

MANDATORY ARBITRATION AND FAIRNESS

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INTRODUCTION

Is mandatory arbitration unfair?¹ The question has risen to the forefront of a fifteen-year academic debate that for the first time may have imminent policy implications. Under a series of controversial judicial interpretations of the Federal Arbitration Act (FAA),² the courts have consistently enforced pre-dispute arbitration agreements imposed on employees, consumers and franchisees in adhesion contracts.³ Courts have been mostly deaf to the arguments of critics that mandatory arbitration is “do-it-yourself tort reform,” systematically favoring corporate defendants.⁴ And Republican congressional majorities from 1994 to 2006 kept arbitration reform off the political agenda, since the business constituency views

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¹ “Mandatory arbitration” refers to arbitration pursuant to an adhesive, pre-dispute arbitration agreement. For further elaboration of these concepts and the surrounding arguments, see, for example, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631–33 & n.1 (2005). I have abandoned my effort to relabel the term “compelled arbitration.” Compare David S. Schwartz, *If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration,”* 8 NEV. L.J. 400, 400 n.1 (2007) [hereinafter Schwartz, *If You Love Arbitration*] (using the term “mandatory arbitration” to describe these agreements), with David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 & n.10 [hereinafter Schwartz, *Enforcing*] (using the term “compelled arbitration”).

² 9 U.S.C. §§ 1–14 (2006).

³ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (upholding arbitration agreement against employee); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (upholding arbitration agreement against franchisee); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (upholding arbitration clause imposed on consumer purchasing termite extermination services).

⁴ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (extolling virtues of mandatory arbitration).

mandatory arbitration as deregulatory in its impact.⁵ In that policy environment, the academic debate over the fairness of mandatory arbitration was condemned to being “academic” in the less flattering sense. But now the fairness of arbitration is squarely under consideration by Congress, and there is a significant possibility that the FAA could be amended to make pre-dispute arbitration clauses unenforceable in most adhesion contracts.⁶

At this important juncture, as academic commentators are increasingly addressing themselves to legislators rather than courts,⁷ the debate over mandatory arbitration has turned political—in the less flattering sense. Critics of mandatory arbitration (myself included) have always assumed we took the side of “fairness” in a classical argument against tort-reform “efficiency.” But the salient argument now advanced by supporters of mandatory arbitration puts “fairness” itself at issue. Their two-pronged argument has an “empirical” and an “egalitarian” component:

(1) There is no empirical evidence that plaintiffs do worse in arbitration than in court. Indeed, existing studies seem to show they

⁵ Compare *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?: Hearing Before the Subcomm. on Commercial & Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 1 (2007) [hereinafter *Mandatory Binding Arbitration Agreements*] (statement of Rep. Linda Sanchez, Chairwoman, Subcomm. on Commercial & Administrative Law) (“[M]andatory arbitration agreements may not always be in the best interests of consumers.”), with *id.* at 3 (statement of Rep. Chris Cannon, Member, Subcomm. on Commercial & Administrative Law) (“The use of mandatory binding arbitration clauses has risen not because companies want to disadvantage consumers, but because companies increasingly believe they need to protect themselves from abusive class action suits.”), available at <http://judiciary.house.gov/hearings/printers/110th/36018.pdf>. Legislative reform at the state level has been almost entirely precluded by a series of U.S. Supreme Court decisions holding that the FAA preempts state law. See generally David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 546–62 (2004) (discussing these cases and criticizing their “incoherence”).

⁶ The Arbitration Fairness Act of 2009, introduced in the House on February 19, 2009, would amend the FAA to provide that: “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—(1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” H.R. 1020, 111th Cong. § 4 (2009) (quotation marks omitted). Identical bills were introduced in the House and Senate in 2007. See S. 1782, 110th Cong. § 4 (2007); H.R. 3010, 110th Cong. § 4 (2007) (providing identical language). The passage of this legislation in the foreseeable future appears promising as the Democrats have won the White House and expanded their majorities in both the House and Senate in the 2008 elections.

⁷ See, e.g., Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 3–4 (2007) (keynoting symposium exploring legislative revision to FAA).

do about as well. Therefore, critics of mandatory arbitration have failed to make their case for reform.⁸

(2) Moreover, mandatory arbitration offers a more egalitarian system of dispute resolution. Because arbitration is faster, cheaper and less formal than litigation, it is more hospitable to more claims, particularly from low income employees. But since employers will not agree to voluntary *post*-dispute arbitration, employees can only get this good deal through the use of mandatory (that is, adhesive, pre-dispute) arbitration clauses, which “hold employers’ feet to the fire.”⁹

Like a political candidate whose strength has been turned into a weakness by opposition spin, mandatory arbitration critics find themselves on the defensive, fighting for ground seemingly won a long time ago. The “empirical” argument preempts the tort-reform question by implying that mandatory arbitration is not in fact tort reform: critics must provide empirical proof that plaintiffs do worse in arbitration before they can debate the merits of imposing such tort reform. Interposing this empirical question as a hurdle to legislative reform would be a strategic victory for mandatory arbitration supporters, because there is a good likelihood that a definitive answer is years away and perhaps unattainable. It therefore is troubling that some legislators (and even mandatory arbitration critics) seem

8 See, e.g., Omri Ben-Shahar, *How Bad Are Mandatory Arbitration Terms?*, 41 U. MICH. J.L. REFORM 777, 779 (2008) (“We simply do not know enough facts to pass a judgment on arbitration as a mandatory procedure.”); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 49 (“[M]any people expect employee claimants to fare worse in arbitration than in litigation. Yet we find the opposite”); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 565 (2001) (concluding that “[w]ithout better empirical studies” it cannot be settled that employees fare worse in arbitration); Peter B. Rutledge, *Whither Arbitration*, 6 GEO. J.L. & PUB POL’Y 549, 551–52 (2008) (“[T]he proper question is whether eliminating predispute arbitration agreements for wide swaths of the economy yields a net benefit. That is the burden confronting the advocates of arbitration reform and one that, based on my review of the available empirical evidence, they have not met.”); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005) (“[T]here is no evidence that plaintiffs fare significantly better in litigation.”).

9 See Eisenberg & Hill, *supra* note 8 *passim*; Estreicher, *supra* note 8, at 567–68; Sherwyn et al., *supra* note 8, at 1581 n.124; David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 31–38 (2003). I use the term “employer” and “employee” deliberately: this is how supporters frame the argument. They discuss far less often the consumer and franchise settings. See *infra* Part I.B.

caught up in the quest for empirical studies.¹⁰

The egalitarian argument, that arbitration is more accessible and therefore more fair than litigation, distracts attention from questions of dispute system design: why should an adhesion contract, rather than legislation, be the vehicle for creating a “fair” dispute resolution system? For good measure, supporters have reduced the fairness argument to the language of a political campaign slogan, needling critics with an accusation of elitism: critics undemocratically promote “Cadillacs for the few” (litigation) at the expense of “Saturns for the many” (mandatory arbitration).¹¹ And like a stunned candidate, mandatory arbitration critics seem befuddled and slow to respond.¹²

Can it be true that mandatory arbitration is as least as fair as litigation? Actually, no. This article presents the first comprehensive response to the argument for the alleged fairness of mandatory arbitration. I offer a clear and simple framework for thinking about this question and demonstrate that each assertion in the argument for the fairness of mandatory arbitration is based on a combination of false premises, faulty empirical research, unproven assumptions, or mere debaters’ tricks.

Part I of this article examines the different senses in which “fairness” has been discussed in the mandatory arbitration debate. I argue that supporters of mandatory arbitration have gained some rhetorical advantage in being imprecise about their definition of fairness. I go on to demonstrate that a “burden of proof” has been placed strategically, but improperly, on critics to prove empirically that mandatory arbitration is unfair; and I argue that the burden should be the reverse.

Part II sets out a new analytical framework that helps us assess the existing empirical research into arbitration outcomes and provides direction for future research. By categorizing cases in terms

¹⁰ See, e.g., *Mandatory Binding Arbitration Agreements*, *supra* note 5, at 113 (statement of Rep. William D. Delahunt, Member, Subcomm. on Commercial & Administrative Law) (“Then I think it is an issue of what we do as a Committee, as a Congress, where it is documented, where if it can be documented by solid studies that implicate a scientific methodology, that there are abuses relative to consumers.”); See also *id.* at 123–24 (statement of Rep. Cannon) (appending empirical studies into the record).

¹¹ See Estreicher, *supra* note 8, at 563–64.

¹² Professor Sternlight took an important first step in addressing this argument directly, in a recent article. See Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L. REV. 82, 105–106 (2007) (suggesting that if arbitration is to be mandatory at all, it should be mandatory against the company, with an opt-out available to employees).

of high and low liability stakes and high and low process costs, we can re-evaluate both empirical and normative arguments for arbitration “fairness.”

Part III explores the data analysis problems that make empirical comparisons of arbitration and litigation outcomes extremely challenging and unlikely to produce reliable evidence of the relative fairness of the two systems. By way of example, I examine the leading empirical study purporting to show arbitration is fair relative to litigation in the employment context, and raise serious doubts about its validity.

Part IV shows how the egalitarian “Saturns for Cadillacs” argument is a pseudo-populist polemic based on self-contradictory logic and an unfounded empirical assumption about the accessibility of arbitration to claimants with low-value claims or modest means. I also raise questions about the bona fides of those who argue for *mandatory* arbitration as a more egalitarian forum without considering alternatives that would promote more widespread access to dispute resolution services.

Finally, Part V argues that there is no need to wait for further empirical research before amending the FAA to eliminate mandatory arbitration.

I. THE CONCEPT OF “FAIRNESS” IN THE MANDATORY ARBITRATION DEBATE

“Mandatory arbitration” refers to the arbitration of a case pursuant to a provision in an adhesion contract requiring arbitration of future disputes.¹³ Typically arising in a consumer, employment, or franchise contract, the arbitration provision is invariably drafted by the would-be corporate defendant.¹⁴ Under the FAA, such arbitration is “mandatory” in that courts will rigorously enforce the arbitration clause and compel the parties to arbitrate, even if one of the parties would prefer to litigate once the dispute actually arises.¹⁵

¹³ See *supra* note 1.

¹⁴ See Schwartz, *Enforcing*, *supra* note 1, at 60–62 (detailing the reasons why defendants tend to prefer arbitration. Significantly, the contracting relationship in question is heavily regulated, because the drafting parties (employers, sellers, and franchisors) have demonstrated histories of using their superior bargaining position to overreach. That regulation also means that a significant proportion of the cases forced into the arbitration system in this way involve public law disputes.

¹⁵ The doctrinal history of mandatory arbitration has been well explained. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 339–79; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims*:

The FAA provides that the arbitration award is final and binding, having the same effect as a court judgment, with exceedingly limited grounds for judicial review.¹⁶ The courts' approach of rigorously enforcing such arbitration agreements means that corporate defendants can opt out of the court system by the simple expedient of writing arbitration agreements into their standard form contracts. Since those contracts are non-negotiable, the corporate defendant only does business on the basis of an arbitration agreement.

Critics argue that this system of mandatory arbitration is unfair. But what is "fairness" in this context? How did fairness become an empirical question, and how did it become the burden of critics to prove that mandatory arbitration is unfair? This section sketches out the answers to these questions.

A. *"Fairness" Defined: Process, Outcome, and Access*

Three related but distinct concepts of fairness—process, outcome, and access—have been at issue in the debate over mandatory arbitration. All three are relevant to answering the question whether mandatory arbitration is unfair relative to its alternatives, and there is no need to make an argument for the superiority of one focus of fairness over another. The important thing is to maintain clarity and awareness about the kind of fairness under discussion and to see through opportunistic attempts to slip from one definition of fairness to another when a fairness argument encounters difficulties.

Doctrine and Policy in the Wake of Gilmer, 14 HOFSTRA LAB. L.J. 1, 7–16 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644–74 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020–36 (1996). Following the lead of the U.S. Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), most federal and state courts have enthusiastically endorsed mandatory arbitration, reading a "national policy favoring arbitration" into the FAA. *See, e.g.*, *Commerce Park v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984). Among judges, the debate currently exists only at the margins—in public speeches or dissenting opinions by a small minority of judges, or in the occasional cases where an arbitration agreement adds on unusually unfair terms. *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285–90 (9th Cir. 2006). Otherwise, courts routinely order cases into arbitration pursuant to adhesive, predispute agreements, irrespective of the type of claim involved or the relative bargaining positions of the parties. *See* Schwartz, *Enforcing*, *supra* note 1, at 107–09.

¹⁶ *See* 9 U.S.C. §§ 9–10 (2006).

1. Process fairness

To date, the most developed discussions of fairness in the mandatory arbitration debate have involved issues of process. Scholars examining what I will call process fairness have considered various aspects of mandatory arbitration leading up to a final arbitration award: Was there meaningful consent in the decision to substitute arbitration for judicial processes? Did the arbitration clause contain specific one-sided or unconscionable terms? Are the procedural rules of arbitration fair compared to litigation?¹⁷ Process

¹⁷ Critics of mandatory arbitration have argued vigorously that forcing cases out of the courts and into a private dispute resolution system chosen by the corporate defendant was procedurally unfair, nonconsensual, wholly at odds with the regulation of the contracting relationships, and probably unconstitutional. *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 636–41 (1997); Schwartz, *Enforcing*, *supra* note 1, at 106–21; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 6, 10–14 (1997). Supporters of mandatory arbitration have taken various approaches to these procedural unfairness arguments. Some have argued that “freedom of contract” trumps consent. *See, e.g.*, Stephen J. Ware, *Arbitration Clauses, Jury-waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 182–93 (2004); Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 209–13 (1998). Others have argued that economic efficiency makes arbitration clauses reasonable, justifying their enforcement in the absence of consent as with any adhesion contract. *See, e.g.*, Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 558–62 (2003). The most common response of supporters, however, has been to skirt these issues by simply assuming that the current judicial endorsement of mandatory arbitration makes it unnecessary to defend the practice, so long as mandatory arbitration meets constitutional minimum standards of due process. *See, e.g.*, Laurie Leader & Melissa Burger, *Let's Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMP. RTS. & EMP. POL'Y J. 87, 107–21 (2004) (claiming that pre-dispute arbitration clauses have the “potential to . . . provide a cost-effective alternative to litigation” but recognizing the need for a well-drafted agreement to ensure due process). Such supporters elaborate on their willingness to raise the due process floor, but generally assert that serious abuses are either too rare for concern or can be controlled by arbitrator self-regulation or occasional judicial regulation at the margins. *See, e.g.*, Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 429–31 (2000). For discussions of the particular problem of arbitration clauses with particular, unconscionable terms, see Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 705–20; Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 98–102 (2006); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 53–65 (2003); W. Mark C.

fairness is arguably an end in itself; but in this article, I consider process fairness as it affects outcomes.¹⁸

2. Outcome fairness

Outcome fairness looks at the relative success of plaintiffs/claimants in litigation and arbitration.¹⁹ Critics have long argued, explicitly or implicitly, that the system of mandatory arbitration favors defendants by reducing overall liability relative to litigation.²⁰ The recent round of empirical research has attempted to test that assertion by trying to measure arbitration and litigation outcomes, in terms of win rates and average awards.²¹ Yet these studies do not articulate a clear definition of fairness. Nor does the scholarship that incorporates their data into policy arguments. And because the empirical outcomes debate is about *whether* mandatory arbitration reduces plaintiff's litigation outcomes, the argument about whether litigation outcomes are themselves too high and thus unfair in some tort-reform sense is put on the back burner.

The empirical studies of outcomes imply two related but different understandings of outcome fairness. First, arbitration is as fair as litigation if any randomly selected plaintiff has equal ex ante chances of getting the same liability payout in both forums. Second, arbitration is fair if plaintiffs *in the aggregate* get the same total average payout as litigation plaintiffs *in the aggregate*. Under this second definition, even if there were some redistribution from higher-winning litigation plaintiffs to a larger number of lower-winning arbitration claimants, fairness would be attained if the overall liability cost to defendants were the same.

For purposes of the present discussion, I will keep *both* definitions of fair outcomes in play, because both are relevant to assess what the empirical studies actually (purport to) tell us and to pin down express or implied normative arguments. For example, the

Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 657–73 (2007).

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part III. In legal parlance, the claiming party in litigation is the “plaintiff,” whereas the claiming party in arbitration is called the “claimant.” For purposes of this article, I will *not* take pains to maintain that distinction; I’ve found that using the two terms more or less interchangeably eases exposition without sacrificing clarity.

²⁰ See, e.g., Schwartz, *Enforcing*, *supra* note 1, at 60–66.

²¹ See, e.g., Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 412–37 (2007) (reviewing empirical research).

second definition of fairness is implicit in the egalitarian argument for mandatory arbitration, but mandatory arbitration supporters, for obvious reasons, do not expressly embrace it. To begin with, it contains an implicit acknowledgment that arbitration does in fact reduce recoveries for at least some plaintiffs—a concession that supporters have been reluctant to make. Moreover, the argument that a redistributive effect of mandatory arbitration is fair “overall” moves quickly out of strictly empirical questions and into normative ones. Somewhat paradoxically, many mandatory arbitration supporters are probably uncomfortable as a matter of temperament in advocating the sacrifice of individual interests for the good of the many. Rather than see that argument through to its awkward conclusion, supporters typically fall back on the claim that mandatory arbitration is fair in the first sense.²²

3. Access fairness

The access argument—that mandatory arbitration is fairer than litigation because of arbitration’s superior openness and access—has popped up like a jack-in-the-box for several years,²³ but has recently gained prominence among mainstream scholars. Its most developed form is largely the contribution of Professors Samuel Estreicher, to whom we owe the colorful “Cadillacs for Saturns” trope, and David Sherwyn.²⁴ The access fairness concept is a bit slippery, and is not fully embraced even by those who argue the point. If, for example, it were to turn out that mandatory arbitration opened the doors of dispute resolution to twenty percent more claimants than litigation, while reducing liability payouts by fifty percent, the egalitarians would

²² See, e.g., Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 48 (supporting the conclusion that those who arbitrate fare just as well as those who litigate, in part, on an empirical outcome study that compared mean damages awarded in arbitration and litigation as a percentage of the damages demanded).

²³ In the past, the “mandatory arbitration fairness” argument had less prominence because it seemed to be merely a hobby horse of arbitration industry partisans: defense attorneys representing companies that use mandatory arbitration clauses, arbitrators, or persons with employment or fiduciary relationships to arbitration vendors. See, e.g., Maltby, *supra* note 22, at 30. Maltby was and is a member of the American Arbitration Association Board of Directors. *Id.* at 29; see also AM. ARBITRATION ASS’N, 2007 PRESIDENT’S LETTER & FINANCIAL STATEMENTS 10 (2008), available at <http://www.adr.org/si.asp?id=5299> (listing Lewis Maltby as member of the AAA Board of Directors).

²⁴ See Estreicher, *supra* note 8, at 563–68; Sherwyn et al., *supra* note 8, at 1578–81; Sherwyn, *supra* note 9, at 67–68.

have a tough normative row to hoe to persuade us that mandatory arbitration was more fair than litigation. Not surprisingly, the access fairness argument is usually made in tandem with one or both outcome fairness claims.²⁵

B. Fairness to Whom—and Compared to What?

Fairness arguments focus on plaintiffs for the simple reason that it is the defendants who have the exclusive choice whether to impose a mandatory arbitration regime or not. But which plaintiffs? Mandatory arbitration is used in various settings where parties with stronger bargaining positions write the adhesion contracts. Empirical legal studies have mostly focused on employment cases, and have not yet given sufficient attention to claims of consumers, franchisees, and others.²⁶ Yet some participants in the mandatory arbitration debate fail to clarify that a study of employment arbitrations does not necessarily speak to all areas of mandatory arbitration. In this Article, I frequently make points about employment arbitration results to comment on studies of such results, but my fairness concerns go to the consumer and franchise settings as well.

A major analytical weakness in the mandatory arbitration fairness argument is its myopic focus on comparing arbitration with *litigation only*. But mandatory arbitration displaces most of the system of public dispute resolution, including small claims courts, other courts of limited jurisdiction, and administrative tribunals.²⁷ In assessing the relative merits of mandatory arbitration—not only its outcome and process fairness, but also its relative speed, expense, and accessibility—it is highly misleading to exclude these other forums,

²⁵ See, e.g., Estreicher, *supra* note 8, at 563–68; Sherwyn et al., *supra* note 8, 1581–90.

²⁶ See, e.g., Colvin, *supra* note 21, *passim*; Eisenberg & Hill, *supra* note 8, *passim*; see also Sherwyn et al., *supra* note 8, at 1563–78 (reviewing empirical research). Other commercial settings may have received insufficient attention. For example, many small agricultural producers are subject to adhesive arbitration clauses in their contracts with powerful buyers; these contracts are not captured by the employee, consumer, or franchisee labels. See, e.g., Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33, 46 & n.87 (2004). I thank my colleague Peter Carstensen for alerting me to this issue.

²⁷ See, e.g., *Perry v. Thomas*, 482 U.S. 483, 489–91 (1987) (holding that the FAA preempts California Labor Code section providing for administrative proceeding to recover unpaid wages); *Fuentes v. DirecTV*, 245 F. App'x 408, 409–10 (5th Cir. 2007) (upholding injunction against state small claims action to protect district court order compelling arbitration).

which tend to be faster and cheaper than full-blown litigation in federal district courts and state courts of general jurisdiction.²⁸ Necessarily, much of this Article will compare arbitration with full-blown litigation because I am examining comparisons between those two forums made by others. However, that should not cloud the issue that, ultimately, mandatory arbitration must be compared to all the forums it displaces. For clarity, where it is appropriate to refer to the full panoply of alternatives to mandatory arbitration, I will refer to the “default” system or to the system of “public dispute resolution.”

C. *The Empirical Game: Who Has the Burden of Proof*

It is typical for supporters of mandatory arbitration to sum up the handful of inconclusive studies comparing arbitration and litigation results and conclude that there is “no empirical evidence to suggest that plaintiffs do better in litigation than in arbitration.”²⁹ “No evidence of X” is an ambiguous phrase that is often deployed rhetorically to imply “inferential evidence of not X.” The logic of this argument is where there’s no smoke, there’s no fire. To be sure, if a well-conceived and diligent search turns up no evidence of a condition, then that can support an inference that the condition does not exist. But the search must be thorough enough for that inference to cross the threshold from “I didn’t find it in this spot” to “we’re probably not going to find it anywhere.”

