

# The Black Hole of Mandatory Arbitration

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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.<sup>1</sup> Given the lack of written, publicly available decisions and the relative secrecy of arbitral proceedings, the diversion of legal disputes from courts to arbitrators threatened 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 Resnick and others have shown that the presumed contrast to litigation was in some ways overstated as litigation itself has dramatically receded from the public stage.<sup>2</sup> 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become nearly extinct, as the overwhelming majority of cases are resolved either on dispositive motions (usually in unpublished opinions) or out-of-court settlements.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.<sup>3</sup>

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,

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<sup>1</sup> Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 Denv. U. L. Rev. 1017, 1036-50 (1996); KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 1-32 (2000); 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, 374 (1992); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 Hastings L.J. 1187, 1190 (1993).

<sup>2</sup> See Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117 (2009); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771 (2008); Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

<sup>3</sup> See Luban, *supra* note --; 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).

occurs in open court in case of litigation but usually in a private conference room in case of arbitration.<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> and partly of confidentiality agreements that often accompany pre-dispute arbitration agreements and that bind the parties.<sup>7</sup> The private and contractual nature of arbitration makes it relatively easy for firms to 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 an obligation on its employees (and customers) to arbitrate rather than litigate future legal disputes, firms can also 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.<sup>8</sup> 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.<sup>9</sup>

Another critical dimension of the relative secrecy of arbitral proceedings concerns the 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. Some arbitration instruments adopt the procedures of

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<sup>4</sup> KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC 5 (2015) (describing differences between arbitration and court proceedings).

<sup>5</sup> *Id.*

<sup>6</sup> AAA staff have an ethical obligation to keep information confidential. AAA *Statement of Ethical Principles*, AM. ARBITRATION SOC'Y, <https://www.adr.org/StatementofEthicalPrinciples> (last visited Oct. 11, 2017).

<sup>7</sup> David B. Lipsky et al., *Mandatory Employment Arbitration: Dispelling the Myths*, 32 ALTERNATIVES TO HIGH COST LITIG. 138 (2014).

<sup>8</sup> A recent contribution to the extensive literature on this question, Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193 (2016), explores the impact of litigation on reputational sanctions.

<sup>9</sup> See Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375 (2007).

reputable arbitration providers like the American Arbitration Association (AAA)<sup>10</sup>; others use more obscure providers or invent their own procedures.<sup>11</sup> Either way, there is no general legal requirement or norm of firms making their chosen procedures publicly available.<sup>12</sup> That has made it impossible to develop an accurate overall 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.

In this Article, I want to 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 empirical picture is now coming into focus. It now appears that the 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 empirical findings discussed here are not mine, and their implications have 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.<sup>13</sup> Jean Sternlight in particular has surveyed the literature and data on this point in detail and elaborated the implications for employee rights.<sup>14</sup> I highlight and elaborate on these findings here because their

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<sup>10</sup> STONE & COLVIN, *supra* note --, at 17.

<sup>11</sup> *Id.*

<sup>12</sup> On why that is problematic and why transparency should be mandated (on this and other terms and conditions of employment), see Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011).

<sup>13</sup> See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUDS. 1, 6 (2011) [hereinafter *An Empirical Study*];

<sup>14</sup> Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOKLYN L. REV. 1309 (2015). Judith Resnick and Maria Glover have also highlighted the paucity of arbitrations in both employment and consumer cases and the implications for access to justice. See Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015); 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 (2015).

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 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 to involve individual disputes, and to involve significant financial stakes for individual claimants (relative to their total resources). The prevalence of fee shifting provisions in many employment statutes<sup>15</sup> attests to the recognized importance of both the public interests at stake and of private enforcement in vindicating those public interests.<sup>16</sup> For present purposes, it is also important that employment litigation has long been and continues to be a major part of federal court dockets.<sup>17</sup> Although the prevalence of arbitration agreements has sharply increased in recent years, many employees remain free to file their claims in court.<sup>18</sup> That makes it possible to compare some aspects of litigation and arbitration that might otherwise remain obscure.<sup>19</sup>

Within the field of employment arbitration, this essay 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 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 my topic here, has been deservedly controversial since its inception.

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

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<sup>15</sup> See, e.g., 42 U.S.C. § 2000e-5(k) (2012); 29 U.S.C. § 216(b) (2012).

