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The Black Hole of Mandatory Arbitration

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THE BLACK HOLE OF MANDATORY ARBITRATION*

CYNTHIA ESTLUND**

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INTRODUCTION

From the early days of mandatory arbitration of statutory claims—especially employment-discrimination claims—one major critique has been the loss of transparency and publicity that attends a shift from litigation in public courts to arbitration in private tribunals.¹ Given the lack of written, publicly available decisions and the relative secrecy of arbitral proceedings, the diversion of legal disputes from courts to arbitrators under the Federal Arbitration Act (“FAA”)² threatens to stunt both the development of the law and public knowledge of how the law is interpreted and applied in important arenas of public policy.

Judith Resnik and others have shown that the presumed contrast to litigation was in some ways overstated as litigation itself has

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1. See Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 *STUD. L. POL. & SOC’Y* 367, 378–83 (1992); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 *DENV. U. L. REV.* 1017, 1047 (1996).

2. 9 U.S.C. §§ 1–16 (2012).

dramatically receded from the public stage.³ Public trials in civil cases have become nearly extinct, as the overwhelming majority of cases are resolved either on dispositive motions (usually in unpublished opinions) or out-of-court settlements. Settlements between private parties often include non-disclosure provisions barring parties from discussing anything about the case or its resolution.⁴

While it is important not to overstate the contrast between arbitration and litigation, there is no doubt that much more of the arbitral process is shielded from public view. In particular, the plaintiff's allegations are set out in a complaint that appears on a public docket in litigation but not in arbitration, and the hearing, if any, occurs in open court in the case of litigation but usually in a private conference room in the case of arbitration.⁵ In cases that proceed through a hearing and decision, the typically terse nature of arbitral rulings means that much of the actual rationale for the decision is hidden inside the arbitrator's head—and even these terse rulings are rarely published.⁶ The relative secrecy of arbitration is a product partly of the confidentiality norms that prevail within this private contractual forum and the community of arbitrators,⁷ and partly of confidentiality agreements that often accompany pre-dispute arbitration agreements and that bind the parties.⁸ The private and contractual nature of arbitration makes it relatively easy for firms to

3. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2932–33 (2015) [hereinafter Resnik, *Diffusing Disputes*] (quoting JUD. CONF. U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 19–20 (1995), <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf> [<http://perma.cc/WEY3-9U0q>]); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 810 (2008). Among others elaborating similar views, see Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117, 1123 (2009); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2629–32 (1995).

4. See, e.g., Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004).

5. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC* 5 (2015), <http://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/M65J-JXNT>] (describing differences between arbitration and court proceedings).

6. See *id.*

7. For example, staff of the American Arbitration Association (“AAA”)—the country's largest providers of arbitration services—have an ethical obligation to keep information confidential. *AAA Statement of Ethical Principles*, AM. ARB. ASS'N, <https://www.adr.org/StatementofEthicalPrinciples> [<https://perma.cc/2E4A-EAZL>].

8. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 466 (2006).

prevent disclosure of just about anything concerning allegations, evidence, disposition, or settlement of the disputes, not just by parties but by the tribunals themselves.

To the extent that firms do impose obligations on their employees (and customers) to arbitrate rather than litigate future legal disputes, they can often draw a heavy veil of secrecy around allegations of misconduct and their resolution. That means that firms have less to worry about if they violate the law. They face more limited “reputational sanctions,” which are among the most powerful deterrents to illegal or legally questionable conduct, at least among reputable firms.⁹ The relative invisibility of particular disputes and their outcomes in arbitration thus undermines the regulatory function of private-enforcement actions, which serve not only as a dispute resolution mechanism but also as an *ex post* alternative or supplement to *ex ante* prescriptive rules of conduct.¹⁰

The relative secrecy and obscurity of arbitral proceedings extends to the nature of arbitral procedures themselves. Courts follow published rules of procedure that are promulgated by publicly accountable bodies. Arbitrators are primarily bound by the agreements under which they are appointed—agreements that are written by the parties, or rather by one party in the case of most employment and consumer arbitration agreements.¹¹ Some arbitration instruments adopt the procedures of reputable arbitration providers like the American Arbitration Association (“AAA”);¹² others use more obscure providers or invent their own procedures.¹³ Either way, firms have no legal obligation to make their chosen procedures publicly available.¹⁴ That has made it impossible to develop an accurate empirical assessment of the shape of mandatory arbitration as a mechanism of dispute resolution and has greatly handicapped efforts to hold firms publicly accountable for the fairness of their dispute resolution procedures.

9. See generally Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193 (2016) (exploring the impact of litigation on reputational sanctions).

10. See Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 377, 385–86 (2007).

11. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681–84 (2010).

12. STONE & COLVIN, *supra* note 5, at 17.

13. *Id.*

14. See *id.* at 18. On why that is problematic and why transparency should be mandated (both for firms’ chosen arbitration procedures and for other terms and conditions of employment), see generally Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011).

In this Article, I focus on another dimension of the obscurity surrounding mandatory arbitration: the outright disappearance of claims that are subject to this process. The secrecy and non-transparency of arbitration providers and procedures greatly impeded empirical research on arbitration, its incidence, and its outcomes for decades after the Supreme Court launched the mandatory-arbitration juggernaut. But the picture is gradually coming into focus. It now appears that the great bulk of disputes that are subject to mandatory arbitration agreements (“MAAs”)—that is, a large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate before they are even filed. It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an “alternative dispute resolution” mechanism than it is a magician’s disappearing trick or a mirage. Metaphors beckon, but I have opted for that of the black hole into which matter collapses and no light escapes.

The paucity of employment claims in arbitration has not gone unnoticed by scholars. Alexander Colvin and his co-authors, who have conducted much of the empirical work on arbitration of employment disputes, have noted the strikingly small number of arbitration filings.¹⁵ Jean Sternlight in particular has surveyed the literature and data on this point and elaborated the implications for employee rights.¹⁶ I highlight and elaborate on these findings here because their implications are profound, and they deserve more attention than they have gotten so far.

A word on the scope of this Article: first, the focus here is on employment disputes. Although mandatory arbitration has probably had a greater proportional impact on consumer claims (largely by way of anti-class action provisions), employment claims are distinctive in ways that matter here. Employment cases, with the exception of wage-and-hour claims, are much more likely than consumer claims to involve individual disputes with significant financial stakes for

15. See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 6 (2011).

16. See Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1328–29 (2015). Judith Resnik and Maria Glover have also highlighted the paucity of arbitrations in both employment and consumer cases and the implications for access to justice. See J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3091–92 (2015); Resnik, *Diffusing Disputes*, *supra* note 3, at 2936.

individual claimants (relative to their total resources). The prevalence of fee-shifting provisions in many employment statutes¹⁷ attests to the recognized importance of both the public interests at stake and of private enforcement in vindicating those public interests.¹⁸ For present purposes, it is also important that employment litigation has long been and continues to be a major part of federal court dockets.¹⁹ Although the use of arbitration agreements has sharply increased in recent years, many employees remain free to file their claims in court.²⁰ That makes it possible to compare some aspects of litigation and arbitration that might otherwise remain obscure.²¹

Within the field of employment arbitration, this Article focuses on employer-promulgated pre-dispute arbitration agreements in the non-union workplace; that is what is meant here by “mandatory arbitration.” Arbitration under individually negotiated agreements (mainly for high-salaried employees) or under either post-dispute agreements to arbitrate or collective bargaining agreements is different, and more likely to be a mutually beneficial alternative to either litigation or labor-management strife. But arbitration that is imposed on employees as a condition of employment before any dispute has arisen, which is the focus of this Article, has been deservedly controversial since its inception.

The Article proceeds as follows. Part I briefly reviews the decades-long quest for empirical data on mandatory-employment arbitration and highlights the small number of arbitrations that take place under these provisions. Part II develops some rough estimates of the number of “missing claims”—potential claims that are subject to arbitration but never enter any adjudicatory process. Part III explores some dimensions of the causal story behind why so few claims are filed in arbitration. Part IV turns to the consequences of the missing claims for enforcement of employee rights. Part V concludes with a plea to reconsider the law of mandatory arbitration

17. See, e.g., 29 U.S.C. § 216(b) (2012); 42 U.S.C. § 2000e-5(k).

18. See, e.g., *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968) (per curiam) (noting that Congress enacted a fee-shifting provision to help individuals advance important policy goals by pursuing private remedies). These features are all found most clearly in cases alleging discriminatory or retaliatory discharge, which make up a large share of employment litigation. In wage-and-hour disputes, individual stakes are typically smaller, and cases are often not viable without collective adjudication, as with most consumer claims.