Moreover, the “no [empirical] evidence” claim is demonstrably false. In addition to some limited statistical data,³⁰ we have salient

28 See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 408 (2006) (“[E]xecutive-branch tribunals are usually assumed to be ‘faster, cheaper, and procedurally simpler and less formal than courts.’” (quoting STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY* 283 (1987))).

29 See, e.g., Sherwyn et al., *supra* note 8, at 1578; see also Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, A.B.A. CONFLICT MGMT., Winter 2003, at 1, 11 (“[W]e find no statistical support for the proposition advanced by the EEOC and other opponents of pre-dispute arbitration that arbitration is somehow biased against claimants.”).

30 Perhaps Exhibit A in the empirical case for the unfairness of mandatory arbitration should be the recent study by Professor Colvin. Based on the largest sample of arbitration cases analyzed to date, he concludes (with caveats) that the data “suggest[s] that employee win rates and damage awards are lower than indicated by the earlier studies and lower than those in litigation.” Colvin, *supra* note 21, at 445. In addition, a reinterpretation of two misleadingly presented statistical analyses—where the authors claim to have shown arbitration to be outcome neutral to claimants—lends further empirical support to critics of mandatory arbitration’s unfairness. See *infra* notes 130, 172–176.

empirical evidence in the form of the behavior of the relevant, real-world participants. When lawyers are involved on both sides—which is generally considered a more level playing field than cases with unrepresented plaintiffs—all indications are that arbitration agreements are enforced almost uniformly by defendants and rarely, if ever, by consumers or employees.³¹ The behavioral evidence may not be conclusive or compelling, it may be unsatisfying in other respects—but it is empirical. (Empirical evidence is based on systematic observation of reality, and is not necessarily the same as “precise” or “quantitative,” even if some aficionados of statistical analysis conflate these concepts.) And it is suggestive. Unless we assume that the parties are acting on bad information, and ultimately contrary to their interests, it gives rise to an inference that arbitration favors defendants.

The “no evidence” claim also reflects an additional rhetorical move. Its clear implication is that the existing evidence is insufficient

31 I’m aware of no serious empirical study actually confirming this—perhaps because there is little academic interest in confirming the obvious. Thus, my evidence for the point is necessarily impressionistic and anecdotal. A February 2009 Lexis search for the term “compel arbitration” in the federal court cases database produced 1668 cases. In a random sampling of 50 decisions in which one of the parties was a consumer or employee, it was the corporate defendant who moved to compel arbitration, and the consumer or employee who resisted arbitration, in all 50 cases. When it comes to advocacy, members of the defense bar invariably take the side in favor of mandatory arbitration, whereas representatives of consumers or employees virtually always oppose it. See, e.g., PUB. CITIZEN, *THE ARBITRATION TRAP* 13–27 (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf> (providing the results of a study by a consumer advocacy group opposing arbitration); ERNST & YOUNG, *OUTCOMES OF ARBITRATION* 8–14 (2004), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf> (relating the results of a study commissioned by defense law firms and the American Bankers Association ultimately finding that mandatory arbitration is favorable to consumers); *Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial & Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Cathy Ventrell-Monsees, plaintiff’s employment attorney) (testifying against mandatory arbitration); *Mandatory Arbitration Agreements*, *supra* note 5, at 5 (statement of F. Paul Bland, Jr., consumer attorney) (testifying against mandatory arbitration agreements); *id.* at 43 (statement of Mark J. Levin, defense attorney) (testifying in favor of mandatory arbitration agreements); Delikat & Kleiner, *supra* note 29 (advocacy piece favoring mandatory arbitration coauthored by chair of a large law firm’s employment defense practice); Nat’l Employment Lawyers Ass’n., *Advocacy: Mandatory Arbitration* (last visited February 19, 2009), <http://www.nela.org/NELA/index.cfm?event=showPage&pg-mandarbitration> (policy statement of employee advocacy group opposing mandatory arbitration). This has held true in my personal experience in nearly a dozen panels or symposia on mandatory arbitration.

to shift from a regime of enforcement to one of non-enforcement of pre-dispute arbitration agreements. Thus, the claim *sub silencio* imposes a burden of proof on the critics of mandatory arbitration. What justification is there to place the burden of proof on critics?

In a scholarly debate over policy—as opposed to a legal brief—judicial decisions do not get a presumption of correctness when the correctness of that case law is precisely what is being debated. And a contract term does not get a presumption of enforceability when the policy under consideration is whether to enforce it.³² In a litigated case, a court will impose an argumentative burden of persuasion on the party trying to depart from precedents endorsing mandatory arbitration. Similarly, a court might treat an arbitration clause—like any contract term—as *prima facie* valid, requiring proof of the claim that it operates as an “exculpatory clause,” reducing liability for the drafting party.³³ Scholarly inquiry is different: the burden of proof is not automatically and mindlessly placed on those who question the enforceability of certain contract terms or who disagree with case law—here, the prevailing judicial interpretation of the FAA. Assigning a burden of proof in this context requires an argument, one that has rarely been made by supporters of mandatory arbitration.

In policy debates, there may not always be a burden of proof beyond the general truth that anyone making a point needs to persuade. If there is a burden of proof on one party, it usually falls on the side of the argument that is either counter-intuitive or innovative—the assertion that goes against the grain of belief, perception, and experience.

There are several good reasons why the burden of proof might well be placed on arbitration supporters. To begin with, arbitration is *alternative* dispute resolution. It, not litigation, represents the variance from the default rule. This is not simply a question of

³² To be sure, many scholars view contract terms as presumptively enforceable. But this normative position itself requires an argument—it is not a universally accepted starting point among legal commentators. Compare Randy E. Barnett, *Some Problems with Contract As Promise*, 77 CORNELL L. REV. 1022, 1028 (1992) (arguing that manifestations of consent make contract terms presumptively enforceable), with Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1262 (1983) (“Contracts of adhesion should be enforced only to achieve particular social purposes, and not as a matter of general right.”).

³³ See, e.g., *Lagatree v. Luce, Forward, Hamilton & Scripps LLP*, 88 Cal. Rptr. 2d 664, 688 n.31 (Cal. Ct. App. 1999) (rejecting “conclusory” assertion that arbitration agreement lessened potential plaintiffs’ liability in violation of state statute voiding exculpatory contract clauses).

historical artifact or an assertion that public dispute resolution has primacy of place because it always has, or because it is in the Constitution. Those factors are not irrelevant, however. Equally important, a longstanding and fundamental principle of fairness is that the rules of resolving a dispute should not be decided by one of the parties without the consent of the other.³⁴

Further, the assertion that arbitration is as fair to plaintiffs as litigation—despite its talismanic repetition by courts³⁵ and the claims of some overeager empirical researchers to have proven it—is contrary to behavioral evidence. The behavioral evidence is the widespread (though not universal, except in some industries) use of mandatory arbitration by defendants and the nearly uniform objection to mandatory arbitration by the plaintiff's bar.³⁶ This evidence is imperfect, to be sure. Parties could be mistaken in their factual assumptions about where their best interests lay. This would not be the first instance in human history in which an entire subculture conformed its behavior to a shared error. Plaintiff's lawyers are no doubt imperfect proxies for the interests of plaintiffs as a class, but they come much closer than do the arbitration vendors,

³⁴ For this reason, contract terms seeking to control disputing processes have had a mixed history in their prima facie enforceability. See, e.g., Carrington & Haagen, *supra* note 15, at 358–59.

³⁵ See, e.g., *Circuit City Stores v. Adams*, 532 U.S. 105, 122–23 (2001) (“[F]or parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“[W]e recognized that ‘[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’” (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))); *Landis v. Pinnacle Eye Care*, 537 F.3d 559, 563 (6th Cir. 2008) (“Arbitration presents a fair opportunity for a claimant to present and prevail on a claim.”); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14 (1st Cir. 1999) (identifying a “presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights”).

³⁶ See *supra* note 31; see also 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, 99 (1999) (“Most plaintiffs’ lawyers, however, oppose arbitration.”); see also Jared Lyles, *The Buying of Justice: Perversion of the Legal System Through Interest Groups’ Involvement with the Partisan Election of Judges*, 27 LAW & PSYCHOL. REV. 121, 132 (2003) (“[I]n those 100 cases arbitration questions split along predictable lines: ‘Justices whose election campaigns are funded by plaintiffs’ lawyers oppose arbitration, whereas justices whose campaigns are funded by business favor arbitration.’” (quoting Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999))).

defense lawyers, tort reform–advocating academics, and docket control–minded judges who endorse mandatory arbitration. Nonetheless, in framing issues and assigning burdens of proof, we should not *presume* that either defendants’ or plaintiffs’ lawyers are irrational or misinformed; it might plausibly be made a rebuttable presumption that they are acting according to their rational self interest.

Finally, the argument that arbitration is fairer than litigation is counterintuitive or innovative. If fairness is measured by aggregate outcomes, then supporters are urging a change in the status quo by redistributing putatively higher per capita recoveries in litigation to more widespread, but lower per capita recoveries in arbitration. Since there is no intuitive reason to presume that arbitration has this effect, it should require proof to justify the redistributive effect.

If fairness is measured by individual plaintiff recoveries, the assertion of arbitral fairness is counterintuitive for the simple reason that it logically implies that the system of civil litigation is pure waste and transaction cost. If arbitration produced the same outcomes as litigation for less time and money, then the process of discovery, which accounts for much of the cost differential, would in fact add nothing to the results of cases.³⁷ It would mean that rules designed to promote fact gathering, reflecting decades of experience of judges and lawyers, would actually have no effect on case outcomes. It would mean that plaintiffs attorneys who have had the experience of seeing the value of a particular case increase through disclosures obtained (and obtainable) only through vigorous and extensive discovery procedures have been deluding themselves. All this may be true, but it would be somewhat shocking and would require a revolutionary rethinking of modern procedural codes. Significantly, none of the empirical researchers who say they have demonstrated arbitral fairness have made so sweeping a claim about the litigation system.

In sum, the fairness argument for mandatory arbitration challenges (1) the default system of dispute resolution; (2)

³⁷ The rest of the cost differential is created by pleading and motion practice, and appeals. My guess is that pleading and motion practice add value to a case from the plaintiff’s point of view, insofar as they force the plaintiff’s counsel to sharpen her case theory and its eventual presentation at trial, though much of it probably doesn’t have this useful effect. The effect of appeals on case value is even more difficult to discern. There is reason to believe that it is either neutral or negative in its impact on case value from the plaintiff’s perspective. See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 971.

traditional notions of fair play in establishing rules of disputing; (3) the beliefs of the relevant actors; (4) existing resource distributions; and (5) intuition based on decades of experience with modern procedural—particularly discovery—rules. No proponent of mandatory arbitration’s alleged fairness has, to my knowledge, made a substantial argument that these factors should be discounted; it thus seems odd to impose an empirical burden of proof on critics of mandatory arbitration to prove its unfairness.

II. AN ANALYTICAL APPROACH TO ASSESSING FAIRNESS ARGUMENTS: FORUM PREFERENCE AND COST

A. *Arbitration and Litigation Preferences As a Function of Cost*

A handful of scholars have argued that claimants with low value cases have no choice but arbitration because they will not find lawyers to represent them in court.³⁸ Otherwise, little attention has been paid to the characteristics of cases that might determine whether a party prefers to arbitrate or litigate. But even without delving deeply into empirical studies, we can mine much more insight from a broad consideration of arbitration versus litigation preference as a function of cost.³⁹ In this section, I examine plaintiffs’ and defendants’ arbitration preferences by looking at both aspects of the costs of disputing: process *and* liability costs. I conclude by arguing that corporate defendants use pre-dispute arbitration clauses in order to reap a cost savings from forcing high-cost/high-stakes claims into arbitration.

1. Defendants’ Arbitration Preference: Robbing Litigation-Preferring Plaintiffs to Pay Arbitration Claimants

There are four possible combinations of the two parties, Plaintiff (P) and Defendant (D), and their preferred forum for resolving their dispute once it has arisen, Arbitration (A) and Litigation (L). (1) P and D both prefer arbitration (PADA); (2) P prefers litigation, but D prefers arbitration (PLDA); (3) P and D both prefer litigation (PLDL); and (4) P prefers arbitration, but D prefers litigation

³⁸ See *supra* note 9; see also Maltby, *supra* note 23, at 30 (“Many people with legitimate claims against their employers never receive justice because they are unable to afford lawyers.”).

³⁹ For this analytical framework, I owe thanks (or apologies) to the work of my colleague, Neil Komesar. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 161–70 (1994).

(PADL).

[Insert Figure 1 here]

Plainly, the enforceability of a pre-dispute agreement makes no difference to categories (1) and (4): in PADA cases, by definition, the parties would agree to submit their dispute to arbitration even after it has arisen. Likewise, in PLDL cases, the parties would be free to waive any pre-dispute arbitration agreement, since those are not enforceable *sua sponte* by a court, and litigate.⁴⁰

PLDA cases are the focal point of mandatory arbitration critics and hence of the mandatory arbitration debate. Virtually every litigated decision over the enforceability of a pre-dispute arbitration agreement, published or not, is a PLDA case.⁴¹ Moreover, these litigated arbitration-clause challenges are likely the tip of an iceberg; since settled case law makes many arbitration clauses legally bulletproof,⁴² it would be unsurprising if numerous litigation-preferring plaintiffs—perhaps a majority—resign themselves to arbitration without challenging the arbitration clause.⁴³

Given that the impetus for mandatory arbitration comes from the defense bar and its clients, it may seem counterintuitive that PADL cases would exist in any significant numbers, or indeed at all. If arbitration is cheaper than litigation, why would defendants ever want to litigate when the plaintiff offers to arbitrate? But Sherwyn and Estreicher assure us that even defendants who employ mandatory arbitration clauses will prefer to litigate low-stakes claims, particularly those for which claimants have been unable to get a lawyer. This

40 The FAA provides only for parties “aggrieved by a failure or refusal of the other to arbitrate” to move to compel arbitration. 9 U.S.C. §§ 3–4 (2006). While no case squarely holds that a court cannot *sua sponte* compel arbitration on two unwilling parties to a pre-dispute agreement, such a rule is implicit in the cases holding that the right to compel arbitration may be waived. *See, e.g.,* *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231–34 (3d Cir. 2008); *Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 428 (D.C. Cir 2008).

41 *See, e.g.,* *South Broward Hosp. Dist. v. Medquist, Inc.*, 258 F. App’x 466 (3d Cir. 2007) (affirming district court’s denial of defendant’s motion to compel arbitration); *Clay v. Permanente Med. Group, Inc.*, 540 F. Supp. 2d 1101 (N.D.Cal. 2007) (granting defendant’s motion to compel arbitration); *2200 M Street LLC v. Mackell*, 940 A.2d 143 (D.C. 2007) (affirming lower court’s denial of defendant’s motion to compel arbitration).

42 *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (recognizing the federal policy towards arbitration and holding that ambiguities in a clause should be resolved in favor of arbitration).

43 Likely the tip of an iceberg, but not certainly so. A bulletproof arbitration agreement may induce litigation-preferring claimants to drop potential claims. It is one of many empirical questions to which we still do not know the answer.

preference reflects a “war-of-attrition” strategy (my term), in which defendants figure that process costs and forum complexity will crush the plaintiff irrespective of the case’s merits.⁴⁴

Yet defendants often prefer to arbitrate—obviously so, since otherwise there would be no mandatory arbitration phenomenon. And the choice by defendants to insert pre-dispute arbitration clauses in their contracts means that, at least theoretically, PADL plaintiffs can hold the unwilling defendant’s “feet to the fire” and require it to arbitrate when it prefers after all to litigate.⁴⁵ In other words, by adopting a mandatory arbitration regime, the defendant trades away its power to pursue a war-of-attrition litigation strategy in its PADL cases for the power to impose arbitration in its PLDA cases. Assuming that defendants’ arbitration/litigation preferences reflect a rational effort to minimize costs, an important empirical inference may immediately be drawn from this behavioral evidence. Namely, defendants who use pre-dispute arbitration clauses believe that their cost-savings from arbitrating PLDA cases exceed their losses from foregoing litigation and arbitrating PADL cases. A mandatory arbitration regime operates as an internal cross-subsidy, in effect robbing PLs to pay PAs.

2. The Costs of Disputing: Process and Liability

Further insights can be generated by taking a closer look at the elements of cost that shape the parties’ preference for arbitration versus litigation.

“Liability cost” is the payout by a defendant to a plaintiff to settle the case or satisfy a judgment or arbitration award.⁴⁶ It includes damages, of course, but also attorneys’ fee awards made part of the judgment under a fee-shifting statute.⁴⁷ When discussing outcome fairness, it makes sense to talk about incurred costs of liability. But when discussing parties’ preferences for arbitration or litigation, the

⁴⁴ See Estreicher, *supra* note 8, at 567; Sherwyn et al., *supra* note 8, at 1579–80; Sherwyn, *supra* note 9, at 32.

⁴⁵ See, e.g., *Kaye v. Macari Bldg. & Design, Inc.*, 967 So. 2d 1112 (Fla. Dist. Ct. App. 2007) (reversing lower court’s denial of plaintiff’s motion to compel arbitration).

⁴⁶ See Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 243.

⁴⁷ While attorneys’ fees can be thought of as a process cost, to the extent that they are incurred throughout the course of the proceedings, an award of attorneys’ fees pursuant to a fee-shifting rule does not affect process costs in any way meaningful to this analysis; instead, the potential of a fee award raises liability stakes.

more pertinent concern is anticipated costs—an assessment of what a plaintiff might win if she succeeds in the dispute process. For clarity and simplicity, I will refer to these as liability *stakes*, meaning the “value” of the case from the plaintiff’s perspective. Such case value is a multiple of the plaintiff’s potential recoverable damages discounted by her probability of winning.

“Process costs” are typically conceived in terms of monetary outlays for items like forum fees, litigation expenses, out-of-pocket attorneys fees, time, and energy devoted by the parties to the dispute resolution process.⁴⁸ But because we are considering forum preferences at the start of a case, the process costs are also prospective. From this vantage point, a more useful way of thinking about process cost is to consider three interlocking aspects of cases that drive these expenses and generate lawyers’ projections of how much a case will cost: complexity of procedure, complexity of factual proof, and inequality of distribution of evidence between the parties. Procedural complexity means the use of procedural steps and devices that require the parties and their attorneys to devote time and effort to the case.⁴⁹ While litigation is more procedurally complex than arbitration in the sense that it offers litigants a broader menu of pre-resolution procedural steps,⁵⁰ not all of those steps are required and not every case lends itself to use of all these devices. A high-process-cost case is one that lends itself to more pre-trial procedural maneuvering.

Process cost is also a function of the complexity of the evidence. Some cases require a more complex presentation of evidence than others. This will of course make the trial or hearing more costly. It will also require more gathering of evidence in the pre-trial/pre-hearing phase. Moreover, evidence distribution between the parties at the outset of the dispute may be an even greater factor in process costs. Where evidence is distributed such that the plaintiff controls all the evidence needed to meet her burden of proof, the cost of pre-trial discovery will be comparatively low. It will be comparatively high where the defendant controls much or most of the necessary

48 See, e.g., Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. DISP. RESOL. 735, 747 (2001).

49 Motions to dismiss or amend pleadings, motions to compel discovery, pre-trial proceedings for preliminary injunctive relief or for class certification, motions for summary judgment and interlocutory appeals are some salient examples. See, e.g., FED. R. CIV. P. 12, 23, 37, 56, 65.

50 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648–49 & n.14 (1985) (noting arbitration’s “informal procedures” and how it does not provide all rights and procedures common to civil trial).

evidence. The more difficult for a plaintiff to obtain and ultimately present evidence to meet the burden of proof, the higher the process cost. A case to recover unpaid wages where the employee is in possession of a set of uncontroverted time records generated by the employer might have low process costs, whereas a wrongful discharge case in which the employer is alleged to have terminated the plaintiff's employment for reasons that are pretextual, may call upon a plaintiff to fight through several bitter discovery disputes to get the evidence necessary to meet her burden of proof.⁵¹

It should be noted that this evidentiary complexity raises process costs *for both sides*. Process costs are to some degree interactive, in that a defendant will incur higher process costs responding to the plaintiff's efforts to obtain and present evidence, and will typically seek to drive up plaintiff's process costs by resisting plaintiff's procurement and presentation of evidence as a defense tactic, driving up its own process costs at the same time.⁵²

For purposes of this analysis, I'll assume that process costs are, on the whole, less in arbitration than litigation.⁵³ This is not necessarily because arbitrations involve less complex cases, but rather because arbitration offers less room for complexity. In particular, limits on discovery (and to a lesser extent on pre-trial motion practice) hold down the actual costs of arbitration relative to litigation.

We can group disputes into four categories as a function of their costs, discussed above: (1) low (process) cost/low (liability) stakes; (2) high-cost/low-stakes; (3) low-cost/high-stakes; (4) high-cost/high-stakes. These cost combinations allow us to make the following generalizations about parties' arbitration versus litigation preferences, based on plausible hypotheses and observed behavior:

[Insert Figure 2 here]

A plaintiff with high process costs—who will have difficult

⁵¹ See G. Charles Douglas, II & William C. Martucci, *Discovery*, in A.B.A. SECTION OF LITIGATION, EMPLOYMENT LITIGATION HANDBOOK 54–56 (Jon W. Green & John W. Robinson, IV eds. 1998) (detailing needed discovery); *id.* at 60–61 (“Typically, employers will refuse to supply many of the documents or answers to interrogatories that you have requested. . . . [I]t is absolutely essential that plaintiff's counsel file the appropriate motion to compel.”).

⁵² See Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes*, 82 ST. JOHN'S L. REV. 893, 912 (2008) (discussing the motivations defendants have for resisting discovery).