<sup>16</sup> These features are all found most clearly in cases alleging discriminatory or retaliatory discharge, which make up a large share of employment litigation. In the case of wage and hour disputes, the individual stakes are typically smaller, and often not viable without collective adjudication, more like the typical consumer claim.

<sup>17</sup> See infra --.

<sup>18</sup> See Alexander J.S. Colvin, *The growing use of mandatory arbitration*, Economic Policy Institute, Sept. 27, 2017 (hereinafter Colvin 2017), available at <http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> (estimating that 56 percent of employees are now covered by MAAs). Until this study, I In 2007, the best evidence available on coverage was based on Colvin’s studies of the telecommunications industry, where he found that 15 to 25 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, 411 (2007).

<sup>19</sup> There are still many difficulties with comparing data on arbitration and litigation. Sternlight, *supra* note --, at nn. 101-02.

under these provisions. Part II develops some more and less firmly grounded empirical 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 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.<sup>20</sup> (Data from state courts is far more difficult to gather or assess.<sup>21</sup>) 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 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.<sup>22</sup> Moreover, nothing in the burgeoning law of arbitration under the FAA, despite its impact on enforcement of important public policies, regulates what entities may provide arbitration. As a result, it has been difficult for scholars to assemble data about the aggregate dimensions or consequences of arbitration in employment (or consumer) cases.<sup>23</sup>

The largest arbitration providers are well-established, reputable organizations like the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Service (JAMS). Survey data indicate that the AAA is designated in about half of employment arbitration agreements, and JAMS in another twenty percent.<sup>24</sup> Both organizations provide lists of qualified arbitrators and are relatively transparent in how

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<sup>20</sup> For examples in the employment discrimination field, see John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 103 (2009).

<sup>21</sup> Sternlight, at 1325.

<sup>22</sup> See Estlund, *Just the Facts*, *supra* note --.

<sup>23</sup> Sternlight at n. 90; 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).

<sup>24</sup> ALEXANDER J.S. COLVIN & MARK D. GOUGH, COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS AND OUTCOMES: RESEARCH REPORT TO THE ROBERT L. HABUSH ENDOWMENT OF THE AMERICAN ASSOCIATION FOR JUSTICE 34-35 (Apr. 2, 2014).

arbitrators are chosen, who they are, and how they deal with disputes (though both organizations also promote confidentiality in the proceedings themselves).<sup>25</sup> 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.<sup>26</sup> But nothing in the law requires arbitration providers to adhere to the DPP, and nothing requires employers to designate the AAA or JAMS as the arbitration provider.

An estimated 30 percent of arbitration provisions call for adjudication of disputes through other providers or ad hoc processes.<sup>27</sup> 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. Consider the egregiously one-sided agreement struck down by the Fourth Circuit in the *Hooters* case,<sup>28</sup> which, among its many defects, essentially guaranteed that the employer would choose the arbitrator.<sup>29</sup> But it can hardly be surprising that the overwhelmingly asymmetric process of “choosing” arbitration and arbitration providers would put pressure on the neutrality of the process.

A 2015 front page New York Times series penetrated the veil of secrecy to expose the partiality of arbitration in practice—even among some AAA and JAMS arbitrators.<sup>30</sup> 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.)”<sup>31</sup> In another case, “a dismayed [plaintiff] watched the arbitrator

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<sup>25</sup> JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, JUDICIAL ARBITRATION AND MEDIATION SERV. 28 (2014); AAA *Statement of Ethical Principles*, *supra* note --.

<sup>26</sup> See Employment Due Process Protocol, adopted by the Task Force on Alternative Dispute Resolution in Employment, May 9, 1995, [https://www.adr.org/sites/default/files/document\\_repository/Employment%20Due%20Process%20Protocol\\_0.pdf](https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf). On the history and enforcement of the DPP, 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 (2005).

<sup>27</sup> See Colvin & Gough, *supra* note --.

<sup>28</sup> *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999).

<sup>29</sup> *Id.* (“[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.”).

<sup>30</sup> Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015 (hereinafter, NY Times, Part I); Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. Times, Nov. 1, 2015 (hereinafter, NY Times, Part II).