19. See *infra* note 70 and accompanying text.

20. See *infra* notes 61–63 and accompanying text.

21. There are still many difficulties with comparing data on arbitration and litigation. Sternlight, *supra* note 16, at 1325. Those difficulties are greatest in relation to data on outcomes. This Article focuses more narrowly on initial filings.

in light of mounting evidence that it effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies.

I. THE LONG QUEST FOR DATA ON MANDATORY ARBITRATION

Federal courts keep public records of lawsuits and filings, and some basic information about types of cases. Based on that data and other information about the disposition of cases, scholars have long been producing empirical studies of litigation.²² (Data from state courts is far more difficult to gather or assess.)²³ The information is limited, but the federal courts are exemplars of transparency compared to the world of arbitration. While federal law routinely consigns federal statutory claims to private arbitration pursuant to mandatory pre-dispute “agreements” imposed as a condition of employment, it does not require either employers or arbitration providers to publish any information about the agreements, the procedures, or the cases thus resolved.²⁴ Moreover, nothing in the burgeoning law of arbitration under the FAA, despite its impact on the enforcement of important public policies, regulates what entities may provide arbitration. Apart from concerns about the fairness of these decision-making processes, the lack of regulation and transparency has made it very difficult for scholars to assemble data about the aggregate dimensions or consequences of arbitration in employment (or consumer) cases.²⁵

The largest arbitration providers are well-established, reputable organizations like the American Arbitration Association and the Judicial Arbitration and Mediation Service (“JAMS”).²⁶ Survey data

22. For examples in the employment discrimination field, see generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

23. Sternlight, *supra* note 16, at 1324–25.

24. See Estlund, *supra* note 14, at 355. Some state laws (including in California) require arbitration providers to publicize certain information about the consumer and employment cases they handle; although compliance with these laws varies, the resulting data has greatly improved the empirical study of arbitration. *Id.*

25. Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, The Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32, 42–43 (2014); Sternlight, *supra* note 16, at 1323–24.

26. See ALEXANDER J.S. COLVIN & MARK D. GOUGH, *COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES* 34 (2014),

indicate that the AAA is designated in about half of employment arbitration agreements, and JAMS in another twenty percent.²⁷ Both organizations provide lists of qualified arbitrators and are relatively transparent in how arbitrators are chosen, who they are, and how they deal with disputes (though both organizations also promote confidentiality in the proceedings themselves).²⁸ Both the AAA and JAMS also adhere to the much-touted “Due Process Protocol” (“DPP”), a set of standards for fair employment arbitration procedures that was approved by a diverse group representing employers, unions, employees, and dispute resolution professionals.²⁹ But nothing in the law of arbitration requires arbitration providers to adhere to the DPP, and nothing requires employers to designate the AAA or JAMS as the arbitration provider.

An estimated thirty percent of arbitration provisions call for adjudication of disputes through other providers or ad hoc processes.³⁰ In this grey zone, arbitration procedures, the pool of arbitrators, the selection process, and case outcomes may all be impossible for outside observers to ascertain. It appears that some of those providers succumb to the temptation to supply what some firms demand, and cater quite openly to the employers who unilaterally draft and impose arbitration agreements and who choose the providers. For example, consider the egregiously one-sided agreement struck down by the Fourth Circuit in *Hooters of America, Inc. v. Phillips*,³¹ which, among its many defects, essentially guaranteed that the employer would choose the arbitrator.³² But it can hardly be surprising that the overwhelmingly asymmetric process

<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1059&context=reports> [https://perma.cc/A853-9SK4].

27. *Id.* at 34–35.

28. JUDICIAL ARBITRATION & MEDIATION SERV., JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES 16–18, 28 (2014), https://www.jamsadr.com/files/uploads/documents/jams-rules/jams_comprehensive_arbitration_rules-2014.pdf [https://perma.cc/8ELD-9VV5]; AM. ARB. ASS’N, *supra* note 7.

29. See Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 174 (2005); see also AM. ARBITRATION ASS’N, EMPLOYMENT DUE PROCESS PROTOCOL 1–5 (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [https://perma.cc/C6M4-5CW8].

30. See COLVIN & GOUGH, *supra* note 26, at 35 fig. 23.

31. 173 F.3d 933 (4th Cir. 1999).

32. *Id.* at 938–39 (“[T]he employee’s arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list.”).

of “choosing” arbitration and arbitration providers would put pressure on the neutrality of the process.

A 2015 front page *New York Times* series pierced the veil of secrecy to expose the partiality of arbitration in practice—even among some AAA and JAMS arbitrators.³³ Among the “subtler” forms of partiality was “the case of the arbitrator who went to a basketball game with the company’s lawyers the night before the proceedings began. (The company won.)”³⁴ In another case, “a dismayed [plaintiff] watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)”³⁵ Part of the problem is the so-called “repeat player effect,” or the tendency of arbitrators to favor the party that is more likely to produce repeat business.³⁶ The *Times* reporters found that, out of the cases they examined, “41 arbitrators each handled 10 or more cases for one company between 2010 and 2014.”³⁷ One “JAMS arbitrator in an employment case . . . simultaneously had 28 other cases involving the [defendant] company.”³⁸ As for the impact of this fact, in interviews, “more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.”³⁹ As for the employee-complainants, one arbitrator said, “Why would an arbitrator cater to a person they will never see again?”⁴⁰ The veil of secrecy that shields arbitration from public scrutiny and from all but the most persistent investigators has obscured these problems for decades.

The opacity of the arbitration process translates into a paucity of empirical data on how mandatory arbitration works and how it has affected the enforcement of public laws. From 1992, when *Gilmer v. Interstate/Johnson Lane Corp.*⁴¹ launched the mandatory arbitration

33. See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/9UY4-3K3K> (dark archive)]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/Z5WM-H8C2> (dark archive)].

34. Silver-Greenberg & Corkery, *supra* note 33.

35. *Id.*

36. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 190–91 (1999).

37. Silver-Greenberg & Corkery, *supra* note 33.

38. *Id.*

39. *Id.*

40. *Id.*

41. 500 U.S. 20, 31 (1991).

juggernaut within the field of statutory employment claims, until about 2010, there was little representative data on any aspect of arbitration under those employer-devised procedures.⁴² The early data that did exist came disproportionately from individually negotiated arbitration agreements (typically involving high-level executives).⁴³

Based on the partial early data, some commentators reached a conclusion that was quite consistent with the *Gilmer* Court's sanguine account of the *quid pro quo* of mandatory arbitration: By agreeing to arbitrate, parties trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."⁴⁴ Plaintiffs, for their part, lost access to juries, judges, and appellate review, but gained access to a faster and often cheaper adjudication process.⁴⁵ Based on that early data, Professor Samuel Estreicher and others concluded that arbitration had some advantages for both sides over the expensive and "lottery-like" litigation process; recoveries were more limited, but employees—especially low-income employees—were more likely to get some kind of hearing and more likely to get some kind of remedy.⁴⁶ On that then-plausible account, the advent of mandatory arbitration appeared likely to enhance ordinary employees' access to justice.

The picture has become a bit clearer in recent years, due in part to a handful of state laws, including California's, requiring arbitration providers to publicly disclose a modicum of information about the disputes they handle.⁴⁷ In addition the AAA has allowed some scholars to examine case files, under assurances of confidentiality, and to publish some aggregate data.⁴⁸ The comparatively rich body of empirical research that has emerged in recent years is still far from

42. See Colvin, *supra* note 15, at 11 tbl.2.

43. See *id.* at 5.

44. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 472 U.S. 614, 628 (1985)).

45. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL., 559, 563–64 (2001).

46. See *id.*; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 148 (1999); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMP. L. 411, 417–18 (2010).