⁵³ To be sure, comparing arbitration and litigation costs can be complicated by a number of factors, and I suspect that the cost savings in arbitration are often exaggerated. See *infra*, Part III.D.2.

hurdles to overcome in obtaining and presenting evidence—would be expected to prefer litigation as the forum that offers superior access to obtaining information from adverse and third parties. But this assumes that the plaintiff has counsel to navigate the complex process, and a relatively high potential recovery that would justify a plaintiff's attorney taking on those costs. Where process costs are high but potential recovery low, we have a classic case where the plaintiff is unlikely to obtain counsel. (Again, for this analysis, I include any potential attorneys fee award as part of the potential recovery.) Here a pro se plaintiff—assuming he pursues the case at all—might well prefer the simpler procedures of arbitration, even though those will likely afford limited access to needed evidence. At the same time, the Estreicher-Sherwyn thesis maintains that strategically-behaving defendants adopt preferences that are the mirror image of the plaintiffs': in order to take advantage of a pro se plaintiff's difficulties in navigating formal litigation, they will prefer it in high-cost/low-stakes cases. But they will prefer arbitration in high-cost/high-stakes cases to restrain a represented plaintiff's ability to build her case through discovery.⁵⁴ Hence, the supposition of PADL cases in box 2 and PLDA cases in box 4.⁵⁵

⁵⁴ Estreicher, *supra* note 8, at 567–68; Sherwyn et al., *supra* note 8, at 1578–81; Sherwyn, *supra* note 9, at 32.

⁵⁵ What about those “nuisance suits” we hear so much about? Nuisance suits are quintessential high-cost/low-stakes cases: cases whose negligible legal merit means that liability stakes approach zero, but sufficiently high process costs that a crafty plaintiff's lawyer can gain a windfall by bargaining for a share of the process cost that defendant will save by settling the case. See Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 53 n.26 (2004) (describing a strike suit, a suit where “a plaintiff brings a claim without merit to extract a settlement”). One would think that by litigating such claims a defendant raises the potential process costs and therefore the plaintiff's counsel's “nuisance value” bargaining range; defendants should welcome arbitration to keep the process costs down. Yet Sherwyn and Estreicher tell us that defendants prefer to litigate low-stakes claims. For their thesis to hold, we would have to suppose that defendants deter the majority of such cases by making a practice of refusing nuisance value settlement offers, and litigating to summary judgment. This in effect “calls the plaintiff's bluff,” because a low-stakes plaintiff cannot afford to litigate that far into the case. If the Estreicher-Sherwyn thesis is correct, that would tell us that the “nuisance value” phenomenon is greatly exaggerated—because defendants tend to refuse to make nuisance value settlements. Yet, strangely, Sherwyn argues that mandatory arbitration is a socially valuable practice because it discourages nuisance suits. See Sherwyn et al., *supra* note 36, at 140 n.377. Part of the problem may be muddled thinking by tort reformers, who use the term “nuisance suits” to mean not very low-stakes cases, but rather cases that a defendant views as meritless (perhaps even with some justification) but that in fact carry a small though non-negligible chance of a high recovery. See, e.g., Note,

Where both process and liability costs are low (box 1), plaintiffs are likely to prefer arbitration. If they are unrepresented, because the low stakes induce lawyers to decline the case, the plaintiffs can be expected to prefer the relative simplicity of an arbitration process, though some low-stakes cases may be worthwhile for a plaintiff's lawyer to undertake if they could be resolved in a quick, low-cost arbitration. The Estreicher-Sherwyn thesis suggests that defendants would prefer to litigate, in the hope of driving the plaintiff's process cost up sufficiently to deter them from going forward.⁵⁶ I think they may be mistaken, and that rational employers might well agree to arbitrate low-cost, low-stakes cases. Acknowledging both defendant motivations, I put PADA cases in box 1, with PADL in parentheses.

The defendant's war-of-attrition strategy does not pertain to box 4 (high-cost/high-stakes) cases, at least not in the world of mandatory arbitration clauses. If defendants preferred to slug out high-cost/high-stakes cases in court, then box 4 would consist of PLDL cases, and there would be no reason for a defendant to impose mandatory arbitration clauses at all. Indeed, to the extent that some defendants decline to embrace a mandatory arbitration regime, it is probably because they prefer to litigate high-cost/high-stakes cases. For those that do use mandatory arbitration clauses, it is plausible to suppose that most PLDA cases consist of this high-cost/high-stakes category.

What about box 3? A premise of this discussion has been that the process costs anticipated in pursuing a case are increasingly expensive in litigation relative to arbitration as case complexity increases, in the relation described in Figure 3.

[insert figure 3 here]

The cost curves are purely notional. Though not intended as accurate estimates of the shapes of the two curves, they illustrate this basic relationship: while increasing case complexity will raise process costs in both arbitration and litigation, the costs of litigation rise at a faster rate. Put another way, the more complex a given case, the more the cost of litigating that case will exceed the cost of arbitrating it.

If this description of relative process costs of arbitration and

Controlling Jury Damage Awards in Private Antitrust Suits, 81 Mich. L. Rev. 693, 702–03 (1983) (arguing for better control of jury awards, in part, because of meritless but potentially high-stakes “nuisance” claims). The settlement is therefore rationally based, not on a division of unspent process cost, but rather as an insurance payment against the low probability of a large judgment.

⁵⁶ See *supra* note 44.

litigation is reasonably accurate, then it is difficult to understand why any defendants would want to litigate low-cost/high-stakes cases. High stakes will keep the plaintiff in the game, even if the defendant tried to raise process costs through a litigation war-of-attrition defense strategy. Even if the defendant were to succeed in substantially raising what could have been low costs, that would merely transform a low-cost/high-stakes case into a high-cost/high-stakes case. But if my argument is correct, a rational defendant with any taste for arbitration would prefer to arbitrate high-cost/high-stakes cases. Moreover, in a low-cost/high-stakes case, the proof should be straightforward enough that the opportunity to raise process costs in litigation beyond what they would be in arbitration might not be so great in any event. Therefore, we would *not* expect to find PADL or PLDL cases in box 3.

With a relatively small variation in process advantage between arbitration and litigation in low-cost/high-stakes cases, the only basis for the plaintiff to prefer litigation would be a belief that arbitration suppresses liability stakes in her case. But since that pro-defendant bias in arbitration is the unanswered question before us (and since I'm assuming a rational and well-informed plaintiff, who would not "mistakenly" believe that arbitration lowers her potential recovery), I am not positing that effect for the present discussion.⁵⁷ PLDA cases are included in figure 2, box 3 in parentheses, to reflect this qualification. Since defendants would prefer to litigate low-cost/high-stakes cases (thus eliminating PADL and PLDL cases), box 3 would consist of PADA cases.

Note that there are no PLDL cases in Figure 2. The only basis for PLDL cases is either an instance where the parties disagree in their assessment of the stakes (an information disparity that I have assumed away for this discussion), or where the defendant dislikes arbitration across the board—in which case we would not expect it to employ pre-dispute arbitration clauses.

⁵⁷ Adjudicator bias arguments might assert, for example, that arbitrators are on the whole more "jaded" about damage claims than juries, which would tilt the arbitration forum toward defendants. Other institutional factors may create a pro-defendant bias in arbitration, stemming primarily from the fact that it is the defendants who "purchase" mandatory arbitration by writing mandatory arbitration clauses; it is possible that arbitration vendors need to skew the process in order to sell their services to defendants. A "repeat player" effect has also been posited by researchers. *See infra* Part III.D.1.

3. The Heart of the Matter: PLDA Cases Are High-Cost/High-Stakes

The analyses to this point yields the following:

[Insert figure 4 here]

Only in boxes 2 and 3 do the parties conflict over forum preference. Since the defendant determines whether or not to impose a pre-dispute arbitration clause, and since Box 3 cases are those that the defendant prefers to litigate, we can see that Box 2, which consists of high-cost/high-stakes cases, drives a defendant's adoption of a mandatory arbitration regime. Defendants adopting mandatory arbitration willingly forego the cost savings they could realize by deterring claims through a war-of-attrition strategy—box 3, PADL cases—with the design of realizing a greater cost savings by arbitrating high-cost/high-stakes cases. Defendants who opt for mandatory arbitration wish to rob PL to pay PA; that is, they are willing to devote additional resources to resolve disputes against arbitration preferring low-stakes plaintiffs in order to suppress resources devoted to resolving cases against plaintiffs who prefer to litigate. As developed below, the egalitarian argument essentially tries to turn this resource allocation preference of defendants into a broad, fairness-based social policy argument: that it is fairer *to plaintiffs* to rob PL to pay PA.⁵⁸

Low-cost/low-stakes cases (divided between boxes 1 and 3) have no impact on a defendant's preference for mandatory arbitration. A defendant may prefer to deter these cases with a war of attrition strategy (a litigation preference), or to resolve them quickly and quietly through arbitration, but either way, since the plaintiff also prefers arbitration, no mandatory arbitration clause is needed to get these plaintiffs into the arbitral forum. Low-cost/high-stakes cases likewise have no impact on a defendant's preference for mandatory arbitration, so long as we assume an absence of adjudicator bias. The parties are likely to share a preference for arbitration since—so we assume for the present—it affords the same liability outcome at lower cost.⁵⁹

In sum, in a world of non-biased arbitration, defendants would choose mandatory arbitration in order to force high-cost/high-stakes

⁵⁸ See *infra* Part IV.B.

⁵⁹ Defendants may also have a process advantage in arbitration based on the idea that plaintiffs need the discovery procedures offered in litigation to develop their cases in a way that maximizes their value. But by definition, this element is not a factor creating a preference for arbitration in low process-cost cases. See *supra* notes 48–50 and accompanying text (discussing costs of procedural complexity).

cases out of the litigation system. Moreover, they would anticipate that their disputing cost savings realized from arbitrating rather than litigating such cases will exceed whatever extra disputing costs they incur by arbitrating rather than litigating high-cost/low-stakes cases.

The foregoing analytical framework provides significant guidance for how empirical research on the fairness of arbitration should be focused. Primarily, two types of questions should be answered. First, how many cases are there in each of the three relevant categories (PADA, PADL, and PLDA)? Second, and more pointedly, how do defendants save money by forcing arbitration in PLDA/high-cost/high-stakes cases? Is it purely a process cost savings, or are they able to suppress their liability costs as well?

B. Characteristics of High-cost/High-stakes (PLDA) Cases: A Closer Look

My distinction between high- and low-cost cases is an idealization and a simplification. The process cost of a set of cases will reflect a continuum rather than two distinct categories. Moreover, the accrual of process costs in pursuing a case is dynamic. A case that appears low-cost at the outset may become high-cost depending on the procedural steps taken by the parties, and the decisions made by the judge or jury. Conversely, cases that are high-cost in contemplation may prove low-cost if settled at an early stage.⁶⁰ Still, there are broad generalizations that can be made about process cost that shed light on a case's prospects in arbitration and litigation. To simplify matters, I will separate process costs into (1) discovery/proof and (2) appeal.

1. Discovery and Proof

Broad, formulaic references to the limited availability of discovery in arbitration⁶¹ fail to capture the potential impact on plaintiffs of forcing high-cost/high-stakes cases from litigation into arbitration. Consider the realities of litigated and arbitrated disputes. Higher stakes employment cases typically involve claims of wrongful termination or sexual harassment, in which the employer is likely to offer elaborate justifications. The plaintiff has an informed suspicion that he or she was fired without cause or because of race, sex or age.

⁶⁰ See *infra* Part III.D.2.

⁶¹ See, e.g., Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 40 & n.186; Sherwyn, *supra* note 9, at 26; see also AM. ARBITRATION ASS'N, EMPLOYMENT DUE PROCESS PROTOCOL § B.3 (1995) [hereinafter DUE PROCESS PROTOCOL], available at <http://www.adr.org/sp.asp?id=28535> (providing for "Access to Information").

The employer responds that the employee was a substandard performer or was selected for dismissal in a complex reorganization. To prevail, the plaintiff has to penetrate the employer's plausible cover story, to demonstrate that it is a pretext.⁶² The plaintiff often has to show that the true motivations of the employer are irrational or discriminatory. Even sexual harassment cases usually transcend the archetypal "he said/she said" dispute and require elaborate corroboration, evidence of how other harassment complainants were treated, and detailed examination of the effectiveness of the company's internal complaint procedures.⁶³ Employment cases usually require analysis of how similarly situated employees were treated or painstaking compilations of circumstantial evidence of what relevant employees knew or intended, not to mention winding paper trails that may give the lie to subjective job performance reviews or that may reveal a departmental "reorganization" to be a shell game intended to squeeze out the plaintiff employee.⁶⁴ The employer typically has sole control of the overwhelming majority of evidence required to sustain the plaintiff's burden of proof, in the form of documents and the testimony of current employees.

The fact that arbitration law empowers the arbitrator to

⁶² The structure requiring a plaintiff to prove the employer's story is a pretext applies in both statutory discrimination and common law wrongful discharge claims (the latter assuming that the employment-at-will presumption has been overcome). *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153–54 (2000) (dealing with statutory employment claims); *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 927–28 (Cal. Ct. App. 1981) (dealing with common law wrongful discharge). The plaintiff normally carries the burden of persuasion to prove that the employer's offered rationale is false. *Reeves*, 530 U.S. at 153–54. Even where the employer carries the burden of persuasion, *see, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003), persuasive stories of poor performance or corporate reorganization are easy to gin up and complicated to refute.

⁶³ *See* 1 ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE* 267–68 (2d ed. 1994) (suggesting that, while not technically necessary, evidence corroborating the plaintiff and evidence of harassment of other employees is important to bolster plaintiff's case); 52 AM. JUR. PROOF OF FACTS 3d § 11, at 301 (2008); *Faragher v. City of Boca Raton*, 524 U.S. 775, 803–08 (1998) (creating affirmative defense to sexual harassment based on adequacy of internal remedies and plaintiff's unreasonable failure to use them); *see also, e.g.*, *Mills v. Brown & Wood, Inc.*, 940 F. Supp. 903, 910 (E.D.N.C. 1996) (granting defendant's motion for summary judgment on Title VII sexual harassment claim on grounds that plaintiff "offered no evidence that the co-managers . . . knew, or should have known, of [the harassing] behavior" nor any evidence that the company's internal procedures for addressing claims of sexual harassment were inadequate).

⁶⁴ *See, e.g.*, *Harper v. ULTA Salon Cosmetics & Fragrance, Inc.*, No. 1105-CV-1285-TWT, 2007 WL 528088, at *11–12, 16–17 (N.D.Ga. Feb. 13, 2007).

subpoena witnesses and documents, and that some employment arbitration rules allow the parties to take one or two depositions and submit a request for production of documents,⁶⁵ can fall far short of what a claimant needs to meet her burden of proof. The problem is twofold. First, plaintiffs typically have scant knowledge of “where the bodies are buried,” and have limited information on what witnesses and documents supply the needed information. Second, witnesses frequently fail to tell the whole truth even under oath. Current employees, motivated by company loyalty or fear of reprisal, may lie outright; short of perjury, they often tell half-truths, shade or distort the truth, or suffer (sometimes opportunistic) memory lapses.⁶⁶ Even witnesses acting in good faith may engage in some of these behaviors. Attorneys responding to discovery requests as a matter of habit tend to construe the other side’s questions narrowly and to refrain from volunteering helpful information, and they instruct their witnesses to do the same.⁶⁷

Breaking through witnesses’ untruths, half-truths and omissions usually requires having access to their prior statements (documents or the testimony of other witnesses) and perhaps detailed advance notice of their testimony (depositions). While it may be possible on occasion, to expose a lie with a skillful improvisation during cross-examination, most frequently an effective cross-examination requires poring over deposition testimony to find subtle gaps and inconsistencies. A cover story can hold up quite well in front of an examiner hearing it for the first time. Thus, discovery limitations impose serious limits on the ability to prepare effective cross-examinations, and put the lawyer in the position of having to “wing it.” The effectiveness of the questioning is likely to be diminished, either because it is underinclusive or rambling. These problems work against claimants who have the burden of proof or the need to penetrate superficially persuasive cover stories.

In this setting, it can be essential to have a process that allows not only the casting of a wide net of inquiry, but also a progressive, sequenced investigation in which leads can be pursued to reveal

65 See, e.g., DUE PROCESS PROTOCOL, *supra* note 61, § C.5.

66 See Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 788 (1997) (“[T]he chances of current employees of an organization cooperating with opposing counsel, even in depositions, to reveal the truth of what happened are slim . . .”).

67 See Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 828–30 (“[I]t would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency and effectiveness . . . of civil discovery.”).

further leads. Arbitration's discovery limitations constrict the ability to conduct such an investigation. In theory, an arbitrator could adjourn a hearing to allow a claimant to follow up on new leads that crop up during a witness's testimony; but it is difficult to believe that, in practice, defendants would continue to patronize a dispute resolution service that conducted proceedings like a rolling investigative commission.

Many mandatory arbitration supporters trivialize a plaintiff's need for discovery by implicitly assuming that all cases are low-cost cases.⁶⁸ That vision of low-cost cases seems based on an idealized scenario, in which both parties have equal access to all of the evidence the plaintiff needs to meet her burden of production, and they simply disagree over what happened. The plaintiff says "the light was red," the defendant says "the light was green," and the plaintiff wins if she is just a tiny bit more believable than the defendant (meeting the civil "preponderance" burden of persuasion of just over 50-50 probability). The only disadvantage to arbitrating such cases, from the plaintiff's point of view, is if juries grant bigger awards than arbitrators. The discovery process, in this scenario, is simply a wasteful set of procedures that affect the outcome of the case only as a transaction cost that can be used to leverage some nuisance value in settlement.

Only slightly less naive is the view that discovery, while making some difference, bears a linear relationship to plaintiff recoveries: that the value of plaintiff's claim (in a meritorious case) increases in direct proportion to expenditure on discovery, as illustrated in Figure 5.

[insert figure 5 here]

The dotted line represents the naive, linear view of the relationship between costs and discovery: any meritorious claim will be recognized by a positive award in arbitration, irrespective of discovery limitations. Mandatory arbitration supporters like to

⁶⁸ See, e.g., Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 799-803 (2003) (suggesting that low attorneys fees and costs in arbitration are a benefit to claimants without considering impact of foregone discovery on plaintiff's recoveries); Sherwyn et. al, *supra* note 8, at 1575 (arguing that lack of discovery benefits claimants because it reduces the papers to which the claimant must respond); Sherwyn, *supra* note 9, at 26 ("[L]imiting discovery significantly reduces costs to all parties. . . . [This] should theoretically increase access to adjudication."); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (dismissing argument that arbitration's limited discovery would prejudice plaintiff's age discrimination claim).

insinuate that discovery proceedings are socially wasteful: the slightly higher recoveries that may perhaps result are not worth the significant extra cost to get there.⁶⁹ (I reflect this idea by giving the dotted cost line only a slight upward incline.) The maximum recoveries are the point at which the curve intersects the second vertical line, reflecting a point of diminishing returns, beyond which further discovery proceedings cease to add value to the case.

In most high-cost cases, however, this linear relationship does not hold. The plaintiff needs extensive discovery to obtain evidence sufficient to meet her burden of production and thereby avert dismissal on summary judgment. In other words, until the plaintiff has enough evidence to cross the burden of production/summary judgment “threshold” (the first vertical line), she stands to recover zero. This threshold relationship between discovery cost and liability stakes is illustrated by the dashed line; I hypothesize that in typical high-cost cases, the value of the case increases sharply once that threshold is crossed.

Figure 5 illustrates what may well be the central concern about the fairness of arbitration. Claimants with meritorious high-cost/high-stakes cases may wind up with nothing because the discovery limitations of arbitration may prevent them from meeting their burden of production. Whether or not the arbitration process allows for pre-hearing motions, a plaintiff with insufficient evidence will still lose at an evidentiary hearing.⁷⁰ In fairness terms, even if mandatory arbitration gives up “Cadillacs for the few” in return for “Saturns for the many,” that would only be true *on average*. Many high-cost/high-stakes claimants may find that they have traded their Cadillac for nothing.

This impact on high-cost/high stakes-cases is a significant test of arbitration fairness, but it is likely obscured by data sets that include low-cost and low-stakes cases. Extreme differences in arbitration-

⁶⁹ See, e.g., Estreicher, *supra* note 8, at 563 (“[T]he sheer costs of defending a litigation and the risks of a jury trial create considerable settlement value irrespective of the substantive merits of the underlying claim.”); Sherwyn, *supra* note 9, at 21 (stating that the litigation system allows employees to “Extort employers with high litigation costs”).

⁷⁰ AAA rules allow for dispositive pre-hearing motions. See AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, R.27 (2006) [hereinafter EMPLOYMENT ARBITRATION RULES], available at <http://www.adr.org/sp.asp?id=32904> (“The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.”).

litigation win rates for high-cost/high-stakes cases can be masked by relatively good arbitration results in low-cost/high-stakes and low-cost/low-stakes cases. To illustrate this possibility, imagine a hypothetical set of fifteen pairs of identical cases resolved, respectively, in litigation and arbitration. Of the fifteen hypothesized disputes, five are high-cost/high-stakes; three are low-cost/high-stakes, and the rest are low-stakes cases. Twenty percent of the cases are arbitrated but not litigated, to reflect the purportedly superior access of arbitration.

TABLE 1: HYPOTHETICAL DISTRIBUTION OF ARBITRATION AND LITIGATION RESULTS

[insert table 1 here]

When the totals are tabulated as normally done in results studies, with “zero awards” (that is, plaintiff losses) omitted, the results look reasonably comparable. Mean awards are higher in litigation, but proponents would easily explain this away by a vague reference to extreme outlier jury awards that skew the sample.⁷¹ The medians look reasonably close, and the win rates are not dramatically different. But if one focuses on high-cost/high-stakes claims and includes “zero awards,” the results are dramatically different. The plaintiff win rate is three times as high in litigation—in forty percent of the cases, the claimant loses in arbitration when he should have won, and the differences in the average awards are much more pronounced.

TABLE 1A: RECALCULATION OF HIGH-COST/HIGH-STAKES OUTCOMES INCLUDING ZERO DOLLAR AWARDS

[insert table 1a here]

These made-up figures are not designed to portray reality of course, but to show the kind and direction of error that can occur when high-cost/high-stakes cases are *not* made the focal point of the analysis. In the hypothetical sample, the employee win rate in arbitration for high-cost cases is 14.3% (one out of seven), to reflect the hypothesis I advance here—namely, that arbitration harms plaintiffs with high-cost cases, that is, who need extensive discovery to prove their claims. *If* that is true, it is plausible that the effect could be obscured by the inclusion of low-cost cases in the sample.

⁷¹ See, e.g., Delikat & Kleiner, *supra* note 29, at 9–10; Sherwyn et al., *supra* note 8, at 1576.

