

2015

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### Recommended Citation

Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. (2015).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol80/iss4/3>

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# Disarming Employees

## HOW AMERICAN EMPLOYERS ARE USING MANDATORY ARBITRATION TO DEPRIVE WORKERS OF LEGAL PROTECTION

*Jean R. Sternlight*<sup>†</sup>

*I'll let you write the substance . . . you let me write the procedure, and  
I'll screw you every time.<sup>1</sup>*

### INTRODUCTION

Congress and state legislatures have passed many laws to protect American workers,<sup>2</sup> but these laws are worthless if they cannot be enforced. In the United States we have largely depended on employees to bring individual claims or class actions to protect their rights to be free from discrimination, paid a fair wage, provided a safe workplace, and given reasonable benefits.<sup>3</sup> While

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<sup>1</sup> *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

<sup>2</sup> See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 201, 206-207 (2012); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-624 (2012); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (2012); Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-e17 (2012) (proscribing discrimination on the basis of race, gender, national origin, and other categories) Americans with Disabilities Act, 42 U.S.C. § 12102-12213 (2012). States also have statutory and common law protecting worker rights. See, e.g., NEV. REV. STAT. § 613 (2013) (detailing law regarding such matters as fraudulent representations by employment agents, prohibition of involuntary servitude, and penalty for obtaining employment by false letters of recommendation).

<sup>3</sup> See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1070 n.2 (2014) (showing that private plaintiffs file many more employment discrimination and FLSA suits than government agencies file on their behalf). For further discussion of the United States' reliance on employees to litigate their own protection, see generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

relying on employees to bring lawsuits to protect their own rights has left many workers without access to justice,<sup>4</sup> at least litigation has protected some employees,<sup>5</sup> and the threat of litigation has protected many others.<sup>6</sup>

Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration<sup>7</sup> clauses to “disarm” employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice. It has been estimated that roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions,<sup>8</sup> and this number may well increase.<sup>9</sup> Whereas the Court’s decision in *Wal-Mart v. Dukes*<sup>10</sup> has received substantial

<sup>4</sup> See, e.g., ANN BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 2 (2009) [hereinafter BROKEN LAWS], available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1> (surveying 4,387 workers in low wage industries and concluding that “the core protections that many Americans take for granted—the right to be paid at least the minimum wage, the right to be paid for overtime hours, the right to take meal breaks, access to workers’ compensation when injured, and the right to advocate for better working conditions—are failing significant numbers of workers”).

<sup>5</sup> See *infra* Part III.B.

<sup>6</sup> See *infra* Part III.C.3 (discussing class, collective action, and group claims).

<sup>7</sup> I call “mandatory” those arbitration provisions that are imposed by employers on their employees as non-negotiated contracts of adhesion. While some higher-level executives do enter into arbitration agreements voluntarily, or at least knowingly, the bulk of employees who are covered by arbitration clauses contained in employee handbooks or other small print documents are not aware that they have waived their rights to go to court. See Alexander J.S. Colvin & Kelly Pike, *Saturdays and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. DISP. RESOL. 59, 64-65 (2014) (distinguishing “individually negotiated” and “employer promulgated” plans and finding that 72.4% of employment arbitrations handled by American Arbitration Association arise out of “employer promulgated” plans).

<sup>8</sup> 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) (estimating that between 15% and 25% of employers have imposed employment arbitration). A recent article raises questions about the validity of Colvin’s estimate, which was originally taken from studies of the telecommunications industry. David B. Lipsky et al., *Mandatory Employment Arbitration: Dispelling the Myths*, 32 ALTERNATIVES TO HIGH COST LITIG. 138 (2014). Yet, the same article also notes that “Colvin’s estimates for the telecommunications industry remain the best empirical estimates that we have of the coverage of mandatory arbitration provisions.” *Id.* at 141.

<sup>9</sup> While the growth of the usage of mandatory employment arbitration may have slowed, additional companies may well now impose mandatory employment arbitration as a means of avoiding class action suits. Lipsky et al, *supra* note 8 at 141. A recent study of over 300 general counsels by defense firm Carlton Fields Jordan Burt found that whereas just 16.1% of the companies surveyed used arbitral class action prohibitions in 2012, 42.7% used such prohibitions in 2014. THE 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION 26 (2015), available at <http://classactionsurvey.com/pdf/2015-class-action-survey.pdf>; see also Lauren Weber, *Careers: Companies Block Staff From Filing Suits*, WALL ST. J., Apr. 1, 2015, at B1.

<sup>10</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (vacating certification of class of over a million women who sought to sue Wal-Mart stores across the country for gender discrimination, reasoning that the class had failed to demonstrate sufficient

attention for its potential to limit employment discrimination class actions,<sup>11</sup> employers' use of mandatory arbitration can be even more detrimental to non-unionized employees.<sup>12</sup> Employers are using arbitration clauses to make it more difficult for employees to bring successful individual claims in any forum<sup>13</sup> and also to eliminate the threat of class actions or even collective or group claims in both litigation and arbitration.<sup>14</sup> Indeed, while some might think the *Wal-Mart* decision has rendered arbitral class action prohibitions unnecessary, instead it may have made arbitral class action prohibitions even more attractive to employers by encouraging plaintiff-side attorneys to file a greater

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commonality among their claims); *see also* *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (rejecting certification of proposed class action on the ground that common consumer claims did not predominate over individual claims).

<sup>11</sup> Law firm Seyfarth Shaw reports that the *Wal-Mart* and *Comcast* decisions have together had a "profound influence in shaping the course of class action litigation rulings throughout 2013," by prompting employers to mount more class certification challenges and causing employers to "settle[] fewer employment discrimination class actions than at any time over the past decade and at a fraction of the levels of 2006 to 2012." SEYFARTH SHAW LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 2 (2014), available at <http://www.seyfarth-classaction.com/2014/2014wcar/index.html>. Academics are exploring ways for employees and their attorneys to work around the impact of *Wal-Mart*. *See generally, e.g.*, Myriam E. Gilles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (urging that state attorneys general use their "parens patriae authority" to help fill regulatory gap left by likely demise of class actions following the *Concepcion* and *Wal-Mart* decisions); Angela D. Morrison, *Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87 (2013) (exploring ways in which EEOC can step in to protect employees who can no longer participate in nation-wide class actions after *Wal-Mart*); *cf.* Dustin Massie, *Too Soon for Employers to Celebrate?: How Plaintiffs Are Prevailing Post-Dukes*, 29 A.B.A. J. LAB. & EMP. L. 177 (2014) (questioning whether *Wal-Mart's* impact has been as negative for employees as many had predicted).

<sup>12</sup> This article focuses only on the non-unionized workplace. Arbitration plays out very differently in the roughly 11% of the workplace that is unionized, where unions enter into collective bargaining agreements (CBAs) on behalf of their members, and where arbitration is customarily used to resolve disputes over the interpretation of the CBA. While some employers also use the CBA to require union members to arbitrate individual statutory claims, at least some unions substantially assist their members with arbitration claims. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (allowing employers to mandate individual arbitration in the unionized context so long as union agrees to clause and employees are not precluded from vindicating their federally protected rights).

<sup>13</sup> *See infra* Parts III.A, B.1 & B.2. Mandatory employment arbitration can also be critiqued for privatizing what ought to be public claims. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2601132](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601132); Theresa M. Beiner, *The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837 (2014).

<sup>14</sup> *See infra* text accompanying note 36; *see also infra* Parts I & III(C)(3). "Collective claims" are those brought under the FLSA, or similar statutes, that require plaintiffs to opt-in to the multi-plaintiff suit. "Group claims" are those involving two or potentially more plaintiffs who choose to bring their litigation in the same lawsuit.

number of smaller regional class actions rather than fewer national class actions.<sup>15</sup>

Employers' use of mandatory arbitration to decrease employees' access to justice is highly disappointing and ironic. Some arbitration commentators have urged that arbitration can be quicker, cheaper, and simpler than litigation, thus offering an accessible venue for employees who cannot litigate their claims in court.<sup>16</sup> Yet available empirical evidence now shows that mandatory employment arbitration is bringing about the opposite result—eroding rather than boosting employees' access to justice by suppressing employees' ability to file claims. This evidence reveals that employees who are covered by mandatory arbitration provisions almost never file arbitration claims.<sup>17</sup> The empirical evidence also provides important insights as to *why* so few employees file claims in arbitration: (1) employees win less often and win less money in arbitration than in litigation;<sup>18</sup> (2) attorneys are less willing to take employee claims that are headed to arbitration rather than litigation;<sup>19</sup> (3) arbitration is not a hospitable venue for pro se employees;<sup>20</sup> and (4) arbitration is being used to eradicate the class actions, collective actions, and even group litigation that are essential to many employees.<sup>21</sup>

<sup>15</sup> Massie, *supra* note 11, at 188, 200-01 (finding that heightened standard enunciated in *Wal-Mart* "has resulted in the filing of multiple class actions on a regional basis, increasing the likelihood of each mini-class going forward . . . [amounting to a] new strategy of 'death by a thousand cuts'"). For a discussion of the relationship between the Court's arbitration and class action decisions, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

<sup>16</sup> See, e.g., Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 840 (2008) ("The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees"); 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) ("A properly designed arbitration system . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach"); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998) (urging that because mediation and arbitration are "generally much less expensive than litigation, [these processes may] bring justice within the reach of many to whom it is currently denied"); 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) (suggesting arbitration is more accessible to lower paid workers than litigation); 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) (arguing that while imperfect, mandatory arbitration is superior to litigation from perspective of both employees and employers).

<sup>17</sup> See *infra* Parts III.A & B.

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *infra* Part III.B.1.

<sup>20</sup> See *infra* Part III.B.2.

<sup>21</sup> See *infra* Part III.B.3.

While, in theory, employees might be protected through means other than either litigation or arbitration, the current practical realities are more bleak. With the rate of unionization now below 7% in the private sector,<sup>22</sup> we cannot count on unions to help workers.<sup>23</sup> Nor are state and federal bureaucracies sufficiently well-funded to protect all workers,<sup>24</sup> and there currently appears to be no political will to increase these bureaucracies.<sup>25</sup> Although enhancing internal enforcement mechanisms, including improved worker democracy and self-governance, may be the best means of improving the workplace, long term,<sup>26</sup> employers have little incentive to use such mechanisms if they can evade regulation altogether. Thus, absent Congressional action restricting employers' ability to use mandatory arbitration to deregulate the workplace,<sup>27</sup> we will continue to see employers free themselves to violate wage and hour laws, to discriminate, to impose unsafe

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<sup>22</sup> U.S. DEP'T OF LABOR, USDL-14-0095, U.S. BUREAU OF LABOR STATISTICS: ECONOMIC NEWS RELEASE (2014), available at <http://www.bls.gov/news.release/union2.nr0.htm> (providing unionization numbers for 2013 including overall unionization rate of 11.3 % and private sector rate of 6.7%).

<sup>23</sup> Indeed, several commentators have noted that employers use some of the same management practices to help avoid both unionization and litigation. Cynthia Estlund, *Employment Rights and Workplace Conflict*, in THE OXFORD HANDBOOK OF CONFLICT MANAGEMENT IN ORGANIZATIONS 55 (William K. Roche, et al. eds., 2014); Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. RELS. REV. 375, 375 (2003). Nonetheless, some are more optimistic than this author that unions may help non-member employees who are covered by mandatory arbitration clauses. See Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682 (2014) (arguing that employers' use of arbitration clauses to limit employees' ability to vindicate their rights provides unions with an organizing opportunity); See also Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55 (2004) (urging unions to help both unionized and non-unionized black employees bring discrimination claims in litigation or arbitration).

<sup>24</sup> Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 270-75 (1995) (urging that the EEOC lacks resources to pursue most meritorious cases and instead leaves most charging parties to pursue their own remedies); Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1111-15 (stating that federal and many state agencies are not adequately enforcing wage and hour laws); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 10 (1996) (describing EEOC procedures as a "strange and vacuous process—one where thousands of claims are filed at no financial cost to the plaintiff, few are truly investigated, fewer still resolved, and none of which is binding on any of the parties"); St. Antoine, *supra* note 16, at 418 (observing that the EEOC is too underfunded and understaffed to help most employees).

<sup>25</sup> FARHANG, *supra* note 3, at 3-4 (discussing that dominance of private enforcement model for employment discrimination suits is product of legislative choice).

<sup>26</sup> See generally, e.g., CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

<sup>27</sup> See, e.g. Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015); see also Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); see also *infra* Part IV.

working, and to otherwise violate federal and state labor and employment laws with impunity.

In examining the impact of mandatory arbitration on the workplace it is important to recognize the tremendous variety among employees, potential employment claims, and arbitration clauses. Policymakers and commentators who unconsciously focus on one particular type of claim, claimant, or arbitration clause may fail to realize that a dispute resolution system that works well for certain kinds of claims may not work well for others. For example, although many academics and members of the public may still think “discrimination” when they conceptualize claims employees bring against their employer,<sup>28</sup> employees instead often seek to bring claims regarding wage and hour violations, contractual issues, fraud, denials of benefits, or other matters.<sup>29</sup> Such claims may vary substantially in terms of legal and factual complexity.<sup>30</sup> Further, arbitration clauses themselves may differ in many ways including what if any arbitration provider is named,<sup>31</sup> how

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<sup>28</sup> Ruan, *supra* note 24, at 1105 (stating that “the focus on employment arbitration is mostly centered on employment discrimination and the difficulties of arbitration as a forum for complex burden-shifting liability. But wage claims are significantly different and bring a different set of considerations that must be addressed when evaluating the benefits and burdens of the arbitration forum”).

<sup>29</sup> In federal court in 2013 employees commenced 15,266 discrimination claims, 7,500 FLSA claims, and 7,599 ERISA claims. ADMIN. OFFICE OF THE U.S. COURTS, 2013 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS TABLE C-2A (2013), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02ASep13.pdf> [hereinafter “TABLE C-2A”].

<sup>30</sup> An hourly employee who is seeking to prove that she was not paid for working certain hours would need to present only fairly simple evidence of the work done and payments made. In contrast, it would be far more complicated for a prospective employee to try to prove that the fire department discriminates against women by using a certain physical examination. Such a claim requires mastery of legal doctrine, complex evidence and expert testimony. Similarly, an employee who seeks to argue that she is entitled to overtime under the FLSA may have to analyze the statute, relevant regulations, and precedent in order to prevail. Also, if an employee’s claim turns on evidence in the employee’s possession, such as pay stubs or contracts, the claim is far easier than if the employee would need to use discovery to obtain evidence from the employer, such as other employees’ files, in order to prevail.

<sup>31</sup> A recent study found that the American Arbitration Association (AAA) was named provider in 50% of employment arbitration clauses, that JAMS was named provider in 20% of clauses, and that the remaining clauses either did not name a provider or named a number of smaller providers. 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) [hereinafter COMPARING MANDATORY ARBITRATION] (on file with author). Some providers may require that the clause adhere to a “due process protocol” or similarly-named document adopted by the provider. See AM. ARBITRATION ASS’N., EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (effective Nov. 1, 2009), [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased) [hereinafter AAA EMPLOYMENT ARBITRATION RULES] (setting out AAA authority to decline cases where employer has failed to comply with Due Process Protocol); see also Richard A. Bales, *The Employment*

arbitrators are selected,<sup>32</sup> the size of costs and their allocation between employer and employee,<sup>33</sup> how much discovery is permitted,<sup>34</sup> the arbitration location,<sup>35</sup> whether class or collective actions or joined claims are precluded,<sup>36</sup> whether statutes of limitations are shortened,<sup>37</sup> whether certain kinds of relief are precluded,<sup>38</sup> whether employees are given a chance to opt out of the clause,<sup>39</sup> and many other matters. Differences among claimants, claims, and clauses will impact whether the employee files a claim, whether the claim is feasible on an individual basis, whether the employee is able to retain an attorney to assist with the claim, and how well the employee does if an arbitration claim is filed.

The remainder of this article is organized as follows. Part I discusses the Supreme Court arbitration decisions that have enabled employers to protect themselves from employment claims. Part II compares substantive results in arbitration and in litigation. While many commentators, journalists, and policy

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*Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005) (reviewing history of AAA employment due process protocol and how it has been enforced).