47. CAL. CIV. PROC. CODE § 1281.96 (West, Westlaw through ch. 2 of 2018 Reg. Sess.).

48. See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 79–82 (2014).

comprehensive. It is also likely to overstate the fairness of arbitration for claimant-employees because the data comes from arbitration providers who comply with state-disclosure requirements (many do not),⁴⁹ and especially from the AAA, which has supported scholarly efforts to understand the operation and impact of arbitration.⁵⁰

With that in mind, it is striking how discouraging the more recent data are. It now appears not only that average recoveries are significantly lower in arbitration than in court (as previously believed), but also that employee-complainants may be significantly *less* likely to prevail and to recover anything.⁵¹ Colvin and Gough, for example, found that employees won something in 19.1% of AAA arbitrations that were terminated from 2003 to 2013.⁵² That compares to the findings of other scholars that plaintiffs won something in 29.7% of federal employment discrimination cases,⁵³ 57% of state non-civil rights employment cases, and 59% of California state wrongful discharge cases.⁵⁴ Moreover, employees who did win something recovered much less in AAA arbitration than in litigation: The median award was \$36,500 in arbitration versus \$176,426 in federal discrimination cases, \$85,560 in state non-civil rights employment cases, and \$355,843 in California wrongful discharge cases.⁵⁵ Still, data on case outcomes are hotly contested, and their

49. See David J. Jung et al., PUB. LAW RES. INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA 3 (2013), <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update> [<https://perma.cc/UZ46-FX6K>].

50. Colvin and Gough, for example, were able to examine AAA files, under promises of confidentiality, to examine case outcomes and characteristics. Alexander J.D. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 1019 (2015).

51. Data on outcomes are difficult to gather and to interpret, particularly in light of high rates of settlement, about which information is especially scarce. So there is still considerable debate about these matters. See, e.g., Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. (forthcoming 2018) (manuscript at 16) (on file with the North Carolina Law Review) (comparing and critiquing various studies on outcomes in arbitration and litigation).

52. Colvin & Gough, *supra* note 50, at 1028 tbl.1. Looking at more recent data, Professor Estreicher, Heise, and Sherwyn found an employee win rate of 22.4% in cases resulting in an award. Estreicher et al. *supra* note 51 (manuscript at 10).

53. See Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 28 (2015).

54. See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535 (2003).

55. Colvin, *supra* note 48, at 80.

meaning is clouded by high rates of dismissal and summary judgment in court and by the paucity of data on settlements.⁵⁶

My focus here, however, is not on outcomes in arbitration versus litigation, but on the sheer number of cases in each. The single most striking fact uncovered by the recent studies is the very small number of arbitration cases that enter the process. During the eleven-year period from 2003 through 2013, an average of about 940 cases per year were filed and terminated with the AAA under employer-promulgated procedures.⁵⁷ If the AAA is the designated provider in about half of arbitration agreements (as surveys suggest),⁵⁸ that yields an estimate of fewer than 2000 employment arbitration cases terminated per year under MAAs.⁵⁹ At first glance, that appears to be a very low number. Let us dig in a bit to see how low it is (in Part II) and to begin to understand why it might be so low (in Part III).⁶⁰

II. COUNTING “MISSING” ARBITRATION CASES

To assess the meaning of the small number of arbitrations, we might start by comparing that number with the number of employees covered by MAAs. Until recently, the prevailing scholarly estimate was that those agreements covered roughly twenty percent of non-union private sector employees.⁶¹ (That compared to just over two percent coverage in 1992.⁶²) By contrast, Colvin’s more comprehensive 2017 study estimated that 56 percent of non-union private sector employees, or approximately 60 million employees, are now covered by MAAs.⁶³ That is a steep increase in coverage, and it sharply raises the stakes in debates over mandatory arbitration. But of course those numbers beg the question: How many such

56. See Estreicher et al., *supra* note 51 (manuscript at 10–11).

57. Colvin & Gough, *supra* note 50, at 1027.

58. See COLVIN & GOUGH, *supra* note 26, at 34–35.

59. In theory, there could be a larger, though hidden trove of arbitrations conducted by non-AAA providers. But the opposite is more probable: Claimants are probably much less likely to file claims with non-AAA providers, many of which are less reputable and less committed to treating claimants fairly. See *infra* text accompanying note 78–79.

60. Again, let me note that Jean Sternlight has reported on these matters in greater detail than I do here. See Sternlight, *supra* note 16, at 1332.

61. This estimate was based on Colvin’s 2007 studies of the telecommunications industry, in which he found that fifteen to twenty-five percent of employees were covered by arbitration agreements. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 410–11 (2007).

62. ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 4 (2017), <http://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/VCG8-37UU>].

63. *Id.* at 2.

individuals each year have potential employment law claims—claims that proceed past “naming” and “blaming” to “claiming” in some forum or another?⁶⁴

I will focus here solely on the number of claims filed (whether or not they are terminated), as that will allow for a relatively clean comparison with federal court filing statistics, and will avoid many controversies surrounding the analysis of case outcomes. I will focus on filings in 2016, the most recent year for which solid data are available for both the AAA and federal courts.⁶⁵ The AAA reports that 2879 individuals filed employment cases with the AAA under employer-promulgated procedures in 2016.⁶⁶ Following the provisional assumption above that this represents half of all arbitrations under MAAs,⁶⁷ that suggests that about 5126 cases were filed in arbitration by the approximately 60 million employees who are covered by MAAs. That appears to represent an increase above what Colvin found, on average, from 2003 to 2013, and that is what one would expect given his recent findings on growing use of MAAs.⁶⁸ Still, it seems like a very low number. But to make sense of it, one needs to know how many claims were filed in court by those free to do so. That might make it possible to roughly estimate the number of claims one would expect to see among those covered by MAAs.⁶⁹

64. The iconic terminology is from William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 631 (1980).

65. I use a single year's data in part because of Colvin's 2017 study showing that coverage of MAAs has risen steeply in recent years. COLVIN, *supra* note 62, at 1. In earlier years, fewer workers were presumably covered by MAAs, but there is no data on coverage. Insofar as the coverage percentage is a key element of the analysis below, I use only the most recent year for which data on court and arbitration are available.

66. Email from Ryan Boyle, Vice President, Statistics and In-House Research, to author (Oct. 24, 2017) (on file with the North Carolina Law Review). Between 2012 and 2016, an average of 2563 cases per year were filed under employer promulgated procedures. *Id.* The AAA reports one filing per individual, even if multiple individuals are covered by the same complaint. See *Consumer Arbitration Statistics*, AM. ARB. ASS'N, <https://www.adr.org/ConsumerArbitrationStatistics> [<https://perma.cc/N2MJ-YRW4>].

67. See *supra* notes 58–60 and accompanying text. I will question that assumption below.

68. See *supra* text accompanying notes 57–64. Note, too, that my 2016 data are on filings, while Colvin's numbers above from 2003–2013 are for cases filed *and terminated*.

69. One caveat to this comparison stems from the fact that some unknown number of individuals (mostly high-income professional or managerial employees) are covered not by employer-promulgated procedures (what I call MAAs here) but rather by individually-negotiated arbitration agreements. Those individuals are not included in Colvin's estimate of 56% coverage by MAAs, and arbitrations under those agreements are not included in the AAA numbers reported here. See Alexander Colvin & Kell Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29

Let us begin with federal court litigation, as to which data are readily available. In 2016, approximately 31,000 federal lawsuits were filed in five categories of employment cases: “Civil rights: employment,” “ADA [Americans with Disabilities Act]/employment,” “FLSA” (Fair Labor Standards Act), “ERISA” (Employee Retirement Income Security Act), and “FMLA” (Family and Medical Leave Act).⁷⁰ If those 31,000 federal court cases were all filed by the 44 percent of employees who are not covered by MAAs, then we would expect over 39,000 claims to be filed in arbitration by the other 56 percent of employees who are subject to mandatory arbitration.⁷¹ Given the preliminary estimate of 5,126 arbitration filings,⁷² this comparison would suggest about 34,000 “missing” arbitrations per year—that is, 34,000 cases that we would expect to enter the arbitration process, based on the general rate of employment litigation and the number of employees covered by MAAs, but that are never filed.

That is a striking number of “missing” arbitrations. But these numbers are open to several objections, two of which may call for downward adjustments, and are reflected in Figure 1. First, some federal court lawsuits are filed by public employees, who are not generally subject to MAAs and should be excluded from the comparison. If government employees (who make up 15.2% of non-farm employees) are as likely as private sector employees to file an employment lawsuit in federal court, the relevant number of federal court filings would fall to 26,300.⁷³ Second, some of the federal court lawsuits were presumably filed by individuals who were covered by

OHIO ST. J. ON DISP. RESOL. 59, 63–66 (2014). In terms of actual arbitrations, the numbers are small; in 2008, for example, 27.6% of the AAA’s employment arbitration docket (124 out of 449 cases) arose out of individually-negotiated agreements. *Id.* Ignoring those cases might introduce some small distortion into the comparison between rates of litigation and of arbitration. I have tried to take this problem into account below. *See infra* note 79.

