<sup>18</sup>

In this situation, however, it is the employer that has the power to condition employment upon the substitution of a private for a public forum on the question of the employer's own conduct being offensive to public policy—a forum that contemplates no pre-trial discovery, that may suffer from possible bias in favor of the employer as a repeat player, and the extent or effectiveness of whose remedial authority remains fully to be seen.<sup>19</sup> Nor do the contract doctrines adverted to temper this result. One is rarely coerced into entering an employment relationship, and coercion of some sort has been thought essential to render an em-

16. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. v. Frick, Co.*, 405 U.S. 174, 185-86 (1972).

17. Estreicher, *supra* note 1, at 768.

18. *Id.* at 782.

19. Professor Estreicher notes Professor West's study for the proposition that the effectiveness of reinstatement is affected by how swiftly the grievant is given that remedy, presumably on the assumption that such would be the remedy here as it is under collective bargaining agreements. Estreicher, *supra* note 1 at 763 n.32 (citing West, *The Case Against Reinstatement in Wrongful Discharge*, 1986 U. ILL. L. REV. 1). But the thrust of her study is that reinstatement is a dubious remedy in the absence of a union.

ployment contract voidable on grounds of “duress.”<sup>20</sup> Neither would the doctrine of “unconscionability” place a significant limit on the employer’s ability to command such an agreement. The doctrine rarely finds expression in employment law. Unconscionability is grounded on the idea that contract terms that are so unreasonably favorable to the drafting party—that, in some jurisdictions, are “‘so outrageous and unfair’”<sup>21</sup> as to shock the conscience or to violate public policy<sup>22</sup>—are voidable. But the very question presented is whether public policy should allow labor protective laws to be swept under such boilerplate contracts. To ask whether such a provision is or is not “unconscionable” is merely to restate the issue.

I am dubious that because a “sophisticated” employee, such as executive K, might freely choose a provision expressly governing federal protective law—a proposition by no means self-evident—then employers may effectively command such a provision for less sophisticated employees, such as K’s secretary or mail room clerk. Professor Estreicher seems troubled by the extension of his argument, for he would draw a distinction between written bilateral employment contracts and a set of employer policies that provide for arbitration as the final step of a unilaterally promulgated grievance system. The distinction will not hold up.

Professor Estreicher observes first, as a descriptive matter, that such employer policies would not be governed by the FAA (or cognate state law) “because of the absence of ‘an agreement in writing to submit to arbitration an existing controversy.’”<sup>23</sup> Then, Estreicher observes as a prescriptive matter that such an arbitration should be confined to claims based upon the employer’s policies. It is one thing, he argues, to enforce an employer’s policy that works a unilateral contract governing the em-

20. H. SPECTER & M. FINKIN, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* § 1.75 (1989) [hereinafter SPECTER & FINKIN].

21. *White v. General Motors Corp.*, 908 F.2d 669, 673 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991). (“Thus, unfairness alone is not enough—the unfairness must rise to a level of outrage or contravene public policy.”).

22. One of the few areas in employment law where the claim of unconscionability has been invoked concerns provisions for arbitration. See generally SPECTER & FINKIN, *supra* note 20, at § 12.04. See also *Sablosky v. Edward S. Gordon Co., Inc.*, 73 N.Y.2d 133, 535 N.E.2d 643, 538 N.Y.S.2d 513 (1989) (sustaining a boilerplate arbitration provision in a real estate broker’s contract as against unconscionability and public policy grounds). At one point, a provision requiring registered brokers to arbitrate all employment disputes with their employees, required by the rules of various stock exchanges, was held unconscionable. *Hope v. Superior Court*, 122 Cal. App. 3d 147, 175 Cal. Rptr. 851 (1981), *cert. denied*, 456 U.S. 910 (1982). But these have more recently been enforced on the ground that SEC approval of the exchange rules is determinative of the question of fairness. *Heily v. Superior Court*, 202 Cal. App. 3d 255, 248 Cal. Rptr. 673 (1988), *cert. denied*, 489 U.S. 1013 (1989). The SEC rules are set out at 54 Fed. Reg. 21,144 (May 16, 1989).