<sup>31</sup> NY Times, Part II.

and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)”<sup>32</sup> 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.<sup>33</sup> 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.”<sup>34</sup> One “JAMS arbitrator in an employment case . . . simultaneously had 28 other cases involving the same [defendant] company.”<sup>35</sup> 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.”<sup>36</sup> As for the employee-complainants, one arbitrator said, “Why would an arbitrator cater to a person they will never see again?”<sup>37</sup> 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 Corporation*<sup>38</sup> launched the mandatory arbitration 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.<sup>39</sup> The early data that did exist came disproportionately from individually negotiated arbitration agreements (typically involving high-level executives).<sup>40</sup>

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.”<sup>41</sup> Plaintiffs, for their part, lost access to juries, judges, and appellate review, but gained access to a faster and often cheaper adjudication process.<sup>42</sup> Based

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<sup>32</sup> *Id.*

<sup>33</sup> See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 *Employee Rts. & Emp. Pol’y J.* 189 (1999).

<sup>34</sup> *NY Times*, Part II.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 500 U.S. 20 (1991)

<sup>39</sup> See *An Empirical Study*, *supra* note --, at 2.

<sup>40</sup> See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *J. EMPIRICAL LEG. STUDS.* 1, 6 (2011) [hereinafter *An Empirical Study*].

<sup>41</sup> *Gilmer*, 500 U.S. at 31 (internal quotation marks omitted).

<sup>42</sup> 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 (2001).

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.<sup>43</sup> On that then-plausible account, the advent of mandatory arbitration appeared to enhance ordinary employees’ access to justice.

The picture has become a bit clearer in recent years, thanks 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.<sup>44</sup> In addition, the AAA has allowed some scholars to examine case files, under assurances of confidentiality, and to publish some aggregate data.<sup>45</sup> The comparatively rich body of empirical research that has emerged in recent years is still far from 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),<sup>46</sup> and especially from the AAA, which has supported scholarly efforts to understand the impact of arbitration.<sup>47</sup>

With that in mind, it is striking how discouraging the more recent data are.<sup>48</sup> It now appears not only that average recoveries are significantly lower in arbitration than in court (as previously believed), but that employee-complainants are significantly *less* likely to prevail and to recover anything. Colvin found that employees won something in 21.4 percent of AAA arbitrations, compared to 36.4 percent of federal employment discrimination cases, 57 percent of state non-civil rights cases, and 59 percent of California state wrongful discharge cases.<sup>49</sup> 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

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<sup>43</sup> See Estreicher, *supra*, at 563; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. OF LAB. & EMP. L. 411, 417-18 (2010); 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 (1999).

<sup>44</sup> Sec. 1281.96, CA Code of Civil Procedure.

<sup>45</sup> See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014).

<sup>46</sup> See, e.g., *An Empirical Study*, *supra* note --, at 3.

<sup>47</sup> Colvin and Gough, for example, were able to examine AAA files, under promises of confidentiality, to examine case outcomes and characteristics.

<sup>48</sup> Colvin, [Mandatory Arbitration], *supra* note [63], (reviewing numerous studies).

<sup>49</sup> *Id.*

cases.<sup>50</sup> There might be differences between claims that enter arbitration and those that enter the courts;<sup>51</sup> but it is hard to conjure up an explanation for such large disparities that do not include the nature of the forum itself.

The single most striking fact uncovered by these recent studies is the very small number of arbitration cases. For the 11-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.<sup>52</sup> If the AAA is the designated provider in about half of arbitration provisions (as surveys suggest<sup>53</sup>), that yields an estimate of fewer than 2000 employment arbitration cases per year under MAAs.<sup>54</sup> At first glance, that appears to be a rather 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).<sup>55</sup>

## II. Counting the 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.<sup>56</sup> (That compared to just over two percent coverage in 1992.<sup>57</sup>) Colvin's more comprehensive 2017 survey found that 56 percent of non-union private sector employees, or approximately 60 million employees, are now covered.<sup>58</sup> That is a steep increase in coverage, and it raises the stakes in debates over mandatory arbitration. But of course those numbers all beg the question: How many such individuals each year have potential employment law claims—claims that proceed past “naming” and “blaming” to “claiming” in some forum or another?<sup>59</sup>

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<sup>50</sup> Id at --.

<sup>51</sup> See infra pp. --.

<sup>52</sup> Colvin and Gough, *Individual Employment Rights*, at 1027.

<sup>53</sup> See Colvin & Gough, *Comparing Mandatory Arbitration*, at 34-35.

<sup>54</sup> 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 note --.

<sup>55</sup> Again, let me note that Jean Sternlight has reported on these matters in greater detail than I do here. See Sternlight, ---.