70. *U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2012 Through 2016*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf [https://perma.cc/8428-MMJ5].

71. That is: $(56 \div 44) \times 31,000$. It is more likely that the federal court numbers includes some claims that are covered by MAAs. That is taken into account below, *see infra* note 74.

72. *See supra* text accompanying note 67.

73. According to the Bureau of Labor Statistics, 15.2% of non-farm employees work for the government at some level. *Current Labor Statistics*, BUREAU OF LABOR STATISTICS (Sept. 2017), <https://www.bls.gov/web/empsit/ceseeb1a.htm> [https://perma.cc/6SA9-H23W].

MAAs (and thus faced a motion to compel arbitration).⁷⁴ In the absence of any data on this point, Figure 1 shows a range of expected arbitration claims, with the top number reflecting the assumption that *no* claims covered by MAAs were initially filed in federal court, and the bottom number reflecting the assumption that *all* such claims were initially filed in federal court.⁷⁵ These two adjustments lead to an estimate of “expected” arbitrations between 14,700⁷⁶ and 33,500,⁷⁷ as compared to the 5,126 arbitrations that appear to have been filed, and to an estimate of between 9600 and 28,400 “missing” arbitrations.

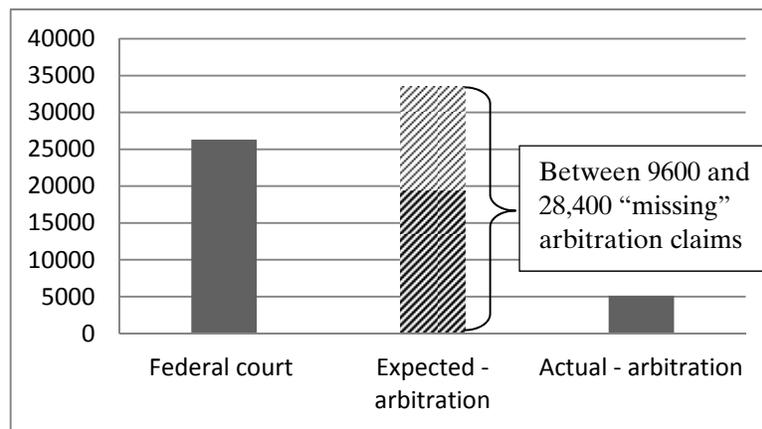


Figure 1: An Initial Estimate of “Missing” Employment Claims in Arbitration (2016)

In several respects, however, the Figure 1 estimate of “missing arbitrations” is far too conservative. To begin with, the estimate of arbitrations filed is almost certainly too high. It assumes that employee-plaintiffs are equally likely to file a claim whether they are covered by AAA- or non-AAA-administered arbitrations. Given that many of the latter do not abide by the DPP, and that some are

74. Plaintiffs and their attorneys are not always aware of the existence of an MAA until after filing a lawsuit. See Mark D. Gough, *Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?*, in 22 *MANAGING & RESOLVING WORKPLACE CONFLICT* 105, 124 (David B. Lipsky, Ariel C. Avgar, & J. Ryan Lamare eds., 2016).

75. In the latter (extremely unlikely) event, the federal claims (26,300) would represent 100% of all claims, and 56% of those claims (about 14,700) would be relegated to arbitration.

76. See *supra* note 75.

77. That is: $(56 \div 44) \times 26,300$. See *supra* note 73 and accompanying text.

employer-controlled,⁷⁸ it seems probable (and my conversations with plaintiffs' attorneys and other experts suggest) that employee-plaintiffs are much less likely to file a claim if they are subject to a non-AAA-administered arbitration. If that is so, then a more realistic estimate of arbitration cases filed in 2016 might be 4000 or less. Nonetheless, I have left the higher estimate of 5126 in place in Figure 2 below.⁷⁹

At the same time, the number of court filings in Figure 1 is certainly too low. First, it takes no account of employment litigation in *state* court; that would include employee claims resting on state common law or statutory grounds, and those that plaintiffs choose to file in state court because the forum is viewed as friendlier. In the most populous state of California, for example, plaintiffs' attorneys rarely choose to file employment actions in federal court.⁸⁰ Second, some of the federal lawsuits (as well as some of the excluded state lawsuits) are class or collective actions, some of which might cover hundreds of employees or more. By contrast, employees covered by MAAs are usually precluded from pursuing their claims as a group.⁸¹

On the first point, the volume of employment litigation in state courts is notoriously difficult to pin down.⁸² However, Professor Mark Gough, drawing on two large studies of state court litigation, has developed a rough estimate of 195,000 employment lawsuits per year in state courts of general jurisdiction.⁸³ That estimate is based on

78. Cf. COLVIN & GOUGH, *supra* note 26, at 34.

79. I do so partly because of the lack of data on non-AAA arbitrations, and partly in order to offset any potential distortion that might be attributed to the exclusion of arbitrations under individually-negotiated arbitration agreements. *See supra* note 69.

80. *See* Sternlight, *supra* note 16, at 1332 n. 143 (citing GARY BLASI & JOSEPH W. DOHERTY, UCLA LAW-RAND CTR. FOR LAW & PUB. POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50, at 11 (2010)).

81. Colvin's 2017 survey showed that thirty percent of MAAs contained such a clause. COLVIN, *supra* note 62, at 3. Because larger employers were more likely to have such a clause in their MAAs, that suggests that forty-one percent of employees covered by MAAs, and twenty-three percent of all employees, were expressly barred from filing or participating in a class or collective action. *Id.* For agreements that are silent about class claims, however, the Supreme Court's decision in *Stolt-Nielsen v. AnimalFeeds International Corp.* holds that silence regarding class arbitration implies *lack* of party consent, and thus precludes class arbitration. 559 U.S. 662, 687 (2010).

82. *See* Sternlight, *supra* note 16, at 1325 nn.99–100.

83. *See* email from Mark D. Gough, Assistant Professor, Penn State Coll. of Liberal Arts, to author (Nov. 30, 2017) (on file with the North Carolina Law Review). Gough used the most recent (2013) data from the National Center for State Courts ("NCSC") showing that over 5.9 million civil cases were filed in state courts of general jurisdiction. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS (2015), <http://www.courtstatistics.org/~media>

some untested (though plausible) assumptions, as Gough recognizes.⁸⁴ But it is more likely to understate than to overstate the volume of state employment litigation given that it still excludes cases from five jurisdictions, including California, which together account for eighteen percent of the national population.⁸⁵ All in all, including Gough's estimate of 195,000 state cases is likely to yield a more realistic estimate of total employment lawsuits, and a more realistic estimate of "missing" arbitration cases.⁸⁶

The second point relates to a legal controversy over the status of aggregate employment claims in arbitration that is currently before the Supreme Court.⁸⁷ The National Labor Relations Board ("NLRB") held in *D.R. Horton, Inc.*,⁸⁸ that employers violate the National Labor Relations Act ("NLRA") in seeking employees' waiver of the right to bring collective legal claims of any kind: Section 7 of the NLRA protects employees' right to engage in "concerted

/microsites/files/csp/ewsc_csp_2015.ashx [https://perma.cc/G2QL-VG8R]. Gough then used the Civil Justice Survey of State Courts ("CJSSC") finding that 3.3% of civil *verdicts* in 2005 were in employment disputes. See U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 STATISTICS 2 tbl.1 (2008) <https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> [https://perma.cc/EFA4-QZRL].

84. The resulting estimate of 194,700 employment cases is based on two assumptions: that employment cases represented the same percentage of filings as of verdicts; and that this percentage has held steady since 2005. In Gough's view (and mine), both assumptions are reasonable though unproven. Any overestimate of employment cases is likely to be offset by the uncounted cases from California and five other jurisdictions, which are still excluded. See *infra* note 85.

85. The excluded jurisdictions are California, Illinois, Idaho, Minnesota, and the District of Columbia (plus Puerto Rico). They are excluded from the NCSC data that Gough relied on because they have "single-tiered" court systems, which take in enormous numbers of cases (such as traffic violations) that go to courts of limited jurisdiction in the included jurisdictions. I calculated the populations using 2016 Census data. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016, 2016 Population Estimates*, U.S. CENSUS BUREAU (Dec. 2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [https://perma.cc/6Z3N-JNE4].

86. It should be noted that some cases might be filed in state court but then removed to federal court; they might thus be counted twice in state and federal court statistics. That is especially likely for class actions given the removal provisions of the Class Action Fairness Act. See 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012). But given the severe undercount of class actions overall, and the omission of cases from California in state statistics, see *infra* note 85, I do not believe the potential double-counting problem is significant.