<sup>32</sup> Under AAA rules arbitrators are selected jointly by employer and employee from a list prepared by AAA, using a system whereby each side is able to strike out undesired arbitrators. AAA EMPLOYMENT ARBITRATION RULES, *supra* note 31, at 44. However, clauses do not always use an arbitration provider nor a fair selection mechanism. *E.g.*, *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 935, 940-41 (4th Cir. 1999) (refusing to enforce purported arbitration clause on the ground that it was too unfair in that it required all arbitrators to be selected from company's list).

<sup>33</sup> The AAA requires that employers pay a non-refundable \$1,350 in cases filed by an employee against the employer. AAA EMPLOYMENT ARBITRATION RULES, *supra* note 31, at 32. However, many employment arbitration clauses do impose significant costs on employees. *See* Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363 (2007).

<sup>34</sup> The AAA affords the arbitrator discretion to regulate discovery. AAA EMPLOYMENT ARBITRATION RULES, *supra* note 31, at 26. However, some employment arbitration clauses may explicitly limit the scope of discovery. *See* Malin, *supra* note 33, at 398-99.

<sup>35</sup> *See* AAA EMPLOYMENT ARBITRATION RULES, *supra* note 31, at 16 (discussing the parties' choice of arbitration hearing location as well as the AAA's discretion to assign arbitration administration to any of its offices); *see also* Malin, *supra* note 33, at 399 (noting that JAMS "provides that . . . the hearing location not place the cost of the proceeding beyond the employee's reach").

<sup>36</sup> *See* AAA EMPLOYMENT ARBITRATION RULES, *supra* note 31, at 42-43; *see also* Malin, *supra* note 33, at 386 (noting the commonality of employer-imposed arbitration agreements in prohibiting the arbitration from proceeding as a class action).

<sup>37</sup> *See* Malin, *supra* note 33, at 395 (discussing the employee's burden of proving that agreement's reduced limitations period precludes effective vindication of rights).

<sup>38</sup> AAA EMPLOYMENT ARBITRATION RULES, *supra* note 31, at 28; *see* Malin, *supra* note 33, at 393-94 (noting instances in which an agreement precluded an award of attorneys' fees or other remedies to a prevailing employee).

<sup>39</sup> *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (suggesting that an employee assented to binding arbitration by failing to exercise right to opt out of the agreement within 30 days).

makers have focused the bulk of their attention on who wins and loses in arbitration as compared to litigation, this article argues that substantive results are important mostly because of the impact they have on discouraging employees from filing claims in arbitration at all. Part III then examines how arbitration clauses deter employees from filing claims by making it more difficult for them to obtain attorneys, by failing to provide a good venue for pro se claimants, and by preventing employees from joining together in class, collective, or even mere group actions. Part IV, the conclusion, urges Congress to pass the Arbitration Fairness Act,<sup>40</sup> which would prevent employers from imposing mandatory arbitration, in order to reinvigorate enforcement of our employment laws.

## I. THE SUPREME COURT'S SUPPORT FOR MANDATORY EMPLOYMENT ARBITRATION

Although the Federal Arbitration Act<sup>41</sup> (FAA) was passed in 1925 to facilitate commercial use of arbitration,<sup>42</sup> employers generally did not seek to mandate employment arbitration for their non-unionized employees for many decades.<sup>43</sup> The Supreme Court's 1974 decision in *Alexander v. Gardner Denver*,<sup>44</sup> while involving a union member, was generally understood to foreclose employers from mandating arbitration in the non-unionized workplace as well.<sup>45</sup> Indeed, commentators have convincingly

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<sup>40</sup> See *infra* Part IV.

<sup>41</sup> Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (1925) (currently codified at 9 U.S.C. §§ 1-208 (2012)).

<sup>42</sup> See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION-NATIONALIZATION-INTERNATIONALIZATION* 100-01 (1992); see also IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 9-10 (2013).

<sup>43</sup> See generally *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 n.11 (2002) (noting that employers began to mandate arbitration in 1990s).

<sup>44</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 59-60 (1974) (holding that union member who had arbitrated claim for violation of contract could not be precluded from subsequently litigating claim for race discrimination, and noting that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices").

<sup>45</sup> See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 408 (2000) (observing that "[b]efore 1991, most parties believed that courts would not enforce mandatory arbitration of statutory employment discrimination claims"); see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 728 (1981) (allowing employees to bring minimum wage claim under FLSA even though they had unsuccessfully submitted wage claim based on same underlying facts to grievance committee).

argued that Congress did not intend for the Federal Arbitration Act to cover employees.<sup>46</sup>

Today, in contrast, a series of Supreme Court decisions have enabled employers to require their non-unionized employees to resolve disputes through arbitration, rather than litigation. As noted, one frequently cited study states that roughly 20% of American non-unionized employees,<sup>47</sup> or 25 million workers,<sup>48</sup> are covered by arbitration clauses. The Supreme Court's first decision opening the floodgates of mandatory employment arbitration was *Gilmer v. Interstate/Johnson Lane Corp.*<sup>49</sup> In that 1991 decision, the Court held that a stock exchange member could be compelled to arbitrate his age discrimination claim against the brokerage.<sup>50</sup> While *Gilmer* was technically not an employment decision, as Mr. Gilmer was a member rather than an employee of the stock exchange, the decision nonetheless emboldened employers to begin to mandate arbitration.<sup>51</sup> Subsequently, in *Circuit City Stores Inc.*

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<sup>46</sup> Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1 (2012), states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” See SZALAI, *supra* note 42, at 191-92; Matthew Finkin, “Workers’ Contracts” Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 289-90 (1996); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 263 (1991).

<sup>47</sup> Colvin, *supra* note 8, at 410. Significantly, even if Colvin’s estimate were substantially too high, and only 10% of American non-unionized employees were covered by mandatory arbitration provisions, the thrust of the analysis of this Article would still be valid. Very few employees actually file arbitration claims. See Lipsky et al., *supra* note 8, at 142.

<sup>48</sup> The Bureau of Labor Statistics estimates the size of the U.S. non-farm workforce as approximately 141 million. U.S. DEP’T OF LABOR, U.S. BUREAU OF LABOR STATISTICS: CURRENT EMPLOYMENT STATISTICS—CES (NATIONAL), available at <http://www.bls.gov/web/empstat/ceseeb1a.htm> (last modified Mar. 6, 2015). Subtracting out the roughly 11% of workers who are unionized, and taking 20% of those who are not unionized yields 25 million workers.

<sup>49</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); see also Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 44 (2004) (noting massive increase in employers’ use of arbitration in 1990s); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1561 (2005) (noting that prior to *Gilmer*, “judges, practitioners and academics widely . . . view[ed]” that employment arbitration agreements would not be enforceable); St. Antoine, *supra* note 16, at 411-15 (calling *Gilmer* “the most significant and most debated ADR decision in labor and employment law during the past quarter century” and discussing significant growth of mandatory employment arbitration following its issuance). For discussion of how the Supreme Court came to embrace mandatory arbitration, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641-42 (1996).

<sup>50</sup> *Gilmer*, 500 U.S. at 23.

<sup>51</sup> Green, *supra* note 45, at 408-09; see also Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14

*v. Adams*,<sup>52</sup> the Court expressly held that employers could require their employees to arbitrate claims against the employer, despite the seemingly contrary language of Section One of the FAA.<sup>53</sup> A few years later, in *EEOC v. Waffle House*,<sup>54</sup> the Court again addressed mandatory arbitration of employment claims, holding that although an employee could be contractually compelled to arbitrate future claims, they could not waive the EEOC's power to investigate employees' charges of discrimination.<sup>55</sup>

While the Supreme Court has not directly held that employers can use arbitration clauses to eliminate employees' ability to participate in class actions, it has certainly implied that they may do so, and lower courts have so held. Specifically, in two recent cases the Court has allowed companies to use arbitration to prevent consumers or small businesses from joining together in class actions. First, in *AT&T Mobility LLC v. Concepcion*,<sup>56</sup> the Court held that consumers' attempt to void an arbitral class action prohibition as unconscionable under California law was preempted by the Federal Arbitration Act.<sup>57</sup> Subsequently, in *American Express Co. v. Italian Colors Restaurant*,<sup>58</sup> the Court held that courts should enforce an arbitral class action prohibition even where that prohibition realistically prevented the plaintiff small business owners from enforcing their rights under federal antitrust law.<sup>59</sup> In light of these decisions it seems quite likely that companies will increasingly use arbitration to block employees from bringing collective or class claims,<sup>60</sup> and that this Supreme Court will

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HOFSTRA LAB. & EMP. L.J. 1, 52 (1996) (critiquing *Gilmer* and arguing that employment arbitration should be knowing and voluntary); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) (opposing mandatory employment arbitration in the wake of *Gilmer*).

<sup>52</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>53</sup> For arguments that *Circuit City* was wrongly decided, see *supra* note 46 and accompanying text.

<sup>54</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

<sup>55</sup> *Id.* at 295-96.

<sup>56</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>57</sup> *Id.* at 1753.

<sup>58</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>59</sup> *Id.* at 2309 (observing that “[t]he antitrust laws do not ‘evin[c]e an intention to preclude a waiver’ of class-action procedure” (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (second alteration in original)).

<sup>60</sup> As management-side firm, Seyfarth Shaw, puts it, the *American Express* decision “ought to help defendants avoid wage and hour class action litigation more easily for those employers that choose to institute workplace arbitration agreements.” SEYFARTH SHAW LLP, *supra* note 11, at 3. Another management side report similarly states “[t]he Supreme Court’s recent decisions in *AT&T Mobility* and *Amex III* have helped to solidify the enforceability of class waivers and clarify the FAA’s controlling

uphold such efforts by employers.<sup>61</sup> While an argument might be made that collective actions, which require employees to opt in, are significantly different from the opt-out class actions addressed in *Concepcion* and *American Express*,<sup>62</sup> this author is not optimistic the argument would carry the day with today's Supreme Court.<sup>63</sup> Certainly a majority of lower courts have applied the *Concepcion* and *American Express* cases to enforce employers' arbitration clauses that block employees from joining together in class actions, collective actions, or even group claims.<sup>64</sup>

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power. As a result, employers can expect a more uniform approach in the lower court's enforcement and positive treatment of class waivers." BAKER HOSTETLER 2013 YEAR-END REVIEW OF CLASS ACTIONS (AND WHAT TO EXPECT IN 2014) 7-8 (2014), available at [http://www.bakerlaw.com/files/uploads/Documents/News/Alerts/Litigation/2014/Class\\_Actions\\_Defense\\_Year\\_in\\_Review\\_1\\_17\\_2014.pdf](http://www.bakerlaw.com/files/uploads/Documents/News/Alerts/Litigation/2014/Class_Actions_Defense_Year_in_Review_1_17_2014.pdf).

<sup>61</sup> See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013) ("Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context."); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 242 (3d Cir. 1989) (Becker, J., dissenting)) (stating, in dictum, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred" (alteration in original)).

<sup>62</sup> See Catherine Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 196 (2014).

<sup>63</sup> This Court has repeatedly expressed its hostility toward class actions in arbitration. Besides *Concepcion* and *American Express*, see *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (finding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that party agreed to do so") (emphasis omitted). Sadly, there is no hint that the Court would treat employment class actions any differently than consumer class actions, nor that it would treat waivers of FLSA collective actions any differently than it has treated class actions. See generally David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 270 (2012) (critiquing the Supreme Court majority for "poorly reasoned," "incoherent" arbitration decisions that support claim suppression while also critiquing Court's "liberal wing" for failing to understand stakes for consumer and employee plaintiffs, and urging Congress to "intercede to fix the Supreme Court's horrendous mistakes").

<sup>64</sup> See, e.g., *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1329, 1337 (11th Cir. 2014) (upholding arbitral class action prohibition in FLSA claim for overtime violations); *Sutherland*, 726 F.3d at 290 (finding, per curiam, that an employee cannot void an arbitral class action waiver even when that waiver removes financial incentive to pursue a claim under the FLSA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir. 2013) (requiring plaintiffs to individually arbitrate putative class action for gender discrimination, even though plaintiffs alleged they could not bring "pattern and practice" claim on individual basis); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (holding that nothing in the text or legislative history of FLSA indicated a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually rather than with other class claims); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014) (holding, in wage and hour class action, that the FAA preempts California case law which had barred class action waivers as unconscionable); see generally Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISC. 164, 170-71 (2013); Iliza Bershad, Note, *Employing Arbitration: FLSA Collective Actions Post-Concepcion*, 34

Also, although for a few months the decision of National Labor Relations Board (NLRB) in *D.R. Horton* suggested that class action prohibitions would violate the “concerted activity” provision of the National Labor Relations Act,<sup>65</sup> the Fifth Circuit’s divided panel reversal of the Board<sup>66</sup> and similar decisions from other courts<sup>67</sup> place this decision in jeopardy,<sup>68</sup> as does the Supreme Court’s recent decision in *NLRB v. Noel Canning*, questioning the status of the NLRB members who issued *D.R. Horton*.<sup>69</sup>

In short, the Supreme Court’s current arbitration jurisprudence not only allows employers to require employees to resolve disputes in arbitration rather than in litigation, but also has been interpreted to permit employers to use arbitration to elude class actions. In decision after decision, lower courts have required employees to arbitrate rather than litigate their employment claims, even when the arbitration clause was contained in a contract of adhesion,<sup>70</sup> was written in small print,<sup>71</sup> was applied to employees who may not have understood the clause,<sup>72</sup> was not signed,<sup>73</sup> eliminated employees’ opportunity to

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CARDOZO L. REV. 359, 362-63 (2012) (stating courts have “struggled mightily to determine the enforcement of arbitration agreements [in] employment contracts” post *Concepcion*).

<sup>65</sup> *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012) (finding that home builder *D.R. Horton* violated Section 7 of the National Labor Relations Act by precluding employees from joining together in a class action and thereby preventing them from engaging in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

<sup>66</sup> *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 362 (5th Cir. 2013) (reversing Board’s decision that class action prohibition rendered clause unenforceable but affirming decision on other grounds).

<sup>67</sup> *E.g., Sutherland*, 726 F.3d at 297 n.8 (refusing, in footnote dictum, to follow *D.R. Horton*); *Owen*, 702 F.3d at 1053 (refusing to follow *D.R. Horton*).

<sup>68</sup> For further discussion of *D.R. Horton*, see *Fisk*, *supra* note 62, at 177 (observing that NLRB administrative law judges continue to follow the Board decision and that a newly reconstituted Board may reaffirm its earlier decision).

<sup>69</sup> *N.L.R.B. v. Noel Canning*, No. 12-1281, 2014 WL 2882090 (U.S. June 26, 2014) (holding that President improperly used recess appointment to name members of NLRB).

<sup>70</sup> See *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 237 (3d Cir. 2012) (holding employee was bound by arbitration provision contained in forms employer required to be signed, despite employee having no knowledge of the arbitration provision); *Carson v. Higbee Co.*, 149 F. App’x 289, 292 (5th Cir. 2005) (finding that an employee assented to an arbitration agreement despite not signing the arbitration acknowledgment form because, amongst other things, the form stated that continued employment constituted assent).

<sup>71</sup> See *e.g., Legair v. Circuit City Stores, Inc.*, 213 F. App’x 436, 439 (6th Cir. 2007) (stating that arbitration agreements imposed on existing employees are enforceable).

<sup>72</sup> See, *e.g., Mazera v. Varsity Ford Management Services, LLC*, 565 F.3d 997, 1002 (6th Cir. 2009) (finding that plaintiff’s lack of understanding of either English or his employment contract were not material to the validity of the arbitration agreement).

<sup>73</sup> The FAA does not require that an arbitration clause be signed in order to be valid, but rather only that it be written. Federal Arbitration Act, 9 U.S.C. § 2 (2012). Thus, courts often enforce arbitration clauses contained in unsigned employee handbooks or other documents provided to employees. See *generally* *Stone*, *supra* note 51.

join together collectively or in a class action,<sup>74</sup> was contained in an expired contract,<sup>75</sup> or did not require the employer to arbitrate all claims against the employee.<sup>76</sup> While it is true that courts may still impose some limits on employers who impose mandatory arbitration,<sup>77</sup> it has become increasingly difficult for employees to defeat employment arbitration clauses.<sup>78</sup> And it is expensive and time consuming for employees to try to mount such challenges.<sup>79</sup> Specific arbitration providers may regulate employers use of arbitration by refusing to administer clauses that do not meet the provider's "due process protocol" or other policies.<sup>80</sup> Employers, however, have the power to select providers that do not propound such requirements.<sup>81</sup> Thus, at this point, employers' are mainly constrained by practical factors that may lead them to decide arbitration is less desirable than litigation, rather than by court decisions or provider rules.<sup>82</sup> Not all employers are yet requiring

<sup>74</sup> See *supra* note 36.