23. Estreicher, *supra* note 1, at 768.



ployer's stated terms.<sup>24</sup> But, "it is quite another matter for an employer by a unilateral promulgation to require an employee to submit to arbitration claims the employee may have stemming from an independent source in external law."<sup>25</sup> He does not explain why distinction should be drawn. The descriptive claim, I submit, is questionable; and if the prescriptive claim is sound, it should place in question Professor Estreicher's willingness to submit public claims to private arbitration under form contracts of employment containing boilerplate arbitration provisions.

The FAA requires the submission to arbitration where there is a "written provision in . . . a contract evidencing a transaction involving interstate commerce" as well as "an agreement in writing" to submit as part of such a transaction. Professor Estreicher identifies the latter with "written *bilateral* employment agreements."<sup>26</sup> But the FAA never uses the word "bilateral." Neither does it, unlike the Statute of Frauds, require a signed instrument.<sup>27</sup> The FAA—and most cognate state laws—merely requires a "written provision," which need not be part of a bilateral contract. As Professor Estreicher concedes, a written arbitration provision made part of a unilateral commercial transaction—whereby a seller or buyer, upon receiving the other's business form that includes an arbitration clause, does no more than ship or order a good respectively—would be binding upon the parties.<sup>28</sup>

Professor Estreicher attempts to surmount this obstacle by questioning whether unilaterally promulgated employer rules are really contracts at all: to enforce them the courts have "dispensed with requirements of mutuality of obligation, independent consideration or detrimental reliance;"<sup>29</sup> they have been held binding even when not generally distributed to employees;<sup>30</sup> and they are subject to subsequent modification or revocation.<sup>31</sup> Thus, he finds it difficult to ground the enforcement of such policies on "unilateral contract theory as conventionally formulated,"<sup>32</sup>

24. *Id.* at 771.

25. *Id.*

26. *Id.* at 768 (emphasis added).

27. *See, e.g.,* *Medical Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973); *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W.2d 934, 937 (Tex. App. 1989) (individual employment case). By way of contrast, Georgia's recent revision of its Arbitration Code exempts, "Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initiated by all signatories at the time of the execution of the agreement." GA. CODE ANN. § 9-9-2(c)(9) (1988).

28. Estreicher, *supra* note 1, at 769 (citing *Joseph Muller Corp., Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013 (S.D.N.Y. 1971)).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 769-70.

and suggests they are best thought of by analogy to administrative rather than to contract law.<sup>33</sup> None of this will do.

The courts have not dispensed with mutuality of obligation: the doctrine requires that both the employer and the employee be bound by the employer's rules, as they are under unilaterally promulgated employer rules.<sup>34</sup> Independent consideration is not required of a unilateral employment contract as "conventionally formulated," for the performance of services constitutes both acceptance and consideration.<sup>35</sup> All contracts are subject to modification. In at-will employment, a unilateral change in employer policy is an "offer" that works a modification when the employee "accepts" by continuance in service.<sup>36</sup> But the employer's power to unilaterally change employer policy, for example, to lower the wage or to abrogate a benefit, does not deprive its currently stated wage rate or benefit policy of contractual status under conventionally formulated contract law. Although some jurisdictions have (rightly) scouted any need for employees to show knowledge of and express reliance on the employer policy in order to render it contractually binding, the reasoning is not an exotic private law borrowing from public law. Rather the result has its origin in the well established contract law of business usage;<sup>37</sup> and that body of law says nothing at all to those situations where the employee in fact was made aware of the employer policy at the time of hire. In sum, and:

[e]xcept in those instances where a candidate for hire has significant bargaining power, there is usually little or no actual bargaining over terms and conditions of employment. Commonly, the employee takes the job on the terms that the employer expressly or impliedly states. When an employee accepts a job offer, a contract has been made even though the acceptance is of terms unilaterally stated. Accordingly, courts hold employers contractually bound by policies such as severance pay or bonuses that are unilaterally promulgated. Indeed, many of these policies may be found in the very same handbooks that contain provisions on termination.<sup>38</sup>

A provision for binding arbitration of "any dispute, claim or controversy arising out of employment or the termination of employment" con-

33. *Id.*

34. SPECTER & FINKIN, *supra* note 20, at § 1.06 (and the authority collected in n.76).

35. E. FARNSWORTH, *CONTRACTS* § 3.4, at 109 (1982). See also SPECTER & FINKIN, *supra* note 20, at § 1.04 (and the authority collected in n.53), and § 2.09 (discussing the "additional consideration" rule required for contracts of "lifetime" employment).