87. The Court granted certiorari and consolidated three decisions: *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S.Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S.Ct. 809 (2017); and *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S.Ct. 809 (2017).

88. 357 N.L.R.B. 2277 (2012), *enforcement denied in part*, 737 F.3d 344, 364 (5th Cir. 2013).

activities for . . . mutual aid or protection,”⁸⁹ and that has long been held to include employees’ collective pursuit of legal claims through courts or otherwise.⁹⁰ According to the NLRB, the fact that such a waiver is part of an arbitration agreement does not make it enforceable under the FAA.⁹¹ Given a split among the courts of appeals,⁹² the Supreme Court has agreed to decide the matter.

The problem for employees is that some legal claims cannot practicably be adjudicated on an individual basis. In particular, many FLSA wage and hour claims involve incremental pay disparities over a few years; the cost of litigating them as an individual often exceeds the expected returns.⁹³ But if many individuals are subject to the same challenged practice, as is often true, employees can practicably pursue their claims through a class or collective action.⁹⁴ If employers have their way in the Supreme Court, they will be free to block all such actions, and to virtually nullify a large category of employee claims that are not viable on an individual basis, simply by requiring individual arbitration. This is a point to which I will return in Part V. For present purposes, however, the point is simpler and less controversial: Given the existence of class and collective claims in court (but not in arbitration), any count of court cases, including the number of federal cases in Figure 1, greatly understates the number of individuals whose claims are encompassed by those filings.

Some useful data exist in one category of cases: lawsuits under the FLSA filed in federal court (8686 cases in 2016). A recent law firm report asserts that nearly all FLSA lawsuits in the past several

89. 29 U.S.C. § 157.

90. *D.R. Horton Inc.*, 357 N.L.R.B. at 2278.

91. *Id.* at 2287.

92. *Compare Epic Sys.*, 823 F.3d at 1147 (upholding the NLRB view) and *Ernst & Young*, 834 F.3d 975 at 975, 990 (same) and *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 408, No. 16-1385 (6th Cir. 2017) (same), with *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (rejecting the NLRB view) and *Murphy Oil*, 808 F.3d at 1015 (rejecting NLRB view) and *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 299 (2d Cir. 2013) (same).

93. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 427–29 (2006).

94. A “collective action” under the FLSA allows many similarly situated individuals to join in a single lawsuit, and thus to litigate more efficiently than through multiple individual lawsuits; yet this form of group litigation lacks many of the advantages of class actions, and particularly of “opt-out” actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure. See generally Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 U. MINN. L. REV. 1317 (2008) (chronicling the difficulties of collective FLSA actions as compared to class actions).

years were filed as class or collective actions.⁹⁵ Let us assume, more conservatively, that 7000 of those 8686 FLSA actions were aggregate actions,⁹⁶ and that each of those covered, on average, fifty individuals.⁹⁷ That would yield an additional 350,000 claims in federal court—that is, 350,000 individuals who would stand some chance of recovering something as a result of group litigation. Figure 2 reflects that adjustment, as well as Gough’s partial estimate of 195,000 additional employment claims filed in state court. Those additions to the Figure 1 estimate of 26,300 federal lawsuits bring the estimated total number of employment claims encompassed by court filings to 571,300.

As Figure 2 illustrates, the resulting estimate of total employment claims filed in court leads to a striking estimate of “expected” claims in arbitration: If MAA-covered employees were as willing and able to arbitrate their claims as non-MAA-covered employees are willing and able to litigate, then we would expect to see between 320,000 and 727,000 employment claims in arbitration (depending again on how many of the claims encompassed by court filings were covered by MAAs).⁹⁸ Given the estimated 5126 claims actually filed in arbitration, that suggests an estimated 315,000 to 722,000 “missing” arbitration cases. Stated differently, well under two percent of the employment claims that one would expect to find in some forum, but that are covered by MAAs, ever enter the arbitration process.

95. See SEYFARTH SHAW LLP, 13TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 20 (2017), <https://www.workplaceclassaction.com/wp-content/uploads/sites/214/2017/01/CAR-2017-Chapter-1-FINAL.pdf> [<https://perma.cc/92KB-HXYX>].

96. For the total number of FLSA actions (8686), see U.S. COURTS, *supra* note 70, at tbl.C-2A. The estimate of 7000 FLSA aggregate actions is conservative relative to the Seyfarth Shaw report contending that “[v]irtually all” FLSA claims are filed as class or collective actions. See SEYFARTH SHAW LLP, *supra* note 95, at 20.

97. Fifty claims per aggregate action is meant to be a conservative estimate; compare to Professor Sternlight’s estimate of 500 individuals per group claim. Sternlight, *supra* note 16 at 1337. If fifty seems high, consider that other class and collective actions, such as those under employment discrimination laws and all of those filed in state court, are not taken into account at all.

98. See *supra* text accompanying notes 75–77 (explaining the rationale behind the top and bottom of this range).

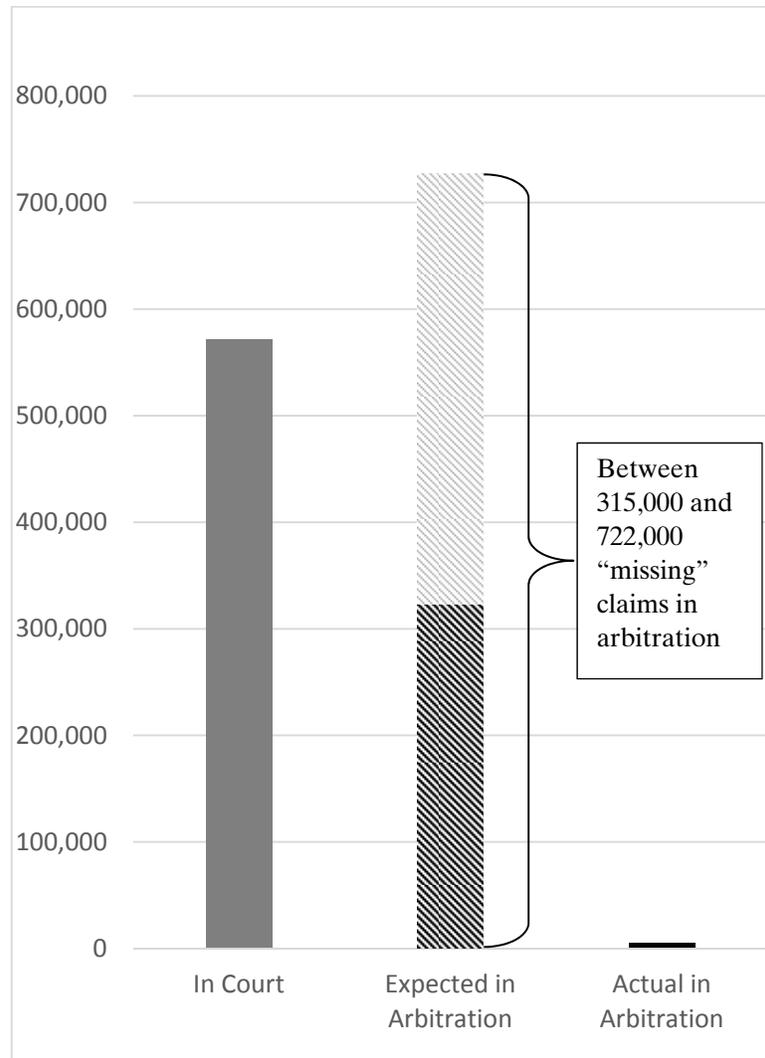


Figure 2: An Estimate of “Missing” Employment Claims in Arbitration (including those encompassed by aggregate FLSA claims) (2016)

By graphically representing these estimates, I do not intend to imply greater precision than the evidence permits. I do intend to

highlight the jaw-dropping disparities in estimated filing rates between court and arbitration, which are large enough, I would argue, to swamp any quibbles about precise numbers. And that is despite the omission of state court litigation in California and several other jurisdictions, as well as many claims encompassed by class or collective actions. Given those omissions, Figure 2 probably understates the number of claims encompassed by court filings, and thus the number of claims one would hypothetically expect to be filed in arbitration if it were a comparably accessible and hospitable forum. All in all, the available evidence suggests that the overwhelming majority of claims that would have been litigated but for the presence of a MAA are simply dropped without being filed in any forum at all.