<sup>56</sup> Colvin, supra note --; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007).

<sup>57</sup> Colvin 2017.

<sup>58</sup> Id.

<sup>59</sup> The iconic terminology is from William L.F. Felstiner, Richard L. Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...*, 15 LAW & SOC. REV. 631 (1980).

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 I will focus only on filings in 2016, the most recent year for which solid data are available for both the AAA and federal courts.<sup>60</sup> The AAA reports that 2,879 individuals filed cases with the AAA under employer-promulgated procedures in 2016.<sup>61</sup> Following the assumption above that this represents half of all arbitrations under MAAs,<sup>62</sup> that suggests that about 5126 cases were filed in arbitration by the approximately 60 million employees who are covered by MAAs. That, too, 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.<sup>63</sup>

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).<sup>64</sup> 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.<sup>65</sup> That compares to the estimate of 5126 arbitration filings.<sup>66</sup> These numbers lead to an estimate of about 34,000 “missing” arbitrations per year – 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

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<sup>60</sup> I use a single year’s data because Colvin’s 2017 study shows that coverage of MAAs has risen steeply in recent years. In earlier years, fewer workers were presumably covered by MAAs, but there is no solid 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 court and arbitration are both available.

<sup>61</sup> Email communication with Ryan Boyle, Vice President, Statistics and In-House Research, American Arbitration Ass’n, Oct. 24, 2017 (on file with author). 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, AAA (available at <https://www.adr.org/ConsumerArbitrationStatistics> ).

<sup>62</sup> See supra ---. I will question that assumption below.

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<sup>64</sup> *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](http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf).

<sup>65</sup> It is more likely that this number includes some claims that are covered by MAAs. For a discussion of how that might affect the estimate of “missing” claims, see infra note --.

<sup>66</sup> See supra ---.

rarely subject to MAAs and should be excluded from the comparison. Assuming that government employees are as likely as private sector employees to file an employment lawsuit in federal court, the relevant number of federal court filings falls by 15.2 percent to 26,300.<sup>67</sup> Second, some of the federal court lawsuits were probably filed by individuals who were covered by MAAs (and thus faced a motion to compel arbitration).<sup>68</sup> In light of the lack of data on this point, Figure 1 shows a range of expected arbitration claims, with the top number reflecting the assumption that *no* employees covered by MAAs initially filed in federal court, and the bottom number reflecting the assumption that *all* such employees initially filed in federal court.<sup>69</sup> These adjustments lead to an estimate of “expected” arbitrations between 33,500<sup>70</sup> and 14,700,<sup>71</sup> as compared to the 5126 arbitrations that appear to have been filed. That yields an estimate of between 28,400 and 9600 “missing” arbitrations.

[Insert Figure 1 about here]

In several respects, however, the Figure 1 estimate of missing arbitrations is far too conservative.<sup>72</sup> 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 some are employer-controlled,<sup>73</sup> 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 those in the latter camp are less than half as likely to file a claim, a more realistic estimate of arbitration cases filed in 2016 is 4000 or less.

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<sup>67</sup> According to the Bureau of Labor Statistics, 15.2 percent of non-farm employees work for the government at some level. Bureau of Labor Statistics, Current Employment Statistics (Sept. 2017), <https://www.bls.gov/web/empsit/cese1a.htm>.

<sup>68</sup> Filing a lawsuit despite the presence of an MAA might have made more sense in the past, when there were many open legal questions about the enforceability of MAAs. But by 2016, few legal challenges to MAAs remained open, and there was little leverage to be gained by filing a lawsuit that faced an inevitable motion to compel arbitration. It is still worth noting that some claims that are subject to arbitration might be first filed in court and then settled before or after a defense motion to compel arbitration, without being filed in arbitration. But any such settlements would take place under the discouraging shadow of the actual outcomes of cases that proceed through arbitration; given the data reviewed above, *supra* ---, that would imply settlements that are very small by comparison to settlements of litigation.

<sup>69</sup> In that extremely unlikely event, the federal claims (26,300) would represent 100 percent of all claims; and 56 percent of those claims (about 14,700) would be relegated to arbitration.

<sup>70</sup> That is:  $(56 \div 44) \times 26,300$ .

<sup>71</sup> See *supra* note --.

<sup>72</sup> but by such a small amount, relative to the disparities shown in Figures 1 and 2, that I have ignored this issue.

<sup>73</sup> See *supra* ---.