<sup>75</sup> *Huffman v. Hilltop Cos.*, 747 F.3d 391, 398-99 (6th Cir. 2014) (finding arbitral class action prohibition applied to employees seeking to bring FLSA class action although contract was expired and contract's survival clause did not list the arbitration provision).

<sup>76</sup> *E.g.*, *Farrow v. Fujitsu America, Inc.*, No. 5:13-CV-05292-LHK, 2014 WL 1396412, at \*6 (N.D. Cal. Apr. 9, 2014).

<sup>77</sup> *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1219-20 (11th Cir. 2011) (refusing to compel plaintiff to arbitrate certain claims on the ground that they did not fall within the scope of the arbitration clause); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482, 1485 (D.C. Cir. 1997) (holding that court could enforce a mandatory employment arbitration provision only if it met various conditions including that it not require employees to pay unreasonable costs or arbitral fees).

<sup>78</sup> See *Ambler v. BT Americas Inc.*, 964 F. Supp. 2d 1169, 1177 (N.D. Cal. 2013) (enforcing an arbitration agreement between employee and defendant's predecessor company despite the company's later acquisition by defendant and multiple unconscionable provisions within the agreement); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1129-30 (C.D. Cal. 2011) (holding that employer Macy's did not waive any rights under an arbitration agreement by waiting over two years to move to compel arbitration after the underlying suit was filed, because superseding case law retroactively rendered the agreement enforceable); see also *Huffman*, 747 F.3d 391 at 398-99.

<sup>79</sup> See F. Paul Bland, Jr., *Is That Arbitration Clause Unconscionable? PROVE IT!*, CONSUMER ADVOC., July-Aug. 2002, at 1.

<sup>80</sup> See Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 294 (2012) (finding that AAA is generally effective at identifying and responding to companies' violations of AAA due process protocols); see also *supra* note 32 and accompanying text.

<sup>81</sup> The potential for employers and providers to engage in "races to the bottom" limits the power of voluntary due process protocols to regulate binding arbitration.

<sup>82</sup> Employers might, for example, decide that the costs of arbitration are too high if the courts or arbitration administrator would require the company to pay substantial arbitrator or administrator fees, that arbitration awards are more difficult to appeal than court awards, or that employees would be more likely to file a claim in arbitration than in litigation. And, employers might worry that mandating arbitration would damage employee morale, hurt the company's reputation, or lead to expensive legal battles. See generally *Green*, *supra* note 45. However, the Supreme Court's recent decisions implying that companies can use arbitration to elude employment class actions may lead greater numbers of employers to mandate arbitration in the workplace.

their employees to resolve future disputes through arbitration rather than through litigation, but as more realize they can use arbitration to elude the risk of defending against class actions it seems likely more will do so.<sup>83</sup>

## II. COMPARING RESULTS IN EMPLOYMENT ARBITRATION AND LITIGATION

When commentators, critics, and defenders debate the merits of employment arbitration and litigation, they tend to focus on how well or poorly employees do when they receive a hearing in arbitration or litigation. While this information is relevant, it should not be our exclusive or even primary focus. First, because very few employees file claims in arbitration,<sup>84</sup> the question of how well or poorly employees do in arbitration is not as directly significant as one might think. Even assuming for the sake of argument that employees did quite well in arbitration (which is not the case), mandatory arbitration would still be quite harmful if it prevented large numbers of employees from filing claims at all.<sup>85</sup> Second, only a minute percentage of claims that are filed in litigation are resolved in trial,<sup>86</sup> so looking at trial results has limited value.<sup>87</sup> Nonetheless, comparing results

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<sup>83</sup> See *supra* notes 9, 60 and accompanying text.

<sup>84</sup> See *infra* Part III.B; see also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *Yale L.J.* (forthcoming 2015) (manuscript at 2893-2915), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2601132](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601132).

<sup>85</sup> See generally Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 *SW. U. L. REV.* 87, 89-90 (2012) (noting that if a villain spread poison killing 99% of the plants on our planet, we likely would not care too much that the 1% of the plants that survived were thriving) [hereinafter *Mandatory Binding Arbitration Clauses*].

<sup>86</sup> One study found that 70% of federal employment discrimination cases were settled, and that just 2.8% of employment discrimination cases went to trial in 2006. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 *HARV. L. & POL'Y REV.* 103, 123 (2009). This is a general phenomenon, not one unique to employment disputes. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEG. STUDS.* 459 (2004). Indeed, trials are more frequent in jobs cases than in other categories of cases. Clermont & Schwab, *supra* at 123 (stating that in 2006, whereas 2.8% of employment cases went to trial, just 1% of other cases went to trial).

<sup>87</sup> Yet, it is also true that one would expect the size of settlements to generally track the results at trial or hearing. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. LEG. STUDS.* 225 (1982). Just as employee win rates and amounts won are lower in arbitration than in litigation, so too are settlement amounts. COLVIN & GOUGH, *COMPARING MANDATORY ARBITRATION*, *supra* note 31, at 24 (reporting on survey of plaintiff-side attorneys showing that 29% of employment arbitration settlements “were between \$1 and \$25,000” compared to 15% and 18% in federal and state court respectively, and that 23% of mandatory arbitration settlements exceeded \$100,000 compared to 43% and 38% of settlements in federal and

in litigation and arbitration is important because it impacts whether claims will be brought in arbitration at all.<sup>88</sup> If employees or their attorneys believe that they will do poorly in arbitration they are not likely to bring claims in that forum.

It is somewhat difficult to assess how well or poorly employees do in mandatory arbitration relative to litigation. As many frustrated empirical scholars have noted, it is very hard to obtain data regarding claims brought in either litigation or arbitration, and even when data is obtained, it is very hard to know how to compare the two sets of information.<sup>89</sup> Arbitration data is difficult to acquire because arbitration is private.<sup>90</sup> Arbitration providers do not need to open their files to researchers and most have not.<sup>91</sup> When arbitration providers do provide access

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state court); *see also* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 144-45 (2007) (reporting on 455 confidential employment discrimination settlements secured by federal magistrates in Chicago between 1999 and 2005 and finding median settlement award of \$30,000, that 2% of cases yielded settlements exceeding \$300,000, and that 7% of cases resulted in plaintiff receiving less than \$5,000); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL L. STUDS. 175, 181, 187 (2010) (reporting on range of employment civil rights settlements from 1988–2003, and noting that the sample includes one settlement for \$110 million, one for \$29 million, and one for \$8.1 million). Admittedly this disparity could also reflect high process costs in litigation relative to arbitration.

<sup>88</sup> Employment arbitration claims do make it to hearing more frequently than such claims make it to trial. For example, approximately 27% of compulsory employment arbitration claims resolved by AAA in 2008 made it to hearing. Colvin & Pike, *supra* note 7 at 71. Just 2.8% of federal employment discrimination cases made it to trial in 2006. Clermont & Schwab, *supra* note 86, at 123.

<sup>89</sup> Eisenberg & Hill, *supra* note 49, at 45 (emphasizing that arbitrators and courts process different cases and also process those cases differently); 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*] (discussing “apples and oranges” problem); Sherwyn et al., *supra* note 49, at 1564-66 (examining difficulties in comparing results of litigated and arbitrated cases).

<sup>90</sup> *E.g.*, 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) (complaining about difficulty obtaining information regarding mandatory employment and consumer arbitration programs); Colvin, *An Empirical Study*, *supra* note 89, at 2 (noting lack of publicly available data on arbitration and fact that “[m]ost empirical research has had to rely on cases of files for which individual arbitration service provider organizations have provided access,” as well as fact that data sets provided “tend[] to be relatively small in size and potentially lacking representativeness of the broader population of arbitration cases”); *see also* Colvin, *supra* note 8, at 446-47 (noting that private providers may not be willing to open files to researchers, and that such limits may cause researchers “to follow the trail from one best case scenario to another while missing the darker cases that are hidden from public scrutiny”).

<sup>91</sup> Virtually all empirical studies on arbitration draw on information provided by the AAA. *See* Colvin, *An Empirical Study*, *supra* note 89, at 2 (noting that “[a]lthough the AAA is arguably the leading and largest player in the arbitration field, it also may be somewhat unrepresentative in its willingness to sign onto and monitor compliance with due process protocols on arbitration”).

to researchers, one can never be sure if the particular provider skewed the data, much less whether one provider's data or one kind of employment arbitration can appropriately be generalized to other providers and other contexts.<sup>92</sup> For example, researchers have observed that early studies of employment arbitration focused on claims brought by executives who negotiated arbitration clauses voluntarily, and results in these kinds of cases may not predict results for lower level employees covered by mandatory arbitration programs.<sup>93</sup> Although California adopted legislation requiring arbitration providers to report on arbitration outcomes around the country,<sup>94</sup> researchers have complained about providers' degree of compliance and have found the data very difficult to analyze.<sup>95</sup>

Litigation data is somewhat easier to acquire because litigation is accessible to the public.<sup>96</sup> The federal courts in particular do quite a good job of collecting data.<sup>97</sup> By contrast, state court data is far harder to access because each state follows

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<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g., id.* at 5 (observing that early studies of arbitration results tended to include not only employer-promulgated arbitration plans but also cases based on individually negotiated arbitration clauses, in which employees tend to have greater success). Such early studies included Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 N.Z. J. INDUS. REL. 5, 11 (1998); *see also* Maltby, *supra* note 16 at 30.

<sup>94</sup> CAL. CIV. PROC. CODE § 1281.96 (West 2015).

<sup>95</sup> DAVID J. JUNG ET AL., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96 1-2 (2013), available at <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update> (finding substantial deficiencies in arbitration providers' compliance with disclosure requirements and also finding information provided is quite difficult to use); 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, 869 (2008) (complaining about difficulties using California data).

<sup>96</sup> *See generally* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding a Virginia trial court violated the First Amendment by closing a criminal trial to the public); *Delaware Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013) (holding that business dispute arbitrations established by Delaware law and implemented by the Delaware Chancery Court must be open to the public).

<sup>97</sup> The Administrative Office of the U.S. Courts annually publishes a report regarding cases handled by the federal courts. *See Administrative Office of the United States Courts*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> (last visited Feb. 16, 2015). However, even federal court statisticians do not collect all the information one might want. For example, whereas the annual report filed by the Administrative Office of the U.S. Courts used to contain a table counting the number of class actions filed each year, this table ceased to be included in the annual report commencing in 2005. *See* TABLE X-5: U.S. DISTRICT COURTS—CLASS ACTION CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2004 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/x5.pdf> [hereinafter TABLE X-5].

its own practices regarding data collection.<sup>98</sup> While, in general, most civil claims are resolved in state rather than federal court,<sup>99</sup> we do not know what proportion of employment claims are resolved in federal as opposed to state court, and this ratio likely differs substantially from state to state and over time.<sup>100</sup>

Gathering arbitration and litigation data is difficult, but the problem of comparing data between the two fora is even more daunting. First, the claims that are brought to arbitration may well differ from those brought to litigation. Second, it is likely that the process leading up to a hearing differs between arbitration and litigation. Some have suggested that summary judgments are far more common in litigation, and that weaker claims may be weeded out more frequently in litigation than in arbitration.<sup>101</sup> Differences between settlement practices in arbitration and litigation may also affect the relative success rates in arbitration and litigation.<sup>102</sup>

Despite these hurdles, empiricist Alexander Colvin has recently made a compelling case that employees do substantially worse in mandatory arbitration than in litigation.<sup>103</sup> Based on examination of files provided by the American Arbitration Association (AAA),<sup>104</sup> disclosures made by providers pursuant to California law,<sup>105</sup> a survey of plaintiff-side employment lawyers conducted by researcher Mark Gough,<sup>106</sup> and empirical work on

<sup>98</sup> Clermont & Schwab, *supra* note 86, at 119 n.49 (complaining about lack of good state court data but also asserting that whereas employment discrimination filings in federal court are falling, those in state court appear to be remaining steady).

<sup>99</sup> See generally R. LAFONTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS (2012), available at [http://www.courtstatistics.org/Other-Pages/~/\\_media/Microsites/Files/CSP/DATA%20PDF/CSP\\_DEC\\_DEC.ashx](http://www.courtstatistics.org/Other-Pages/~/_media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC_DEC.ashx) (stating that over a million cases are filed in state court each year). By contrast, a little over a quarter of a million cases are filed annually in federal courts. TABLE C-2A, *supra* note 29.

<sup>100</sup> This author was unsuccessful in collecting state court employment data.

<sup>101</sup> See Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 296 (2012).

<sup>102</sup> Colvin, *An Empirical Study*, *supra* note 89, at 6 (observing that differences in settlement practices may either depress or increase the arbitration win rate relative to litigation); see also David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1292-93 (2009) (discussing impact of settlements on relative win rates).

<sup>103</sup> See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014) (finding mandatory arbitration exacerbates inequality in access to justice).

<sup>104</sup> Colvin, *An Empirical Study*, *supra* note 89, at 4 (basing study on AAA California filings from January 1, 2003 through December 21, 2007, a total of 3,945 employment arbitration cases from across the country).

<sup>105</sup> *Id.*

<sup>106</sup> See Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91 (2014).

litigation done by other researchers,<sup>107</sup> Colvin has found that employees win far less frequently and are awarded far less money in arbitration than in litigation.<sup>108</sup> In particular, with respect to win rates Colvin found that employees' win rate was 21.4% in AAA arbitration,<sup>109</sup> 36.4% in federal court employment discrimination cases,<sup>110</sup> 57% in state court non-civil rights cases,<sup>111</sup> and 59% in California state court common law discharge claims.<sup>112</sup>

Professor Colvin also discovered that employees win much less money in arbitration than in litigation. He found median damages, when damages were awarded, of \$36,500 in AAA arbitration, \$176,426 in federal court employment discrimination cases, \$85,560 in state court non-civil rights employment cases, and \$355,843 in California state court common law discharge cases.<sup>113</sup> Comparing mean damages, including those in which plaintiff recovered nothing, Colvin found a recovery of \$109,858 in AAA arbitration, \$394,223 in federal court employment discrimination cases, and \$575,453 in state court non-civil rights employment cases.<sup>114</sup> While some

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<sup>107</sup> See Colvin, *An Empirical Study*, *supra* note 89, at 4-5 (citing, *e.g.*, Eisenberg & Hill, *supra* note 49, at 44-45; 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, 514, 535 (2003)).

<sup>108</sup> See Colvin, *An Empirical Study*, *supra* note 89, at 5 (comparing data from AAA arbitrations, federal court employment discrimination cases, and state court non-civil rights claims and finding that win rates, median and mean recovery were all much lower in arbitration than in litigation); Gough, *supra* note 106, at 91 (drawing on survey of plaintiff-side employment attorneys to find that higher employee win rates and recoveries in arbitration than in litigation cannot be explained by systematic differences in caseloads between the arbitral and litigation fora).

<sup>109</sup> Colvin, *An Empirical Study*, *supra* note 89, at 5 (defining "win" to include "any case in which some award of damages, however small, is made in favor of the employee").

<sup>110</sup> *Id.* (citing Eisenberg & Hill, *supra* note 49, at 46 (relying on data provided by the Administrative Office of the U.S. Courts for 1979-2000)); see also Clermont & Schwab, *supra* note 86, at 129 (finding federal employment discrimination plaintiffs won 28.47% of trials based on data provided by the Administrative Office of the U.S. Courts from 1979 through 2006); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 56, 57 (reporting 33.6% employee win rates in claims brought in the S.D.N.Y.); Nielsen et al., *supra* note 87, at 186-88 (finding in study of sample employment discrimination claims brought in federal court from 1998-2003 that plaintiffs settled 58% of cases and prevailed in one-third of the 6% of cases that went to trial).

<sup>111</sup> Colvin, *An Empirical Study*, *supra* note 89, at 5 (citing Eisenberg & Hill, *supra* note 49). The Oppenheimer study looked at "every California verdict in a common law wrongful discharge or statutory employment discrimination case reported in 1998 or 1999 in one or more of the three major California jury verdict reporters." Oppenheimer, *supra* note 107, at 532.