Before turning to the reasons for the paucity of arbitration cases, let us take note of two possible but unquantifiable explanations for at least part of the disparity shown above. First, it is possible that employers that impose MAAs are systematically different from those that do not, and less likely to generate claims. We do know that larger and more sophisticated employers are more likely to use MAAs.⁹⁹ If those larger employers are less likely to violate the law and to generate employee claims, then one would expect fewer claims from employees covered by MAAs than the “expected” numbers generated above. On the other hand, it would not be surprising if the obscure netherworld of employer-dominated arbitration attracted some less scrupulous employers seeking to immunize themselves from liabilities. Nor would it be surprising if employers who jumped on the mandatory arbitration bandwagon in the wake of *AT&T Mobility LLC v. Concepcion*¹⁰⁰ and *American Express Co. v. Italian Colors Restaurant*,¹⁰¹ and who might have been motivated chiefly by the prospect of foreclosing all group claims, are a less scrupulous bunch than the early adopters, and perhaps less scrupulous than the average employer. Either of those surmises might lead one to expect *more* disputes arising among employees covered by MAAs than the “expected” numbers above. I know of no data pointing either way, but these possibilities cloud the meaning of the “missing” arbitration cases, and qualify what follows.

It is also important to recognize that employee claims can be resolved before they are filed in any forum, and that this might be more likely for claims that are subject to mandatory arbitration than

99. See COLVIN, *supra* note 62, at 5.

100. 563 U.S. 333 (2011).

101. 570 U.S. 228 (2013).

for those that are not.¹⁰² Some employers use mandatory arbitration as the final stage in a structured alternative dispute resolution (“ADR”) process.¹⁰³ Those processes typically call for formal or informal mediation, as well as confidential meetings with ombudsmen, before any arbitration.¹⁰⁴ At least in the first decade or so after *Gilmer*, employers that used mandatory arbitration were considerably more likely to have robust internal-grievance procedures.¹⁰⁵ To the extent that remains true, it suggests that the resolution of arbitrable claims before they are formally filed—through mediation, for example—might account for some of the “missing claims” estimated above. On the other hand, it is possible that later adopters of MAAs, and especially those drawn in by the ability to block group claims, were less likely than the early adopters to embed arbitration within a structured dispute resolution process. All in all, it seems unlikely that this difference—a higher rate of early dispute resolution among arbitrable claims—accounts for more than a fraction of the estimated “missing” arbitration cases. But it is surely one more source of uncertainty about the numbers.

Much is still unknown about the fate of cases in arbitration (and litigation). From whatever angle one looks at the numbers, however, it appears that a very large majority of aggrieved individuals who face the prospect of mandatory arbitration give up their claims before filing. For all the sound and fury about skewed outcomes, repeat player effects, biased arbitrators, limited discovery, and lack of adherence to or production of precedent in arbitration,¹⁰⁶ it turns out

102. I thank Professor David Sherwyn for highlighting this point.

103. See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1581–91 (2005).

104. *Id.* at 1586.

105. Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 649 (2001) (finding telecommunications industry employers that elected to use arbitration were more likely to also have structured ADR processes). Moreover, employees were more likely to bring grievances in workplaces that had such systems. Alexander J.S. Colvin, *The Dual Transformation of Workplace Dispute Resolution*, 42 INDUS. REL. 712, 729 (2003) (finding peer-review and nonunion arbitration procedures had grievance rates that were, respectively, forty-three percent and sixty-eight percent higher than basic nonunion procedures). It is worth noting, however, that not all claims resolved via such grievance procedures are legally cognizable. See W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J. L. REFORM 843, 849 n.14 (2008).

106. See, e.g., Bingham, *supra* note 36, at 190–91 (discussing repeat player effects); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 246 (2012) (“If the arbitrator decides that the arbitration agreement is unenforceable, he loses income.”); Stone, *supra* note 1, at 1040 (discussing pro-employer outcomes in arbitration).

that, except for a relative handful of cases, arbitration does not take place at all.¹⁰⁷ That is the black hole of mandatory arbitration.

III. ACCOUNTING FOR MISSING CASES: WHY SO FEW ARBITRATIONS?

What happens to the claims that can be adjudicated only in arbitration but are never filed? Conjecture calls for caution. But let us bring some hypothetical plaintiffs' attorneys into the story.¹⁰⁸ And let us assume that those attorneys are rational actors with at least a rough idea of the law and empirics surrounding arbitration. After all, attorneys' livelihood depends on their ability to calculate the probabilities and degrees of success, or risk-return ratios, in cases brought to them.¹⁰⁹ Suppose now that they learn that a prospective client is subject to a mandatory arbitration agreement. What enters into their calculations in deciding whether to take a case?

With or without an express anti-aggregation clause, they know that an MAA is likely to knock out some small value claims at the outset even if they are shared by hundreds or thousands of the complainant's co-workers.¹¹⁰ The legality of those clauses is currently before the Supreme Court, as noted above,¹¹¹ so let us focus on other legally questionable provisions the attorney might encounter, and that might impede the fair adjudication of otherwise viable individual claims.

Attorneys at the intake point may or may not have access to a detailed written description of the arbitration process. If they do, they might find some provisions that would bar the claim altogether (like a very short limitations period or unaffordable arbitrator fees), or impede investigation (like very limited discovery), or sharply skew proceedings against the complainant (like a biased arbitrator pool or a skewed selection process), or curtail recovery even in the event of

107. Of course, that may be precisely because of the many discrete problems that have attracted critical attention; more on this below.

108. Although claimants can proceed in arbitration without legal representation—that was once thought to be an advantage of arbitration—it does not appear to be a very successful strategy. Colvin found that, for the 24.9% of employees who represented themselves, the win rate was 18.3% and the average award overall was \$12,228, as compared to 22.9% win rate and \$28,993 average award for represented claimants. Colvin, *supra* note 15, at 16. I note that the perspective of plaintiffs' attorneys, as with much else in this Article, has been explored quite thoroughly by Professor Gough based on his survey of 1,256 employment plaintiff attorneys, Gough, *supra* note 74, and by Professor Sternlight in her article, Sternlight, *supra* note 16, at 1334–40.

109. For evidence that they do just that, see Gough, *supra* note 74, at 120–21.

110. See Estlund, *supra* note 93, at 427–30.

111. See *supra* note 87.

“success” (like provisions against attorney fee shifting or punitive damages, or damage limits). It hardly helps, of course, if the arbitration agreement is vague or silent about these matters. If attorneys do identify invalid or troublingly vague provisions, they know that a court challenge would be costly, and would almost certainly pour them back into the still-flawed arbitration process, whether or not the court recognizes the flaws in that process.¹¹²

Let us underscore this point: Some “missing” or dropped cases are probably dropped because they would be subject to invalid arbitration provisions that nonetheless deter claims. The viable legal objections to arbitration are dwindling, especially under the Supreme Court’s decisions in *Concepcion* and *Italian Colors*, which sharply limited courts’ ability to police the fairness of arbitration agreements under either the state contract doctrine of unconscionability or the federal common law concept of “effective vindication” of statutory rights.¹¹³ But the doctrine appears to still make it possible to challenge arbitration provisions that, for example, preclude statutorily prescribed remedies (including attorney fees),¹¹⁴ skew the selection of arbitrators,¹¹⁵ or impose excessive arbitrator fees or other barriers to the arbitral forum.¹¹⁶ Unfortunately, even these standards of fairness are administered in a manner that undermines their efficacy. Most objections are relegated to the arbitral forum itself for case-by-case resolution (as in the case of excessive arbitrator fees);¹¹⁷ unfair provisions are likely to be struck or amended from an agreement rather than invalidating the agreement. As a result, firms get the benefit of the arbitration agreement despite any overreaching.¹¹⁸ That inevitably tempts unscrupulous firms to “go for it”—to include knowingly unfair or invalid provisions that are likely to discourage many complainants and their attorneys from pursuing a case at all, with little or no downside risk in case the overreach is detected and

112. Most alleged defects in the arbitral process must be adjudicated within that very process. See Schwartz, *supra* note 106, at 265.

113. See *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

114. That appears to come within the narrowed *Italian Colors* exception to blanket enforceability of arbitration agreements: the exception “would certainly cover a provision . . . forbidding the assertion of certain statutory rights.” *Id.* at 236.

115. Or so one can hope. Some “arbitration agreements,” like the one invalidated in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999), arguably do not even qualify as “arbitration,” the essence of which is an impartial decision maker chosen by both sides.