At the same time, the number of court filings in Figure 1 is 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 California, for example, it is rare for a plaintiffs' attorney to file an employment action in federal versus state court.<sup>74</sup>) Unfortunately I know of no data on the volume of employment litigation in state court.<sup>75</sup> Second, some of the federal court lawsuits (as well as some of the excluded state court lawsuits) are class or collective actions, some of which might cover hundreds of employees or more. By contrast, employees covered by MAAs are often precluded from pursuing their claims as a group.<sup>76</sup>

The treatment of aggregate employment claims in arbitration is currently before the Supreme Court.<sup>77</sup> The National Labor Relations Board (NLRB) held in *D.R. Horton, Inc.*,<sup>78</sup> that employers violate the National Labor Relations Act (NLRA) in seeking employees' waiver of the right to bring a collective claim of any kind: Section 7 of the NLRA protects employees' right to engage in "concerted activity for . . . mutual aid or protection,"<sup>79</sup> and that has long been held to include employees' collective pursuit of legal claims through courts or otherwise.<sup>80</sup> In the NLRB's view, the fact that such a waiver is part of an arbitration agreement does not make it enforceable under the FAA.<sup>81</sup> The courts of appeals have split on the question,<sup>82</sup> and the Supreme Court has agreed to decide the matter this term.

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<sup>74</sup> See Sternlight, *supra* note --, at 1332, n. 143, citing GARY BLASI & JOSEPH W. DOHERTY, UCLA LAW/RAND CENTER FOR LAW & PUBLIC POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50 (2010), p. 11.

<sup>75</sup> *Id.* at nn. 99-100. The number is likely to be quite large, given the overwhelming predominance of state court claims in California, the most populous state, see *supra* note --; and the existence of employee contract and tort causes of action that sound only in state law. In general, state civil lawsuits greatly outnumber federal civil suits, *id.*; but that is almost certainly less true of employment cases.

<sup>76</sup> Colvin's 2017 survey showed that 30 percent of MAAs contained such a clause. Because larger employers were more likely to have such a clause in their MAAs, 41 percent of employees covered by MAAs, and 23 percent of all employees, were barred from filing or participating in a class or collective action. For agreements that are silent about class claims, the Supreme Court's decision in *Stolt-Nielsen v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010), holds that silence regarding class arbitration implies *lack* of party consent, and thus precludes class arbitration.

<sup>77</sup> The Court granted certiorari and consolidated three decisions, *Epic Systems v. Lewis*, 823 F.3d 1147 (7<sup>th</sup> Cir. 2016); *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9<sup>th</sup> Cir. 2016); and *NLRB v. Murphy Oil USA*, 808 F.3d 1013 (5<sup>th</sup> Cir. 2015).

<sup>78</sup> 357 NLRB 2277 (2012), enforcement denied in part, 737 F.3d 344 (5<sup>th</sup> Cir. 2013).

<sup>79</sup> NLRA, 29 U.S.C. §157.

<sup>80</sup> 357 NLRB at ---.

<sup>81</sup> *Id.* at 2287.

<sup>82</sup> Compare *Epic Systems*, 823 F.3d 1147 (upholding NLRB view); *Ernst & Young*, 834 F.3d 975 (same); and *NLRB v. Alternative Entertainment, Inc.*, No. 16-1385 (6<sup>th</sup> Cir. 2017) (same), with *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 776 (8<sup>th</sup> Cir. 2016) (rejecting NLRB view); *Murphy Oil USA, Inc. v.*

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 exceeds the expected returns.<sup>83</sup> But if many individuals are subject to the same challenged practice, employees can practicably pursue their claims through a class or collective action. According to a recent law firm report, nearly all FLSA claims in the past several years were filed as class or collective actions.<sup>84</sup> 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. For present purposes, however, the point is simpler and less controversial: Given the existence of class and collective claims in federal court (but not in arbitration), the number of federal court filings in Figure 1 greatly understates the number of individuals whose claims are encompassed by those filings.

Let us assume that, on average, each of the 8686 FLSA actions filed in federal court in 2016 covered 50 individuals, each of whom would stand some chance of prevailing in court through collective or class action procedures.<sup>85</sup> That would yield an additional 368,000 claims in federal court.<sup>86</sup> With that adjustment, Figure 2 suggests that, if MAA-covered employees were as willing and able to arbitrate their claims as non-MAA-covered employees are willing and able to litigate, we would expect to see between 206,000 and 468,000 claims in arbitration, rather than the fewer than 4000 claims that are probably filed. That amounts to an estimated 202,000 to 464,000 “missing” arbitration cases. Stated differently, over 98 percent of the employees who would be expected to have legal claims under consideration in some forum, but who are covered by MAAs, fail to file any claim in arbitration.