<sup>112</sup> Colvin, *An Empirical Study*, *supra* note 89, at 5.

<sup>113</sup> *Id.* (converting damages to 2005 dollars).

<sup>114</sup> *Id.* (again converting to 2005 dollars).

of this difference may be attributable to the fact that disputes generally proceed to hearing more quickly in arbitration than litigation,<sup>115</sup> thereby lessening employees' entitlement to back pay, not all employment claims involve back pay and this difference cannot explain the stark disparities found by Colvin.

Some scholars have suggested that, even if employees' success rate or recovery is lower in arbitration than litigation, these results may reflect the supposed fact that lower income employees use arbitration rather than litigation,<sup>116</sup> or that weaker cases are weeded out by summary judgment in litigation but not in arbitration.<sup>117</sup> However, a recent study by researcher Mark Gough undercuts both of these rationales. In an effort to solve the "apples and oranges" challenge, Gough surveyed plaintiff-side employment attorneys as to their most recent cases in both arbitration and litigation.<sup>118</sup> Gough found that whereas 62% of cases handled by attorneys in arbitration involved employees making less than \$100,000 per year, 85% of cases handled by attorneys in litigation involved employees making less than \$100,000.<sup>119</sup> That is, the employees in arbitration were actually *better* paid than those in litigation, and therefore one would expect them to recover more, not less, in their hearings.<sup>120</sup> Similarly, Gough found that summary judgment was far more common in arbitration than many have assumed, and that "motions for summary judgment were filed in over half of all arbitration proceedings."<sup>121</sup> Thus, plaintiffs' inferior results in employment arbitration cannot be entirely attributed to greater use of summary judgment in litigation than in arbitration.

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<sup>115</sup> *Id.* at 8 (finding that AAA employment arbitrations were heard in about a year whereas litigated employment disputes took about two years to get to trial).

<sup>116</sup> Malin, *supra* note 101, at 295 (contending lower income employees can be expected to recover less).

<sup>117</sup> *Id.* at 291-96; Sherwyn et al., *supra* note 49, at 1566 (noting purported rarity of summary judgment in arbitration); *see also* St. Antoine, *supra* note 16, at 418-20 (recognizing difficulty of conducting good empirical studies in this area but concluding that employment claimants "generally fare about as well (or better) in arbitration as in court," although "extremely large awards are more common in litigation").

<sup>118</sup> *See generally* Gough, *supra* note 106.

<sup>119</sup> *Id.* at 109.

<sup>120</sup> *Id.* This finding also casts substantial doubt on the premise that arbitration is more accessible to lower paid workers than is litigation.

<sup>121</sup> *Id.* at 108.

### III. MANDATORY EMPLOYMENT ARBITRATION HARMS EMPLOYEES BY SUPPRESSING THEIR CLAIMS

Some commentators have argued that even assuming employees win more frequently and win more money in litigation than in arbitration, arbitration is nonetheless the superior forum because it is quicker, cheaper, more informal, and more accessible to employees. The best known of these pieces is Professor Samuel Estreicher's article, "Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements."<sup>122</sup> In an era when a "Saturn" was a reasonably priced no-frills car, Estreicher analogized a Saturn to arbitration. Specifically, he argued that it was better to provide a Saturn (arbitration) to all workers than to provide a Cadillac (litigation) to just a few fortunate employees and mere rickshaws to the rest.<sup>123</sup> He urged that "[a] properly designed arbitration system . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach."<sup>124</sup>

The argument seems plausible. Most employees, like most potential claimants of all sorts, lack the realistic ability to bring claims in court.<sup>125</sup> Few employees have the resources to

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<sup>122</sup> Drahozal, *supra* note 16, at 840 (2008) ("The empirical evidence suggests that arbitration may be a more accessible forum than courts for lower income employees . . ."); Estreicher, *supra* note 16; *see also* Sherwyn et al., *supra* note 16, at 99 (arguing that arbitration is "more accessible to employees" because it is faster); St. Antoine, *supra* note 16, at 417-18 (2010) (suggesting arbitration is more accessible to lower paid workers than litigation). For a recent critique and update on Estreicher's piece, *see generally* Colvin & Pike, *supra* note 7.

<sup>123</sup> Estreicher, *supra* note 16, at 563 (urging that "[t]he people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by competent counsel" but that "[v]ery few claimants, however, are able to obtain a position in this 'litigation lottery'").

<sup>124</sup> *Id.* Estreicher suggested that while the litigation system is not generally good for employees it is valued by plaintiffs' employment counsel "because it enables them to be highly selective about the cases they take on." *Id.* Estreicher echoed many themes that had been expressed earlier by Lewis Maltby, a self-proclaimed employee advocate. Like Estreicher, Maltby asserted that "[m]any people with legitimate claims against their employers never receive justice because they are unable to afford a lawyer." Maltby, *supra* note 16, at 30. Maltby urged that because mediation and arbitration are "generally much less expensive than litigation . . . [these processes may] bring justice within the reach of many to whom it is currently denied." *Id.* However, while suggesting that advocates for employees be open to the possible benefits of voluntary and regulated arbitration, Maltby rejected employers' imposition of arbitration as a condition of employment. *Id.* at 34; *see also* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U. S. F. L. REV. 105, 117 (2003) (suggesting that twice as many employees could afford to arbitrate rather than litigate their claims).

<sup>125</sup> *See, e.g.*, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37, 38 (2010) (urging that programs to assist self-representation and to provide counsel all be considered part of a larger endeavor to enhance access to justice); *see also* Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 90 (2004)

pay an attorney an hourly fee, and few employees' claims are large enough for an attorney to be willing to take the claim on a contingent fee basis.<sup>126</sup> Yet, while a theoretical argument can be made that mandatory employment arbitration might be more accessible to employees than litigation,<sup>127</sup> the following sections show that arbitration worsens rather than ameliorates employees' access to justice.

### A. *Counting Employment Claims in Arbitration*

Given that roughly 20% of the non-unionized workforce is covered by arbitration clauses,<sup>128</sup> if imposing mandatory arbitration enhances employees' access to justice we would expect to see lots of employees bringing claims in arbitration. Very few employees, however, bring claims in arbitration, paralleling the Consumer Financial Protection Board finding that very few consumers bring claims in arbitration.<sup>129</sup> Researcher Alexander Colvin found that although the American Arbitration Association handles roughly 50% of employment arbitration claims that are filed,<sup>130</sup> in 2008 it received only 946 claims involving employees.<sup>131</sup> And roughly 10%

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(asserting that few individuals who are neither wealthy nor assisted by public interest organizations can obtain access to litigation).

<sup>126</sup> See *infra* text accompanying notes 152-153; see also Malin, *supra* note 101, at 292 (discussing difficulties many employees face in securing legal representation); GARY BLASI & JOSEPH W. DOHERTY, UCLA LAW/RAND CTR. FOR LAW & PUBLIC POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50 36 [hereinafter CALIFORNIA EMPLOYMENT] (finding California plaintiff-side employment attorneys take approximately 10% of cases in which representation is sought, but that elite firms rejected more than 95% of potential clients); Maltby, *supra* note 16, at 58 (citing plaintiff-side employment attorneys' estimates that only 5% or less of employees who seek representation are able to obtain it).

<sup>127</sup> See *supra* note 16 and accompanying text.

<sup>128</sup> See *supra* note 8 and accompanying text.

<sup>129</sup> See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), Section 5 p. 9 (Mar. 2015), available at <http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/> (click "Full Report") (reporting that from 2010-2012 just 1,847 consumer financial product claims were filed with AAA, of which 613 were claims filed by the company or jointly by company and consumer).

<sup>130</sup> COMPARING MANDATORY ARBITRATION, *supra* note 31, at 35. The study found that JAMS handled 20% of the claims and that the remaining 30% of claims were split among ad hoc processes (no provider) and miscellaneous smaller providers. *Id.*

<sup>131</sup> Colvin & Pike, *supra* note 7, at 81. Colvin's study looked at internal AAA files to compile these numbers, going beyond information made publicly available due to California disclosure requirements. *Id.* at 61. Of these 946 claims, 449 were resolved following a hearing, with the rest being settled or withdrawn. See *id.* at 61, 82; see also Lipsky et al, *supra* note 8 at 143-44 (drawing from a variety of sources to find that the largest arbitration providers—AAA, JAMS, and FINRA—together handle at most a couple thousand arbitration claims each year). Notably, some of the claims counted by

of those claims were brought by employers against employees rather than employees against employers.<sup>132</sup> In an earlier study Colvin had similarly found that between 2003 and 2007, AAA handled just 3,945 employment cases arising out of employer promulgated plans, making for less than 1,000 filings per year.<sup>133</sup> Thus, if AAA handles 50% of claims and it handles less than a thousand claims per year, it seems that fewer than two thousand non-unionized employees are filing arbitration claims each year.

A system in which fewer than two thousand employees file employment arbitration claims per year does not provide substantial access to justice. On its face, two thousand is a small number, but it is also important to put this number in context. According to the Bureau of Labor Statistics, the size of the United States non-farm workforce is roughly 141 million.<sup>134</sup> Subtracting out the 11% of these employees who are unionized and using the estimate that roughly 20% of the non-unionized employees in the country are covered by arbitration clauses,<sup>135</sup> we can estimate that 25 million non-unionized employees are governed by arbitration clauses. Doing the math we can see that only .008% of covered employees, or one of every twelve thousand employees are filing an employment claim in arbitration each year.

Some might argue that few employees file arbitration claims because they simply do not have claims to file, however, we

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Professor Lipsky and his co-authors are voluntary or post-dispute arbitrations and some are claims by employers against employees, again confirming the point that very few employees covered by mandatory arbitration clauses file claims against their employer. Based on information obtained anecdotally, and based on review of reported cases, it seems that employers are far more likely to impose mandatory arbitration on their blue collar or lower level employees than on senior management, with whom they might use voluntary arbitration. *See id.* at 141.

<sup>132</sup> Colvin found that of the 449 cases that went to hearing, 72.4% arose out of employer-promulgated plans and 27.6% arose from individually negotiated arbitration clauses. Colvin & Pike, *supra* note 7, at 65. Among the claims arising from employer promulgated plans, 8.6% involved claims by employer plaintiffs, and 16.1% of the claims arising from individually negotiated clauses involved employer plaintiffs. *Id.* at 66.

<sup>133</sup> Colvin, *An Empirical Study*, *supra* note 89, at 4 (drawing from AAA filings). David Lipsky and his co-authors have also found that the number of claims that employees take to arbitration is quite small, and that the number of arbitration awards issued each year is even significantly smaller. Lipsky et al, *supra* note 8, at 142-44. "It therefore appears that in a typical year the most important ADR providers (AAA, JAMS, and FINRA) administer no more than 500 employment arbitration cases that result in an award." *Id.* at 144.

<sup>134</sup> U.S. Bureau of Labor Statistics, *Current Employment Statistics—CES, (National)*, U.S. DEP'T OF LABOR (2015), <http://www.bls.gov/web/empsit/cese1a.htm>.

<sup>135</sup> *See supra* note 8. Cf. David Lewin, *Employee Voice and Mutual Gains*, in *THE OXFORD HANDBOOK OF PARTICIPATION IN ORGANIZATIONS* 427, 431 (Adrian Wilkinson et al. eds., 2010) (reporting that 63% of surveyed non-union publicly traded companies imposed employment ADR, and that 70% of these ADR programs included arbitration, so that 44% of the surveyed companies were imposing arbitration).

know this is not true. Although, as noted, the litigation system is not particularly accessible to many employees,<sup>136</sup> over the past five years roughly 30,000 employees have filed employment civil rights, Fair Labor Standards Act (FLSA), or Employee Retirement Income Security Act (ERISA) claims in federal court alone on an annual basis.<sup>137</sup> This figure does not even include other categories of employment claims, such as breach of contract or the employment claims filed in state courts.<sup>138</sup> It is also important to consider that some of the claims filed in court would be class actions, likely covering hundreds, thousands, or even greater numbers of employees.<sup>139</sup> From 2007 through 2011 an average of 560 employment class actions were filed in federal courts alone.<sup>140</sup>

Drawing on all of this data, one can make at least a very rough estimate of how many employment claims are filed in court. We have seen that 30,000 employment civil rights, FLSA, and ERISA claims are filed annually in federal court, of which roughly 560 were class actions.<sup>141</sup> Estimating, conservatively, that each class contains 500 members, this means that the 80% of the workforce not covered by arbitration clauses files roughly 300,000 claims in federal court alone each year. Even ignoring state court claims altogether, we would expect the 20% of the workforce covered by arbitration clauses to file at least 75,000 claims. Or, even ignoring the class action factor as well as state court actions we would expect at least 7,500 arbitration claims. Instead, we have seen that the 20% of the workforce covered by arbitration clauses files just two thousand arbitration claims each year. Clearly this is a very, very small number.

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<sup>136</sup> See *supra* Part III.A.

<sup>137</sup> See TABLE C-2A, *supra* note 29.

<sup>138</sup> One study of employment discrimination claims in California found that of 400 administrative complaints in which “right to sue letter[s]” were issued within a week of filing the administrative complaint, 176 filed a complaint in state court and just one filed a complaint in federal court. CENTER FOR LAW & PUBLIC POLICY, *supra* note 126, at 11. However, this ratio no doubt varies substantially by state and over time.

<sup>139</sup> See *infra* notes 213-19 and accompanying text.

<sup>140</sup> According to civil terminations data obtained from the Federal Court Cases Integrated Data Base and analyzed by researcher Mark Gough, in this five-year time frame employees filed an average of 347 FLSA class actions, 110 ERISA class actions, and 89 ADA or other civil rights class actions. E-mail from Mark Gough, Ph.D. Candidate, Cornell Univ., to author (June 18, 2014, 9:23AM) [hereinafter E-mail from Gough to Sternlight] (on file with author). Similarly, data published by the Administrative Office of U.S. courts shows that in 2003 and 2004 an average of roughly 85 employment class action suits, 115 FLSA class actions, and 100 ERISA class actions were filed annually in federal court, for a total of 300 employment-related class actions. See TABLE X-5, *supra* note 97. Unfortunately, the Administrative Office no longer publishes the chart showing the number of employment class actions filed in federal court.

<sup>141</sup> See *supra* notes 136-42 and accompanying text.

Another piece of empirical evidence regarding whether employees have claims they would like to file against their employers is the fact that in every year between 1997 and 2013, the EEOC has received at least 75,000 charges of discrimination and sometimes as many as 99,947 in one year.<sup>142</sup> We also know that additional employees file administrative claims of employment discrimination with state agencies<sup>143</sup> and that many employees may have employment claims that are not founded on alleged discrimination. Of course the number of employees who file claims administratively, in court or in arbitration, is also an undercount of those employees who actually feel they have been aggrieved. The social science literature on the “dispute pyramid” of “claiming” shows that a significant number of employees who feel aggrieved by an employer’s action do not go on to file a claim against that employer.<sup>144</sup> Ideally arbitration might offer a hospitable forum to some of those potential claimants, but the low numbers of arbitration filings make it clear that this is not happening.

In short, it is not true that mandatory employment arbitration affords employees increased access to justice. Rather, it seems that the imposition of mandatory arbitration is actually suppressing the claims of employees. The fifth of the workplace covered by mandatory arbitration provisions is filing a miniscule number of claims in arbitration, whether one compares the number of claims to those that might have been litigated or to those that were filed administratively.

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<sup>142</sup> *Charge Statistics FY 1997 Through FY 2014*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 16, 2015).

<sup>143</sup> A study of employment discrimination claims in California found that “[f]or every 1 million employees in California, about 1,000 administrative employment discrimination complaints are filed each year,” and that employees filed three times as many claims with the state agency as they did with the EEOC, although many employees file with both agencies. CALIFORNIA EMPLOYMENT, *supra* note 126 at 11. The complaint rate in California was found to be comparable to that of several other large states. *Id.* at 26.

<sup>144</sup> *E.g.*, Alexander & Prasad, *supra* note 3 at 1073 (reporting that 43% of low-wage workers who were aware they had experienced an employment problem decided not to make any kind of complaint); Brenda Major & Cheryl Kaiser, *Perceiving and Claiming Discrimination*, in OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES (Laura Beth Nielsen & Robert L. Nelson, eds., 2005); see also Herbert K. Kritzer et al., *To Confront Or Not To Confront: Measuring Claiming Rates In Discrimination Grievances*, 25 LAW & SOC’Y REV. 875, 880-82 (1991) (finding “claiming” rate of 57% in employment “conditions/salary” disputes); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 539-40 (1980) (finding claiming rate of 29% in discrimination disputes).