116. “Perhaps” such a provision would be invalid, per *Italian Colors*, 570 U.S. at 236.

117. See *Green Tree Fin. v. Randolph*, 531 U.S. 79, 89–92 (2000).

118. See Estlund, *supra* note 93, at 405.

corrected.¹¹⁹ Legally objectionable arbitration clauses and procedures, as well as vague and indeterminate ones, can deter both litigation and arbitration, especially by plaintiffs in relatively small-dollar cases.

Even if plaintiffs' attorneys do not encounter (or can surmount or ignore) all these hurdles to a fair arbitration process, they presumably know that they are less likely to win anything, and thus recover any attorneys' fees, and even less likely to win enough to make the odyssey worthwhile for the attorney or the client. In short, expected recoveries (including attorneys' fees) in arbitration will often fall below some threshold of economic viability for attorneys. Even in cases with "smoking gun" evidence and scandalous facts that might have jolted a jury into a mega-bucks verdict or posed a risk of serious public opprobrium for the defendant firm, arbitration muffles or even eliminates those risks.

With all of this in mind, does a rational attorney take the case? Is it even worth writing a demand letter seeking to settle such a claim? Would a demand letter have any credible threat behind it? From all that appears from the data, the answer to all those questions is "rarely."

Of course, litigation is no panacea for plaintiffs.¹²⁰ Many potential employee-claimants who believe they have been wronged are still free to litigate their claims (if they have not already waived those claims on their way out of the job through a severance agreement).¹²¹ Yet most of them cannot get an attorney to represent them. Given plaintiffs' bleak track record in court, experienced attorneys agree to represent only a tiny fraction of the prospective clients they see—only about ten percent, according to surveys of plaintiffs' attorneys.¹²² For most claims, the risk-return ratio is apparently too low even in court. To be sure, many individuals who believe they have been wronged, and who seek legal advice, have very weak legal claims on either the facts or the law.¹²³ Still, it looks as

119. *Id.*

120. See generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL. REV. 103 (2009) (detailing how plaintiffs in employment cases struggle in litigation).

121. See Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS U. L. REV. 943, 948 (1998).

122. COLVIN & GOUGH, *supra* note 26, at 14–15.

123. That proposition is obviously difficult to document. But it is often repeated by judges and by lawyers for both plaintiffs and employers, even with regard to claims that are actually filed. For example, two management-side lawyers quote several federal judges who characterize some employment litigation as frivolous or not well-founded. See Jay W. Waks & Gregory R. Fidlon, *Federal Judges Recognize Growing Trend of Dubious Workplace Discrimination Cases*, N.Y. EMP. L. & PRAC., Mar. 2000, at 1–2,

though the presence of a mandatory arbitration provision dramatically reduces an employee's chance of securing legal representation,¹²⁴ as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf.

IV. FROM CAUSES TO CONSEQUENCES: EMPLOYER EXCULPATION AND JUDICIAL ABDICATION

If the imposition of mandatory arbitration means that the employer faces only a miniscule chance of ever confronting a formal legal claim in any forum regarding future legal misconduct against its employees, then such a provision virtually amounts to an *ex ante* exculpatory clause, and an *ex ante* waiver of substantive rights that the law declares non-waivable.¹²⁵ Let me explain.

Nearly all statutory rights and most common law rights of employees are non-waivable or inalienable: An employee who is covered by the minimum wage law cannot make a valid agreement to waive its protections and to accept a lower wage; nor can she agree to waive the protections of antidiscrimination laws and to be subject to discrimination.¹²⁶ Scholars debate the wisdom of non-waivable employee rights, with the usual face-off between market enthusiasts and market skeptics.¹²⁷ But that normative debate should not distract from the point that, as a matter of positive law, most employee rights are not waivable *ex ante*. Of course, once claims arise, they can be settled or given up, even before any actual disputation, as with a severance agreement that waives any existing claims arising out of the

<https://www.fidlonlegal.com/files/dubious-workplace-discrimination-cases.pdf> [<https://perma.cc/7K58-3TJ2>].

124. More than half of plaintiffs' attorneys reported in a large survey that the presence of an arbitration provision tends to discourage them from accepting a case (even relative to the low percentage of cases they accept in general). Gough, *supra* note 74, at 121–22. Given the tiny number of arbitrations actually filed, these self-reports probably understate the actual impact of arbitration provisions on filing behavior. Indeed, Gough found that, in addition to those attorneys who reported that they were more likely to reject cases because of an arbitration clause as such, others acknowledged that lower expected recoveries in arbitration did affect their decisions. *Id.*

125. The essentials of this argument are developed in Estlund, *supra* note 93, at 427–30.

126. *See id.* at 380.

127. On the pro-contract side, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 358–59 (5th ed. 1998); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1131–37 (1989). For just two examples of the contract-skeptics, see Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2787 (1991) and Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482–83 (1976).

employment in exchange for a severance payment beyond what is contractually due.¹²⁸ But the relevant rights and liabilities cannot be waived *ex ante*.

Imagine now that an employer required employees, as a condition of employment, to agree that any disputes that arise out of the employment, including claims of discrimination or other violations of statutory rights, must be submitted to the company president for a final and binding decision. That agreement would presumably be void, for contracting *ex ante* into a one-sided or sham process of adjudication—one that offers no fair opportunity to vindicate one's rights—is equivalent to a waiver of the underlying rights.

Obviously, mandatory arbitration is not supposed to be that. It is supposed to be, and in principle could be, a fair alternative process for the adjudication of disputes. Under the Court's very broad reading of the FAA, the right to *litigate* future disputes over non-waivable substantive rights is itself waivable, but only in exchange for an alternative process for the adjudication of disputes by an impartial decision maker in which all substantive rights are preserved.¹²⁹ But unless the alternative arbitral process does in fact allow for fair and impartial adjudication, and for the "effective vindication" of substantive rights, then a mandatory arbitration provision amounts to an *ex ante* waiver of those rights.

The condition of "effective vindication" of rights is what ensures that "arbitration remains a real, not faux, method of dispute resolution Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights."¹³⁰ Unfortunately, that compelling language comes from Justice Kagan's powerful dissent in *Italian Colors*. Until that ruling, the Court's FAA decisions appeared to require an opportunity for "effective

128. Ordinarily such a waiver must be "knowing and voluntary." 29 U.S.C. § 626(f)(1) (2012). Under the Older Workers' Benefits Protection Act ("OWBPA"), a valid waiver of an existing ADEA claim must be "in exchange for consideration in addition to anything of value to which the [employee] already is entitled," such as normal severance pay, and it must be preceded by disclosure of information about the triggering event and sufficient time to consult with an attorney, among other requirements. *Id.*

129. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). I have argued elsewhere that, under the FAA, the right to litigate over non-waivable substantive rights is only "conditionally waivable"—it is waivable in favor of a fundamentally fair arbitration process—rather than fully or unconditionally waivable; and that is because unconstrained waiver of the right to litigate would amount to a waiver of the underlying rights. Estlund, *supra* note 93, at 409.

130. *American Express Co v. Italian Colors Rest.*, 570 U.S. 228, 244 (2013) (Kagan, J., dissenting).

vindication” of substantive rights through arbitration.¹³¹ *Italian Colors* was deeply unsettling in two ways: At a minimum, the decision diluted the meaning of “effective vindication.” For the majority, an arbitration provision does not prevent “effective vindication” unless it actually blocks access to the arbitral forum (like an unreasonably high arbitrator’s fee) or explicitly denies substantive rights.¹³² On that formalistic view, a provision that makes adjudication economically infeasible (like a bar against aggregation of “negative value” claims) does not prevent “effective vindication” of rights.¹³³ Even more disturbing, the Court in *Italian Colors* seems to have demoted “effective vindication” from a fixed principle guiding the assessment of arbitral fairness to something like dicta.¹³⁴ If mandatory arbitration is not held to the standard of “effective vindication,” then it will devolve into—if it is not already—a mechanism for employers’ unilateral dissolution of inalienable substantive rights.

Until recently, the piecemeal nature of the challenges to mandatory arbitration agreements and the paucity of data had obscured the cumulative impact of the Court’s decisions and of the many ways employers can tilt the process in their favor. Since the early decisions expanding the reach of mandatory arbitration (*Gilmer* and *Circuit City Stores v. Adams*¹³⁵ in the employment context), the challenges to arbitration have mostly proceeded one by one: Does one particular provision prevent fair adjudication of claims? The Court, often by narrow majorities, has rejected most of those challenges and relegated nearly all of the challenges that it has recognized in principle to the arbitral forum itself. Each of those rulings might be defended given the law and norms of arbitration that had evolved in the context of disputes between business entities or between unions and employers. But the cases give no indication that the Court has ever stepped back and looked at the cumulative effect of its rulings, and at the mounting evidence on how mandatory arbitration of employee (and consumer) claims works in practice, to see whether it does indeed represent a fair quid pro quo relative to litigation.