36. SPECTER & FINKIN, *supra* note 20, at § 3.03.

37. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 748 n.68 (citing *inter alia* Orton & Steinbrenner Co. v. Miltonberger, 74 Ind. App. 462, 129 N.E. 47 (1920)) (posted notice governing bonuses binds employer as to payment to employee who had no knowledge of its precise terms).

38. *Id.* at 745.

tained in a compendium of unilaterally promulgate employer policies is not distinguishable from other provisions governing, for example, bonuses, seniority, vacations and employee benefits, or from rules governing progressive discipline and termination contained in the very same document. If the presence of a signed contract is dispositive, all that the employer would need to do is have the employee sign an application for employment expressly incorporating the relevant arbitration provision of the employee manual. This, in fact, would be very much like the practice in the securities industry, where a brokerage employee's signing of an application for employment, incorporating the relevant exchange's arbitration rule, has been held to satisfy the FAA's "written provision" requirement.<sup>39</sup> So we come full circle, to the form contract that Professor Estreicher would enforce as to federal labor protective law, subject only to his proposed accommodation.

The choice is exactly as Professor Estreicher puts it: to reserve public law questions for de novo judicial determination, subject to whatever weight the courts chose to give a prior arbitration between the parties, as *Gardner-Denver*,<sup>40</sup> *Barrentine*,<sup>41</sup> and *McDonald v. City of West Branch*<sup>42</sup> suggest, or to defer to arbitration subject to some level of judicial review. Professor Estreicher, in arguing for the latter, distinguishes these cases on the ground that they rest: (1) on the union's special role in administering the grievance arbitration procedure—its authority to compromise the individual claim for the sake of the common good—that is not present in the individual contract case; and, (2) upon the lack of real, individual assent in collective bargaining to "waive" the public for a private forum. He does make a case for the first distinction, but it alone would not seem to be dispositive, for it does not speak to the situation where the union has in fact aggressively pursued the discrimination claim to the utmost before the arbitrator.<sup>43</sup>

39. See SPECTER & FINKIN, *supra* note 20, at § 12.02 (and the authority collected in n.24). Compare *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 664 F. Supp. 969 (E.D. Pa. 1987) (employee's omission of affirmative acknowledgement of arbitration clause, question 8 in Form U-4, renders dispute non-arbitrable) with *Zdeb v. Shearson Lehman Bros.*, 674 F. Supp. 812 (D. Colo. 1987) (exchange rules binding even in the absence of express employee agreement).

40. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

41. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

42. 466 U.S. 284 (1984) (arbitration of discharge of public employee not preclusive of suit predicated upon discharge as violative of the first amendment).

43. In fact, in his zeal to press this distinction, Professor Estreicher makes it bear little more weight than it can hold, for he extends this distinction even to the Court's questioning of arbitral competence to apply external law. "Here, too," he opines, "it is possible to read the Court's language in light of a labor arbitrator who sits primarily to adjudicate claims under the contract and to resolve a dispute to which the participants are the employer and the union, with no formal involvement of the individual employee." Estreicher, *supra* note 1, at 780-81. But the Court's reservation on this account, of arbitral competence, was not grounded in the union's function in labor arbitra-

As to the second distinction, there may be as little actual assent to the sweeping effect of the arbitration provision in an individual contract—a form agreement, an application incorporating the employer's arbitration policy by reference, or a compendium of employer policies supplied at the time of hire—as there is to one in a collective agreement. In all these cases, the employee takes the job on the terms established, unilaterally or collectively, with little or no thought of whether the employer might violate some labor protective law in the future and of whether the employee is making an election of remedies for such future misconduct when entering employment.