In sum, the limitations on discovery may well be the biggest single factor, possibly exceeding—perhaps even greatly exceeding—the behavioral/perceptual differentials between jurors and arbitrators variously labeled as “arbitrator bias” or “runaway juries.” It is certainly possible that this “discovery gap” between arbitration and litigation could be narrowed or even closed by providing more expansively for discovery in arbitration.⁷² That, of course, would also narrow or eliminate the process cost savings in arbitration, and likely also the liability cost savings that, as I hypothesize, results from the plaintiff’s discovery process disadvantage in arbitration. Since one or both of these effects probably accounts for most (if not all) of the economic motivation for mandatory arbitration, however, it does not seem like a sustainable practice.⁷³

2. Appeals

Discovery aside, the other significant component of process cost—in both time and money—is appeals.⁷⁴ Not surprisingly, one of the main hallmarks of arbitration, along with restricted discovery, is severely limited appeals. Arbitration’s “final and binding” quality is buttressed by rules that limit the grounds for appeal and restrict the scope of appellate review to a deferential standard.⁷⁵

To the extent that arbitration is faster and cheaper than

⁷² In individual cases, some arbitrators may already be making it their practice to allow discovery in an extent that matches what would be available in litigation. *See, e.g.,* Am. Arbitration Ass’n, ADR Perspectives Profile: Albert Bates, Jr., <http://www.adr.org/sp.asp?id=35047> (last visited Nov. 8, 2008) (noting the growing perception that “arbitration continues to become more and more like litigation”).

⁷³ Significantly, AAA has resisted setting specific minimum standards for discovery in its rules. *See* DUE PROCESS PROTOCOL, *supra* note 61, § B.3 (“Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims.”); EMPLOYMENT ARBITRATION RULES, *supra* note 70, at R.9 (“The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”).

⁷⁴ Jury verdicts, it should be noted, are subject to two levels of appeal. Often overlooked are post-trial motions for judgment notwithstanding the verdict and for new trial. These are in form and function appeals to the trial judge from the jury’s verdict. *See* FED. R. CIV. P. 50.

⁷⁵ *See* Federal Arbitration Act, 9 U.S.C. §§ 9–10 (2006). *See generally* Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 235–38 (2007) (explaining the deferential judicial review of arbitration decisions under a “manifest disregard of the law” standard).

litigation, the restrictions on appeal are undoubtedly a significant factor, but one that is all too easily exaggerated. Parties to litigated civil suits rarely file an appeal at all—the appeal rate in federal civil cases appears to be on the order of one appeal for every 14 district court cases filed.⁷⁶ At the same time, arbitration is not appeal-free.⁷⁷ Yet another unanswered empirical question about mandatory arbitration is the comparative impact of appeals on the process costs and outcomes of arbitrated and litigated cases.

Is the superior availability of appeal a reason for plaintiffs to prefer litigation or to find arbitration less fair? According to Clermont and Eisenberg, the appellate system strongly favors employers.⁷⁸ Indeed, this suggests that reported trial results may overstate plaintiff success levels, at least to the extent that appeals tend to undo plaintiff successes. It is certainly a factor that must be accounted for.

Another factor that may be difficult to assess empirically, however, is a possible deterrent effect that the lack of appeal may have on arbitration. Mandatory arbitration supporters often suggest that the prospect of a “runaway jury” has an *in terrorem* effect on

⁷⁶ Compare ANALYTICAL SERVS. OFFICE, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.2.3 (2007) (“Appeals Filed by Type of Appeal and Originating Agency”), with *id.* tbl.4.4 (“[District Court] Civil Cases Filed by Nature of Suit”). In 2007, there were 14,769 civil appeals filed in the U.S. court of appeals. *Id.* tbl.2.3. This number represents a 20% decline since 2000. See *id.* By contrast, the number of civil cases filed in district courts, which has remained fairly steady, averaged about 203,000 from 2003 to 2007. See *id.* tbl.4.4. I compare the 2007 appeal total, which seems to represent a trend, with the five-year average of district court cases to reflect the fact that appeal filings may be taken from cases filed over a number of years. (I’ve excluded prisoner petitions from these totals, since such cases are appealed at about four times the rate of other civil cases.) 14,769 appeals out of 203,000 cases comes to roughly 1 in 13.7, or an appeal rate of 7.3%. See generally Robert Wilson, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test*, 18 GEO. MASON U. CIV. RTS. L.J. 389, 403 (2008) (stating that rates of appeal are lower in civil cases than criminal cases, in part because of the cost); Ignazio J. Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 218 (2005) (“Because appeals are expensive, factoring the wasting effect of continued litigation into one’s net recovery expectation leads many litigants to see the economic benefit of settlement.”).

⁷⁷ See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003) (vacating and remanding arbitration award); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 215–18 (2007) (describing enforceability of judicial review provided by arbitration clause); Drahozal, *supra* note 75, at 235–38 (describing judicial review of arbitration awards for “manifest disregard of the law”).

⁷⁸ See Clermont & Eisenberg, *supra* note 37, at 958.

defendants embarking on the litigation process, softening them up for over-generous settlements.⁷⁹ Yet no one seems willing to acknowledge the possibility of an *in terrorem* effect on claimants who fear a “runaway arbitrator.” Multi-judge panels and appellate review probably have a moderating influence on the arbitrary exercise of power by single adjudicators, but contemporary mandatory arbitration offers neither.⁸⁰ Do claimants decide not to pursue arbitration out of fear that they will be assessed with a largely unreviewable award in the defendant’s favor—either on a meritless counterclaim or a bill for fees and costs?⁸¹ While this question is purely speculative, one can hypothesize that the relevant *in terrorem* effect may not be symmetrical: defendants are less likely to feel pain from a single extreme arbitration award, and the much larger award needed to make them feel comparable pain may be more likely to capture the attention of appellate courts.⁸² The question is worth empirical attention.

III. AN EMPIRICAL DEAD END? THE (PERHAPS INSURMOUNTABLE) DIFFICULTIES OF OUTCOMES ANALYSIS

Ten years of empirical research into the fairness of mandatory arbitration has produced only a handful of empirical studies, and these have told us very little. The studies, which compare win rates and average monetary awards in arbitration hearings and trials, are fraught with problems and objections: small data sets, an over-reliance on data from AAA arbitrations, and skewed samples. Also, they deal almost exclusively with employment and not consumer cases, which may be significantly different. Finally, it is far from clear that any researcher will be able to design a study that will overcome

⁷⁹ See, e.g., Estreicher, *supra* note 8, at 568 (noting that offering arbitration removes the threatening possibility of a jury trial).

⁸⁰ In employment and franchise cases, mandatory arbitration has moved away from the commercial arbitration tradition of three-arbitrator panels due to the great expense. See AMERICAN ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES, R.15 (1997), available at <http://www.adr.org/sp.asp?id=22440> (allowing the AAA to appoint three arbitrators); EMPLOYMENT ARBITRATION RULES, *supra* note 70, at R.12(a) (providing for single arbitrator as a default rule).

⁸¹ I have personally decided not to pursue a couple of small consumer claims out of an anxiety that an arbitrator could assess me with fees and costs in amounts far in excess of my claim.

⁸² For example, the \$26 million arbitration award against Green Tree Financial went all the way to the U.S. Supreme Court, though admittedly the terms of the remand may in the end have provided cold comfort to the defendant. See *Green Tree*, 539 U.S. at 454 (remanding to the arbitrator to determine the contract terms).

the fundamental problem in comparing arbitrated and litigated “outcomes” in this way: cases that wind up going to trial and to arbitration may systematically differ from each other and even from the overall mix of claims filed and resolved through their respective (litigation and arbitration) systems.

It is truly surprising that some scholars—even while acknowledging these problems—nevertheless draw fairly robust conclusions from this indeterminate body of research. Sherwyn, Estreicher, and Heise, for example, correctly acknowledge that

[NNP]one can never be sure if the reason for a disparity in [arbitration and litigation] outcomes, if any, involves the adjudication system or some other factor, such as the strength of the case, or perhaps a selection factor determining which cases go to court and which cases end up in arbitration.⁸³

Yet these authors go on to assert what it “seems clear from the results of these studies is that the assertions of many arbitration critics [about unfair arbitration outcomes] were either overstated or simply wrong.”⁸⁴

In this section, I will first outline the challenges to any meaningful study of comparative litigation and arbitration results, challenges that may well be insurmountable. I will then, by way of example, carefully examine the most respected empirical study that claims to demonstrate the fairness of mandatory arbitration—and show that it is fatally flawed or actually tends to support the opposite conclusion. I conclude the section with a brief summary of the current state, and limits, of empirical knowledge of the arbitration system.

A. *The Difficulty of Collecting Data and Defining the Universe*

Any empirical comparison of arbitration and litigation outcomes faces truly daunting obstacles. We do not even know how widespread pre-dispute arbitration agreements really are. In his excellent review of current empirical research on employment arbitration, Professor Colvin points out how the lack of centralized data collection limits our knowledge to extrapolations and estimates.⁸⁵ Colvin estimates “a

⁸³ Sherwyn et al., *supra* note 8, at 1565. A finding of no disparity is suspect for the same reason.

⁸⁴ *Id.* at 1567; *see also id.* at 1578 (“Still, despite the flaws, there are some conclusions about which we can be confident regarding the ‘fairness’ of arbitration. First, there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true.”).

⁸⁵ Colvin, *supra* note 21, at 408.

range of 15 to 25 percent of employers having adopted [pre-dispute] employment arbitration.”⁸⁶ A cleverly-conceived study of pre-dispute consumer arbitration estimated that an average consumer in Los Angeles has pre-dispute arbitration clauses covering about one-third of his transactions.⁸⁷ But Los Angeles may be atypical.⁸⁸

Data is hard to come by. There is no general system of public collection of private arbitration awards as there is to some extent with court judgments. Historically, a selling point of private arbitration has been that awards are not a matter of public record, and arbitration vendors have in the past asserted that case information was confidential.⁸⁹ Until recently, there was no public law anywhere in the country requiring data collection and disclosure by arbitration vendors.⁹⁰

Virtually all the existing attempts at empirical study rely on data sets from one of two sources: the AAA or the securities exchanges (NYSE and NASD). These data sets have been relatively small—

⁸⁶ *Id.* at 411. Colvin reaches this estimate by extrapolating from a patchwork of empirical studies, each of which has limited data from sets that might overrepresent the extent of arbitration agreements. *Id.*

⁸⁷ Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004).

⁸⁸ In the analogous (perhaps!) context of employment arbitration, Colvin has found that companies are influenced to adopt pre-dispute arbitration clauses “where there were higher levels of employment litigation activity, for example in California in the early 1990s.” Colvin, *supra* note 21, at 411–12.

⁸⁹ See, e.g., Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp. v. United States*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION 169, 169 (Todd Weiler ed., 2005) (calling arbitration not only “private between the parties but . . . absolutely confidential”).

⁹⁰ California requires “any private arbitration company that administers or is otherwise involved in[] a consumer arbitration” to publish quarterly data in a computer-searchable format. CAL. CIV. PROC. CODE § 1281.96 (West 2004). The term “consumer” is defined to include employees. See ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, Standard 2(e)(4) (Cal. Judicial Council 2007), *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators.pdf. The required information includes: (1) the name of the “nonconsumer” corporate party; (2) the type of dispute involved; (3) who prevailed; (4) how often the nonconsumer party has previously arbitrated; (5) whether the consumer party was represented by an attorney; (6) the dates of arbitration demand, appointment of the arbitrator and disposition; (7) the type of disposition; (8) the amount of the claim and the amount and type of relief granted; and (9) the name of the arbitrator, the total fee, and its allocation between the parties. Unfortunately, the statute does not require that any information be provided about the legal claims or facts involved beyond a broad label. CAL. CIV. PROC. CODE § 1281.96 (West 2004).

always ending up with fewer than 300 cases after some significant proportion of cases were discarded due to missing information⁹¹—and pose selection bias problems. For example, securities industry employment arbitrations present a particular class of employees that may not be representative of employees generally.

The AAA represents the first refuge of a frustrated arbitration empiricist, and this raises potential reliability problems. As the largest arbitration vendor,⁹² and the one that has apparently been most responsive to requests for data, AAA is a tempting proxy for the world of arbitration in general. But a good empiricist should (and some do⁹³) raise questions about whether data from AAA arbitrations can be generalized to non-AAA arbitrations. The National Arbitration Forum (NAF) has come under heated criticism from consumer watchdog groups for creating a systematically biased arbitration forum for banking and consumer credit interests.⁹⁴ If we are to take seriously AAA's own marketing of its reputation for fairness and integrity—with its much-touted Due Process Protocols for consumer and employment cases—then we should expect employees and consumers to fare better in AAA arbitrations than others. Therefore, studies relying on AAA data may well overstate the case for how well employees and consumers do in arbitration in general. To know that for sure would require answering several empirical questions, about which very little is currently known. Are AAA results different from other arbitration vendors' results in a statistically significant way? How many arbitration agreements and arbitrations are covered outside the ambit of AAA? And how many

91 Lisa Bingham, in her well-known study of a “repeat player” effect in arbitration, discarded 55 out of 330 cases (16%) due to missing information, because the case settled before an award, or because the case was not an employment dispute. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 206 (1997). Eisenberg and Hill discarded 36 out of 297 (12%) for similar reasons; for reasons not fully explained, they also discarded 59 cases at random from their original data set of 356 cases. See Eisenberg & Hill, *supra* note 8, at 46, 48 tbl.1. As to the cases discarded for missing data, it would be good to know whether or not they may have particular characteristics—might they have been disproportionately employer wins, for instance—and in a large enough number to skew the sample.

92 See AM. ARBITRATION ASS'N, *supra* note 23, at 4 (“The AAA is and will continue to be the largest provider of ADR services.”).

93 See, e.g., Eisenberg & Hill, *supra* note 8, at 45 (“We also emphasize that our arbitration data came from a single organization, the AAA. If the AAA's practices and procedures are not followed in employment arbitration, our results should not necessarily be expected to be replicated.”).

94 See PUB. CITIZEN, *supra* note 31.

arbitrations are conducted by freelance arbitrators without being administered by any established arbitration vendor? In the employment setting, we can very roughly estimate that AAA handles only about a third of the nation's arbitration business; and I know of no basis on which to estimate AAA's share of consumer and franchise arbitrations.⁹⁵

B. *The Problem of Sampling Error*

Studies comparing the fairness of arbitration vis-à-vis litigation have used either or both of two tests: claimants' win percentages and average (both mean and median) awards. Both tests have problems. Fundamentally, both are benchmarks that are not meaningful unless we know how they vary from their baseline values. Any meaningful comparison of arbitration and litigation outcomes must be carefully constructed to make an "apples to apples" comparison—that is, to eliminate sampling errors that can lead to systematic differences in the kinds of cases that wind up in the arbitration and litigation data sets.⁹⁶

1. Establishing Baseline Values

Differences in underlying case merit (whether the plaintiff should win) and case value (how much) can undermine the accuracy and even the meaning of numbers that report mere outcomes. For instance, one reads that "employees prevailed 28% of the time" in trials but won "68% of the cases" in AAA arbitrations.⁹⁷ Likewise, one can read that the median arbitration award in employment cases was \$100,000 compared to \$95,000 in litigation, while the higher litigation mean award (roughly \$377,000 to \$236,000) was "not statistically significant."⁹⁸ These findings appear to tell a story that

⁹⁵ Colvin's estimate that fifteen to twenty-five percent of the U.S. workforce (about 140 million) is covered by non-union predispute arbitration clauses, yields a very rough estimate of twenty-one to thirty-five million employees under a mandatory arbitration regime. *Colvin*, *supra* note 21, at 411. AAA estimates its arbitration clause coverage at around eight million workers. Telephone Interview with Representative of the American Arbitration Association, May 7, 2007.

⁹⁶ *See, e.g.*, Sherwyn et al., *supra* note 8, at 1576 (refusing to draw firm conclusions regarding damages because the data was "too difficult to interpret because the standard deviations were high").

⁹⁷ *Id.* at 1568 (citing William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J. Oct.–Dec. 1995, at 40, 42–43).

⁹⁸ Delikat & Kleiner, *supra* note 29, at 10 & tbl.III.

arbitration is as good as, or better than litigation for plaintiffs. It is surprising how often scholars report or repeat these numbers as fact, blowing past caveats to reach supposedly confident conclusions.⁹⁹ The problem is that a 28% win rate in litigation would be better than a 68% win rate in arbitration if 30% of litigated cases and 90% of arbitrated cases in the analyzed samples were meritorious. By the same token the \$100,000 median arbitration award would be much worse for plaintiffs than the \$95,000 median trial verdict if the average underlying case values were, say, \$300,000 in the arbitration sample and \$200,000 in the litigation sample.¹⁰⁰

There are two ways to deal with this problem of baseline values in comparing arbitration and litigation win rates and average awards. One is to estimate the percentage of meritorious cases and the average value of claims in the respective pools of arbitration and litigation cases. Results can then be reported as a function of baseline values. For instance, “plaintiffs win 60% of meritorious claims in arbitration and 85% of meritorious claims in litigation,” or “a plaintiff recovers 36 cents for every \$1 of claim value in arbitration compared to 58 cents in litigation.”

This approach is extremely difficult, if not impossible, because it is difficult to imagine a reliable methodology to assess whether a claim is meritorious and assign it a monetary value. These are matters that even experienced litigators find elusive, and far more of an “art” than a “science.” A couple of studies have tried to use plaintiff’s initial demand as a proxy for objective case value,¹⁰¹ but this provides an unreliable measure. If plaintiffs generally have an incentive to inflate their monetary demands, that incentive may systematically differ in arbitration and litigation. Arbitration vendors scale their filing fees, charging more for higher amounts claimed.¹⁰² Additionally, arbitrators, but not jurors, will have access to information about the claimant’s original demand on filing and may take a dim view of wildly inflated demands. These two factors might

⁹⁹ See, e.g., Eisenberg & Hill, *supra* note 8, at 53; Estreicher, *supra* note 8, at 568; Maltby, *supra* note 23, at 46–51; Sherwyn et al., *supra* note 8, at 1578.

¹⁰⁰ It is unlikely, of course, that arbitration cases are three times more likely to be meritorious than litigation cases, but then the 28% and 68% win rates cited by Sherwyn et al. are wildly inaccurate and misleading due to sampling and methodological errors of the type discussed in the next section. See *infra* Part III.B.2. The Delikat & Kleiner study, *supra* note 29, which produced the median arbitration and litigation awards, was based on an invalid comparison of different pools of cases that greatly overstated the arbitration results. See *infra* note 130.

¹⁰¹ Bingham, *supra* note 91, at 209; Maltby, *supra* note 23, at 49.

¹⁰² See PUB. CITIZEN, *supra* note 31, at 34.

lead arbitration claimants to make more realistic (that is, lower) initial demands than litigation plaintiffs. Case value is also difficult to pin down, because the value of any given litigated case may vary over time as it proceeds toward trial and information is uncovered in the discovery process.¹⁰³

The alternative to this extreme challenge of estimating the underlying baseline values is to generate arbitration and litigation samples that contain approximately equal mixes of meritorious cases and aggregate average claim value. If we were confident that the underlying values were approximately equal we would not have to know what those values were in order to make meaningful comparisons of win rates and award averages. Equal win rates in arbitration and litigation would tell us that a claimant's chances were about the same in both—for example, 20% higher recoveries in litigation would tell us plaintiffs do 20% better, and so forth.¹⁰⁴

Simply assuming that any undifferentiated sample of “employment” claims in arbitration and litigation will have equivalent underlying values fails to provide a basis to be confident in the results. As discussed in the next section, there may well be systematic differences in the characteristics of cases that wind up in arbitration and litigation that would lead to significant differences in the underlying case values. Unfortunately, most empirical researchers to date have either ignored this issue, or tried to work around it by sorting their data based on speculative hypotheses about what groups of cases will have comparable underlying values.

¹⁰³ See Drury Stevenson, *Revenue Bifurcation*, 75 U. CIN. L. REV. 213, 243–44 (2006) (describing how case value is difficult, if not impossible, to determine initially and advocating use of discovery to allow more accurate determinations early on).

¹⁰⁴ Even assuming comparable pools of arbitration and litigation cases, win percentages are a crude measure of claimant success because of the difficulty in determining whether an outcome is in fact a win. Studies of win rates invariably define a “win” as the claimant or plaintiff recovering anything at all. Awards or judgments of zero dollars for a claimant are plainly a loss. But equally evident, the award of a token amount, or even a substantial amount that represents a small fraction of the claimant's true damages, may be justifiably—indeed, objectively—viewed as a loss for the claimant. See, e.g., *Mandatory Binding Arbitration Agreements*, *supra* note 5, at 68–69 (testimony of Jordan Fogel, Political Activist) (reporting that she received \$26,000 in arbitration damages against her contractor for an uninhabitable home that cost \$150,000 to repair). Yet the research typically codes that as a “win.” See, e.g., Maltby, *supra* note 23, at 48 (assuming that any non-zero award for an arbitration claimant is a win, regardless of claim amount or case value).

2. Arbitration and Litigation Case Streams

Influential scholarship from the early 1980s has made clear that disputes resolved in terminal, formal procedures—such as trials or binding arbitration hearings—are only the tip of an extensive “pyramid” of potential claims.¹⁰⁵ At a minimum, before any dispute finds its way into court or arbitration, an aggrieved party must recognize a wrong has occurred, voice their claim to the other party, only to have the other party reject the claim.¹⁰⁶ Formal rules may interpose additional procedural steps before a dispute goes to court or arbitration.¹⁰⁷ Each of these stages greatly winnows down the number of potential disputes.¹⁰⁸ For present purposes, the question is whether the dispute-filtering processes that terminate in mandatory arbitration and litigation, respectively, have significant differences that filter out different kinds of claims—resulting in samples whose underlying merit and value are significantly different. Most commentators assume such differences exist.¹⁰⁹

Many arbitration supporters try to hypothesize their way around this problem by emphasizing case stream differences that would accentuate the fairness of arbitration. Thus, they argue that arbitration is more hospitable to low-stakes claims than litigation, because it is cheaper and more receptive to pro se claimants.¹¹⁰ Some have also posited an “appellate effect,” by which the sample of

105 William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC'Y REV. 631, 647–49 (1981); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 543 (1981); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86–87 (1983).