*B. How Does Mandatory Employment Arbitration Suppress Claims?*

How does mandatory employment arbitration suppress rather than encourage claims? Why do employees not flock to what is supposed to be an inexpensive, fair, speedy, informal forum for presenting their claims? To understand this phenomenon one must consider both the legal nature and the economics of employment claims. Specifically, this section examines the impact of mandatory arbitration on employees' ability to secure legal representation, on their willingness to bring claims pro se, and on their ability to participate in class actions, collective claims, or group actions.

The matters discussed in this section can be understood through claims that might be raised by two hypothetical workers, Mark and Lucinda. Mark works as a server at a chain restaurant, Bananabees. He is paid less than minimum wage but does receive tips. His median weekly salary including tips, for a 40-hour week, is \$449, making for an annual salary of \$23,348 and an hourly wage of \$11.22.<sup>145</sup> Bananabees, however, requires Mark and other servers to spend a substantial amount of time performing duties for which they are not compensated.<sup>146</sup> For example, he and the others must report to work a half an hour ahead of the official beginning of their shift and also stay at least a half an hour after the shift ends to perform tasks, including cleaning the store, washing dishes, and stocking food supplies.<sup>147</sup> Lucinda is a security guard for Protection Inc., a company with 21,000 employees throughout the United States. She has repeatedly applied for a promotion to a supervisory position but has always been denied. She earns \$500 per week, and an annual salary of \$26,000.<sup>148</sup> The supervisory position she seeks would pay \$35,000 per year. Lucinda, who is Mexican-American, believes she is being discriminated against on the basis of gender and ethnicity. The company president, Joe Jerk, has made ethnic slurs and sexist comments in meetings and at parties on occasion. The discrimination to which Lucinda

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<sup>145</sup> U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex*, U.S. DEPT OF LABOR, <http://www.bls.gov/cps/cpsaat39.htm> (last modified Feb. 12, 2015).

<sup>146</sup> One recent study showed that a substantial number of workers are denied legal protection to which they are entitled under statutes such as the FLSA. See BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 4.

<sup>147</sup> This hypothetical is loosely based on *Porreca v. Rose Grp.*, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013).

<sup>148</sup> U.S. Bureau of Labor Statistics, *supra* note 145.

believes she has been subjected has upset her greatly and she is suffering mentally and physically as a result of her belief that she has been discriminatorily denied a promotion.

### 1. Securing Attorney Representation

When employees believe they have been treated improperly in the workplace they may seek to resolve issues on their own or with the help of internal company resources, but if their initial efforts are unsuccessful they will at times reach out for legal assistance.<sup>149</sup> Yet, given the economics of how plaintiff-side employment attorneys are compensated, when employers impose mandatory arbitration clauses they may make it more difficult for employees to secure legal representation. Most plaintiff-side employment attorneys in the United States represent the bulk of their clients on a partially or entirely contingent fee basis.<sup>150</sup> While some employees may obtain free representation from advocacy organizations, such organizations are not sufficiently well-funded to handle the claims of most employees.<sup>151</sup> Very few employees have the resources to pay an attorney an hourly fee,<sup>152</sup>

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<sup>149</sup> Of course, employees very often choose *not* to seek legal assistance, for a variety of reasons including lack of time, lack of resources, or fear of adverse emotional or employment consequences. *See supra* note 146 and accompanying text; *see also* Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 366 (2013) (stating that aggrieved workers “are left with a bleak choice: stay quiet and forego needed wages, try to find a private attorney willing to litigate a modest individual claim or complex class claim, or wait for one’s wage claim at a government agency that might never be answered”).

<sup>150</sup> *See* COMPARING MANDATORY ARBITRATION, *supra* note 31, at 12 (reporting survey of 1,256 plaintiff-side employment attorneys showing that while their average hourly rate was \$398 per hour, 75% of the attorneys usually represented employees on a contingency fee basis, 17% usually represented employees under a contingency fee hybrid including upfront costs or reduced hourly fees, and 6% usually charged hourly fees); *see also* Sherwyn et al., *supra* note 16, at 89 (noting that because few employees can afford attorneys’ hourly rates, most aggrieved employees seek to retain an attorney on a contingency basis).

<sup>151</sup> Ruan, *supra* note 24, at 1115. Ruan also notes that federally funded Legal Services Corporation offices are proscribed from representing undocumented workers, who make up a significant number of the low-wage workers in the United States. *Id.* *See generally* RUBEN L. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION (2012).

<sup>152</sup> This is not surprising given the \$398 average hourly fee found by Colvin & Gough. *See supra* note 31, at 12.; *see also* Green, *Finding Lawyers*, *supra* note 23, at 64 (asserting that “most employees pursuing employment discrimination claims . . . face little hope of finding an attorney [in that] only about five percent of those pursuing employment discrimination claims find attorneys to represent them in court”); William M. Howard, Ph.D., J.D., *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40, 44 (reporting on survey of plaintiffs’ counsel showing that plaintiffs’ counsel accepted only 5% of the employment discrimination claims brought to them by prospective clients, and

particularly if they have just lost their job.<sup>153</sup> Thus, when employees seek legal representation the attorneys they consult must typically decide whether they can afford to handle the case on a contingent fee basis.

To make the calculation of whether a case is worth taking on a contingent fee basis, plaintiff-side lawyers will generally do a cost-benefit analysis.<sup>154</sup> On the benefit side the attorney will consider the expected value of taking the case, such as the odds of getting a settlement or prevailing in adjudication, and also the size of the expected settlement or likely adjudicated outcome by judge or jury, including any awarded attorney fees.<sup>155</sup> Then the attorneys will also consider the costs of getting a settlement or judgment in both dollars and time. Plaintiff-side employment attorneys typically advance to their clients such costs as filing fees, deposition fees, and payments to expert witnesses.<sup>156</sup> Plaintiff-side attorneys will sometimes advance costs of arbitration—both the arbitration filing fee and the arbitrators' hourly or daily fees.<sup>157</sup> When attorneys are required to advance arbitral fees the cost can easily be thousands of dollars, depending on the value and complexity of the case and the credentials of the arbitrator or arbitrators.<sup>158</sup> Claims that are

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that they looked for cases in which the clients demonstrated provable damages of at least \$60,000); *see also supra* note 127.

<sup>153</sup> Maltby, *supra* note 16, at 57 (“It is nearly impossible for a worker to raise thousands of dollars for an attorney when she is struggling to support herself and his dependents without an income.”).

<sup>154</sup> *See generally* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

<sup>155</sup> *See* Sherwyn et al., *In Defense of Mandatory Arbitration*, *supra* note 16, at 89-94 (discussing how plaintiff-side attorneys decide which cases to take, albeit recognizing that opinions are not founded on empirical studies). With regard to the possibility of recovering attorney fees in some employment cases *see generally* Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535 (1990).

<sup>156</sup> Sherwyn et al., *In Defense of Mandatory Arbitration*, *supra* note 16, at 93 (stating “[i]t is one thing to work for free; paying to work is another matter”); *see also* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270 (1998) (discussing practice of advancing costs to clients).

<sup>157</sup> Christopher Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 760 (2006) (arguing that because contingent fee attorneys often front arbitration costs for their clients, “the contingent fee system provides a means for overcoming possible liquidity and risk aversion barriers to arbitration”). While it seems that the employer generally pays arbitrators' fees, *see* COMPARING MANDATORY ARBITRATION, *supra* note 31 at 35 (reporting that survey of plaintiff-side employment attorneys showed that the employer paid 100% of arbitrator fees in 82% of cases), the need to advance such costs in some cases no doubt affects attorneys' willingness to take cases on a contingent fee basis.

<sup>158</sup> Drahozal, *supra* note 157, at 738-39; *see also* Morrison v. Circuit City Stores, 317 F.3d 646 (6th Cir. 2003) (requiring case-by-case analysis as to whether cost-

more legally or factually complex, perhaps requiring statistical proof or substantial expert testimony, are more challenging to bring from an economic standpoint.

In light of this cost-benefit analysis plaintiff-side employment attorneys often refuse to take cases offered to them. One oft-cited survey found in 1995 that plaintiff-side employment attorneys typically would not take such cases unless the plaintiff could show a minimum of \$60,000 in damages, excluding consequential or punitive damages,<sup>159</sup> and that plaintiff-side employment attorneys only accepted between 5% and 10% of the case offered to them.<sup>160</sup> Two more recent studies similarly found that plaintiff-side employment attorneys would look for potential settlement value or total damages of approximately \$60,000.<sup>161</sup> One recent study found the median attorney would take 10% of the employees who sought representation in litigation.<sup>162</sup> While the exact numbers likely differ substantially depending on the attorney and the context, one implication of these economics is that higher paid employees are typically far more able to secure legal representation than lower paid employees because their back pay losses will be greater.<sup>163</sup>

Let us consider how a plaintiff-side attorney might decide whether to represent our hypothetical plaintiff Mark, the server at Bananabees who complains he is required to work an extra uncompensated hour per day. At Mark's hourly rate of \$11.23, and assuming a five day work week and 50 weeks of work per year, this converts to a wage loss of roughly \$2,800 per year. Even assuming a six year statute of limitations,<sup>164</sup> and that Mark could recover time and a half for his wage loss,<sup>165</sup> the \$25,200 maximally

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splitting requirement in employment arbitration clause should be upheld and noting average arbitrator fee was \$700 per day).

<sup>159</sup> Howard, *supra* note 152, at 40, 44-45.

<sup>160</sup> See *supra* note 128. Cf. KRITZER, RISKS, *supra* note 154, at 71 (2004) (reporting that contingent fee attorneys more generally take a much higher percentage of cases, in the order of 50%).

<sup>161</sup> COMPARING MANDATORY ARBITRATION, *supra* note 31, at 13; CALIFORNIA EMPLOYMENT, *supra* note 126, at 36 (finding median plaintiff-side employment attorney required \$50,000 in damages before accepting case, while noting that elite firms accepted cases only if expected recovery exceeded \$250,000).

<sup>162</sup> COMPARING MANDATORY ARBITRATION, *supra* note 31, at 14 (reporting that the median attorney would take just 5% of cases that included arbitration clause). The mean acceptance rates were somewhat higher—19% in litigation and 11% in arbitration. *Id.*

<sup>163</sup> Higher paid employees are more able to obtain attorneys both because their salary loss will be greater and because they are more likely to have at least some savings they could put towards legal bills. See Eisenberg & Hill, *supra* note 49, at 47.

<sup>164</sup> See, e.g., *Mascol v. E & L Transp., Inc.*, No CV-03-3343 CPS, 2005 WL 1541045 (E.D.N.Y. June 29, 2005) (discussing six year statute of limitations for wage claims in New York).

<sup>165</sup> Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) (2012).

at stake in his case likely is not sufficient to tempt many plaintiff-side employment attorneys.<sup>166</sup> Nor is the potential availability of attorney fees to prevailing plaintiffs usually sufficient to tempt attorneys to take such an individual case, as attorneys realize that they may not prevail and that even if they do prevail a court may well not provide them with a substantial award of attorney fees.<sup>167</sup> Thus, even if a plaintiff-side attorney thinks Mark's claim is very strong, on the merits, Mark may well not be able to obtain an attorney on an individual basis. Perhaps, however, he might stand a chance of obtaining representation as part of a group or class of employees with similar legal problems.<sup>168</sup>

Lucinda, the Mexican-American security guard who believes she was discriminatorily denied a promotion, will likely also have a tough time obtaining representation. The annual difference in pay between the position she seeks and the position she already has is just \$9,000. Depending on when the case went to trial, Lucinda might recover at most \$18,000 in back pay, given the two year statute of limitations,<sup>169</sup> but this number could be lower if the case gets to court or hearing earlier or if Lucinda gets a pay raise or obtains another position paying more than what she currently earns.<sup>170</sup> Lucinda's best hope of obtaining representation may rest on any claim she might have to compensatory or punitive damages. Such damages are sometimes available in discrimination cases, since the passage of the Civil Rights Act of 1991.<sup>171</sup> An attorney Lucinda consulted would likely make a careful

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<sup>166</sup> Cf. *Chase v. AIMCO Props. L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) (finding individual wage and hour claims often not sufficient to warrant litigation); *Savon Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 209 (Cal. 2004) (noting that class action suit was desirable in overtime suit because it "provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation" (quoting *Richmond v. Dart Industries Inc.*, 629 P.2d 23 (1981))).

<sup>167</sup> See Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees*, *supra* note 155; see also Sherwyn et al., *In Defense of Mandatory Arbitration*, *supra* note 16, at 93-94 (discussing plaintiff-side employment attorneys' rational hesitation to take low damages cases).

<sup>168</sup> See *infra* Part III.C.3.

<sup>169</sup> Front pay is also sometimes available as an equitable remedy when reinstatement is not possible. See *Pollard v. E.I. Du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding front pay not subject to damages cap). But, as Lucinda has not been terminated she would not be entitled to reinstatement or front pay. See *id.* (describing the purpose of front pay awards).

<sup>170</sup> Regarding Lucinda's duty to mitigate her damages, see, e.g., *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992) ("A Title VII claimant seeking either back pay or front pay damages has a duty to mitigate those damages by exercising reasonable diligence to locate other suitable employment and maintain a suitable job once it is located.").

<sup>171</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (2012); see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (holding punitive damages are available under 1991 Act when employer has acted with malice or reckless indifference).

assessment of whether, given the more detailed facts Lucinda may report and the law of the particular jurisdiction, she might state a viable claim to either compensatory<sup>172</sup> or punitive damages.<sup>173</sup> If these claims appeared fairly strong an attorney might take the case, but quite likely many attorneys would conclude that Lucinda's provable damages were too low to warrant taking the case on a contingent fee basis.<sup>174</sup>

Let us now consider how arbitration impacts the calculation. If arbitration were quicker and cheaper than litigation and also offered plaintiffs just as good a chance at recovery as litigation then plaintiff-side employment attorneys would presumably flock to arbitration in droves.<sup>175</sup> As one set of commentators states "[h]olding all else constant (the merits, plaintiff, defendant, and most important, damages), lawyers should be more likely to accept a Title VII arbitration-bound plaintiff than a litigation-bound plaintiff."<sup>176</sup> It does seem to be true that claims proceed more quickly in arbitration than in litigation, which is a benefit to plaintiffs.<sup>177</sup> But if, however, plaintiff-side employment attorneys have reason to believe that their client's chances of recovery will be worse in arbitration than in litigation, or that their process costs will be higher,<sup>178</sup> then the attorneys will generally be *less* likely to take a claim that is covered by an arbitration clause.

In fact, a survey of plaintiff-side employment attorneys conducted by Alexander Colvin and Mark Gough found that the presence of an arbitration clause would discourage the attorneys

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<sup>172</sup> See, e.g., *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995) (awarding \$267,268.55 for termination on basis of age). Note that even when compensatory or punitive damages can be proven, they are capped at between \$50,000 and \$300,000, depending on the size of the employer. 42 U.S.C. § 1981(a) (2012).

<sup>173</sup> Punitive damages are rarely held appropriate in employment discrimination cases. See Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008) (reporting that of more than 600 employment discrimination cases issued in 2004-2005 just 24 included an award of punitive damages).

<sup>174</sup> Howard, *supra* note 152, at 44. Converting \$60,000 in 1995 to current dollars, the average plaintiff-side attorney today might look for cases with at least \$95,000 in damages. U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com> (last visited June 8, 2014) (drawing on Consumer Price Index calculations).

<sup>175</sup> See generally Sherwyn et al., *In Defense of Mandatory Arbitration*, *supra* note 16, at 92-93 (discussing how plaintiff-side employment attorneys select cases).

<sup>176</sup> *Id.* at 100. Recognizing that most plaintiff-side employment attorneys, nonetheless, oppose arbitration, the authors contend the hostility is due to the supposed fact that it is harder to settle claims quickly and for high amounts in arbitration than in litigation. *Id.* at 99-100.

<sup>177</sup> Colvin, *An Empirical Study*, *supra* note 89, at 30.