Professor Estreicher argues that, "It is not always clear that even unsophisticated workers lacking access to counsel are always better off with a rule *requiring* resort to civil courts *rather than* arbitration to pursue their statutory claims."<sup>44</sup> But, as his discussion of *Gardner-Denver* illuminates, that is not the choice. The question is not whether an arbitration conducted on behalf of an unsophisticated worker, one who lacks access to counsel, should be allowed, but whether arbitration should preclude the possibility of a subsequent *de novo* judicial determination of that employee's statutory rights. Professor Estreicher sees no reason why contract rights—rights which may be "considerably more important"<sup>45</sup> to the employee—should be entrusted to arbitrators, but statutory rights should not. The reason, it seems to me, in addition to practical considerations of arbitral competence, systematic bias in the arbitral process, and any imbalance in resources or representation, is that these statutory rights are not only for the employee's benefit, they are expressions of public policy, designed to achieve public ends, that are best entrusted to public tribunals for their vindication.

### III. ARBITRATION UNDER EMPLOYER POLICIES

If an employer establishes an internal grievance procedure to render a "final and binding" resolution of an employee's grievance, Professor Estreicher inquires whether employees should be able to "bypass the designated mechanism and repair to the civil courts."<sup>46</sup> The question he actually poses, however, is not only whether the procedure must be exhausted but, more importantly, whether its exhaustion is preclusive of a

tion in contrast to arbitration directly with the individual. It was grounded in the fact that arbitrators aren't judges. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 57; *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. at 743; *McDonald v. City of W. Branch*, 466 U.S. at 290.

44. Estreicher, *supra* note 1, at 782 (emphasis added).

45. *Id.*

46. *Id.* at 769.

suit for breach of the underlying substantive contractual obligation—whether “final and binding” means just that. As I read it, Professor Estreicher would defer to the final disposition of an arbitral body, limited, however, to its application of employer policy. Unlike the due process clause of the fourteenth amendment, which places a limit on the ability of a public employer to condition an express guaranty of job security upon procedurally gross means of termination,<sup>47</sup> the private sector employee’s only claim is in contract; and so, in this setting, Professor Estreicher suggests that the employee must take the “bitter with the sweet.”<sup>48</sup> He acknowledges that some courts have refused to require exhaustion where the internal machinery is procedurally gross, the theoretical justification for which is grounded in the doctrine of illusory promises.<sup>49</sup> But, on the explicit assumption that “the dispute mechanism does not give rise to difficulties on illusory promise . . . grounds,” and:

Without denying the potential for unfair outcomes in some situations, I question whether courts as a matter of their common law authority may legitimately rewrite the contract to render enforceable the substantive contractual commitment contained in the policy while declaring ineffective the accompanying dispute-mechanism term.<sup>50</sup>

In any event, he sees no such problem where the procedure is not wholly an internal one, but provides for arbitration by an outside neutral; and any objection even to that would be mitigated where provision is made for “competent representation of the employee’s interest,”<sup>51</sup> such as a system of “employee advocates” housed in the personnel department or by provision of peer representatives.

The conclusion, quoted above, follows only if the assumption—the lack of an illusory promise—is sound. But Professor Estreicher does not attend to the law of illusory promises; indeed, he scoffs at it:

[I]f the employer can unilaterally revoke or modify the commitments contained in its policy manual, it seems difficult to understand why the employer cannot also insist that disputes under the policy be committed to a designated procedure for final, binding resolution.<sup>52</sup>

It is not enough to point out that the conclusion does not follow from the premise—that the possibility of future abrogation is irrelevant to the ability of the provision, currently in effect, to withstand attack or illusory promise grounds—or that promissory estoppel might well limit

47. *Id.* at 771 n.53 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)).

48. *Id.* (citing Justice Rehnquist’s plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974), rejected as a constitutional proposition in *Loudermill*).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 770-71.

the effectiveness of a retroactive abrogation.<sup>53</sup> What requires attention is the doctrine itself. The fundamental principle, reflected in a variety of employment cases, is that an employer cannot reserve to itself the power to declare its underlying obligation an illusion.<sup>54</sup> It follows from this principle that an employer cannot give an assurance of fairness, or of job security, and reserve to itself an unreviewable final authority to decide whether it has acted fairly or discharged wrongfully. Whether or not the employee may be compelled to exhaust the procedure, she may not be precluded from an action for breach of contract on the underlying obligation; a contrary result would make the employer (directly or acting more subtly through those under its control) a judge in its own cause of action.<sup>55</sup> Academic tenure, for example, would afford no protection if a private institution's board of trustees could preclude judicial vindication by reserving to itself "final and binding" authority to determine whether there was cause to dismiss a faculty member after exhausting an intramural hearing procedure.<sup>56</sup>