[Insert Figure 2 about here]

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NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015) (same), *cert. granted*, 137 S. Ct. 809 (2017); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 296 (2d Cir. 2013) (same).

<sup>83</sup> See Estlund, *supra* note --, at 427–29.

<sup>84</sup> See Seyfarth Shaw, 13<sup>th</sup> Annual Workplace Class Action Litigation Report, p. 20, available at <http://www.workplaceclassaction.com/wp-content/uploads/sites/214/2017/01/CAR-2017-Chapter-1-FINAL.pdf>.

<sup>85</sup> 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 at n. --, at 136-141. but if 50 seems high, consider that other class actions, such as those under employment discrimination laws, are not taken into account at all.)

<sup>86</sup> That is: 50 times the estimated 7365 FLSA claims filed in federal court by non-governmental employees in 2016 (i.e., 8686 total claims minus 15.2 percent to account for government employees, see *supra* note --).

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 so large as to swamp any quibbles about precise numbers. And that is despite the omission of state court litigation. Given that omission, even 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 a very large number 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, we must recognize the possibility that employers that impose mandatory arbitration are systematically different from those that do not. We do know that larger and more sophisticated employers are more likely to use MAAs.<sup>87</sup> 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 *Concepcion*<sup>88</sup> and *Italian Colors*,<sup>89</sup> seeking to foreclose all group claims, are a less scrupulous bunch than the early adopters, and perhaps less scrupulous than the average employer. Either of those surmises would 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.

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,<sup>90</sup> it turns out that, except for a relative handful of cases,

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<sup>87</sup> ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 5 (2017).

<sup>88</sup> 563 U.S. 333 (2011).

<sup>89</sup> 570 U.S. --- (2013).

<sup>90</sup> See, e.g., Bingham, *supra* note – (on 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, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, *supra* note --, at 1040 (on pro-employer outcomes in arbitration).

arbitration just doesn't take place at all.<sup>91</sup> 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 plaintiffs' attorneys into the story,<sup>92</sup> and assume that they are rational actors with at least a rough idea of the law and empirics surrounding arbitration. After all, attorneys' livelihood depends on their calculating the probabilities and degrees of success, or risk-return ratios, in cases brought to them. 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?

Attorneys at the intake point may or may not have access to a detailed written description of the arbitration process. If they do, they are quite likely to find an anti-aggregation clause that would knock out some small value claims at the outset even if they are shared by hundreds or thousands of the complainant's co-workers.<sup>93</sup> The legality of those clauses is currently before the Supreme Court, as noted above,<sup>94</sup> 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. Some provisions could 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 "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 provisions, they know that a costly court challenge would almost certainly pour them out and back into the still-flawed arbitration process, whether or not the court recognizes the flaws in that process.<sup>95</sup>

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<sup>91</sup> Of course, that may be precisely because of the many discrete problems that have attracted critical attention; more on this below.

<sup>92</sup> 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 25% of employees who represented themselves, the win rate was 18.3% and the average award overall was \$12,228, as compared to 23% win rate and \$29,000 average award for represented claimants. Colvin, *Empirical Study*, at 16. I note that the perspective of plaintiffs' attorneys, as with much else in this essay, has been explored quite thoroughly by Prof. Sternlight in her article, *supra* note --.

<sup>93</sup> See *supra* note --

<sup>94</sup> See *supra* note ---

<sup>95</sup> Most alleged defects in the arbitral process must be adjudicated within that very process. See *Schwartz, supra* note --, at 265.