<sup>178</sup> See *supra* note 158.

from taking the case on a contingent fee basis.<sup>179</sup> Specifically, they found that whereas the surveyed attorneys reported accepting 10% of the potential clients who sought representation in litigation, they accepted only 5% of potential clients who were covered by a mandatory arbitration clause.<sup>180</sup> While their finding certainly does not show that the presence or absence of an arbitration clause is an employment attorney's most important consideration, the presence of arbitration is clearly significant, cutting acceptance rates in half.

Colvin and Gough also considered plaintiff-side employment attorneys' subjective attitudes towards mandatory arbitration and litigation, and found that such attorneys preferred litigation to mandatory arbitration. Specifically, if an employee was covered by a mandatory arbitration clause the attorneys said they would be less willing to take the case, less willing to invest time and resources in the case, and less willing to represent the client on a contingent fee basis.<sup>181</sup> Along these same lines Colvin and Gough also found that the attorneys perceived mandatory arbitration had negative effects on the "adequacy of discovery, fairness of proceedings, and fairness of outcomes."<sup>182</sup> And, where the attorneys had taken claims to verdict or award, they were more satisfied with the reasoning of decisions and the opportunity to present evidence and collect information from the opposing party in litigation than in arbitration.<sup>183</sup>

In sum, while an attorney's feelings about arbitration will likely vary according to the context of the claim and the parties,<sup>184</sup>

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<sup>179</sup> COMPARING MANDATORY ARBITRATION, *supra* note 31, at 9 (presenting results from a fall 2013 survey of 1,256 members of the National Employment Lawyers Association and the California Employment Lawyers Association, two major professional associations of plaintiff-side employment attorneys). They found that the presence of such a provision would lead the attorneys on average to be somewhere between "somewhat likely to reject for this reason" and "undecided whether to reject for this reason." *Id.* at 13. In the consumer context the National Association of Consumer Advocates performed a survey of nearly 350 consumer attorneys and similarly found that 84% of the surveyed attorneys had "rejected a client with a meritorious consumer claim because of an arbitration clause." NAT'L ASS'N OF CONSUMER ADVOCATES, *Consumer Attorneys Report: Arbitration Clauses Are Everywhere, Consequently Causing Consumer Claims to Disappear*, at 5 (June 23, 2012), available at [http://www.naca.net/sites/default/files/NACA2012BMASurveyFinalRedacted\\_0.pdf](http://www.naca.net/sites/default/files/NACA2012BMASurveyFinalRedacted_0.pdf).

<sup>180</sup> COMPARING MANDATORY ARBITRATION, *supra* note 31, at 14.

<sup>181</sup> *Id.* at 16. It should be noted, however, that these scores were not extremely negative, rather ranging from 2.75 to 2.88 where one meant "very negative" and four meant "no effect." *Id.* The most important factor influencing whether the attorneys would take a case was their assessment of its strength on the merits. *Id.*

<sup>182</sup> *Id.* at 17.

<sup>183</sup> *Id.* at 18.

<sup>184</sup> In certain situations attorneys may predict that a client might do better in arbitration than in litigation. For example, highly paid white male executives who are complaining of being denied a contractual bonus might fare better in front of an

it is clear that when employers require their employees to pursue claims in arbitration, rather than litigation, the employers make it more difficult for their employees to obtain representation.

## 2. Pro Se Claimants

If arbitration were more hospitable to pro se claimants than is litigation, perhaps it would not matter that attorneys are more reluctant to take claims to arbitration than to litigation. Those who believe arbitration provides greater access to justice than litigation suggest that because arbitration is supposedly quicker and simpler than litigation, employees would be more willing and able to bring claims pro se in arbitration than in litigation.<sup>185</sup>

Certainly it is true that pro se employees have a difficult time in litigation. It is hard to file a case in court pro se and even harder to prevail. One study of the 20% of employment claims filed in federal court pro se by employees found such pro se employee plaintiffs were almost three times as likely to have their lawsuits dismissed, were less likely to obtain an early settlement, and were twice as likely as represented plaintiffs to lose on summary judgment.<sup>186</sup>

However, while the proposition that unrepresented employees might do better in arbitration than in litigation again seems plausible, available data suggests it is not true. As we have seen, very few employees, represented or not, file claims in arbitration. Also, data collected by Alexander Colvin from the AAA showed that only 31.4% of employee claimants were self-

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arbitrator than in front of a jury. Perhaps this helps explain why the incomes of employees represented by attorneys in arbitration exceeded the incomes of employees represented by attorneys in litigation. See COMPARING MANDATORY ARBITRATION, *supra* note 31, at 28-29 (reporting that “whereas 69% of plaintiffs [represented by attorneys] in mandatory employment arbitration had incomes under \$100,000 per year, 84% of plaintiffs represented by attorneys in litigation had incomes under \$100,000 per year”); Gough, *supra* note 106, at 101.

<sup>185</sup> See, e.g., Malin, *supra* note 101, at 296; Sherwyn et al., *supra* note 49, at 1575. Other commentators assert that arbitration is better for lower paid workers, implying that it may be accessible to those who need to proceed pro se. See St. Antoine, *supra* note 16, at 417-18; Estreicher, *supra* note 16, at 565.

<sup>186</sup> Nielsen et al., *supra* note 87, at 188 (discussing sample of claims filed between 1998 and 2003). The authors found that while some of the benefit of attorney representation was likely due to a selection effect, that attorneys also brought additional benefit to the employees’ cases. *Id.* at 189 (citing, e.g., HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990)); see also HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339 (2008).

represented in arbitration.<sup>187</sup> Moreover, the incomes of plaintiffs in employment arbitration were actually higher than those of plaintiffs in employment litigation.<sup>188</sup> Thus, it does not seem that arbitration is a haven for the unrepresented.

Turning to results, when employees do choose to proceed pro se in arbitration they do not fare particularly well. Colvin and Pike's analysis of AAA data showed that whereas employees covered by employer-promulgated plans who were represented by attorneys won 27.9% of the cases they brought, self-represented employees won just 17% of their cases.<sup>189</sup> When one looks at the damages awarded to both groups of employees, this difference is even more stark. Those prevailing employees represented by attorneys recovered an average of \$99,217, whereas the unrepresented employees who prevailed were awarded an average of \$11,071 in damages.<sup>190</sup> Thus, employees appear to be making a rational decision when they choose not to file pro se claims in arbitration. Perhaps arbitration is not the quick, simple process some commentators might suggest.

If we consider our hypothetical plaintiff, Mark, we can better understand why filing an employment case pro se is very challenging in arbitration, just as it is in litigation. Attorneys know that Mark ought to file a claim under the FLSA claiming an entitlement to overtime. Mark, however, may not even be aware that he has a viable claim. Further, Mark may well hesitate to bring a claim, particularly unrepresented, for fear of retaliation.<sup>191</sup> While potential retaliation is also an issue when one is represented by an attorney, an attorney might give Mark more reassurance

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<sup>187</sup> Colvin & Pike, *supra* note 7, at 69. Colvin and Pike note that this figure is only slightly higher than the 22.5% rate of pro se filings found in federal court employment discrimination cases. *Id.* (citing Nielsen et al., *supra* note 87, at 200).

<sup>188</sup> COMPARING MANDATORY ARBITRATION, *supra* note 31, at 28-29.

<sup>189</sup> Colvin & Pike, *supra* note 7, at 78. An older study from the collective bargaining context found, similarly, that having an attorney significantly increased either side's likelihood of success when the opposing side was unrepresented. Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543 (1987).

<sup>190</sup> Colvin & Pike, *supra* note 7, at 78. Of course this difference may be attributed in part to a selection effect, as those employees with greater damages would typically find it easier to secure attorney representation. *See supra* note 186.

<sup>191</sup> *See, e.g.*, Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779 (2013); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 83 (2005) (citing studies noting that although retaliation is proscribed "being fired is widely perceived to be a consequence of exercising certain workplace rights"); *see also* BERNHARDT ET AL., *supra* note 4 at 3, 24-25 (reporting that 43% of surveyed workers who complained to their employer or tried to form a union experienced illegal retaliation).

that he would be protected from retaliation.<sup>192</sup> The attorney also provides legal information. Even if Mark were to raise a question about not being paid for his hours the employer might well tell him “that is the way it works,” or “that is how it is done.” A server at Bananabee’s, such as Mark, likely has not had the opportunity to complete a high level of education. He may not read or write very well and almost certainly is not familiar with legal research. Nor does Mark likely have the time to do legal research or to stop by a law library. And, even were Mark to decide to make a claim pro se he would have to figure out how to write a complaint, how to submit that complaint, how to respond to the defenses the company would no doubt raise, and how to conduct discovery. In short, Mark will likely hesitate to file pro se in arbitration and if he does file pro se will face significant challenges.

Our hypothetical client Lucinda likely faces challenges at least as great as Mark should she think to try to present her discrimination claim pro se in arbitration. Like Mark, Lucinda may rationally fear retaliation if she seeks to present her claim. She may not have gotten the promotion she wants, but she does at least still have a job. Further, although Lucinda is likely somewhat better educated than Mark, given their respective jobs, she still will probably find daunting the factual and legal challenges of presenting a claim for discrimination on the basis of gender and ethnicity. Even assuming Lucinda files a timely charge of discrimination with the EEOC or parallel state agency she will likely have to pursue the claim on her own. In the vast majority of the more than 90,000 claims filed with the EEOC the agency either finds no cause to believe discrimination occurred or else, most frequently, issues a notice of right to sue permitting the employee to try to pursue her claim in court or in arbitration.<sup>193</sup> To prove that her failure to receive a promotion was discriminatory Lucinda would need substantial factual information on the nature of the position, the qualifications of other applicants, and the promotion process. It is virtually certain that the company would offer a non-discriminatory

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<sup>192</sup> See *infra* notes 241-51 and accompanying text for further discussion of retaliation.

<sup>193</sup> *All Statutes: FY 1997-FY 2014*, U.S. EEOC, <http://www1.eeoc.gov/eeoc/statistics/enforcement/all.cfm?renderforprint=1> (last visited Mar. 17, 2015); see also *Filing a Lawsuit*, U.S. EEOC, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Feb. 11, 2015) (explaining that when the EEOC fails to find for an employee it issues a “notice of right to sue,” permitting the employee to file a private action on their own behalf); see generally Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1410-30 (2004) (discussing U.S. approach to resolving employment discrimination claims).

rationale for why Lucinda was not promoted, and Lucinda would need to try to conduct discovery to defeat that rationale. Then, even if she might prevail, Lucinda would need to try to prove her entitlement to various types of relief. These are very tough cases for attorneys, much less non-attorneys who are trying to make a living at their job, perhaps search for alternative employment, and hold together a personal life.<sup>194</sup>

In sum, arbitration does not provide substantial access to justice to individual pro se employees. Such employees do not typically file claims in arbitration, even though it is more difficult for employees to obtain representation in arbitration than in litigation.<sup>195</sup> Moreover, when employees do file pro se in arbitration, they do not do very well. We will now consider the impact of mandatory employment arbitration on whether employees can bring claims as part of groups, and how this affects their access to justice.

### 3. Class Actions, Collective Actions, and Group Claims

While employment lawsuits brought by individuals are more common,<sup>196</sup> those brought in class actions or collectively<sup>197</sup> are typically more successful and more potent.<sup>198</sup> The annual

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<sup>194</sup> Perhaps arbitration is a reasonably hospitable venue for knowledgeable, sophisticated plaintiffs who present claims that are fairly simple with regard to the facts and law.

<sup>195</sup> See *supra* Part III.B.1.

<sup>196</sup> It appears that roughly 1.7% of the FLSA, ERISA, and employment discrimination claims filed in federal court are class or collective actions. Drawing on data provided by the Federal Court Cases Integrated Data Base, researcher Mark Gough found that between 2007 and 2011 an average of 560 such class actions were terminated each year. E-mail from Gough to Sternlight, *supra* note 140. Meanwhile, roughly 33,000 FLSA, ERISA and discrimination claims were annually filed in federal court in this same time frame. See *supra* notes 138-42. An older study looking at a sample of employment discrimination cases filed in federal court between 1998 and 2003 similarly found that approximately 90% were filed by individuals, 6.5% by two or more joint plaintiffs, and 1% by a certified class. Nielsen et al., *supra* note 87, at 189.

<sup>197</sup> Note that aggregate claims brought under the FLSA are not covered by R. 23 class action provisions but rather by Section 216(b) of the FLSA, 29 U.S.C. §§ 206-07, 216(b) (2012). The difference is important because FLSA claims are “opt-in,” requiring each plaintiff who seeks to participate to file a consent-to-join form. See Ruan, *supra* note 24, at 1117.

<sup>198</sup> Nielsen et al., *supra* note 87, at 189 (finding that plaintiffs who sued jointly with other plaintiffs, as members of a class, or with the assistance of the EEOC or a public interest law firm, were less likely to be dismissed, less likely to lose on motion for summary judgment, and more likely to win at trial than individual plaintiffs). The Consumer Financial Protection Bureau similarly found that when consumer finance claims are brought through class actions they bring substantial benefit to the millions of consumers who are members of those classes. See CONSUMER FINANCIAL PROTECTION BUREAU, *supra* note 129 at Section 8, 1-3 (examining 422 consumer financial class action settlements finalized in federal district courts between 2008 and 2012 and finding 350

report on workplace class actions prepared by management law firm Seyfarth Shaw<sup>199</sup> showed that the top ten employment class action settlements in 2013 paid out \$638.15 million.<sup>200</sup> For example, Merrill Lynch paid \$160 million to settle a race discrimination class action,<sup>201</sup> Bank of America paid \$73 million to settle a wage and hour collective action,<sup>202</sup> and Colgate-Palmolive Co. paid \$45.9 million to settle an ERISA class action.<sup>203</sup> It seems evident that this kind of exposure must discourage employers from violating employment laws.<sup>204</sup>

Yet, as has been discussed, the Supreme Court is now allowing companies to use mandatory arbitration in the business and consumer settings to elude class and collective action exposure,<sup>205</sup> and lower courts have held that employers may therefore use arbitration clauses to prevent their employees from joining together in class or collective actions.<sup>206</sup> While it is too soon to tell how many employers will ultimately take advantage of the opportunity to insulate themselves from class or collective actions,<sup>207</sup> it seems likely many will. A recent study of general counsels showed that the number of arbitral class action prohibitions more than doubled from 2012 to 2014, rising from 16.1 % to 42.7%,<sup>208</sup> and management-side attorneys are describing the *Concepcion* and *American Express* decisions as an opportunity

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million class members secured more than \$2 billion in cash relief and in-kind relief exceeding \$644 million).

<sup>199</sup> The firm “defends employers in single-plaintiff lawsuits and in massive, multi-district discrimination, ERISA/employee benefits, and wage and hour class and collective actions under the FLSA and state laws.” *Labor & Employment*, SEYFARTH SHAW LLP, <http://www.seyfarth.com/labor-employment> (last visited Feb. 11, 2015).

<sup>200</sup> SEYFARTH SHAW, *supra* note 11, at 11. The Report also observes, however, that the 2013 top ten settlement figure was substantially less than the \$840.43 million total of the top ten settlements in 2012. *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 12.

<sup>203</sup> *Id.* at 14. For a study of five major employment class actions, see NAT’L WORKRIGHTS INST., CLASS ACTIONS: A LOOK AT THE RECORD (2011), available at [workrights.us/wp-content/uploads/2011/02/Class-Action-PDF.pdf](http://workrights.us/wp-content/uploads/2011/02/Class-Action-PDF.pdf) (summarizing results of five major recent employment class actions and concluding that they served as “an effective means for workers with legitimate claims against their employer that are not large enough to support the expense of litigation to receive justice”) [hereinafter *Class Actions*].

<sup>204</sup> Nonetheless, there is debate regarding the deterrence impact of class actions. See *infra* notes 259-67 and accompanying text.

<sup>205</sup> See *supra* text accompanying notes 56-83.

<sup>206</sup> See *supra* text accompanying note 64. Such clauses can also potentially eliminate multi-plaintiff suits. See *infra* notes 264-70 and accompanying text.

<sup>207</sup> While we do not have good data on employment arbitration clauses, one study of credit card arbitration clauses post-*Concepcion* found that 93.6% of the clauses, “covering 99.9% of the credit card loans outstanding[,]” contained class action prohibitions. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 38 (2013).