This is not to say that deference should not be given the "final" decision of an adequately neutral body;<sup>57</sup> and where the procedure terminates before a truly neutral external adjudicator, the case for judicial deference is strengthened considerably. But two closely related features of

53. SPECTER & FINKIN, *supra* note 20, at § 3.03 (and the authority collected in nn.18 and 19).

54. Thus an employer may not enter upon a contract of fixed duration while reserving to itself the power to terminate earlier for no reason. *See, e.g.,* Carter v. Bradlee, 245 A.D. 49, 280 N.Y.S. 368, *aff'd*, 269 N.Y. 664, 200 N.E. 48 (1936), *followed in* Rothenberg v. Lincoln Farm Camp, Inc., 755 F.2d 1017 (2d Cir. 1985). *See also* King v. Control Systematologists, Inc., 479 So. 2d 955 (La. App. 1985), *cert. denied*, 482 So. 2d 630 (La. 1986); Yazujian v. J. Rich Steers, Inc., 195 Misc. 694, 89 N.Y.S.2d 551 (Sup. Ct. 1949); Dallas Hotel v. Lackey, 203 S.W.2d 557 (Tex. Civ. App. 1947). An employer's reservation of "sole discretion" to pay a commission may not defeat an obligation to pay. *See, e.g.,* Spencer v. General Elec. Co., 243 F.2d 934 (8th Cir. 1957); Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984); Allen D. Shadron, Inc. v. Cole, 101 Ariz. 122, 416 P.2d 555, *aff'd*, 101 Ariz. 341, 419 P.2d 520 (1966). Similarly, an employer may not obligate itself to pay a bonus while disclaiming a legal obligation to pay. *See, e.g.,* Cinelli v. American Home Prods. Corp., 785 F.2d 264 (10th Cir. 1986); George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926); Patterson v. Brooks, 285 Ala. 349, 232 So. 2d 598 (1970); Ellis v. Emhart Mfg. Co., 150 Conn. 501, 191 A.2d 546 (1963); Wellington v. Con P. Curran Printing Co., 216 Mo. App. 358, 268 S.W.2d 396 (1925); Molbey v. Hunter Hosiery, Inc., 102 N.H. 422, 158 A.2d 288 (1960); Oiler v. Dayton Reliable Tool & Mfg. Co., 42 Ohio App. 2d 26, 326 N.E.2d 691 (1974); Goudie v. HNG Oil Co., 711 S.W.2d 716 (Tex. App. 1986). Nor may it promise benefits while disclaiming a legal obligation to pay. *See, e.g.,* Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 A. 205 (1933); Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N.W. 385 (1936); Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N.E. 697 (1935); Schofield v. Zion's Co-op Merchantile Ind., 85 Utah 281, 39 P.2d 342 (1934).

55. *See e.g.,* Cross & Brown Co. v. Nelson, 4 A.D.2d 501, 167 N.Y.S.2d 573 (1957); Burger v. Jan Garment Co., 52 Luz. L. Reg. 33 (Pa. Com. Plas 1962).

56. McConnell v. Howard University, 818 F.2d 58 (D.C. Cir. 1987); Manes v. Dallas Baptist College, 638 S.W.2d 143 (Tex. App. 1982) (writ of error refused, no reversible error).

57. *Cf.* Swartout v. Precision Castparts Corp., 83 Or. App. 203, 730 P.2d 1270 (1986) (employer bound by the "final" decision of its own internal grievance committee favorable to employee); Lehmann v. Board of Trustees of Whitman College, 89 Wash. 2d 874, 576 P.2d 397 (1978) (same).

such an arbitration system seem to me to be critical to its integrity, so to justify judicial deference—the ability of the parties jointly to select the “final” decisionmaker, and the ability of the grievant to be represented by any counsel of his or her choice.<sup>58</sup> Indeed, the latter plays back upon the former. Professor Estreicher observes that the “repeat player” problem may be mitigated by the role of plaintiff’s counsel in the individual employment setting, who may be a repeat player in the selection of future arbitrators. An allowance of representation by a union of the individual’s selection (or counsel supplied by it), which may see such representation as an effective means of securing an organizational base and which may be an active repeat player in future arbitral selection would go far to solve the problem. Where such independence of representation is lacking, the grievance-arbitration system would appear to be inherently skewed in favor of the employer and, whether or not there is an obligation to exhaust, should not be treated as a genuine arbitration for the purpose of judicial deference even as to the employee’s contract rights.