Let us underscore this point: The large number of missing or dropped cases is likely to include many that are subject to legally flawed arbitration provisions. The viable legal objections to arbitration are dwindling under Supreme Court case law. For example, the Court's decisions in *AT&T v. Concepcion*<sup>96</sup> and *Italian Colors v. American Express*<sup>97</sup> sharply limited courts' ability to police the fairness of arbitration agreements under either the state doctrine of unconscionability or the federal common law concept of "effective vindication" of statutory rights. But neither doctrine was abolished altogether, and either of them might invalidate arbitration provisions that, for example, preclude statutory remedies (including attorney fees),<sup>98</sup> skew the selection of arbitrators,<sup>99</sup> or impose excessive fees or other absolute barriers to the arbitral forum.<sup>100</sup> Unfortunately, these standards of fairness are applied in a manner that undermines their efficacy. Most objections are relegated to the arbitral forum, and often for case-by-case resolution (as in the case of excessive arbitrator fees);<sup>101</sup> at most the offending provisions are likely to be struck from an agreement rather than invalidating the agreement and allowing litigation to go forward.<sup>102</sup> 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 corrected.<sup>103</sup> Legally objectionable arbitration clauses and procedures, as well as vague and indeterminate ones, can deter both litigation and arbitration.

Even if plaintiff's attorneys were to surmount or ignore all these hurdles and proceed in arbitration, they presumably know that odds are sharply against their winning anything (and thus recovering any attorneys' fees), and even more sharply against their winning enough to make the odyssey worthwhile for the attorney or the client. In short, given the lower prospect of prevailing and lower average awards, expected recoveries (including attorneys' fees) in arbitration will often fall below some threshold of economic viability for attorneys. Even in cases with "smoking gun"

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<sup>96</sup> 563 U.S. 333 (2011).

<sup>97</sup> 570 U.S. ---, 133 S. Ct. 2304(2013).

<sup>98</sup> 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 2310.

<sup>99</sup> Or so one can hope. Even without a principle of "effective vindication," some "arbitration agreements," like the one invalidated in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4<sup>th</sup> Cir. 1999), do not even qualify as "arbitration," the essence of which is an impartial decision maker chosen by both sides.

<sup>100</sup> "Perhaps" such a provision would be invalid, per *Italian Colors*, 133 S.Ct. at 2310.

<sup>101</sup> See *Green Tree Financial v. Randolph*, 531 U.S. 79, 88-92 (2000).

<sup>102</sup> See Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PENN. L. REV. 379, 405 (2007).

<sup>103</sup> *Id.*

evidence and scandalous facts that might have jolted a jury into a mega-bucks verdict, or that might 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, the answer to all those questions is “rarely.”

Of course, litigation is no panacea for plaintiffs.<sup>104</sup> 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).<sup>105</sup> 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.<sup>106</sup> 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. Still, it looks as though the presence of a mandatory arbitration provision dramatically reduces an employee’s chances of any kind of recovery, any kind of hearing, or even legal representation.<sup>107</sup>

#### **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 facing 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 a waiver of substantive rights that the law declares non-waivable.<sup>108</sup> Let me explain.

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<sup>104</sup> That has been especially well documented in the discrimination arena. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol. Rev. 103 (2009).

<sup>105</sup> See Estlund, *Between Rights and Contract*, *supra* note --, at --; Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 948 (1998)

<sup>106</sup> Colvin & Gough, *supra* note --, at 14–15.

<sup>107</sup> Plaintiffs’ attorneys do report that the presence of an arbitration provision tends to discourage them from accepting a case (even relative to the very low percentage of cases they accept in general). Colvin and Gough, *Comparing Mandatory Arbitration*, at 14-15 (based on a 2013 Survey of Plaintiffs’ Attorneys). But given the tiny number of arbitration filings, these self-reports may understate the actual impact of arbitration provisions on filing behavior.

<sup>108</sup> The essentials of this argument are developed in Estlund, *Between Rights and Contract*, *supra* note --, at 427-30.

Nearly all statutory rights and most common law rights of employees are non-waivable or inalienable. An employee who is eligible for overtime or is covered by minimum wage laws cannot make a valid agreement to forego those laws' protections in the future; nor can she agree to waive the protections of antidiscrimination laws or laws that protect whistleblowers from reprisals.<sup>109</sup> Scholars debate the wisdom of non-waivable employee rights, with the usual face-off between market enthusiasts and market skeptics.<sup>110</sup> 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 employment in exchange for a severance payment beyond what is contractually due.<sup>111</sup> 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 discretionary decision. That agreement would presumably be void, for contracting *ex ante* into a sham process of adjudication—one that offers no fair opportunity to vindicate one's rights—is equivalent to a waiver of those rights.