<sup>208</sup> See *supra* note 9.

for companies to avoid expensive class actions.<sup>209</sup> While some authors have suggested that employers would be better off allowing employees to sue them all at once in class actions than opening themselves to numerous individual suits,<sup>210</sup> the proposition seems dubious. Employers well know, as has been shown here,<sup>211</sup> that few individual employees will bring claims, and thus, employers will protect themselves from most exposure by eliminating class actions.<sup>212</sup>

To the extent employers use arbitration to prevent employees from joining together in collective or class actions in either litigation or arbitration, they significantly impede employees' access to justice. As a numerical matter while far more employment actions are filed by individuals than by classes or collectives,<sup>213</sup> the 560 class or collective actions<sup>214</sup> filed in federal court still cover far more employees than do the 30,000 individual employment claims filed in federal court.<sup>215</sup> Even a single class action can easily include many thousands of employees.<sup>216</sup> If the average class or collective action included just 500 employees, the numbers of employees litigating through class and collective actions in federal court (roughly 280,000) far exceeds the number of employees litigating individually.<sup>217</sup>

Is the estimate of 500 members in an average class or collective action reasonable, or at least not too high? Precise data on the size of all filed class and collective actions is not available, but we can piece together an anecdotal picture of employment class actions and it shows many are quite sizable. While the Supreme Court found the *Wal-Mart* class of over a million women

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<sup>209</sup> See *supra* note 60.

<sup>210</sup> See Fisk, *supra* note 62, at 197-98 (arguing that employees may be able to use offensive non-mutual collateral estoppel to apply a victory in one individual suit to other individual claims); Malin, *supra* note 101, at 300 n.79 (contending that employees can use the high cost of employers' fees in individual arbitration claims to coerce employers into settling).

<sup>211</sup> See *supra* Part III.B.

<sup>212</sup> See generally Estreicher, *supra* note 16, at 567-68 (asserting that employers typically would not voluntarily agree to arbitrate small employment disputes, post-dispute, because they don't want to empower employees who otherwise could not have obtained access to court).

<sup>213</sup> See *supra* notes 140 and 196.

<sup>214</sup> *Id.*

<sup>215</sup> See *supra* note 141 and accompanying text.

<sup>216</sup> See, e.g., Susan Antilla, *Fighting the Old Boys' Club*, N.Y. TIMES, Mar. 29, 2014, at B1 (discussing attempts by more than 40,000 women employees of Sterling Jewelers to obtain class certification in arbitration claiming discriminatory pay practices); see also generally *Case Finder: Sterling Jewelers*, COHEN MILSTEIN, <http://www.cohennemilstein.com/cases/97/sterling-jewelers> (last visited Feb. 11, 2015) (providing plaintiffs' counsel's description of pending arbitral class action).

<sup>217</sup> Unfortunately, we lack data on employment class actions filed in state court.

not certifiable,<sup>218</sup> other classes have been quite substantial, though not gargantuan. For example, the proposed Sterling Jewelers class would contain more than 40,000 women.<sup>219</sup> An FLSA settlement reached with pharmaceutical company Novartis covered an estimated 7,000 current and former sales representatives.<sup>220</sup> For other examples of employment class actions one can look to a study issued by the National Workrights Institute.<sup>221</sup> It described a race and gender discrimination claim brought by 15,000 employees against Boeing,<sup>222</sup> a wage and hour claim brought by over 5,000 employees against IBP Inc.,<sup>223</sup> a working conditions suit brought by over 30,000 workers against The Gap,<sup>224</sup> and a race discrimination claim brought by over 2,000 African-American employees against Coca-Cola.<sup>225</sup> Thus, while companies will try to use the *Wal-mart* decision to defeat future class actions,<sup>226</sup> sizable class and collective actions remain potent tools for employees unless employers can use arbitration clauses to eradicate those devices.

It is easy to see why so many more employees receive access to justice through class and collective litigation rather than through individual claims. First, class and collective actions are essential for those employees who cannot feasibly afford to litigate or arbitrate a claim individually.<sup>227</sup> As we have seen with the hypothetical claims of Mark and Lucinda, when an employee's

<sup>218</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

<sup>219</sup> *See supra* note 216.

<sup>220</sup> Judy Greenwald, *Novartis Agrees to \$99M Settlement in Sales Representatives' Wage Dispute*, BUS. INS. (Jan. 25, 2012), <http://www.businessinsurance.com/article/20120125/NEWS07/120129931#>.

<sup>221</sup> NAT'L WORKRIGHTS INST., *supra* note 203.

<sup>222</sup> *Id.* (discussing *Williams v. Boeing Co.*, No. 2:98-CV-00761-MJP (W.D. Wash. Sep. 30, 1999) (reporting a \$15 million settlement)).

<sup>223</sup> *Id.* (discussing *IBP v. Alvarez*, 546 U.S. 21, 42 (2005)) (affirming award of \$11.4 million).

<sup>224</sup> *Id.* (discussing *Union of Needletrades Indus. and Textile Emps v. The Gap*, No. CV-01-1387 (Cal. Super. Ct. S.F. May 14, 1999) (reporting settlement including \$20 million in compensation and also creating a monitoring program to prevent future abuses)).

<sup>225</sup> *Id.* (discussing *AbDallah v. Coca-Cola Co.*, No. 1:98-CV-3679-RWS (N.D. Ga.) (reporting a \$192 million settlement)).

<sup>226</sup> *See, e.g.*, Mollie A. Murphy, *Rule 23(b) After Wal-Mart: (Re) Considering a "Unitary" Standard*, 64 BAYLOR L. REV. 721 (2012); George Rutherglen, *The Way Forward After Wal-Mart*, 88 NOTRE DAME L. REV. 871 (2012).

<sup>227</sup> *See, e.g.*, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (stating class actions are designed "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually."). Many courts have specifically recognized the importance of class and collective actions in the employment context. *E.g.*, *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 563 (D. Or. 2009); *Sav-on Drug Stores, Inc. v. Super. Ct.*, 96 P.3d 194, 209 (Cal. 2004).

individual damages are fairly low it often makes little economic sense either for the employee to file a claim or for a contingent fee attorney to take the case.<sup>228</sup> By contrast, when claims are grouped together in class, collective or group actions, claims that were not previously economically feasible may become feasible, and individual employees may benefit.<sup>229</sup> If an attorney can represent not only Mark, but also 100 or more other employees at Bananabee's who were similarly forced to work unpaid hours, the case suddenly makes economic sense. FLSA claims are particularly attractive as collective actions because the harms individual employees suffer are often so similar.<sup>230</sup> While Lucinda's claim of gender discrimination may be harder to certify as a class, due to greater potential differences between her situation and that of other employees,<sup>231</sup> certification may be possible if common practices were followed in denying promotions to Lucinda and the other class members or if non-promotion decisions were made by a central decision maker.

Second, apart from economic feasibility, class or collective claims can be essential to assist those employees who may not realize they have been harmed, or that the harm violated a law.<sup>232</sup> Sometimes employees' legal claims are obvious. For example, an employee may be upset that he is only being paid \$16 per hour when the employer promised to pay \$25. Or the employee may be complaining that the employer is not providing promised insurance, or has imposed certain dress or appearance requirements. But, some harms are less obvious. Employees may not realize they have been harmed at all, or they may not realize that the harm was unlawful. For example, most

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<sup>228</sup> See *supra* text accompanying notes 145-97; see also *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85-86 (S.D.N.Y. 2001) (noting individual suits may not be feasible due to class members' lack of financial resources and attorney disincentives).

<sup>229</sup> See, e.g., Steven Greenhouse, *Wal-Mart Asks Supreme Court to Hear Bias Suit*, N.Y. TIMES (Aug. 25, 2010), [http://www.nytimes.com/2010/08/26/business/26walmart.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/08/26/business/26walmart.html?pagewanted=all&_r=0) (reporting that named plaintiffs in the Wal-Mart suit received pay increases following filing of the suit).

<sup>230</sup> These similarities make it easier to have the case certified under Fed. R. Civ. P. 23 (requiring commonality between claims).

<sup>231</sup> Her claim admittedly bears some resemblance to those of the unsuccessful *Wal-Mart* plaintiffs. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

<sup>232</sup> See, e.g., Alexander & Prasad, *supra* note 3 at 1072-73 (presenting data from study of low-wage workers showing most lacked substantive and procedural knowledge regarding their employment rights); LEWIS MALTBY, CAN THEY DO THAT? RETAKING OUR FUNDAMENTAL RIGHTS IN THE WORKPLACE 1-4 (2009) (observing that many employees are quite ignorant as to their rights); see also generally Harry Kalven Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) ("Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.").

applicants for new positions or even promotions would have little knowledge of discrimination because while they know that they themselves did not get the job or promotion, they would not have access to information regarding other successful or unsuccessful applicants.<sup>233</sup> While Lucinda believes she was a victim of discrimination, many workers who were denied a promotion would have no idea why they were denied the position.<sup>234</sup>

And even a worker who realizes they have been harmed may not know that the harm violates a law. “[M]any workers, especially low-wage workers, are unaware that their statutory wage rights have been violated until they are specifically informed of the violation.”<sup>235</sup> Due to ignorance or even employer misrepresentation a Bananabee’s employee such as Mark may not realize he is entitled to be paid for all the hours he works, or that he is entitled to a minimum wage, much less that he may be entitled to extra payment for hours in excess of 40 hours per week.<sup>236</sup> Not all employees will know that the FLSA requires payment of overtime,<sup>237</sup> that the Family Medical Leave Act guarantees certain family leave benefits,<sup>238</sup> or that a test requiring physical strength might discriminate<sup>239</sup> on the basis of gender.<sup>239</sup> Thus, one critically important aspect of both Rule 23 class actions and FLSA opt-in collective actions is that the bringing of the lawsuit provides notice to the employees of a potential legal violation.<sup>240</sup>

Third, the ability to file collective or class claims can be essential to help employees who might fear retaliation if they had

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<sup>233</sup> See, e.g., CALIFORNIA EMPLOYMENT, *supra* note 126, at 23 (applicants for jobs “rarely know much”).

<sup>234</sup> This phenomenon is discussed in the well-known case of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649-50 (2007) (recounting, in dissent, how it is common for employees such as plaintiff Lilly Ledbetter to be unaware of pay disparities at private company). Similarly, Sterling Jewelers plaintiff said she had no reason to believe her salary was unfair until she accidentally stumbled on documents showing the salaries of her male counterparts. See Antilla, *supra* note 216.

<sup>235</sup> Ruan, *supra* note 24, at 1121.

<sup>236</sup> Even if an employee such as Mark is aware of these general entitlements, he may not realize he is in a category of employment covered by the laws. *Id.* at 1121 & n.105 (citing cases in which companies misled employees about their entitlement to overtime pay).

<sup>237</sup> See Fair Labor Standards Act, 29 U.S.C. § 207 (2012).

<sup>238</sup> See Family Medical Leave Act, 29 U.S.C. § 2614 (2012).

<sup>239</sup> See e.g., 42 U.S.C.A. § 2000e-2 (2012).

<sup>240</sup> In most R. 23 class actions the court issues a notice describing the lawsuit and provides the employee with the opportunity to “opt out” of the litigation. FED. R. CIV. P. 23(c)(2) (2014). In the FLSA context a notice of collection action is provided to affected employees so that they can “opt in” to the suit before the statute of limitations runs. Ruan, *supra* note 24, at 1122.

to file claims individually.<sup>241</sup> Workers such as Lucinda and Mark who might think to file legal claims often perceive retaliation as a significant risk.<sup>242</sup> And these fears may be well founded.<sup>243</sup> Though it is unlawful for employers to retaliate against employees who bring many claims,<sup>244</sup> winning retaliation suits can be challenging.<sup>245</sup> Employers can potentially retaliate in ways that are difficult to detect or prove, whether they make employees miserable,<sup>246</sup> reduce their hours, terminate them, induce them to quit, or make it more difficult for them to secure alternative employment.<sup>247</sup> This threat of retaliation falls most heavily on the most vulnerable workers—those who work for low wages, have limited English proficiency or education, or are otherwise most dependent on retaining their current job.<sup>248</sup> Yet, whereas prospective plaintiffs might, quite rationally, hesitate to file individual claims, in contrast collective or class actions take the spotlight off the individual employee. If Lucinda or Mark are part of a large group action they will be and feel far less vulnerable than they would be if they instituted an individual action.<sup>249</sup>

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<sup>241</sup> See *supra* note 191; see also Andrew C. Brunnsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 296-97 (2008) (discussing risks to workers who file external claims rather than merely challenge employment practices internally).

<sup>242</sup> Ruan, *supra* note 24, at 1106 (“Collective actions . . . have the advantage of protecting vulnerable workers from drawing attention to their individual participation and subjecting them to retaliatory measures.”); see also Estlund, *The Development of Employment Rights*, *supra* note 23, at 64 (“Employees, especially those who are terminable at will, may fear reprisals if they report or complain about misconduct (unless they have already quit or been fired).”).

<sup>243</sup> In fiscal year 2013, 41.1% of the 93,727 employees who filed claims of discrimination with the federal Equal Employment Opportunity Commission alleged that their employer had engaged in retaliation. *Charge Statistics FY 1997 Through FY 2014*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 12, 2015); see also ANNETTE BERNHARDT ET AL., *supra* note 4, at 3 (finding 43% of surveyed low-wage workers who complained of workplace violations claimed they were retaliated against).

<sup>244</sup> See, e.g., Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a) (2012).

<sup>245</sup> See Weil & Pyles, *supra* note 191, at 86.

<sup>246</sup> When Paula Jones brought her sexual harassment claim against President Bill Clinton she alleged that her employer engaged in a campaign to mistreat her including moving her office, changing her job duties, and “failing to give her flowers on Secretary’s Day[.]” *Jones v. Clinton*, 990 F. Supp. 657, 665 (E.D. Ark. 1998). While the court found these actions legally insignificant, and granted Clinton’s motion for summary judgment, these kinds of actions have led many employees to feel miserable. *Id.* at 679.

<sup>247</sup> *E.g.*, *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (reversing grant of summary judgment for company in retaliation case, observing that employee complaints could be chilled if management were free to make seemingly minor workplace changes that they knew would critically affect the employees, and observing that “Catbert, the Evil Director of Human Resources in the comic strip Dilbert, delights in pouncing on employees’ idiosyncratic vulnerabilities”).

<sup>248</sup> Ruan, *supra* note 24, at 1120.

<sup>249</sup> *Id.* at 1119-20 (emphasizing risks of retaliation to most vulnerable employees including immigrants and low-wage workers).

Fourth, class actions and collective actions can be used to procure broad injunctive relief that might not be available to individuals. For example, if the plaintiff's goal is to change the way an employer trains, hires, or compensates its employees, an individual lawsuit may not be sufficient. While legislation such as Title VII allows courts to issue broad equitable relief in individual cases,<sup>250</sup> some courts have expressed reluctance to do so.<sup>251</sup> At minimum it will be harder for individual employees than it would be for a class or group to muster the evidence necessary to convince a court to issue broad injunctive relief.<sup>252</sup> Thus, if Lucinda were to bring and win or settle her discriminatory promotion case it is highly unlikely her employer would broadly change the way it promotes women. Similarly, were Mark to bring his claim individually he might recover his own unpaid wages without causing the company to restructure the work environment for others. By contrast, class and collective actions can lead to broader injunctive relief. The 2013 Seyfarth Shaw Report reveals that every one of the "top ten" employment class action settlements for the year included significant injunctive relief such as "modification of internal personnel practices and procedures; oversight and monitoring of corporate practice; or mandatory training of supervisory personnel and employees."<sup>253</sup> In contrast, a study of the relief gained by individual employees showed they received almost no non-monetary relief in either litigation or arbitration.<sup>254</sup>

Fifth, it seems likely that the availability of class and collective actions deters companies from violating employment laws.<sup>255</sup> Such actions threaten companies with the possibility of having to pay for broad relief, as well as having to defend a costly

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<sup>250</sup> *E.g.*, 42 U.S.C. § 2000e-5(g)(1) (2012); *see also* Ruffin v. Great Dane Trailers, 969 F.2d 989, 993 (11th Cir. 1992) (affirming use of broad injunction in individual suit); EEOC v. KarenKim, Inc., 698 F.3d 92 (2d Cir. 2012) (reversing lower court's denial of broad-ranging injunction to prevent recurrence of discrimination in an individual suit).