106 See, e.g., Miller & Sarat, *supra* note 105, at 527.

107 Employees, for instance, may be bound by contract to go through formal internal dispute resolution processes within the employer company before going to arbitration or court. See Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 378–79 (2003). Discrimination claims must go through the administrative process within the EEOC or parallel state agency before suit may be filed in court. See 42 U.S.C. § 2000e-5 (2006).

108 Miller and Sarat, for example, estimated that 3% of consumer “disputes” (rejected claims) and 3.9% of employment discrimination disputes resulted in court filings. Miller & Sarat, *supra* note 105, at 537.

109 See, e.g., Eisenberg & Hill, *supra* note 8, at 51–52; Sherwyn et al., *supra* note 8, at 1565–66. For a good comparison of filtering processes in arbitration and litigation, see W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Reframing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 848–58 (2008).

110 See *supra* notes 8 & 19–23 and accompanying text.

arbitrated cases will contain a disproportionate number of “bad” or “meritless” cases compared to a litigation sample because “strong” cases are likely to have been resolved through a company’s internal dispute resolution processes.¹¹¹ Both of these case-filtering mechanisms should mean that arbitration samples contain a higher proportion of meritless and low-stakes claims than the litigation sample. The “arbitration accessibility” and “appellate” effects would thus explain—or explain away—data in which litigation outcomes appear more plaintiff-friendly than arbitration outcomes. They would also transform approximately equal arbitration and litigation outcomes into findings that arbitration actually favors claimants relative to litigation.

But these are problematic conjectures. The “appellate effect” argument is speculative and highly debatable. We can assume that the first part of the argument is true: that employers using mandatory arbitration also employ internal dispute resolution (IDR) processes at greater rates than employers that do not rely on mandatory arbitration—meaning that litigated cases are less likely to have been subject to IDR. Even if these differences occur in statistically significant numbers in the arbitration and litigation data sets, however, the next step of the argument lacks empirical support or even intuitive appeal. Why would IDR tend disproportionately to resolve strong cases? One might as readily suppose that IDR disproportionately settles out weak cases by persuading employees to drop them. In fact, a more plausible (though equally speculative) hypothesis is that IDR programs disproportionately settle cases where the employer and employee wish to preserve their on ongoing employment relationship.¹¹² Such cases would tend to involve lower damages. High wage-loss cases are more likely to involve termination of employment, and high emotional distress cases are more likely to involve the sort of hard feelings that make continued employment difficult or impossible. In short, IDR may disproportionately weed out low-stakes cases—meaning that the “appellate effect” tends to send higher-stakes cases into arbitration, exactly the opposite of the effect posited by mandatory arbitration supporters.¹¹³

The “arbitration accessibility” argument is also speculative. As

111 See, e.g., Hill, *supra* 68, at 814–18.

112 Cf. Cindy Cole Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment Related Disputes*, 26 U. MEM. L. REV. 1131, 1142 (1996) (arguing that mediation prevents the development of an adversarial relationship and can thus preserve a working relationship).

113 See Hill, *supra* note 68, at 814–18.

developed further below, actual litigant behavior may not be consistent with the hypothesis that arbitration samples include a significant disproportion of low stakes claims. There is some indication that employees file mandatory arbitration claims at much lower rates than litigation claims, and the samples actually studied by researchers reveal a high proportion of what appear to be high-stakes claims.¹¹⁴

While it seems very likely that there are systematic differences between arbitrated and litigated cases, those differences have not themselves been the subject of any rigorous empirical study. We are thus left with more or less plausible conjectures about how those case streams might differ, and whether they differ in ways that make arbitration data sets include a higher, lower or equal proportion of meritless and low-stakes claims.

3. Comparing Trials and Arbitrations While Omitting Settlements

All of the existing studies comparing arbitration and litigation outcomes compare *trials* with final arbitration awards following a *hearing*. This, too, is problematic: a further filtering process takes place between the filing of a civil suit or an arbitration claim and a trial or arbitration hearing. If the characteristics of those filters differ, the validity of the outcomes comparisons will be thrown into doubt even if cases *filed* in arbitration and litigation were similar.

The trial story is the by-now familiar one: only a tiny fraction of civil cases ever get to trial. Most cases are dismissed on the pleadings, or settle, or are resolved on summary judgment. From 1979 to 2000, only 3.17% of total cases filed in federal court went to trial.¹¹⁵ Focusing on employment cases, which are the subject of virtually all the empirical studies of arbitration and litigation outcomes, it might be useful to think of the following post-filing “pyramid.” Data on employment discrimination cases filed in federal court from 1991 to 2000 shows that about 70% were resolved by settlement; 20% by “non-trial adjudication” (almost entirely consisting of summary judgment); 6% by trial; and 4% by “other” disposition.¹¹⁶

¹¹⁴ See *infra* Part IV.A.

¹¹⁵ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEG. STUD. 429, 457 (2004).

¹¹⁶ *Id.* at 457. These figures are rounded for convenience. The trial rate for employment cases is actually 5.42%. The “other dispositions” include things like remand to state court, dismissals for lack of jurisdiction, and, presumably, orders compelling arbitration, which would not finally dispose of the claims, but merely send them to another forum. In employment cases, very few cases are dismissed on

The arbitration story is less familiar; there has been no effort to study systematically the reasons why, and rates at which, arbitration cases drop out of the system prior to final hearing. But arbitration cases do settle before hearing: though estimates vary widely, ranging from 10% to nearly 50%, the arbitration settlement rate is much lower than in litigation. This is what we would expect, since arbitration's greater speed and lower cost to hearing would reduce the incentives to settle.¹¹⁷ As employment arbitrations have become increasingly judicialized, it appears that more arbitration claims are being dismissed in summary judgment type proceedings—that is, based on paper submissions, without a live-witness evidentiary hearing—but we do not know how many. The following table shows the figures reported by Eisenberg and Hill based on their sample of employment cases filed with AAA in 1999–2000.¹¹⁸

TABLE 2: AAA EMPLOYMENT ARBITRATION CASE TERMINATIONS BY HEARING AND OTHERWISE

[table 2 here]

Since the point is to compare arbitration and litigation outcomes, one has to reckon with the fact that 70% of litigated outcomes take the form of settlements. Settlements are a valid and necessary part of the litigation outcome sample. The great differences in settlement rates between arbitration and litigation could create significant discrepancies between arbitration and litigation data sets that could invalidate any comparative results analysis that fails to take settled cases into account. Yet none of the empirical studies of arbitration versus litigation results consider settlements in their data analysis. The fact that settlement data is hard to come by is no justification for simply ignoring settlements. Nor will it do to dismiss settlements as irrelevant to the analysis because they are inferior to having a “day in court” in the form of a trial or arbitration hearing.¹¹⁹ A litigant with a strong case who

the pleadings and very few are won by plaintiffs on summary judgment; therefore, the vast majority of the 20.89% of cases subject to “non-trial adjudication” are summary judgments for defendants. *Id.* at 440.

¹¹⁷ Eisenberg & Hill, *supra* note 7, at 52.

¹¹⁸ *Id.* The figures represent case terminations of the 1999–2000 filings as of September 2002. The authors do not indicate whether “final awards” include summary dismissals without hearing; thus it is possible that the percentage of hearings was even less than 32.6%. Nor do the authors define what “closed for other Reasons” (“Closed” in the table) means.

¹¹⁹ Delikat and Kleiner, for example, take the latter approach, obtusely asserting

makes a great settlement does not need to try the case to benefit from the existence of a system that offers the *prospect* of a trial.

Only if employment cases that go to trial and arbitration are a highly representative sample of all such cases filed is the omission of settlements unproblematic for the analyses. Eisenberg and Hill, the only empirical researchers who even acknowledge the settlement issue, finesse it by asserting that “the most extreme cases for both sides (i.e., the best and the worst) are the most likely to settle. As a result, the cases that do not settle are probably more alike than the original set of disputes.”¹²⁰ But that’s nothing more than a plausible hypothesis, and it is very dicey to assume away 70% of one’s potential data. It is also plausible to believe that corporate defendants systematically settle stronger claims against them at a higher rate than weaker ones.¹²¹ That would mean that weaker claims would be overrepresented in any sample of trial outcomes. This would push down win rates and average recoveries in the trial results samples.¹²²

that the small number of employment discrimination jury trials “provides a significant counter-point to the opponents of pre-dispute arbitration” who contend “that arbitration deprives discrimination claimants of a jury trial.” Delikat & Kleiner, *supra* note 29, at 8.

120 Eisenberg & Hill, *supra* note 8, at 52 (footnote omitted).

121 According to one theory, cases go to trial when one side significantly misvalues its claims or defenses. See, e.g., Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997). Conceivably, employer-litigants (and their attorneys) would have a larger experience base, and therefore better information about, case values than employee-litigants. This would mean that a higher proportion of tried cases would be cases where the plaintiff overvalued his case and refused to settle. See *id.* at 95–112 (arguing that heuristic “frames” lead inexperienced clients to misvalue cases and settlement offers). If that were so, then trial results could understate aggregate plaintiff success. Another theory suggests that settling stronger cases is a strategy for managing risk and the development of decisional law. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 99–100 (1974) (arguing that repeat players settle based on strategic factors extending beyond the particular case).

122 Among non-settling cases, some provision should arguably be made for non-trial/non-hearing case terminations. Lewis Maltby has made the argument that the plaintiff win rate in federal employment discrimination litigation is to be determined by discounting the 36–38% win rate at trial by adding summary judgment dismissals to the denominator—that is dividing the number of plaintiff trial wins by the number of losses at trial and summary judgment. See Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 112–13 (2003); Maltby, *supra* note 23, at 49 tbl.1 (reporting a litigation win rate of 14.9%). By this maneuver, Maltby, a mandatory arbitration supporter and member of the AAA Board of Directors, produces a plaintiff win rate in litigation in the 12–15% range, and he discounts average plaintiff awards accordingly. While this seems logical at first blush,

4. Improper Sampling and Sorting

Empirical research is always faced by the limitation that researchers cannot gather all the evidence in the world. They have to choose data sources, and understandably often turn to existing data sets for efficiency. Sampling must be done with some care, because pre-existing data sets constructed by real world actors may contain samples that are unrepresentative of overall claims and claimants in several ways. For example, most of the empirical studies rely on AAA data for employment arbitrations, which may create a sampling error by itself.¹²³ Studies of employment cases in federal and state court generally show that plaintiffs do better in state court: they survive summary judgment and win at trial more frequently than in federal court.¹²⁴ Three of the four most commonly cited empirical reports, however, compare arbitration to *federal court* litigation outcomes, making the arbitration results look better than they would with state court figures included.¹²⁵ A valid comparison of arbitration and

it is highly misleading, for several reasons. First, withdrawals and case closures in arbitration—which may approximate, and even include, summary judgment dismissals—appear to occur at a rate in arbitration comparable to litigation—18% compared to 20%, according to the very limited data we have on arbitration. See *supra* table 2. Second, the summary judgment dismissal rate in state court employment disputes appears to be about one-fourth the summary judgment rate in federal court. See Maltby, *supra*, at 112–13. Since most adjudication occurs at the state court level, the federal summary judgment rate greatly overstates the total percentage of litigation cases resolved in that way. Third, Maltby ignores the strong possibility that settled cases do not mirror merits dispositions. If nontrial losses are included in the denominator (that is, Maltby’s move of adding summary judgment dismissals to the total number of trials), it is misleading to omit nontrial wins (good settlements) from the numerator. The seventy percent of the cases that settle involve some significant average payout, whereas summary judgment dismissals are defendant wins, with no payouts. Finally, there is an argument to be made that meritless claims should be excluded from the analysis. (I recognize that summary judgment dismissals may be a highly imperfect proxy for meritless claims.) The decision whether or not to endorse a mandatory arbitration regime should not be made to turn on the relative chances for success of meritless claims in arbitration or litigation; one would hope that any fair and accurate truth finding process would dismiss them. Instead, the comparison should be based on comparing how claimants with arguably meritorious claims fare in the two forums.

¹²³ See *supra* Part II.A.

¹²⁴ Compare Clermont & Schwab, *supra* note 115, at 441 fig.7 (presenting plaintiff win rate in federal court in 2001 as 39.5% in employment discrimination cases) with Eisenberg & Hill, *supra* note 8, at 48 (presenting plaintiff success rate in state employment litigation 56.6%).

¹²⁵ Delikat & Kleiner, *supra* note 29, at 9; William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP.

litigation outcomes should take into account both federal and state court results, since mandatory arbitration displaces both court systems. In addition, one must be careful in comparing these reports to others that include state court data.

Further, success rates may vary significantly across different kinds of claims for reasons completely independent of the arbitration/litigation forum choice. Eisenberg and Hill, for example, present persuasive evidence that statutory civil rights claims have a markedly lower success rate than common law employment claims in both arbitration and litigation. Consequently, they claim that results comparisons of “employment” cases are likely to be misleading—particularly in smaller samples—unless the researcher separates out the two groups of cases.¹²⁶ This issue overlaps with—or compounds—the federal/state problem insofar as federal employment cases consist predominantly of employment discrimination claims,¹²⁷ whereas state employment cases may have a broader mix of statutory and common law claims¹²⁸ and state statutory schemes may provide different remedies than federal ones.¹²⁹ One study frequently cited by mandatory arbitration supporters manages to make all of these sampling errors at once.¹³⁰

RESOL. J., Oct.–Dec. 1995, at 40, 41; Maltby, *supra* note 23, at 46. This presentation of data could be characterized as “cherry picking” if one had reason to believe that the authors were mandatory arbitration proponents. Delikat is “Chair of [the Orrick law firm’s] Global Employment Law Practice.” Orrick, Mike Delikat—Orrick Bio, <http://www.orrick.com/lawyers/Bio.asp?ID=7547> [hereinafter Delikat Bio] (last visited Jan. 18, 2009). Howard is an AAA arbitrator, Howard, *supra* at 40, and Maltby is a member of the AAA Board of Directors, Maltby, *supra* note 22, at 29.

¹²⁶ Eisenberg & Hill, *supra* note 8, at 47–48 & tbl.1.

¹²⁷ Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL’Y J. 329, 357 (2003) (“Discrimination claims are the most common employment cases litigated in federal court.”).

¹²⁸ In the Eisenberg and Hill study, non-civil rights employment claims made up 47.5% of the state court trial sample (145/305), but over 80% of the arbitration sample (173/215). *Id.* at 48 tbl.1.

¹²⁹ For example, California provides for uncapped damages in employment discrimination claims, in contrast to federal law, which caps consequential damages at \$300,000. Compare CAL. GOV. CODE § 12970 (West 2005) (allowing recovery of actual damages and only limiting the nonpecuniary portion of an actual damages award), with 42 U.S.C. § 1981a(b)(3) (2000) (limiting recovery to \$50,000, \$100,000, \$200,000, or \$300,000 depending on the size of the employer).

¹³⁰ The Delikat and Kleiner study, *see supra* note 29, cited frequently by pro-arbitration polemicists but also by some legal academics, found that plaintiffs were more likely to win in arbitration (46.2% to 33.6%), that the median arbitration award was slightly higher than the medial trial judgment (about \$100,000 to \$95,000) and that, though the mean award was higher for the trials (roughly \$377,000 to

Sampling error can also occur when a researcher makes a bad methodological choice to sort the data. It is possible to try to create comparable baseline values in arbitration and litigation samples by sorting the data. For example, researchers could pick a subset of arbitration cases that they have strong grounds to believe resembles the compared set of litigation cases in relevant characteristics. It would not be necessary to know the underlying values of the two samples—case merit and claim value—if the cases were sufficiently similar and numerous. Random differences in case merit and claim value in the two samples could be analyzed by statistical significance

\$236,000), the difference was not statistically significant. Delikat & Kleiner, *supra* note 29, at 10 tbl.III. From this less-than-compelling showing, they robustly conclude that there is therefore “no statistical support” that arbitration favors employers, that their data provide a “strong rebuttal” to such a claim, and that, on the contrary, “plaintiffs are well served by arbitration relative to the federal courts both in terms of speedy justice and the likelihood of a positive outcome for plaintiffs.” *See id.* at 11.

But those conclusions are unwarranted. The study compares 186 securities industry arbitrations of employment cases of all types by New York Stock Exchange and National Association of Securities Dealers with a sample of all 125 employment *discrimination* trials in the Southern District of New York. *Id.* at 8–9. Given the lower success rate for employment discrimination cases in federal court, compared to non-discrimination employment claims and state court claims, *see supra* note 124, the data necessarily understates the success of litigation plaintiffs. At the same time, the study overstates the success rates for arbitration: securities industry employment arbitrations are likely to be overrepresented by highly-compensated employees. For “securities industry” jobs in New York City, “[t]he mean annual salary in 2007 was slightly less than \$400,000.” James Bram et. al, *Employment in the New York-New Jersey Region: 2008 Review and Outlook*, CURRENT ISSUES ECON. & FIN. (Fed. Reserve Bank of N.Y., New York, N.Y.), September/October 2008, at 1, 5, *available at* http://www.newyorkfed.org/research/current_issues/ci14-7.pdf. This is nearly ten times higher than the mean annual wage for all occupations as of May 2007, which was \$40,690. Bureau of Labor Statistics, U.S. Dep’t of Labor, May 2007 National Occupational Employment and Wage Estimates (last visited February 19, 2009), http://www.bls.gov/oes/2007/may/oes_nat.html#b13-000. Finally, sixty-one percent of the cases in Delikat and Kleiner’s arbitration sample comprised nondiscrimination employment claims (350 out of 572). *See* Delikat & Kleiner, *supra* note 29, at 9 tbl.1. Plaintiffs tend to do better in such claims as the Delikat and Kleiner data itself shows: arbitration claimants recovered in 39.71% of their presumably contract-based “wrongful termination” claims, compared to 27.57% (74 out of 259) of their discrimination claims. *Id.* Delikat and Kleiner did not attempt to break out success rates and averages for discrimination claims, but one can calculate from their data table that arbitration claimants won a mean award of \$159,860 in their discrimination claims—less than half the mean judgment of \$377,030 in employment discrimination trials. *Id.* at 9 tbl.1; 10 tbl.3. The authors ran no statistical tests to determine the significance of that difference. In light of the above, the Delikate and Kleiner data may actually support the conclusion that plaintiffs do worse in arbitration.

tests. The power of such tests would increase with larger sample sizes, and presumably the random variations in underlying values would tend to equalize with larger samples.¹³¹ How large the samples should be is a question not addressed in any of the studies. The only study that gives any systematic thought to sorting the data in order to generate comparable arbitration and litigation samples is the Eisenberg and Hill study. Regrettably, as I show in the next section, the criteria they use for sorting is fatally flawed and undermines the reliability of their study.

C. *A Case in Point: The Eisenberg and Hill Study*

A leading empirical analysis comparing arbitration and litigation outcomes is the 2003 study conducted by Theodore Eisenberg and Elizabeth Hill.¹³² That study reworks a data set collected by Hill of 356 AAA employment arbitration awards decided in 1999 and 2000 and compares the outcomes to a substantial database of federal and state trial outcomes from approximately the same period.¹³³ The larger size of the data sets, combined with Prof. Eisenberg's sterling reputation as an empirical researcher and his lack of a record of partisanship in the mandatory arbitration debate, hold out the promise of a highly useful, perhaps even definitive study. Unfortunately, the study is so deeply flawed that even its carefully qualified conclusions are, quite simply, unreliable.

Eisenberg and Hill conclude that there were "no statistically significant forum-related differences in employee win rates or in the median or mean award levels for higher-paid employees."¹³⁴ Comparing higher-paid employees' non-discrimination employment claims in arbitration and state court trials, they found that employees won in arbitration at a rate of 64.9% compared to 56.6% in state court; that their median arbitration award was \$94,984 compared to a median state court trial judgment of \$68,737; and that the mean arbitration award was \$211,720 compared to a mean trial award of \$462,307.¹³⁵ While these differences were not statistically significant, the authors found it "telling" that higher paid employees won more

131 See Richard Lempert, *The Significance of Statistical Significance: Two Authors Restate an Incontrovertible Caution. Why a Book?* 34 LAW & SOC. INQUIRY (forthcoming 2009) (manuscript at 9), available at <http://ssrn.com/abstract=1142865>.

132 Eisenberg & Hill, *supra* note 8, at 46–53.

133 *Id.* at 46.

134 *Id.* at 45.

135 *Id.* at 48 tbl.1, 50 tbl.2.

often, and won higher medians, in arbitration.¹³⁶ They concluded that their results did not “support the arguments of those concerned about the fairness of arbitration to employees” and “were consistent with arbitrators acting similarly to in-court adjudicators.”¹³⁷

On the other hand, the authors also found that “lower-paid” employees obtained arbitration outcomes significantly worse than both the litigation samples and the higher-paid employee arbitration samples for nondiscrimination employment claims (win rate = 39.6%, median award = \$13,450, and mean award = \$30,732).¹³⁸ However, they claim that those results are not meaningfully compared with litigation outcomes because they “assume that the economics of obtaining counsel effectively precludes most lower-pay employees from commencing litigation.”¹³⁹ The authors concluded that there was not enough arbitration of civil rights cases in their study to make meaningful arbitration-litigation comparisons.¹⁴⁰ Finally, Eisenberg and Hill found that success rates and average awards for “civil rights employment disputes” were significantly lower than for “non-civil rights employment disputes,” for both higher pay and lower pay employees, in both arbitration and litigation; they also found statistically significant differences in the frequency of such cases in the arbitration and trial samples.¹⁴¹ That statistically significant pair of findings supports their argument for sorting out the two kinds of claims.

The authors take pains to qualify the conclusiveness of their findings in a number of key respects. They provide candid and thoughtful discussions of the likelihood that “disputes with differing characteristics [are] being routed to arbitrators and courts,”¹⁴² and they deserve credit for trying to account for those differences. Yet in the end, they claim to have cast doubt on the argument that arbitration is unfair. That conclusion is far too robust, and indeed, actually a misinterpretation of their own data. More pointedly, the reliability of the study is undermined by two fundamental errors in

¹³⁶ *Id.* at 49.

¹³⁷ *Id.* at 48, 51.

¹³⁸ *Id.* at 48 tbl.1, 50 tbl.2.

¹³⁹ *Id.* at 48.

¹⁴⁰ *Id.* at 50. In fact, the win rates and average awards were much lower in arbitration of employment discrimination (“civil rights employment claims”). However, thirty-seven out of the forty-two “civil rights employment disputes” in the arbitration sample were brought by lower-paid employees, which the authors contend is not a relevant comparison with the litigated cases. *Id.* at 48.