Obviously, mandatory arbitration is not supposed to be that. It is supposed to be, and sometimes is, 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.<sup>112</sup> But unless the mandated arbitral process does in

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<sup>109</sup> See Estlund, *Between Rights and Contract*, *supra* note --, at 380

<sup>110</sup> On the pro-contract side, illustrative analyses include RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 358-59 (4th 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 Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976), and Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 Yale L.J. 2767, 2787 (1991).

<sup>111</sup> Ordinarily such a waiver must be "knowing and voluntary." 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. 29 U.S.C. §626(f)(1)(A)-(H) (2000).

<sup>112</sup> 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

fact allows 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 (roughly echoed in state law by unconscionability analysis) 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. . . .”<sup>113</sup> 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 vindication of substantive rights through arbitration.<sup>114</sup> *Italian Colors* was deeply unsettling in two ways: At a minimum, the decision diluted the standard 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.<sup>115</sup> On that formalistic view, a provision that merely makes adjudication economically infeasible (like a bar against aggregation of “negative value” claims) does not prevent “effective vindication” of rights.<sup>116</sup> 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.<sup>117</sup> 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 the dissolution of inalienable substantive rights.

Until now, the piecemeal nature of the challenges to mandatory arbitration agreements has 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*<sup>118</sup> and *Circuit City*<sup>119</sup> in the employment context), the challenges to arbitration have mostly proceeded one by one: Does one particular provision stand in the way of “effective vindication” or 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

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waivable; and that is because unconstrained waiver of the right to litigate would amount to a waiver of the underlying rights. Estlund, *Between Rights and Contract*, supra note --, at 409.

<sup>113</sup> *Italian Colors Restaurant v. American Express*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

<sup>114</sup> *Id.* at 2314 (Kagan, J., dissenting) (Kagan, J., dissenting).

<sup>115</sup> *Id.* at 2310.

<sup>116</sup> *Id.* at 2311.

<sup>117</sup> *Id.* at 2310.

<sup>118</sup> 500 U.S. 20 (1991).

<sup>119</sup> 532 U.S. 105 (2001).

law and norms of arbitration that had evolved in the context of disputes between business entities or between unions and employers. But the Court has never 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 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 the employer to tweak and tilt the arbitration process to its liking, have made arbitration so inhospitable to claimants that they routinely give up their claims.

One might well ask why all employers do not impose such agreements if they represent a virtual insurance policy—and one that is free, no less—against employment claims. The answer may lie partly in 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, the 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.<sup>120</sup> Moreover, in the early days 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 overturned.<sup>121</sup> Most employers might sensibly have decided to take their chances on litigation, where they held familiar advantages.

But things have changed with the Supreme Court’s drastic constriction of judicial oversight of arbitration and its presumptive green light to provisions that foreclose aggregate claims.<sup>122</sup> 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 rose from 16 percent to nearly 43 percent just from 2012 to 2014.<sup>123</sup> Although such provisions do not

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<sup>120</sup> See Estreicher, *supra* note --.

<sup>121</sup> See, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 *Rutg. L. J.* 399 (2000).

<sup>122</sup> “Presumptive” because the legality of such clauses in employment agreements under the NLRA is currently before the Court.

<sup>123</sup> See THE 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION, *supra* note --.

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.<sup>124</sup>

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. 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.

## V. 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. Such a provision amounts to a virtual *ex ante* waiver of substantive rights that the law declares non-waivable.

Already in 1996, 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 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.”<sup>125</sup> 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.

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<sup>124</sup> See *supra* – .

<sup>125</sup> Stone, *Mandatory Arbitration of Individual Employment Rights*, *supra* note --, at 1037.

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.<sup>126</sup> 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 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, full compliance with which is a condition of enforceability.<sup>127</sup> In any case, the Court’s FAA 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

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<sup>126</sup> See Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights* (August 27, 2013). 61 *UCLA Law Review Discourse* 164 (2013); UCLA School of Law, Law-Econ Research Paper No. 13-12. Available at SSRN: <https://ssrn.com/abstract=2317031>.

<sup>127</sup> 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 the risk-return calculations that govern attorneys’ decisions. See Estlund, *Just the Facts, supra note --*.

employee rights.<sup>128</sup> In light of the emerging data on the sheer paucity of arbitrations, however, that view can no longer stand. If the Court continues on the current pro-arbitration path in the face of this stark reality, it will be complicit in employers' effective nullification of employee rights and protections.

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<sup>128</sup> Mandatory employment arbitration has its academic defenders. See, e.g., supra note --. 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.