<sup>251</sup> Brief for National Workrights Institute as Amicus Curiae Supporting Respondents, at 14-15, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Ruan, *supra* note 24, at 1123; *see also generally* Davis v. Coca-Cola Bottling Co. Consolidated, 516 F.3d 955 (11th Cir. 2008) (finding "pattern or practice" discrimination claim could only be pursued in a class action, and not by one or more individual employees).

<sup>252</sup> *See* EEOC v. AutoZone, Inc., 707 F.3d 824, 840-41 (7th Cir. 2013) (discussing standard of proof for injunctive relief in discrimination cases).

<sup>253</sup> SEYFARTH SHAW LLP, *supra* note 11, at 11 (including requirements that company abstain from inquiring into genetic information, make available American Sign Language interpreters for important workplace communications, adopt new interview policies, and develop and apply a new pension determination formula for all employees).

<sup>254</sup> *See* COMPARING MANDATORY ARBITRATION, *supra* note 31, at 24.

<sup>255</sup> *See generally* Kalven, Jr. & Rosenfield, *supra* note 232 (asserting that twin goals of class actions are compensation and deterrence).

class action.<sup>256</sup> Class and collective suits seem more likely to deter company misconduct than the mere threat of suits by individual employees who may not even choose to file a claim, for reasons discussed above.<sup>257</sup> Yet while the deterrence impact of class actions may seem obvious it has, admittedly, been disputed or at least questioned by some.<sup>258</sup> For example, after completing an empirical study finding that employment discrimination class actions did not have substantial and long lasting impact on the stock price of the defendant companies, Michael Selmi urged that the remedies in employment discrimination suits ought to be toughened so that such actions would have a greater impact on corporate defendants.<sup>259</sup> Yet Selmi still found that companies took employment class actions quite seriously,<sup>260</sup> and that “[c]lass action litigation has brought jobs and monetary relief to thousands of individuals, and has likely ended or significantly altered many discriminatory practices.”<sup>261</sup> Thus, employers can greatly reduce the deterrent effect of employment discrimination laws by eliminating group or class claims.<sup>262</sup>

While this section has focused on how employers are using mandatory arbitration to prevent employees from joining together in class or collective claims, it is also important to note that some mandatory arbitration clauses even preclude employees from joining together claims with as few as one other employee.<sup>263</sup> For

<sup>256</sup> See Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106 (2006) (querying whether anyone doubts the deterrence effect of class actions).

<sup>257</sup> See Ruan, *supra* note 24, at 1122 (observing that “[t]he sheer magnitude and scope of class litigation enhances the likelihood that a targeted employer will comply with the law”); Brief for National Workrights Institute as Amicus Curiae Supporting Respondents, *supra* note 251, at 14 (arguing that an “essential objective of a class action is to get a sufficiently broad and substantial corrective order to stop the wrongdoing and to deter future misconduct”).

<sup>258</sup> See, e.g., Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014) (urging that class action benefits, including deterrence, have not been proven, and that the class action device ought to be reined in).

<sup>259</sup> Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1321 (2003).

<sup>260</sup> *Id.* at 1250.

<sup>261</sup> *Id.* at 1321 (stating “this is an instance where the evidence is clearly mixed”).

<sup>262</sup> Samuel Estreicher has postulated that because more claims will be possible in arbitration than in litigation, the imposition of mandatory arbitration may actually increase rather than decrease deterrence. Estreicher, *supra* note 16, at 566 n.20. However, as discussed earlier the paucity of claims actually brought in arbitration defeats this hypothesis. See *supra* Part III.B.

<sup>263</sup> See Fisk, *supra* note 62 at 192-99, (arguing that courts should not interpret *Concepcion* to allow employers to preclude employees from engaging in joint litigations that are not class actions). For an interesting discussion of some of the social, moral and legal implications of group litigation that is not class action litigation, see, e.g.,

example, the arbitration clause discussed in *In re D.R. Horton*<sup>264</sup> provided that the arbitrator “may hear only Employee’s individual claims” and “will not have the authority to consolidate the claims of other employees.”<sup>265</sup> In litigation, by contrast, rules of civil procedure typically allow claimants with common issues of law or fact to join together in a single action.<sup>266</sup> Although the preclusion of class and collective claims is more dramatic than the mere preclusion of group claims, the latter is harmful to employees as well for several reasons. First, sometimes a claim that was economically infeasible may become feasible merely by joining together two or three similarly situated employees. If Lucinda could help her prospective attorney identify just a few other employees who were also allegedly denied promotions on the basis of their gender or ethnicity the claim may make more sense, economically. Two or more employees will have greater damages and can also potentially front more of the costs of the litigation. Also, it appears that lawsuits filed on behalf of more than one employee have a higher rate of success than lawsuits filed on behalf of a single employee.<sup>267</sup>

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Elizabeth Chamblee Burch, *Litigating Together: Social, Moral and Legal Obligations*, 91 B.U. L. REV. 87 (2011).

<sup>264</sup> 357 N.L.R.B. 184 (2012), *rev'd*, *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013).

<sup>265</sup> 357 N.L.R.B. 184 at 1; *see also* Malin, *supra* note 33, at 402 (noting that employers’ arbitration clauses commonly preclude employees from joining together with other employees, as well as from participating in class or collective actions).

<sup>266</sup> Rule 20 of the Federal Rules of Civil Procedure states that “[p]ersons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.” FED. R. CIV. P. 20 (2014). Many if not most state rules of civil procedure are similar. *E.g.*, NEV. R. CIV. P. 20. (“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or of fact common to all these persons will arise in the action.”).

<sup>267</sup> *See* Nielsen et al., *supra* note 87, at 189. This study of 1,672 employment discrimination cases found that 108 of the lawsuits involved two or more plaintiffs but were not class or collective actions. Although the study did not separately report on the success of these 108 claims it did show that, at least when examined together with 46 cases where EEOC intervened as a party and 18 certified class actions, these collective claims were far more successful than claims brought by single individuals. In particular, the 152 collective claims, including the 108 multiple plaintiff claims, were “less likely to be dismissed and less likely to lose on motion for summary judgment[.]” and more likely to prevail at trial. *Id.* Further, the trial success rate of the collective claims was 50% as opposed to the 30% chance of success for plaintiffs overall. *Id.* While recognizing that these statistics may well have been influenced by mixing the multi-plaintiff cases with the EEOC plaintiff and class action cases, it seems likely the multi-plaintiff cases alone are significantly different from the individual plaintiff cases given that they represent 108 of the 152 claims studied in the collective action variable.

IV. WHAT IS TO BE DONE?<sup>268</sup>

In sum, employers' use of mandatory arbitration provisions is "disarming" employees—denying them the opportunity they would have had to enforce their legal rights through litigation. While the litigation system is not as accessible to employees as many would like, the imposition of mandatory arbitration has worsened rather than improved the situation. In particular, the use of arbitration clauses makes it more difficult for employees to bring a claim by making it harder for them to secure representation, and by often eliminating their opportunity to bring class, collective, or even group claims. Nor has employment arbitration proven to be a hospitable forum for pro se employees.

If neither litigation nor mandatory arbitration provide sufficient access to justice for most employees some will suggest we should look for other ways in which we might protect employees' rights. We can easily imagine alternatives to litigation or mandatory arbitration including encouraging employers to work cooperatively with employees on self-governance,<sup>269</sup> better funding government agencies,<sup>270</sup> figuring out ways to help employees use social media or other technology to present their claims,<sup>271</sup> encouraging unions to represent non-members in employment disputes,<sup>272</sup> setting up labor courts or governmentally sponsored arbitration as exist in some other countries,<sup>273</sup> mandating that companies agree to arbitrate employment disputes if arbitration is desired by employees,<sup>274</sup> or many other creative options. Perhaps some of these solutions make sense and perhaps some of them will be achieved one day, maybe even in some of our lifetimes. Our current litigation system is not ideal, and we

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<sup>268</sup> Apologies to Vladimir Lenin. Lenin's 1902 pamphlet, "What is to be Done?," was said to have been inspired by Nikolai Chemyshevsky's 1886 novel of the same title.

<sup>269</sup> See, e.g., ESTLUND, *supra* note 26.

<sup>270</sup> Cf. FARHANG, *supra* note 3 at 16 (noting U.S. reliance on private enforcement).

<sup>271</sup> See Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213 (2014) (considering potential use of new technologies to serve some ends previously achieved through class actions); see also Sternlight, *Mandatory Binding Arbitration Clauses*, *supra* note 85, at 124-26 (discussing possible uses of social media to help consumers bring procedurally difficult claims).

<sup>272</sup> See *supra* note 23.

<sup>273</sup> See Sternlight, *In Search*, *supra* note 193, at 1430-67 (discussing Great Britain's and Australia's approaches for resolving employment discrimination claims); see also Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 5 STAN. L. REV. 1631, 1674-75 (2005) (considering whether arbitration imposed on mandatory basis by federal government would be just).

<sup>274</sup> See Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82 (2007).

should continue to search out better procedural alternatives for resolving employment disputes.<sup>275</sup>

In the short term, however, I favor a far simpler option: passage of the Arbitration Fairness Act (AFA).<sup>276</sup> Initially proposed in 2007<sup>277</sup> and subsequently revised various times,<sup>278</sup> the AFA would, among other things,<sup>279</sup> prohibit employers from mandating that their employees resolve their employment claims through arbitration.<sup>280</sup> This statute would effectively reverse those Supreme Court decisions that extended the FAA to allow employers to bar their employees from the courtroom.<sup>281</sup> Prohibiting employers from requiring employees to resolve disputes through arbitration is consistent with the legislative history of the FAA, as the original drafters never contemplated that the FAA would apply broadly to all employees.<sup>282</sup> Also, as employers did not broadly begin to mandate arbitration until the 1990s, we know that our workplace can function quite effectively without mandatory arbitration. While passage of the AFA does not at this point seem imminent,<sup>283</sup> perhaps as the true nature of mandatory employment arbitration

<sup>275</sup> See, e.g., Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, *supra* note 273, at 1674-75 (urging that while privately imposed mandatory arbitration is unfair we should continue to search for alternatives to litigation); Sternlight, *In Search*, *supra* note 193, at 1498-99 (finding that a combination of formal and informal processes is needed to best resolve employment discrimination claims).

<sup>276</sup> See Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015); Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015).

<sup>277</sup> Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (1st Sess. 2007).

<sup>278</sup> See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (1st Sess. 2011).

<sup>279</sup> The proposed Arbitration Fairness Act of 2015 provided “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” H.R. 1844 § 402(a).

<sup>280</sup> *Id.* at § 402; see also S. 1133 § 402.

<sup>281</sup> See *supra* Part I.

<sup>282</sup> See *supra* note 46 and accompanying text.

<sup>283</sup> The 2013 version of the AFA was never referred out of committee. *Text of the Arbitration Fairness Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s878/text> (last visited Feb. 24, 2015). The Bill had somewhat more support back in 2008 and 2009, when Democrats had just taken the Presidency and controlled both Houses of Congress. The Bill was reintroduced April 29, 2015. It has been referred to committee but no other action has been taken. For a good description of the Act’s history, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 458-63 (2011). Another scholar has described the AFA as “oft-introduced, oft-ignored.” Nancy A. Welsh, *What is “(Im)Partial Enough” in a World of Embedded Neutrals?* 52 ARIZ. L. REV. 395, 405 (2010); see also Lipsky et al., *supra* note 8 at 139 (noting that “AFA was strongly supported by many Democrats in Congress but opposed by most Republicans,” and that after Republicans took control of the House after the 2010 elections the possibility that the AFA might be passed into law in the near future “was virtually eliminated”).

becomes better understood a wider coalition of legislators will come to appreciate the benefits of that proposed statute.<sup>284</sup>

Some nonetheless suggest that the AFA is too extreme, and that we should only *regulate* mandatory arbitration to ensure it is fair rather than abolish the practice altogether.<sup>285</sup> Such a proposal has proved attractive to many in the dispute resolution community.<sup>286</sup> Senator Sessions (Republican, Alabama) proposed legislation in 2000 that would purportedly accomplish this end.<sup>287</sup> However, upon reflection the “mend it don’t end it” approach does not work for several reasons. First, it is highly unlikely that a measure aimed at ensuring mandatory arbitration is “fair” would address all the most important problems. While such a law might insist arbitrators be neutral or might prevent employers from imposing high costs it likely would not bar employers from using arbitration to prevent employees from joining together in class or group actions. Indeed, for every practice Congress might seek to proscribe, employers could come up with another way to skew arbitration that was not yet on the prohibited list.<sup>288</sup> Second, advocates of such regulatory legislation have not given enough thought to how such a measure would be enforced. As we have seen with unconscionability, it is time consuming and expensive

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<sup>284</sup> While full discussion of the AFA exceeds the scope of this article, and while some critics of the Act urge it is overly broad, see *infra* note 285, this Author believes that some possible overbreadth is warranted to protect numerous employees and consumers from unfair practices. A year ago, Pres. Obama issued an Executive Order providing that companies who enter contracts with the federal government providing goods and services in amounts in amounts exceeding one million dollars could not mandate that their employees resolve through arbitration claims of employment discrimination or sexual assault or sexual harassment. Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

<sup>285</sup> *E.g.*, Cole, *supra* note 283 at 498-99 (urging that Congress reject the AFA as too extreme but, instead, adopt a bill to allow consumers to participate in class actions either in litigation or in arbitration); Malin, *supra* note 101, at 290; St. Antoine, *supra* note 16, at 433-34 (noting that National Academy of Arbitrators declined to express any opinion on AFA at October 2009 meeting but did recommend that any legally permissible form of mandatory arbitration should include due process protections).

<sup>286</sup> See Malin, *supra* note 101 at 289-90; St. Antoine, *supra* note 16 at 433-34; see also Cole, *supra* note 283 at 504 (urging that while AFA supposedly goes too far, Congress should adopt legislation “designed to preserve individuals’ rights to proceed through class arbitration or class actions in court”). My students, similarly, often urge that it is too radical to prohibit mandatory arbitration altogether and that it should be sufficient to regulate to ensure arbitration is “fair.”

<sup>287</sup> Consumer and Employee Arbitration Bill of Rights, 106 CONG. REC. S10, 619, 10626-27 (2000), 2000 WL 1532688. This proposed legislation never made it out of committee. See S. 3210 (106th): *Consumer and Employee Arbitration Bill of Rights*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/106/s3210#overview> (last visited Feb. 17, 2015).

<sup>288</sup> See generally Blomgren Amsler, *supra* note 90 at 32, 41-42 (discussing that companies’ use of mandatory arbitration can be viewed as a “systems design problem” suffering from various “structural bias[es]”).

for employees to try to show that an employer's program is deficient, so merely setting out fairness requirements would not ensure that employers' plans meet those requirements.<sup>289</sup> Nor is it likely Congress would authorize establishment of a new administrative agency to monitor whether employers' plans are compliant.<sup>290</sup> Thus, regulating rather than eliminating mandatory employment arbitration seems infeasible. We should, instead, ban the harmful practice of allowing employers to force their employees out of the litigation setting.

## CONCLUSION

On paper, the United States has strong laws protecting its workers, but in practice, these laws fall far short if they cannot be enforced. This article has shown that employers are using the practice of mandatory arbitration to prevent employees from bringing claims to enforce their rights in any forum, either litigation or arbitration. Mandating arbitration makes it more difficult for employees to participate in group or class actions, and more difficult to obtain legal representation. Thus, if we continue to rely on a system in which employees bring claims to protect their own rights it is critically important to prohibit employers from using mandatory arbitration to disarm their employees. The proposed Arbitration Fairness Act is our best hope of continuing to protect employees from illegal mistreatment.

While prohibiting employers from using mandatory arbitration will not ensure that employees have access to justice, taking this step will at least move us in a positive direction. Absent mandatory arbitration at least a few more employees would be able to secure legal representation, participate in class or collective actions, and present their claims in court. Companies would continue to face litigation pressure and thus have reason to think more creatively and expansively about ways to comply with the law and promote their employees' wellbeing. Thus, by passing the Arbitration Fairness Act we can undertake to find more and better ways to provide employees with access to justice.

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<sup>289</sup> *E.g.*, Bland, *supra* note 79, at 1; *see also* Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 92-97 (2000) (Ginsburg, J., concurring & dissenting) (critiquing majority for imposing burden of proof on party resisting arbitration to show process is unfair).

<sup>290</sup> As we have seen, we are not eager to establish new bureaucracies in the United States. *See supra* note 3.