¹⁴¹ *Id.* at 47, 48 tbl.1, 50 tbl.2.

¹⁴² *Id.* at 45.

their analysis, arising from (1) their censoring and (2) their sorting of the data.

1. “Censoring”: Analyzing the Wrong Cases

Apparently, AAA held arbitration hearings in 988 employment cases filed in 1999–2000, but Eisenberg and Hill decided to exclude or “censor” (their word) some 632 cases that were decided after the end of 2000.¹⁴³ If this were an effort to refine the data to produce greater reliability in their findings, the authors would undoubtedly have said so—as they try to do with their decision to sort “higher pay” and “lower pay” claimants, discussed below. So presumably, the reason for censoring the 632 slower cases was simply that awaiting those results would have delayed completion of the study. But this choice ruins the reliability of the study.

Simply put, the 632 excluded cases are likely to have a higher proportion of high-cost/high-states (PLDA) cases—the very ones we would want to analyze—than the 356 cases actually sampled by the authors. High-cost/high-stakes cases are more complex, more likely

¹⁴³ *Id.* at 52; *see supra* tbl.2 and notes 117–118 (relating the data from the Eisenberg and Hill study). The Eisenberg and Hill article relies on “a database compiled by Hill” in her connected study of arbitration costs. *Id.* For this earlier study, *see* Elizabeth Hill, *supra* note 68. There, Hill studies “[t]wo hundred awards [that] were randomly selected from the total pool of 356 AAA Employment Arbitration Dispute awards initiated during 1999 and 2000 and decided as of November 5, 2000.” *Id.* at 792. The Eisenberg and Hill study randomly adds ninety-seven cases from the remainder of the original subset of 356. Eisenberg & Hill, *supra* note 8, at 54 n.17. Why they randomly select a subset of the 356 cases they never explain.

According to Eisenberg and Hill’s description of their data, as of September 2002, there were 885 final arbitration awards in cases filed in 1999–2000. Eisenberg & Hill, *supra* note 8, at 52 (stating 459 final awards in 1999 and 426 final awards in 2000); *see also*, Hill, *supra* note 68, at 822 n.126 (describing the process of choosing cases to include in the data). They “censored” all but 356 of those 885 cases (that is, a total of 529 cases) because those had not yet been decided as of their November 2000 cutoff. *See* Eisenberg & Hill, *supra* note 8, at 46 (“In addition, claims that were not completed, i.e., had no award issued by Nov. 5, 2000, were eliminated . . .”). In other words, those 529 cases decided between November 2000 and September 20002 were excluded from their analysis. In addition, as of September 2002, there were an additional 103 “pending” (that is, still unresolved) cases (35 filed in 1999 plus 68 filed in 2000). *Id.* at 52. Obviously, those cases were also censored inasmuch as they were not decided by November 2000. Thus, 632 total cases were censored. Adding those to the 356 in their data set yields 988 total cases. The censored cases therefore represent nearly sixty-four percent of their potential sample. As is implicit in these arithmetical calculations, Eisenberg and Hill themselves nowhere clearly state the number of cases they censored.

to involve represented plaintiffs, more worth seeing through to conclusion—and therefore more likely to take longer to resolve. We should therefore expect high-cost/high-stakes cases to be overrepresented in the 632 censored cases, and maybe even to preponderate in that group. Some low-cost cases may be in the group simply by virtue of stalling or procrastination by a party or arbitrator, but most low-cost cases should tend to be resolved more quickly.¹⁴⁴ Some high-cost/low-stakes cases may also be in the mix, but probably not as many. Those are the cases where the claimant is less likely to get a lawyer: pro se cases are probably less likely to be filed, and more likely to resolve quickly. High-cost/high-stakes cases are the best—and arguably the only meaningful—comparison with litigated cases because (1) they are the ones around which the mandatory arbitration debate revolves and (2) they are the most similar to litigated cases that wind up going to trial.¹⁴⁵

The authors dismiss the impact of the 632 censored cases by asserting that cases that take longer probably will lead disproportionately to results favoring the employee—therefore, including them would only have strengthened their finding of an absence of pro-employer bias.¹⁴⁶ But that assertion is unconvincing. There is no reason to assume that arbitration hearings in longer-duration cases tend to come out in favor of claimants. It is at least as plausible to suppose that claimants do significantly better in arbitrating the straightforward, low-cost/high-stakes cases while encountering difficulties in the longer-running high-cost/high-stakes cases. I have argued that low-cost/high-stakes cases will be characterized by relatively easily-proven claims yielding high damages, and that the procedural (particularly discovery) limitations in arbitration will have much less impact on the outcome in such cases.¹⁴⁷ An overrepresentation of faster resolving, low-cost/high-stakes cases in the analyzed sample will most likely make arbitration

144 A phenomenon apparently recognized by Eisenberg and Hill. See Eisenberg & Hill, *supra* note 8, at 53 (“Our conclusions about the time to completion must be more tentative because censoring the data clearly distorted downward the time to disposition of the arbitrated cases.”).

145 See *supra* Part II.B.

146 Eisenberg & Hill, *supra* note 8, at 53 (“[C]ases with claimant wins and large awards are likely to take longer than cases with claimant losses and small awards. So in uncensored data one might find disproportionately more claimant wins. Uncensored data also might show higher mean and median awards for employee arbitration claimants. This strengthens our finding that awards in arbitrated cases are not lower than awards in litigated cases.”).

147 See *supra* Part II.

look better for plaintiffs than it really is overall.

More to the point, the question whether “one might find disproportionately more claimant wins” and “higher mean and median awards”¹⁴⁸ in arbitration of slower and (if I’m correct) predominantly high-cost/high-stakes cases is the very question in controversy. Eisenberg and Hill simply assume what they are purporting to prove. In short, Eisenberg and Hill have selected their data in exactly the reverse of what they should have done to generate meaningful results. They should, if anything, have sorted out the more quickly arbitrated cases and studied the slower ones.

2. The Sorting Error

Significantly, Eisenberg and Hill implicitly recognize the importance of comparing arbitration and litigation samples that have comparable case value—of comparing high-stakes cases with high-stakes cases. But they perform that sorting in a mystifying way, leading to the second major flaw in their study.

Following Hill’s earlier study of arbitration time and cost in the same data set, Eisenberg and Hill separate their data by what they refer to as “higher pay” and “lower pay” claimants. The rationale for this sorting is their assumption that the set of “higher pay” cases more closely approximates the mix of litigated cases that wind up at trial.¹⁴⁹ To be sure, a fair comparison of arbitration and litigation outcomes should sort the data in some manner to account for the presence of low-stakes cases that are arguably more likely to have been arbitrated but unlikely to be litigated; including such cases in the analysis would skew the results favorably toward litigation. On the other hand, since we have no clear idea how many more—if any—low-stakes cases go into arbitration unfounded assumptions in that direction are problematic.¹⁵⁰

Moreover, there are serious problems with how Eisenberg and Hill go about their sorting. First, using employee income as a proxy for liability stakes is a questionable move. There is some correlation between employee income and liability stakes in employment cases, since lost income is a major component of damages.¹⁵¹ But how

¹⁴⁸ Eisenberg & Hill, *supra* note 8, at 53.

¹⁴⁹ *Id.* at 47.

¹⁵⁰ See *infra* Part IV.A.

¹⁵¹ This effect is even more pronounced in non-civil rights employment cases, where attorneys’ fees and non-economic damages are generally not recoverable. And the one point on which the Eisenberg and Hill study is convincing is in demonstrating the need to separate out civil rights from non-civil rights claims to

strong is that correlation? Low-wage workers with strong employment discrimination claims (particularly sexual harassment claims) may have very large potential recoveries for emotional distress and attorneys' fees.¹⁵² Even in cases where lost income is the only recoverable damage, a key variable is the time period for which damages are recoverable. The value of a claim by a \$200,000-a-year employee entitled to recover one year of backpay is less than that of a \$40,000-a-year employee entitled to eight years of front pay.¹⁵³ The weaker the correlation between pay level and damages, the less valid it is to sort the data based on employee income.

In any case, Eisenberg and Hill do not actually sort the data based on employee income. Instead they “exploited a variable the AAA uses” to sort the data “by reference to the type of arbitration agreement under which the claimants agreed to arbitrate.”¹⁵⁴ Apparently, AAA codes its arbitration files with the letters “P” for “promulgated” arbitration agreements—AAA’s polite term for mandatory arbitration clauses imposed by an employer on a companywide basis as a condition of employment—and “N” for “individually negotiated employment agreements with arbitration clauses in them.”¹⁵⁵ Eisenberg and Hill analyze the data by separating out arbitration results in N cases from those in P cases. And they base their ultimate conclusion—“no statistically significant forum-related differences in employee win rates or in the median or mean award levels for higher-paid employees”¹⁵⁶—by assuming away the P results on the grounds that P claims would never find their way into litigation. In other words, Eisenberg and Hill use N and P as a

account for this difference. See Eisenberg & Hill, *supra* note 8, at 47.

¹⁵² See, e.g., *McDonough v. City of Quincy*, 452 F.3d 8, 22 (1st Cir. 2006) (upholding an employment discrimination award of \$300,000, the majority of which was for emotional distress).

¹⁵³ Back pay refers to compensation that would have been earned prior to the time of judgment or settlement. Front pay means lost future earnings. Large front pay awards are not uncommon in cases of wrongfully discharged older workers—in their fifties, say—who have several years of potential worklife remaining but who find it difficult or impossible to be rehired into a comparable job. See, e.g., *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1334–35 (6th Cir. 1994) (upholding front-pay award of \$249,741 for fifty-three year-old employee). To complete the example in the text, the present value of an eight-year front pay award to an employee losing \$40,000 per year in income, at an eight percent discount rate, is \$229,880. In contrast, a one-year backpay award of \$200,000 with an eight percent pre-judgment interest rate is \$216,000.

¹⁵⁴ Eisenberg & Hill, *supra* note 8, at 47.

¹⁵⁵ *Id.*; see also Hill, *supra* note 143, at 794 (noting the same).

¹⁵⁶ Eisenberg & Hill, *supra* note 8, at 45.

proxy for employee pay levels, which they in turn use as a proxy for liability stakes—which they, in turn, use as a proxy for access to the litigation forum.¹⁵⁷

How do the authors know that N and P correlate to employee pay levels? For this, we have to turn to Hill's sole-authored article that originally organized this data.¹⁵⁸ There, Hill explains that she estimated earnings of each employee by either finding their earnings stated in the case file or, where that was absent, correlating their job descriptions with Bureau of Labor Statistics data on compensation.¹⁵⁹ That method of estimating employee pay seems reasonable enough, but the question is this: if Hill has estimated the income of each claimant in the data set, why then “exploit” the variables N and P as proxies for employee income?¹⁶⁰

On closer inspection, Hill's attribution of income characteristics to employees with N and P arbitration agreements is extremely strange. According to Hill, P employees are those earning from \$14,000 to \$60,000 a year, and N employees earn more than \$60,000.¹⁶¹ But \$60,000 seems a highly arbitrary cutoff if the point of the distinction is to differentiate cases likely and unlikely to be litigated. What is more, it appears that 28% of Hill's P employees in fact earn more than \$60,000 a year and that nearly one in five of the P employees earn more than \$80,000 per year.¹⁶² Yet these are

¹⁵⁷ *See id.* at 46–47.

¹⁵⁸ Hill, *supra* note 143, at 794.

¹⁵⁹ *Id.*

¹⁶⁰ I suppose one answer is that, to save time, a researcher might estimate an average income for a subset of N and P employees and then project that average over the rest of the data set. While such an approach might be justifiable for a huge data set, here we are talking about fewer than 300 case files. Hill does not tell us whether she took this shortcut, and if so, how few cases she sampled to arrive at her estimates of N and P income. The point is not so much that a diligent researcher could be expected to estimate the income for all 300 employees—though that may be true. Rather, the problem is that with such low numbers, the sample-based projection could be highly inaccurate.

¹⁶¹ Hill, *supra* note 143, at 794.

¹⁶² *See id.* Hill's explanation is befuddling:

[NP]An estimated 43.5% of the employees in this sample earned between \$14,000 and \$ 60,000. The employees will be called “P employees” in the instant article. . . .

[NP]The AAA database uses the letters “P” and “N” to differentiate between those employees who are party to promulgated, or “P,” agreements and those employees who are party to individually negotiated, or “N,” agreements with arbitration clauses in them. I also use the terms “P employee” and “N employee” in this article with the same meaning. I use these terms as a short-hand for income level because 72% of the “P

treated as “low income” employees for purposes of the analysis, which means that they are excluded from the data that “counts”—that the authors treat as comparable to the trial sample. But is it reasonable to assume that the P employees earning over \$80,000 are unlikely “to have access to the courts” for employment claims? And what about the P employees earning \$60,000 to \$80,000?

The real concern, of course, is whether the relative proportion of high- and low-*stakes* claims are the same in arbitration and litigation. Even if one insists on using employee income as a proxy for case value, then the question is not whether higher-income employees are more likely to gain access to court than lower-income employees, but whether the proportion of higher-income employees among litigation plaintiffs is greater than it is among arbitration claimants. Put another way, is there a significant set of cases that are effectively arbitrable despite having stakes too low to make them litigable? Eisenberg and Hill never really address that empirical question. Instead, they assert that “higher-pay employees are probably the class of employees most represented in court because the stakes involved in claims by lower-pay employees may be too low to attract counsel on a widespread basis.”¹⁶³ On this breezy assumption, Eisenberg and Hill build a nonsequitur, further assuming that their arbitration sample necessarily includes a higher proportion of low-income claimants than their litigation sample and that, therefore, there is a significant number of nonlitigable low-stakes claims in the arbitration sample. An arguable hypothesis, perhaps, but there is no empirical evidence that non-litigable cases are filed in arbitration, let alone make it to arbitration hearings, in substantial numbers.¹⁶⁴ In the two years sampled by Eisenberg and Hill, only about one-third of the claims filed in arbitration went to hearing, and nearly twenty-percent were “withdrawn,” or “closed for other reasons.”¹⁶⁵ It may well be that most or all of the non-litigable arbitration cases are not really arbitrable either—that they drop out

employees” in this sample are lower and middle-income employees who I estimate earned between \$14,000 and \$60,000 per year. The “N employees” I estimated earned more than \$60,000 annually.

[NP] I estimated that 81% of P employees earned no more than \$ 80,000 annually and that 50% of P employees earned between \$ 14,000 and \$ 40,000 annually.

Id.

¹⁶³ Eisenberg & Hill, *supra* note 8, at 46–47.

¹⁶⁴ See *infra* Part IV.A.2.

¹⁶⁵ See Eisenberg & Hill, *supra* note 8, at 52; *supra* table 2.

prior to hearing, to the extent they are filed at all.¹⁶⁶

But the most curious thing about the P/N distinction—the elephant in the room that goes entirely unmentioned by the authors—is why there are so many individually negotiated arbitration agreements among AAA arbitrations. It appears that the ratio of N claimants to P claimants in this data set is about two to three, or forty percent.¹⁶⁷ By no reasonable stretch of the imagination do employees with individually negotiated employment contracts represent forty percent of the workforce. They may not even represent one percent of the workforce.¹⁶⁸ So it appears that the sample of AAA employment arbitrations represents a very elite group of workers, even before sorting N and P cases. More to the point, equating N arbitrations with litigation is to suggest that employees with individually negotiated agreements represent something close to one hundred percent of the cases that wind up in litigation. That seems farfetched. But even if N-type employees made up as much as

166 A further potential complicating factor with the N set of arbitrations is the likelihood that this group includes “submission” or “post-dispute” arbitration agreements. Agreements to arbitrate after the dispute has arisen are purely voluntary and are not an issue in the mandatory arbitration debate—that is, they are not “mandatory” arbitrations at all. Therefore, such cases should be excluded from any arbitration data set comparing mandatory arbitration with litigation results. AAA estimated that six percent of its employment arbitrations in 2001 were conducted pursuant to voluntary post-dispute agreements. See Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003). AAA uses the N and P distinction primarily, not to track data about pre-dispute arbitration clauses, but to set fees: it charges higher administrative fees to claimants with “disputes arising out of individually-negotiable employment agreements and contracts, even if such agreements and contracts reference or incorporate an employer-promulgated plan” than to claimants with disputes that arise out of “employer-promulgated plans.” See AM. ARBITRATION ASS’N, *supra* note 70, at R.48. If the 6% figure is also good for 1999–2000, then 16% of the N arbitrations analyzed by Eisenberg and Hill would be post-dispute arbitration agreements improperly included in a study of pre-dispute agreements. (There were eighty-two N arbitrations out of 215 arbitration awards analyzed by Eisenberg and Hill sample. Six percent of 215 is 13, which is 16% of the 82 N cases.) Their inclusion could produce a significant error in their calculations.

167 See Eisenberg & Hill, *supra* note 8, at 48 tbl.1 (showing 133 of the 215 arbitrated claims—roughly sixty percent—were by lower pay employees).

168 The fact that P employees make up only 60% of the arbitration sample, given their undoubtedly much higher proportion of the workforce, suggests that they do not file arbitration claims at very high rates, and tends to undercut the egalitarian defense of mandatory arbitration. Hill in particular hits this theme very hard in her work, so it is especially noteworthy that she doesn’t find that question even worth mentioning. See Hill, *supra* note 143, at 782–83 (describing the lack of court access for lower pay employees).

forty percent of the plaintiffs in employment litigation—a figure that still strikes me as excessive—then Eisenberg and Hill’s *full* sample, adding both N’s and P’s, would have better approximated their litigation sample. Put another way, we know that *some* lower pay plaintiffs manage to try their employment cases in court. Even if they did so at a much lower rate than employees with individually negotiated employment contracts, their numbers are so much greater in the workforce that they are still likely to represent a substantial subset—perhaps even as much as sixty percent, perhaps more—of the tried case sample. Eisenberg and Hill would therefore have done better to sort N from P cases in analyzing their data.

There are certainly reasons to believe that the N and P samples will have markedly different characteristics. To be sure, there is an acute ambiguity in the N characterization—was the employee amenable to the arbitration clause or not? We know very little about the N sample—not even their average income or the kinds of jobs they hold—because Hill is so cagey about it, telling us only that N’s earn “more than \$60,000 annually.”¹⁶⁹ But it is quite plausible that the characteristics of N and P claims do not correlate strongly with, respectively, cases that go to court and those that do not. A highly compensated executive who negotiates his employment agreement and willingly accepts—perhaps even proposes—a pre-dispute arbitration agreement is not a significant concern of opponents of mandatory arbitration, even if he thinks better of his arbitration agreement once he has a claim to file. Moreover, it is conceivable that such claimants more often than not prefer arbitration when their dispute arises. The N sample may well contain an undue proportion of low-cost/high-stakes PADA cases, and an underrepresentation of the PLDA cases with which the mandatory arbitration debate is most concerned.¹⁷⁰ Nor would such a sample highly correlate with tried

¹⁶⁹ *Id.* at 794. Apparently, “key employees” (that is, top executives) are much more likely to have arbitration agreements in their (individually negotiated) employment contracts than are employees generally, and are therefore likely to be at least slightly overrepresented in the N sample. Compare Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 349–50 (2007) (stating that thirty-seven percent of key employee employment contracts contain arbitration clauses), with Colvin, *supra* note 21, at 411 (estimating that fifteen to twenty-five percent of employers generally use pre-dispute arbitration clauses).

¹⁷⁰ My point is somewhat different than that made by Alexander Colvin in his critique of the Eisenberg and Hill study. See Colvin, *supra* note 21, at 415–16. Colvin suggests that the situation of highly compensated employees with sufficient bargaining power to negotiate an individual employment agreement may not raise

cases. And their high incomes may well skew the arbitration sample upward.

One cannot of course say why the authors used P and N rather than some other sorting mechanism to refine the arbitration data to approximate a litigable sample.¹⁷¹ What we can say is that the authors have oversorted, if not cherry-picked their data, in a way that skews it to make arbitration outcomes look better. It is likely that a significant proportion of tried cases include employees making less than \$60,000 a year who did not negotiate their employment agreements. To the extent that pay and damages are correlated, their presence in the trial sample will pull down the average liability stakes in the trial sample relative to the arbitration sample. And by excluding such cases from the arbitration sample, the authors have inflated both the win rates and the award averages in arbitration.

3. Reinterpretation of the Data

Eisenberg and Hill present a number of candid disclaimers and caveats about the limitations on their findings. And yet they overclaim. The study engages in a number of rhetorical framing devices that invite the reader to interpret their findings more aggressively, and to underemphasize the less interesting and harder to understand cautions. Thus, they assert “there is no authoritative evidence that arbitration is inferior to in-court adjudication.”¹⁷² In defending their censoring of the data, the authors refer to “our

the same concerns about adhesive pre-dispute agreements that clearly pertain to P employees. *Id.* Colvin may be right up to a point; on the other hand, some mid-level employees—and even some highly-compensated executive types—may individually negotiate key contract terms, like salary, yet submit to adhesive arbitration clauses in the same transaction. *See, e.g.,* *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 140, 159 (Ct. App. 1997) (involving plaintiff, a chief financial officer for defendant company, who was subjected to an onerous arbitration clause). A high proportion of such cases in the “individually negotiated sample” would make that data more relevant to the concerns of compelled arbitration critics.

¹⁷¹ Since Eisenberg and Hill plausibly assert that meaningful access to the courts depends on having a lawyer take the case, *see* Eisenberg & Hill, *supra* note 8, at 47, perhaps a better proxy for “cases that go to litigation” than the N and P variable would have been to do some kind of sorting of the pro se cases. Hill reports that twenty percent (40 out of 200) of the AAA sample she analyzed in her sole-authored article consisted of pro se cases. Hill, *supra* note 68, at 798 n.92. Apparently all of them were in the P group of 121 cases. *Id.* at 800, 801 tbl.6. But this is not a straightforward proxy either, since a significant proportion of litigation filings are pro se—17% in federal employment discrimination cases. *See infra* note 236 and accompanying text.