#### IV. THE “COMPANY UNION” PROBLEM

Professor Estreicher also confronts the design of such unilaterally promulgated grievance-arbitration plans with respect to their passing muster under section 8(a)(2) of the National Labor Relations Act, the prohibition on “company unions.” He notes a “debate of sorts” between those who view “only one form of collective representation of employee interests” as permissible, and others who are more tolerant of employee participative mechanisms as a means of “promoting communication and cooperation between the firm and its employees.”<sup>59</sup> But he sees it as unnecessary to resolve that larger debate in order to reach the narrower question of the allowable limits of employee representation as part of such a grievance-arbitration system. The maintenance of such a system, he argues, ending before an external neutral, does not constitute the creation of a “company union,” and, for section 8(a)(2) purposes, it does not matter “whether the employee-advocate is enlisted from the same job class as the claimant or from the firm’s human resources department, or whether the employee advocate is chosen randomly or selected by the

58. Interestingly, one of the reasons Professor Estreicher gives for distinguishing the arbitration of public law questions under collective agreements is the lack of individual control over the presentation of his or her grievance. Estreicher, *supra* note 1, at 781. I fail to see why this should be of any less significance to the individual, nonunionized employee as to contract claims that Professor Estreicher concedes may be more important to the employee than a labor protective provision. *Id.* at 782.

59. *Id.* at 773.

claimant."<sup>60</sup>

Despite the effort to decline engagement in the larger debate over the contemporary significance of section 8(a)(2), the disposition of the instant question necessarily implicates that debate. It cannot be avoided. And, as we shall see, it does—or should—make a difference who the “employee advocate” is.

Professor Estreicher’s premise is that, “It is *only* the element of collective representation of employee interests that triggers” the policy underlying section 8(a)(2), “that the employer is attempting to undermine the conditions for forming a truly autonomous institution for the purpose of collective representation.”<sup>61</sup> From this it follows that “the mere use of an employee-advocate” poses no such threat. I do not believe Professor Estreicher’s analysis is faithful to either the text or setting of section 8(a)(2).

An employer is forbidden to dominate or interfere in the formation or administration of a “labor organization,” and, at first blush, it is not obvious that a unilaterally promulgated grievance-arbitration policy establishes a “labor organization.” On that, however, the expansive statutory definition must be attended to. A “labor organization” is defined as:

[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.<sup>62</sup>

Is the employer’s grievance-arbitration policy an “employee representation plan”? It is a plan whereby employees are to be represented in the matter of their grievances. Do employees “participate” in it? They do, under the configurations Professor Estreicher discusses, as employee “representatives.” Do these representatives function even “in part” to “deal” with the employer concerning “grievances”? That is precisely the purpose; indeed, it is unimaginable that there would not be a course of

60. *Id.* at 774. Professor Estreicher speaks to both employee participation in a wholly intramural adjudicative body, along the line of Sparks Nugget, Inc., 230 NLRB Dec. (CCH) 275 (1977), and to employee representation as a part of a system that terminates before an external neutral adjudicator. The former involves not only the “company union” issue Professor Estreicher discusses, but whether the employee adjudicators are rendered members of management by virtue of their participation. That problem becomes especially acute when professional employees are implicated. See College of Osteopathic Medicine and Surgery, 265 NLRB Dec. (CCH) 295 (1982), and FHP, Inc., 274 NLRB Dec. (CCH) 1141 (1985). See also Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989). Both are interesting questions, worthy of extended discussion. But inasmuch as the role of arbitrators in nonunion employment is the major theme of Professor Estreicher’s paper, this comment is limited to that question.

61. Estreicher, *supra* note 1, at 774 (emphasis added).

62. 29 U.S.C. § 152(5) (1986).



dealing between the employee's advocate and the company's representative both prior to and during the arbitration, in an effort to explore avenues of possible settlement, to narrow issues, to seek stipulations as to remedy and the like, and to agree upon more technical matters such as the production of witnesses and documents.