Ultimately, the proof is in the pudding—in the revealed preferences of those who are subject to MAAs. There is a kind of verdict on mandatory arbitration in the thousands of decisions that

131. *Id.* at 241.

132. *Id.* at 234–37 (majority opinion).

133. *Id.* at 236–37.

134. *See id.* at 235.

135. 532 U.S. 105 (2001).

employees and their attorneys make about whether it is worth submitting a claim to arbitration versus simply abandoning it. For all but a relative handful of cases per year, the answer appears to be that it is just not worth it. Somehow the cumulative effect of the Court's rulings, given the dominant power of employers to tweak and tilt the arbitration process to their liking, have made arbitration so inhospitable to claimants that they routinely give up their claims.

A skeptic might respond: If MAAs did represent a virtual insurance policy against employment claims—and one that is free, no less—then why wouldn't all employers impose such agreements? I fear that may be exactly where we are headed, albeit more slowly than one might have expected. And the lag in adoption of MAAs might be traceable to the obscurity surrounding mandatory arbitration and the long quest for reliable empirical data on its impact.

As noted above, after *Gilmer* opened the door to mandatory arbitration of employment claims, some early data seemed to suggest that arbitration was a mixed bag for employers: It tended to produce more modest and predictable recoveries, but at the cost (to employers) of greater employee access to the forum and perhaps more claims reaching a hearing on the merits.¹³⁶ Moreover, in the early days of mandatory arbitration it appeared that the lower courts were rising to the challenge of policing the fairness of MAAs, so that manifestly skewed arbitration procedures were likely to trigger litigation, and perhaps be invalidated.¹³⁷ Many employers might sensibly have decided to take their chances in court, where they held familiar advantages. Others—especially small employers without regular access to sophisticated legal counsel—might simply not have learned about the arbitration option.

But the arbitration landscape has changed with the Supreme Court's drastic constriction of judicial oversight of arbitration and its presumptive green light to provisions that foreclose aggregate claims.¹³⁸ Just since *Italian Colors*, the evidence suggests that employers have responded quickly and enthusiastically to the Court's invitation to block group claims: A law firm survey found that employers' usage of anti-class action provisions in MAAs rose from

136. See Estreicher et al., *supra* note 51 (manuscript at 7–8).

137. See, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS U. L.J. 399, 429 (2000).

138. “Presumptive” because the legality of such clauses in employment agreements under the NLRA is currently before the Court. See *supra* note 87.

sixteen percent to nearly forty-three percent just from 2012 to 2014.¹³⁹ Although anti-class action provisions do not affect all employment claims, they can obliterate potentially costly group claims at the virtual stroke of a pen. So why not? That single advantage of arbitration might indeed be driving the dramatic expansion in the adoption of MAAs shown by Colvin's recent survey data.¹⁴⁰

The appeal of mandatory arbitration for employers might be affected by the outcome in this term's *D.R. Horton* cases. The shift to arbitration seems likely to accelerate if the Court reverses the NLRB and removes the last legal hurdle to employers' use of MAAs to preclude aggregate claims. If the Court instead affirms the NLRB and bars that use of MAAs, some employers might have second thoughts about arbitration, and some employees will have access to mechanisms of collective adjudication, either in court or in arbitration. But emerging data on the miniscule number of arbitrations that are filed at all—the data that are highlighted here—underscore the advantages of MAAs for employers even in individual cases, and might fuel the arbitration juggernaut for years to come.

CONCLUSION

The premise of *Gilmer* in the crucial domain of employment discrimination was that arbitration was merely an alternative forum—more informal but comparably effective—for the vindication of statutory rights. But *Gilmer* took a leap of faith on that score, for at the time there was no evidence on how mandatory arbitration would actually work when designed by the more powerful party in the highly asymmetric employment relationship and imposed as a condition of initial or continued employment. The empirical evidence—or enough of it—is now in. It now appears that, by imposing mandatory arbitration on its employees, an employer can ensure that it will face only a miniscule chance of ever having to answer for future legal misconduct against employees. Such a provision amounts to a virtual *ex ante* waiver of substantive rights that the law declares non-waivable.

Already in 1996, Professor Katherine Stone described mandatory pre-dispute arbitration agreements as the modern equivalent of the pre-New Deal “yellow dog contracts” by which employees had to

139. See CARLTON FIELDS JORDEN BURT, THE 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY 26 (2016), http://www.thenalfo.org/files/2015_Carlton_Class_Action_Survey.pdf [<https://perma.cc/3FR6-4K96>].

140. See COLVIN, *supra* note 62, at 7.

agree not to join a union as a condition of employment: “Today’s ‘yellow dog contracts’ require employees to waive their statutory rights in order to obtain employment.”¹⁴¹ At the time that conclusion might have seemed a bit hyperbolic. It was not foreordained that submission to arbitration would amount to a waiver of substantive rights. But that now appears to be the cumulative effect of the FAA jurisprudence on judicial oversight (or lack thereof) of the fairness of arbitration agreements.

The erasure of substantive rights will be plain for all to see if the Court allows employers to use MAAs to ban aggregate actions, for that alone will sound a death knell to most wage and hour claims, and will confer virtual immunity on firms for those claims.¹⁴² But the data reviewed above show that MAAs function as a virtual death knell for most employment claims, including the many individual wrongful dismissal or harassment claims that are not amenable to collective adjudication and are unaffected by anti-aggregation provisions. The upshot of the Court’s nearly-unwavering insistence on deferring to the arbitration “agreement”—that is, to the employer who drafts the agreement and imposes it as a condition of employment—has been to swallow up most employment disputes on the way from “naming” and “blaming” to “claiming,” and before they take shape in a formal complaint.

It is not clear, and this Article does not venture to say, what particular combination of changes to the doctrine, if any, could make mandatory arbitration reasonably hospitable to actual plaintiffs and their attorneys. Perhaps there is nothing that can be done to ensure the fairness of mandatory pre-dispute arbitration in the context of the highly asymmetric employment relationship. Or perhaps the efficacy of arbitration for claimants could be salvaged by the establishment of a clear set of minimum standards of fairness for both arbitration procedures and arbitration providers, with full compliance as a condition of enforceability.¹⁴³ In any case, the Court’s FAA

141. Stone, *supra* note 1, at 1037.

142. See generally Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164 (2013) (discussing how collective arbitration is being threatened by the courts and employers).

143. It would help to require employers to disclose publicly the terms of any mandatory arbitration agreements to which employees are subject. That would better enable advocates and scholars to expose and challenge legal defects, and to pressure firms to live up to legal standards and norms of fair process, outside the context of particular disputes and apart from the risk-return calculations that govern attorneys’ decisions. See Estlund, *supra* note 14, at 427–30.

jurisprudence so far has done almost nothing to encourage such an effort. As things stand, the imposition of mandatory arbitration by employers amounts to a virtual cancellation of employee rights—an *ex ante* forced waiver of non-waivable rights.

The FAA is a mere statute—albeit a miraculously muscled up statute. It is thus open to Congress to either reject the application of the FAA in some or all employment (and consumer) cases or to impose more rigorous standards of fairness in such cases. But in the face of congressional inaction, if not dysfunction, the fate of employee rights turns on the evolving views of mandatory arbitration in the Supreme Court. One might hope that the Court's stubborn insistence (by the slimmest of margins) on routine enforcement of MAAs stems from a lag in empirical understanding of their impact on employee rights. Perhaps the judicial proponents of mandatory arbitration still hold the view that arbitration entails a fair tradeoff, and allows for the effective vindication of employee rights.¹⁴⁴ In light of what we now know about the sheer paucity of arbitrations, however, that view can no longer stand. If the Court continues on its current pro-arbitration path in the face of this stark reality, it will be complicit in employers' effective nullification of employee rights and protections.

144. Mandatory employment arbitration has its academic defenders. *See, e.g.*, Waks & Fidlon, *supra* note 124, at 1–2. But none has thus far acknowledged and responded to the emerging empirical evidence on the miniscule number of arbitration claims and the import for employee rights.