¹⁷² *Id.* at 45.

finding that awards in arbitrated disputes are not lower than awards in litigated cases.”¹⁷³ And the cautions do not prevent the authors from finding the results telling: “[M]any people expect employee claimants to fare worse in arbitration than in litigation. Yet we find the opposite The fact that the difference is not statistically significant is perhaps less telling than its observed direction.”¹⁷⁴ But, as shown above, that “observed direction” is obtained only by the dubious sorting of N (negotiated) and P (promulgated) agreements and by eliminating (censoring) a likely disproportion of high-cost/high-stakes cases, which pose the greatest concern about the fairness of mandatory arbitration.

If one adjusts for the sorting error, the correct interpretation of their results looks very different from their stated conclusions. A better interpretation of the N sample results would be that highly compensated employees with individually negotiated employment contracts (and perhaps with easy-to-prove contract disputes) may do nearly as well in arbitration as in litigation. Viewed this way, the Eisenberg and Hill study is better understood as a study of a sample approximating low-cost/high-stakes PADA cases. Its conclusions may support the hypothesis that there is a set of cases that both parties should rationally prefer to arbitrate. That, of course, is not an argument for mandatory arbitration, but for post-dispute voluntary arbitration of low-cost/high-stakes cases.

One might also undo the mistaken N and P sorting. The combined win rate of N and P arbitrations is less than the trial win rates, and the median and mean awards for combined N and P cases appear to be substantially lower than those for non-civil rights employment disputes.¹⁷⁵ The civil rights claims already reveal outcomes much worse for arbitration claimants compared to trial plaintiffs, but the sample sizes may be too small to prove that.¹⁷⁶

¹⁷³ *Id.* at 53.

¹⁷⁴ *Id.* at 49.

¹⁷⁵ Win rates for “non-civil rights employment disputes”: 88/173, or approximately fifty percent in arbitration, compared to 82/145, or 56.6% in state employment trials. *See id.* at 48 tbl.1. Award amounts: the mean would be reduced to about \$153,250 in non-civil rights employment arbitrations, compared to \$462,307 in state court employment trials. *See id.* at 50 tbl.2. Sorting out the pro se cases could well raise the arbitration success rates and awards, but we cannot tell by how much, since the authors do not provide that data.

¹⁷⁶ Win rates for civil rights employment disputes: eleven out of forty-two or 26.2% in arbitration, compared to 43.8% in state and 36.4% in federal court. *See id.* at 48, tbl.1. Mean award amounts: \$202,971 in arbitration compared to \$478,448 in state and \$336,291 in federal trials. The median is about three times higher in

Recalculated without the misleading N versus P distinction the results may well look very different. They might not be a dramatic, or statistically significant demonstration of, but might nevertheless be consistent with, the claim that mandatory arbitration favors defendants.

D. Other Fairness-Related Issues

1. The “Repeat Player” Effect

The repeat player studies provide empirical support for a concern that the arbitration system may reflect a pro-defendant bias arising out of the fact that the defendants select and pay for the decisionmaking forum. In a series of studies, Lisa Bingham attempted to analyze whether there is a bias in the arbitration system favoring repeat employers.¹⁷⁷ Bingham’s salient findings were that employees were significantly less likely to win, and were awarded

federal, and four times higher in state court trials. *See id.* at 50 tbl.2.

177 Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 115 & tbl.5 (1996) (comparing employment case decisions in repeat and non-repeat player situations); Bingham, *supra* note 91, at 205–12; *see also* Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT’L J. CONFLICT MGMT. 369, 374–83 (1995) (reporting the results of a study testing whether employees, on average, receive less of their initial demand when the arbitrator is paid a fee); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 235 (1998) (reporting the results of an empirical study of the repeat player effect in employers with personnel manuals). Bingham’s work has pride of place in empirical arbitration scholarship as being among the first to attempt to examine the fairness of the arbitration system using rigorous quantitative methods. *See* Colvin, *supra* note 21, at 427 (“The first empirical evidence suggesting a concern about repeat player bias . . . came from a series of studies by Lisa Bingham in the 1990s.”). Not surprisingly, it has come in for criticism from arbitration supporters—criticism that is perhaps undeserved, but in any case unpersuasive. For example, it has been objected that the first arbitration result of an eventual repeat player should have been excluded from the “repeat player” data. *See* Sherwyn et al., *supra* note 8, at 1570–71. This point has been persuasively rebutted. *See* Colvin, *supra* note 21, at 431. Another claim is that the repeat player effect is entirely, or mostly, explained by a so-called “appellate effect.” *See* Hill, *supra* note 143, at 814–18; *see also* Sherwyn et al., *supra* note 8, at 1571 (interpreting research data as demonstrating that “the availability of an internal review process and the employer’s experience with employment cases likely explains the repeat player effect”). That claim is completely overblown. *See infra* Part III.D.1; *see also* Colvin, *supra* note 21, at 429 (arguing that research data does not yet affirmatively support the appellate effect theory).

significantly lower damages when they did win, against “repeat player” employers (employers who arbitrate more than once).¹⁷⁸ Bingham’s findings are based on small samples of AAA arbitration awards from the mid-1990s; in more recent research, Bingham concluded that the repeat player employers’ advantage has diminished since the adoption of the AAA Due Process Protocol,¹⁷⁹ though employers overall still appear to achieve better results.¹⁸⁰ More recently, Colvin tested the existence of a repeat player bias in the data filed by AAA under California law (which Colvin refers to as “C-filings”).¹⁸¹ He found an employee win rate of 32% against one-shot employers compared to 13.9% against repeat player-employers, and only 11.3% where the repeat player-employer was paired with a repeat arbitrator.¹⁸² Moreover, in the 49 cases where a repeat employer appeared before a repeat arbitrator to defend against a pro se claimant, only one claimant was awarded damages—a very troubling 2% win rate.¹⁸³

Nevertheless, what repeat player studies tell us is quite limited. Both Colvin and Bingham acknowledge that there may be other causes for repeat employer success than arbitrator bias.¹⁸⁴ The fact that these studies look only at arbitration and not litigation results is both a strength and a weakness. On the one hand, the problem of disparate arbitration and litigation case streams does not arise; on the other hand, the studies, naturally, have nothing to say about how the repeat player bias in arbitration compares in degree to the one attributed to the litigation system.¹⁸⁵

178 See, e.g., Bingham, *supra* note 91, at 209–10 & tbls 2 & 3.. For example, employees recovered a median of 28% and a mean of 48% of their claimed dollar amounts against non-repeat player defendants, but a median of 0% and a mean of 11% of their claimed dollar amounts against repeat player defendants. Employees won damages in over 70% (142/201) of cases against non-repeat players, compared to only sixteen percent (5/31) in cases against repeat players. *Id.*

179 See DUE PROCESS PROTOCOL, *supra* note 61.

180 Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 303, 325–26, & tbl.4 (Samuel Estreicher & David Sherwyn eds., 2004). The data are presented as logistic regressions rather than averages, so the numbers are not easily lined up for comparison against her earlier studies.

181 See *supra* note 90; Colvin, *supra* note 21, at 408.

182 Colvin, *supra* note 21, at 430.

183 *Id.* at 434.

184 See Bingham & Sarraf, *supra* note 180, at 325–28; Colvin, *supra* note 21, at 431.

185 See Galanter, *supra* note 121, at 100–03 (discussing repeat players “playing for

Finally, the repeat player analysis seems to nibble around the edges of the problem. The risk of customer-service bias in the arbitration system probably does not come from individual arbitrators' desire to please a particular defendant who arbitrates two or more cases. Rather, the concern is that arbitrators will reduce their awards to increase their chances of being rehired by *any* future defendant. Insofar as information about an arbitrator's prior decisions is available to the parties in the next case, every defendant is functionally a repeat player.

Moreover, the repeat player studies seem to miss the broader point that arbitration is a service sold by arbitration vendors to putative defendants.¹⁸⁶ That means the "aim to please" comes not only from individual arbitrators, but also from vendors—like AAA—who compile the panels of potential arbitrators from which the parties choose. AAA, for example, not only maintains an accredited list of arbitrators, but in a given case, will send the parties a short list from which the arbitrator in that case will be selected.¹⁸⁷ In other words, arbitration vendors play a significant role in arbitrator selection; individual arbitrators have to be responsive to the vendors who keep them on "the list," and vendors must be responsive to their customer-defendants. Repeat player analysis, then, should give way to a more holistic customer-bias analysis that looks more carefully at

rules" in litigation).

¹⁸⁶ The use of a mandatory arbitration clause represents a commitment on the part of the defendant to pay private arbitrators at some future time to resolve disputes as they arise. Mandatory arbitration clauses are thus, in an important sense, a promise to purchase a service as the occasion arises. These clauses foster a structured market of private arbitrators and arbitration-administering organizations like the AAA. In the trade, and the academic literature, these institutions are called arbitration "administrators" or "providers," terms that emphasize their quasi-governmental or even parental characteristics while unduly downplaying their commercial nature. While they may be organized as non-profits, they can generate significant revenues that would not exist if there were no market for private judging. AAA generates over \$70 million per year in administrative fees (a figure which does not include compensation to individual arbitrators), and holds an investment endowment that was worth over \$88 million at the end of 2007. See AM. ARBITRATION ASS'N, REPORT ON CONSOLIDATED FINANCIAL STATEMENTS: YEARS ENDED DECEMBER 31, 2007 AND 2006, at 4–5 (2007), available at <http://www.adr.org/si.asp?id=5299> (reporting revenues and endowment); AM. ARBITRATION ASS'N, *supra* note 70, at R.43–44 (distinguishing AAA administrative fees from compensation and reimbursable expenses of arbitrator); *id.* at R.48 ("Arbitrator compensation is not included as part of the administrative feeds charged by the AAA."). Accordingly, I prefer to call them arbitration "vendors."

¹⁸⁷ EMPLOYMENT ARBITRATION RULES, *supra* note 70, at R.12(c).

such factors as the size of the defendant company,¹⁸⁸ and the process of arbitrator selection—for example, scrutinizing the relationship between an arbitrator’s award-making behavior and the frequency with which that arbitrator is nominated for short-lists by the vendor.

2. Is Arbitration Faster and Cheaper than Litigation?

It is generally assumed that arbitration is faster and cheaper than litigation, but there is reason to believe that it is not. Elizabeth Hill’s oft-cited study, purporting to show that arbitration is faster and cheaper,¹⁸⁹ really tells us very little about the relative costs in time and money, but illustrates the problems and challenges in undertaking such research. The fundamental problem is that Hill compares time-to-disposition for arbitration *hearings* and federal *trials*.¹⁹⁰ However, if one compares all case dispositions in the two forums—including settlements, pre-trial dismissals, and the like—the average time to disposition may well be shorter in litigation than arbitration. That is right: there is reason to believe that litigation is faster than arbitration.¹⁹¹

There is no colorable argument to omit settlements and other pre-trial terminations from the analysis of the relative speed of the two forums. Defendants weighing their dispute resolution options in employment or consumer cases necessarily consider the prospect of winning on summary judgment. Plaintiffs who file lawsuits know that the great likelihood is that their cases will resolve by settlement (nearly seventy percent of civil cases settle¹⁹²). Settlements are valid resolutions for lawsuits and must necessarily be averaged into the real time-to-termination, because the prospect of early settlement should affect the decision-making of a rational litigant. Whatever may be

188 The customer bias is a function of anticipated future business. The number of arbitrations with the one-to-three-year time window of the repeat player studies no doubt is a factor, but the size of the company may be a bigger factor in how an arbitration vendor views its future business potential.

189 Hill, *supra* note 143, at 822; *see also* Eisenberg & Hill, *supra* note 8, at 51 (presenting same data).

190 *See* Eisenberg & Hill, *supra* note 8, at 51 tbl.3; *see also* Hill, *supra* note 143, at 792 (describing hearing data used in the study).

191 The pieces of missing data that renders this assertion tentative are: the average times to disposition of arbitration cases that terminate pre-hearing, and state court time-to-termination data, which may reflect slower case disposition than federal court.

192 Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 136 (2002) (calculating a settlement rate of 66.7% in federal civil cases terminated in 2000).

said for an argument that settlement dollars are roughly proportional to trial verdict dollars (Eisenberg and Hill's rationale for going forward with a results analysis that omits settlement data)¹⁹³, there is no plausible argument that settlements on average take as long to consummate as trial dispositions.

Eisenberg and Hill report that the average time to final disposition in arbitration cases is about seven to thirteen months, compared to twenty to twenty-seven months for state and federal trials.¹⁹⁴ Of course, we have to remember that their data "censors" the 632 cases that were not resolved by the end of 2000.¹⁹⁵ In other words, the seven to nine month time-to-resolution figure represents the 300 or so faster cases but excludes the 632 slower ones—a relevant piece of information omitted by this study. In a caveat often ignored by scholars citing to this data,¹⁹⁶ Hill estimates that the censored cases would increase the time-to-disposition of arbitration cases to 15.2 months.¹⁹⁷ So the most the Eisenberg-Hill studies tell us is that it will take five months to a year longer, on average, to bring one's case to trial than it would to have it heard by an arbitrator.

But looking at overall case disposition time, including settlements and pre-trial adjudications, the picture looks very different. The median time from filing to disposition of civil cases in district courts in 2002 was 8.1 months.¹⁹⁸ Eisenberg and Hill do not present comparable data for AAA arbitrations, but we can apply the following extrapolation to illustrate the very real possibility that arbitration is on the whole *slower* that litigation in average disposition time. According to the AAA data presented by Eisenberg and Hill, for every one hundred cases filed in arbitration, forty-five settle, twenty are "withdrawn or closed for other reasons," and thirty-five are

193 See *supra* note 120 and accompanying text.

194 See Eisenberg & Hill, *supra* note 8, at 51 & tbl.3; Hill, *supra* note 68, at 822. The higher end of the range is the average of five employment discrimination cases by N employees. Eisenberg & Hill, *supra* note 8, at 51 & tbl.3.

195 See Eisenberg & Hill, *supra* note 8, at 52; Hill, *supra* note 69, at 822.

196 See, e.g., Sherwyn et al., *supra* note 8, at 1572–73, and Eisenberg & Hill, *supra* note 8, at 51. Next time someone asks you for an example of *chutzpah*, consider telling them about the "time-to-disposition" study that simply omits the slower cases.

197 Hill, *supra* note 143, at 822 & n.126. Hill's estimate continues to omit the longest-running 8% of her data set, which had still not terminated by the time her article went to press. Hill breezily discounts those slowpokes on the ground that the still pending cases "comprise less than 8% of the 440 awards supporting my estimate." *Id.*

198 Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459, 545 (2004).

terminated after arbitration hearing.¹⁹⁹ The arbitration hearings take an average of 15.2 months, according to Hill.²⁰⁰ If we assume that pre-hearing arbitration dispositions—settlements, case closures, etc.—take the same amount of time to conclude as comparable dispositions in court (approximately 7.6 months²⁰¹), then the overall average time to disposition for arbitration cases would be 10.26 months.²⁰² I don't offer these extrapolations as a substitute for a serious study comparing time-to-disposition in arbitration and litigation, but rather to show that the existing studies fail to frame the correct questions and thereby grossly exaggerate the relative speed of arbitration—which may conceivably take longer than litigation.

The second way in which the Eisenberg-Hill time-to-termination study exaggerates the relative speed of arbitration is that it fails to account for administrative and small claims processes that may be equipped to handle low-cost/low-stakes cases more quickly and efficiently than arbitration. Again, mandatory arbitration has to be compared not only with litigation, but with all the procedures that it displaces.²⁰³

Further, any valid comparison of time and money expenditures in arbitration and litigation must also make an effort to sort the data by case characteristics. Low-cost/low-stakes cases are not meaningfully comparable to high-cost/high-stakes cases in time-to-termination, any more than they are in average amounts recovered.²⁰⁴ For example, the times-to-termination in high-cost

199 See Eisenberg & Hill, *supra* note 8, at 52; *supra* tbl. 2.

200 See Hill, *supra* note 68, at 822.

201 See *id.* While federal trials may take an average of twenty months for disposition, recall that fewer than four percent of federal cases go to trial. Therefore: $(.04 \times 20 \text{ months}) + (.96 + x \text{ months}) = 8.1 \text{ months}$. Solving for x we get $x = (8.1 - .08) / .96 = 7.6 \text{ months}$ on average for pre-trial resolutions.

202 $(.35 \times 15.2 \text{ months}) + (.65 \times 7.6 \text{ months}) = 10.26$. If we were to extrapolate further that arbitration pre-hearing dispositions occurred at a speed relative to final hearings in proportion to the same relationship of pre-trial and dispositions (15 months for arbitration hearings compared to 20 months for federal trials, or .75), then the mean time to resolution for arbitration cases drops to 8.95 months: $(.35 \times 15) + (.65 \times 7.6 \times .75)$. To be sure, state court cases may take longer than federal cases. Federal trial dispositions in the period studied by Hill averaged around 20 months. State court average trial dispositions were about 27 months, or 35% longer. If that proportion holds, then perhaps the average overall litigation time to termination would be closer to 10.9 months.

203 See *supra* Part I.B.

204 Two further caveats are in order. First, appeals should arguably be broken out of the total disposition time of litigation, since they are an option with the parties rather than an automatic incident of litigation. Second, *mandatory* arbitration is far more likely than consensual arbitration to generate pre- or post-arbitration litigation.

arbitration cases are presumably higher and will only increase if arbitrators incorporate more discovery and other litigation-type procedures.²⁰⁵ In finding arbitration faster and cheaper than litigation, Hill made no effort to sort cases by liability stakes.²⁰⁶

Assessing the relative monetary costs of arbitration and litigation raises some of the same issues. Litigation costs are significantly lessened by early settlements, and some administrative and small claims processes displaced by arbitration may be cheaper than arbitration. Moreover, liability stakes and related case characteristics are highly relevant to assessing costs: a plaintiff is likely to be more willing and able to take on the same litigation cost in a high-stakes than a low-stakes case. Put another way, a \$10,000 attorneys fee is more “expensive” in relation to a \$10,000 claim than a \$100,000 claim. Finally, timing and contingency issues also weigh heavily in evaluating case costs: If the relevant issue is access to justice, then a hefty contingency fee extracted from a litigation settlement or judgment may be far less of a deterrent to a plaintiff than a far more modest “retainer” fee required up-front by an attorney to handle an arbitration claim.²⁰⁷ In finding arbitration to be cheaper than litigation, Hill takes none of these issues into account.²⁰⁸

IV. THE EGALITARIAN (PSEUDO-POPULIST) ARGUMENT FOR MANDATORY ARBITRATION

Supporters argue that arbitration is a more accessible forum to smaller claimants. However, only a system of *mandatory* arbitration can solve the “access to justice” problem with the litigation system, because parties will not agree to voluntary, post-dispute arbitration.

I call this the “pseudo-populist” argument. It is populist because it purports to be egalitarian in motivation, and indeed its leading proponents actually use populist political campaign sloganeering to make the point: mandatory arbitration offers “Saturns” for “the many,” in place of litigation’s offer of “Cadillacs” for “the few.”²⁰⁹

Since that is a cost of doing business (both in time and money) of mandatory arbitration, time studies should include that data on the arbitration side of the ledger—failing to do so would overstate the relative speed of mandatory arbitration.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ See Hill, *supra* note 68, at 822.

²⁰⁷ See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 833 (2008).

²⁰⁸ See Hill, *supra* note 68, at 799–803.

²⁰⁹ Estreicher puts it this way:

And it is pseudo because its premises—every one of which is either an unfounded empirical assertion or a fallacy—are transparently not egalitarian. Proponents of the argument appear less interested in making dispute resolution more accessible than they are in promoting the business of arbitration or lowering the disputing costs of defendants.

A. *The Accessibility Myth: Is Arbitration Really “The People’s Court”?*

Few people would argue that the public dispute resolution system is perfect, that it is completely accessible to all consumer or employee claimants, or that it is one-hundred percent fair to those claimants who make it through the door. But its many faults do not necessarily mean arbitration is better simply because arbitration is an alternative.²¹⁰ Before jumping into the arms of mandatory, or even

[NNP] The 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; these are the folks who are likely to derive benefit from the considerable upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this “litigation lottery.”

[NP] Most plaintiff lawyers understandably value this system because it enables them to be highly selective about the cases they take on. Moreover, the sheer costs of defending a litigation and the risks of a jury trial create considerable settlement value irrespective of the substantive merits of the underlying claim. Thus, most cases where claimants obtain competent counsel will settle, and at sufficiently high values to give plaintiff lawyers ample economic rewards without actually having to try many law suits. Thus, the system works well for high-end claimants and most plaintiff lawyers, and not very well for average claimants.

[NP] A properly designed arbitration system, I submit, can do a better job of delivering accessible justice for average claimants than a litigation-based approach. It stands a better chance of providing Saturns for average claimants, in place of the rickshaws now available to the many so that a few can drive Cadillacs.

Estreicher, *supra* note 8, at 563–64.

²¹⁰ This pattern of assumption making reflects a common analytical mistake in comparing legal or social institutions, identified by Neil Komesar as “single institutionalism.” KOMESAR, *supra* note 39, at 6–7; *see also* NEIL K. KOMESAR, *LAW’S LIMITS* 20 (2001) (“The analysis must be comparative institutional not single institutional.”). Komesar explores the pitfalls of single institutional analysis primarily in the context of legal rules that distribute legal decisionmaking authority among courts, the political branches of government, and the market. However, as he persuasively shows, the problem, and the need for rigorous examination of parallel flaws, applies to any comparison of two or more institutions’ relative functionality. KOMESAR, *supra* at 20–25. Simple to describe, but hard to avoid falling into, the trap

voluntary, arbitration, we should move beyond unfounded assumptions about *that* system.

The belief that arbitration is significantly more accessible to lower-income claimants than litigation may be the biggest misconception in the mandatory arbitration debate. While plausible in theory, it remains lacking in empirical support. Yet it is surprisingly widely held, by mandatory arbitration supporters and critics alike.²¹¹

The main reason for assuming the superior accessibility of arbitration is that litigation is generally expensive to conduct and generally requires the services of a lawyer; therefore, one sees fewer cases brought by lower-income (or more precisely, lower-stakes) plaintiffs than one might otherwise. Arbitration is presumably cheaper²¹² and less formal than litigation; therefore it stands to reason that arbitration is more accessible to those with less money and those without attorney representation. Because arbitration is more accessible to lower-income claimants, it stands to reason that more lower-income claimants in fact access it. At the same time, arbitration appears to be the only dispute resolution alternative to expensive, individual lawsuits. Therefore, for many, many claimants, it is arbitration or nothing.²¹³ Supporters frequently assert these

of single institutional analysis means assuming that a flaw associated with salient characteristics of one institution does not exist in its alternative simply because the latter has different characteristics. A common version of this logical fallacy takes the following form: "Institution 1 has characteristic A, which causes effect X. Institution 2 has characteristic not-A (or less-A). Therefore, Institution 2 does not have effect X." Obviously, if "effect X" can be produced by causes other than characteristic A, the absence of that characteristic does not necessarily free Institution 2 from the effect. *See id.* at 20–21 (critiquing law and economics scholars' analysis of common law nuisance doctrine for falling victim to this logical fallacy).