More important, the gravamen of section 8(a)(2) is not limited to alternative forms of collective bargaining. From World War I on through the 1920s a variety of works councils and representation plans were assayed as a product of progressive reform—to involve the workers in some organic way in the determination of the terms and conditions of their working lives.<sup>63</sup> Some councils or plans were the product of good faith efforts by “progressive” employers better to realize an industrial democracy, such as the extensive plan at the Filene store in Boston.<sup>64</sup> Others had their origin in more cynical efforts to counter unionization, such as the much-publicized plan instituted at the Colorado Fuel and Iron Company in the wake of the infamous “Ludlow massacre” of 1914.<sup>65</sup> All these plans invariably provided a procedure for the resolution of grievances, either by appeal to the managerial hierarchy via an intramural representative, by final resolution of a joint worker-management committee or works council, or, under some plans—including, prominently, that adopted by management for the Colorado Fuel and Iron Company—for final and binding decision of a jointly selected external neutral arbitrator.<sup>66</sup> But all were intended by Congress to be governed by the broad sweep of then section 8(2) whether they were enlightened experiments or cynical manipulations.

In sum, the National Labor Relations Act says nothing at all to a nonunion employer's prerogative to establish a grievance procedure which allows an employee individually to appeal to the managerial hierarchy or to an external neutral. What the employer may not do is devise a plan that says to the employee, “Here is your representative for the presentation of your grievance irrespective of your personal choice”

63. See generally E. MILLER, *WORKMEN'S REPRESENTATION IN INDUSTRIAL GOVERNMENT* (1922); C. FRENCH, *THE SHOP COMMITTEE IN THE UNITED STATES* (1923); E. BURTON, *EMPLOYEE REPRESENTATION* (1926).

64. M. LADAMME, *THE FILENE STORE* (1930).

65. B. SELEKMAN & M. VAN KLEECK, *EMPLOYEES' REPRESENTATION IN COAL MINES: A STUDY OF THE INDUSTRIAL REPRESENTATION PLAN OF THE COLORADO FUEL AND IRON COMPANY* (1924) [hereinafter SELEKMAN & VAN KLEECK].

66. E. BURTON, *supra* note 63, at 174; C. FRENCH, *supra* note 63, at 48-49; E. MILLER, *supra* note 63, at 61; SELEKMAN & VAN KLEECK, *supra* note 65, at 66-67. See also, 1 *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 125-26* (Commemorative Ed. 1985) (colloquy with President Green of the AFL concerning *inter alia* the arbitration plan in effect for the Chrysler Corporation) [hereinafter LEGISLATIVE HISTORY].

whether chosen by election,<sup>67</sup> by random selection, or by the company's personnel department.

This is not to say that weighty policy arguments could not be made for such devices. Henry Dennison, industrialist, Progressive reformer, and member of the old National Labor Board argued powerfully before the Senate's committee that forms of worker cooperation serve as a invaluable supplement to unionism; that employee representation plans of the progressive type—not sham unions—establish “a basis for wholesome mutual business relationship between management and workers [that] should be cultivated as seeding ground or laboratories from which we may learn, not dug up”<sup>68</sup> by the then proposed section 8(2). One may well come to the conclusion, as the Sixth Circuit has, that “the adversarial model of labor relations in an anachronism,”<sup>69</sup> even though the contemporary rhetoric of “cooperation” and “participation” is indistinguishable from the reformist language of the Progressive period. But, contrary to Professor Estreicher, that is not a choice for the labor Board—or the courts—to make. Congress has made that choice categorically, and if chose unwisely, or if contemporary circumstances require a refashioning of the rules, the only legitimate agency of change is legislative.

67. As an elected employee representative at the Colorado Fuel and Iron Company observed, the men “won't present their grievances to the representatives they elect.” SELEKMAN & VAN KLEECK, *supra* note 65, at 89.

68. LEGISLATIVE HISTORY, *supra* note 66, at 438 (testimony of Henry Dennison). One student of Dennison's employee participation plan concluded that it was “very largely the product of the employees.” E. BURTON, *supra* note 62, at 85.

69. NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 293 (6th Cir. 1982).