211 *See, e.g.*, RICHARD A. BALES, COMPULSORY ARBITRATION 152–60 (1997); Eisenberg & Hill, *supra* note 8; Estreicher, *supra* note 8, at 563–68; Hill, *supra* note 143, at 782–84; Maltby, *supra* note 23, at 57–62; Sherwyn et al., *supra* note 8, at 1578–81; Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790–93 (2008). It is also frequently asserted in more qualified terms by scholars who summarize existing research without careful scrutiny of its methodological flaws. *See, e.g.*, Drahozal, *supra* note 207, at 833–35; Weidemaier, *supra* note 109, at 847–58.

212 *But see supra* Part III.D.2 (questioning the assumption that arbitration is less costly than litigation).

213 As Hill asserts, "[lower-pay] employees most likely cannot gain access to the court system," so therefore, "private employment arbitration may be the only adjudicative forum which they can access as a practical matter." Hill, *supra* note 143, at 794; *see also* Eisenberg & Hill, *supra* note 8, at 53 ("Lower-pay employees seem to be unable to attract the legal representation necessary for meaningful access to

speculative claims as bedrock fact in the very articles in which they offer, or call for, more empirical research to answer empirical questions.²¹⁴

1. Precision About Claimants and Forum

The accessibility argument rests in part on vagueness about who is filing claims and where. Access to litigation in the contingency fee environment of most employment and consumer claims, is based on liability stakes, not plaintiff income.²¹⁵ While there is no doubt a correlation between income and damages in employment cases, that correlation is imperfect. In cases involving common law employment torts, employment discrimination, or harassment, liability stakes may be based primarily on emotional distress and punitive damages.²¹⁶ In statutory employment cases, attorneys' fees may be a major component of liability stakes.²¹⁷ Where damages claims are small, even wealthy claimants—if they behave rationally—are likely to drop the claims if costs are high. Even if higher-income employees are over represented among employment litigation plaintiffs, it remains plausible that a significant number of low-income plaintiffs have cases resolved through the litigation system and even go to trial. In sum, stakes are a more salient determinant of claim access than wealth or income. But with disturbing frequency, supporters glide over this claim value point to talk about employee income, as though they were interchangeable.²¹⁸ Supporters no doubt score rhetorical populist points whenever they use income as a proxy for claim value when discussing forum access, but they do so at the cost of clarity and precision.

Equally misleading in discussions of forum accessibility is the

court.”); Estreicher, *supra* note 8, at 563 (arguing that “[v]ery few claimants” are able to access the litigation system).

214 See, e.g., Hill, *supra* note 143, at 781; Sherwyn et al., *supra* note 8, at 1560.

215 See Howard, *supra* note 125, at 44 (reporting that case intake decisions by contingency fee lawyers are based on amount of damages).

216 Cf. 42 U.S.C. § 1981a(c) (2006) (allowing recovery of emotional distress and punitive damages in certain employment discrimination cases).

217 See Nancy Levitt, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 369–70 & 369 n.20 (2008).

218 Thus, for example, Eisenberg and Hill shift subtly from data to the effect that plaintiff's employment lawyers generally refuse claims with less than \$60,000 in “provable damages” to the assertion that lawyers will generally refuse cases brought by plaintiff's earning less than \$60,000 per year. Eisenberg & Hill, *supra* note 8, at 47 (citing Howard, *supra* note 125, at 45).

mistaken tendency to compare arbitration to a traditional, single-plaintiff model of litigation. Again, arbitration displaces a range of public dispute resolution options, including small claims court and administrative tribunals that may be much cheaper than arbitration.²¹⁹ Furthermore, arbitration may also displace class actions. By aggregating low-cost/low-stakes or high-cost/low-stakes cases into a single high-cost/high-stakes case, class actions can realize potential process-cost economies of scale that make them a relatively inexpensive forum for the class members—both in terms of monetary and information costs.²²⁰ Defendants' aggressive efforts to use mandatory arbitration clauses as an escape from class actions, provides a strong signal that their primary concern is to deter claims, not to ensure that all claims against them are aired more cheaply.²²¹ While there is no doubt disagreement among some mandatory arbitration supporters about whether class actions are arbitrable—

²¹⁹ See *supra* Part I.B.

²²⁰ See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28–31 (2000); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 85–92; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is 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))).

²²¹ Professor Eisenberg's recent study of consumer arbitration agreements provides a persuasive demonstration that companies using consumer arbitration clauses “do not view consumer arbitration as offering a superior combination of cost savings, expeditious decision-making, consistency, and justice. Rather, they view consumer arbitration as a way to save money by avoiding aggregate dispute resolution.” Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 894–95 (2008); see also *Mandatory Binding Arbitration Agreements*, *supra* note 5, at 3 (statement of Rep. Chris Cannon, Member, House Comm. on the Judiciary) (stating that mandatory arbitration clauses are used “because companies increasingly believe they need to protect themselves from abusive class action suits”). Alan S. Kaplinsky, a leading mandatory arbitration spokesman and attorney representing financial services institutions, has claimed that “Arbitration is a powerful deterrent to class-action lawsuits against lenders Stripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue.” Paul Wenske, *Some Cardholders are Signing Away Their Right to Sue*, KAN. CITY STAR, April, 30, 2000, <http://kcsweb.kcstar.com/projects/carddebt/2side.htm>. Many in the mandatory arbitration defense bar assert that class action bans written into arbitration agreements are enforceable, or that by its very nature, an arbitration agreement permits only individualized dispute resolution. See, e.g., Reply Brief of Petitioner at 24–25, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634).

and the law remains unsettled²²²—it is clear that at least some find the possibility of getting rid of class actions as the primary virtue of mandatory arbitration. That motivation is incompatible with an interest in increased access to dispute resolution for “the many.”

2. Empirical Evidence of Relative Access of Arbitration and Litigation

Although assertions about the superior access of arbitration fly freely in the arguments of mandatory arbitration supporters, no one has made an empirical study of the accessibility of arbitration compared to public dispute resolution. It seems reasonable to believe that there are significant limitations on access to legal representation and to the courts.²²³ That of course tells us nothing

²²² See *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (describing the legality of arbitral class actions); Schwartz, *If You Love Arbitration*, *supra* note 1, at 413–14 (discussing the state of the law on arbitral class actions); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1732–42 (2006) (same).

²²³ The high attrition rates of disputes just prior to the litigation filing stage supports this view. See, e.g., Miller & Sarat, *supra* note 105, at 537 tbl.2. The oft-repeated assertions about the limited access to litigation in employment cases, see, e.g., Eisenberg & Hill, *supra* note 8, at 47; Hill, *supra* note 143, at 782–83, may well be true, but rest on a sketchy empirical basis that may exaggerate the problem somewhat. The usual source for this claim is Howard’s survey of 321 plaintiff’s employment lawyers in California, in which, on average, the responding lawyers each accepted “only” five percent of the potential plaintiffs seeking representation. See Howard, *supra* note 97, at 43–44. Arbitration supporters like to present that five percent figure as if it actually meant that only five percent of potential claimants get lawyers. See, e.g., Hill, *supra* note 68, at 783 (plaintiff’s employment lawyers “accepted only 5% of the employment discrimination cases offered them by prospective plaintiffs”); Maltby, *supra* note 22, at 58 (citing Howard survey for proposition that “ninety-five percent of those who seek help from the private bar with an employment matter do not obtain counsel”). The five percent figure has thus become a real urban myth. Howard’s survey found that *each individual attorney* accepted an average of five percent of the potential clients screened. Howard, *supra* note 97, at 43–44. But each lawyer’s individual five percent acceptance rate adds up to an overall five percent acceptance rate only if we assume that every potential client either gives up or hires a lawyer after contacting only one lawyer. That is not how things work: persistent claimants will often contact several lawyers before having their case accepted or giving up. If each potential client speaks to an average of three lawyers, then the five percent case-acceptance rate would yield an overall fifteen-percent success rate in getting a lawyer. If each potential client speaks to an average of five lawyers, the five percent case acceptance rate would yield a twenty-five percent rate of client representation. Assume purely for the sake of illustration that there were 400,000 employees seeking legal representation for potential employment claims, and that each employee speaks with an average of four lawyers before either finding

about the accessibility of arbitration.

Our current, sketchy empirical picture of access to arbitration raises real questions about whether it is truly more accessible to low-stakes claimants than litigation, even without considering other public dispute resolution options. If arbitration were so much more accessible to claims, we should expect to see more claims per capita filed in arbitration than litigation. But a rough cut at the data seems to show the opposite. In 2001, there were 2159 employment cases filed with AAA, out of a pool of approximately six million employees nationwide covered by AAA mandatory arbitration clauses.²²⁴ This yields a filing rate of 360 cases per million employees.²²⁵ A rough estimate of the litigation-filing rate comes to 1818 cases per million employees, over five times higher than the filing rate for employment arbitration.²²⁶ I do not offer this as a refined data analysis that proves

representation or giving up. Assume further that there are 4,000 lawyers who represent employee-plaintiffs. The National Employment Lawyers Association, for example, claims 3000 attorney members. See National Employment Lawyers Association (NELA), <http://www.nela.org/NELA/index.cfm> (last visited February 19, 2009). Assume that each attorney takes an average of twenty cases per year, and the average case-acceptance rate across the attorneys is five percent. Each attorney would thus interview 400 potential clients to find twenty cases. This represents 1.6 million client interviews, which matches the number of interviews generated by 400,000 potential clients each speaking with four lawyers. The 4,000 lawyers end up taking 80,000 cases among them. In this illustration, then, the five percent case-acceptance rate per lawyer generates an overall representation rate of 20%.

The point is that a survey of lawyers' case-acceptance rate is not a sensible way to determine the percentage of claimants who get lawyers. A better methodology is to sample a pool of claimants and ask how many of them used lawyers. Miller and Sarat did just this: they found that lawyers were used in 13.3% of discrimination disputes and 23% of overall grievances. See Miller and Sarat, *supra* note 105, at 537 tbl. 2.

²²⁴ See Eisenberg & Hill, *supra* note 8, at 44 (reporting 2,159 AAA filings); Hill, *supra* note 143, at 780 (reporting six million employees covered by AAA arbitration clauses by 2002).

²²⁵ The arbitration filing rate is probably lower than this, since the 2159 AAA arbitrations are likely to have included cases in which parties arbitrated pursuant to a generic clause that did not specify AAA arbitration. That means that the AAA arbitrations are drawn from a pool of more than the six million employees covered by AAA pre-dispute agreements.

²²⁶ The figure is based on several estimates and extrapolations. In 2001 there were approximately 143 million people in the U.S. workforce (employed and unemployed). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COMPARATIVE CIVILIAN LABOR FORCE STATISTICS, 10 COUNTRIES, 1960-2004, at 10 tbl.2 (2005), available at <http://www.bls.gov/fls/flslforc.pdf>. I estimate 260,000 employment cases, as follows. There were 23,075 statutory employment cases (discrimination and Fair Labor Standards Act) filed in the federal district courts that year, representing 9.2% of all 251,000 federal civil filings. See ADMIN. OFFICE OF THE U.S. COURTS,

that plaintiffs are more likely to file cases in court than in arbitration.²²⁷ Think of it instead as an ugly blemish on the skin of the received wisdom that arbitration is more accessible than court: it may ultimately prove benign, but it needs to be checked out. A significantly lower filing rate in arbitration than in court raises the possibility that mandatory arbitration is less accessible than court and discourages many claimants from coming forward.

There are other indications that arbitration may be less accessible than court. Recall that in Eisenberg and Hill's study, about forty percent of the claimants in arbitration were employees of sufficient income and status to have individually-negotiated employment agreements.²²⁸ That seems like a striking overrepresentation of elite employees in arbitration relative to their

STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 2001, at 29–30 tbl.C-2 (2001) (reporting 23,075 statutory employment damages claims—21,062 employment “civil rights” claims and 2013 Fair Labor Standard Act cases). The number of state court employment cases is difficult to determine, since reliable nationwide data on state court business remains a work in progress. Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 755 (2004). There were 7,171,842 civil case filings in state courts of general jurisdiction in 1999. *See id.* at 757 tbl.1. For this estimate, I assume that a comparable number of cases were filed in 2001. That year, contract trials represented nearly one-third of all state court trials in the seventy-five largest counties, and employment trials with individual employee plaintiffs accounted for about 10.5% (388/3676) of the contract trials. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CONTRACT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 3 tbl.2 (2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctvlc01.pdf>. If these trial percentages held up for case filings and for state courts overall, then we can extrapolate that about 3.3% of the 7.17 million state court civil cases were employment disputes, or approximately 236,600 cases. Note that this figure excludes the many employment disputes filed in state courts of *limited* jurisdiction (such as small claims courts) and administrative tribunals are not captured in filing statistics for state courts of general jurisdiction. *See, e.g.*, Ostrom, *supra*, at 757 tbl.1 (reporting state court statistics only for courts of general jurisdiction). But they are relevant in determining filing rates in forums displaced by pre-dispute arbitration clauses.

²²⁷ Among other things, we would need data on the filing rate for arbitrations outside AAA, and data about pro se representation and plaintiff demographics to make meaningful comparisons. We would also need to consider the possibility that employers with arbitration clauses resolve a higher proportion of their disputes in-house. A study by Alexander Colvin, for example, suggests that employers using mandatory arbitration adopt multi-step internal dispute resolution procedures at a much higher rate than employers who do not use mandatory arbitration. *See* Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, in 13 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 69, 70–93 (David Lewin & Bruce E. Kaufman eds., 2004).

²²⁸ *See supra* note 167 and accompanying text.

frequency in the workforce; it is very conceivable that the demographic profile of litigation is more egalitarian. Equally striking is the comparatively low percentage of statutory (that is, civil rights) employment claims in the AAA data sets.²²⁹ The majority of non-civil rights employment discrimination claims are contract claims, in which damages are entirely based on lost wages.²³⁰ Such claims will be more correlated to income than statutory employment claims, where provisions for emotional distress, punitive damages, and attorneys' fees provisions, will act as access equalizers.²³¹ In the 1999–2000 arbitration sample analyzed by Eisenberg and Hill, statutory employment cases represented less than twenty percent of the arbitrated cases.²³² In contrast, statutory employment claims appear to represent around fifty percent of the employment cases tried in state courts and the majority of federal employment cases.²³³

229 Only 19.5% of the arbitration awards (42 out of 215) reported by Eisenberg and Hill involved employment discrimination claims. Eisenber & Hill, *supra* note 8, at 48 tbl.1.

230 See, e.g., MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 815–19 (3d ed. 2004) (stating that wage loss provides the measure of contract damages in employment cases); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 398 (Cal. 1987) (“[T]he employment relationship is fundamentally contractual, and several factors combine to persuade us that in the absence of legislative direction to the contrary contractual remedies should remain the sole available relief . . .”).

231 See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (finding that the purpose of the civil rights attorneys' fees statute is to ensure effective access to the judicial process); Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RESOL. 153, 157 (finding the availability of punitive damages under the Civil Rights Act of 1991 is to encourage wronged individuals and plaintiffs' attorneys to file suit).

232 See Eisenberg & Hill, *supra* note 8, at 48 (presenting a table showing 173 “non-civil rights” and 42 “civil rights” employment disputes).

233 Statutory employment claims made up 52.4% of the state court 1996 employment trials in the Eisenberg and Hill sample. See *id.* at 48 tbl.2 (calculating 145 “non-civil rights” and 160 “civil rights” employment trials in 1996). In 2001, employment discrimination cases made up forty-three percent of the state court employment trials in large counties. See COHEN, *supra* note 226, at 3 tbl.2 (reporting 165 employment discrimination cases, comprising 42.5% of the 388 employment related cases brought by employees). The discrepancy may be that civil rights employment claims may also include statutory wage and hour claims, in addition to discrimination claims. Nonstatutory employment cases in federal court are not broken out of the data and are therefore difficult to estimate. In 2007 the number of statutory employment damages cases filed in federal court (employment discrimination and Fair Labor Standards Act cases) was roughly 20,000. Other employment cases would appear to represent some fraction of “Other Contract Actions” (roughly 14,000 cases). See ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, 2007, at tbl.C-2 (2007).

To the extent that employment statutes themselves contain provisions to equalize access to the courts, the apparently low-incidence of such claims in arbitration is a ground for caution in generalizing about the accessibility of arbitration.

Since the need to hire a lawyer is a possible barrier to access, the receptiveness of arbitration to pro se claimants (not represented by a lawyer) is relevant in considering its overall accessibility. Here, again, we simply don't know the relevant information to judge whether unrepresented employees are more likely to file pro se claims in arbitration than they are in litigation—but pro se claimants may actually find arbitration inhospitable compared to court. Eisenberg and Hill reported that twenty percent of the claimants in their sample were pro se—thirty-three percent of the P claimants, but only five percent of the N claimants, were pro se.²³⁴ In his study of AAA C-filing data—a sample consisting entirely of P claimants—Colvin found the proportion of pro se cases to be twenty-five percent.²³⁵ In contrast, Clermont and Schwab report that pro se cases comprised seventeen percent of all employment *discrimination* cases filed in federal court from 1998–2001.²³⁶ But this does not mean that pro se claimants file at a higher rate in arbitration than in litigation. The missing piece of information is the overall case-filing rate. If, for example, my rough estimate were correct, that employees are five times more likely to file in court than arbitration, then it would also be true based on the foregoing data that pro se claimants are over three times more likely to file in court than arbitration.²³⁷

In any event, pro se filing rates do not tell us the whole story. Access to dispute resolution services is not necessarily a prize for claimants who lose because they cannot represent themselves effectively. Colvin found the win rate for pro se claimants in 836

²³⁴ See Hill, *supra* note 143, at 818 n.125. Eisenberg and Hill used the same data as Hill's original study. See *supra* note 143.

²³⁵ See Colvin, *supra* note 21, at 432.

²³⁶ Clermont & Schwab, *supra* note 115, at 434 tbl.1 (reporting that 16.99% of plaintiffs in employment discrimination cases proceeded pro se). Several key pieces of data are missing from this litigation pro se rate for present purposes. We do not know the pro se rate for employment cases overall; chances are it is lower than seventeen percent. We also need similar data from state court.

²³⁷ Taking the figures above, see *supra* notes 224–226 and accompanying text, as an illustration, and assuming the seventeen percent pro se rate in federal court litigation applies in state court as well, the comparative pro se filing rates would be 90 cases per million employees under mandatory arbitration (twenty-five percent of 360) compared to 309 cases per million employees filed in court (seventeen percent of 1818). In other words, pro se claimants would be more than three times more likely to file in court than in arbitration under these assumptions.

arbitrations reported in the AAA C-filings data was significantly lower than for represented claimants (13.7 % compared to 22.6%).²³⁸ One also has to wonder about the merit of the pro se cases. While there may be some social value in opening dispute resolution processes to meritless claims, that value is a mixed bag. It would be worth knowing whether the increment of pro se arbitration cases that exceeds pro se litigations are disproportionately lacking in merit. One might expect that effect if, as often hypothesized, attorneys' case screening practices tend to filter out low- and no-merit claims.²³⁹

Recall that the pseudo-populist argument for mandatory arbitration is based on finding an accessible forum for the class of cases that are allegedly welcome in arbitration but not litigation. This tail—which wags the “dog” of high-cost/high-stakes claims forced from litigation into arbitration—looks smaller and smaller if it consists primarily of perhaps meritless low-stakes claims. I consider this point further in the next section.

3. The Theoretical Limits of the “Populist Effect”

The thrust of the populist argument is that, all other things being equal, a mandatory arbitration regime will lead to more claims being brought in arbitration than in litigation. This sounds nice from the claimant's point of view; for the defendant, however, it means more cases to defend. Arbitration populists generally fail to acknowledge an important limitation: defendants will drop mandatory arbitration from their contracts if too many of “the many” benefit. The following graph illustrates this point:

[insert figure 6 here]

In figure 6, the X axis equals the number of cases against a hypothetical defendant, and the Y axis represents the defendant's total cost of disputing. The solid diagonal line represents a cost curve for litigation and the dashed line, a cost curve for arbitration. Since litigation is assumed to be more expensive than arbitration, the litigation line reflects a steeper cost curve. Since the populist argument assumes more cases would be filed in arbitration than

²³⁸ Colvin, *supra* note 21, at 433. Hill found a higher a pro se win rate, but worked with a very small sample—thirteen out of forty cases. See Hill, *supra* note 143, at 820.

²³⁹ Curiously, some mandatory arbitration supporters who decry plaintiffs' attorneys for taking so few cases also decry the filing of meritless cases. See, e.g., Estreicher, *supra* note 8, at 563; Sherwyn et al., *supra* note 8, at 1580; Sherwyn, *supra* note 9, at 17–20. Yet they somehow fail to credit the possibility that at least some cases rejected by greedy plaintiffs' attorneys are those same meritless ones.

litigation, the arbitration line necessarily extends farther along the X (number of cases) axis to reflect the greater number of cases. The dotted vertical line represents the maximum number of cases brought against our hypothetical defendant under a litigation regime. Since we do not know how many more claims would be brought under an arbitration regime, we really do not know how far the arbitration (dashed) line extends. But the populist argument presupposes that it extends somewhere beyond the dotted line.

At the same time, we also know that there is a point at which the number of arbitration cases is so great that the total cost of resolving arbitration disputes equals that of the smaller number of more expensive litigation cases. The point at which the cost line “a” meets the thick vertical line represents the arbitration-litigation “break even” point. To the right of the vertical line, the arbitration regime is more expensive.

We can deduce that defendants will prefer a mandatory arbitration regime only up to the break-even point, where arbitration is cheaper, and prefer a litigation regime if the number of arbitration cases goes beyond the break even point. To be sure, the number of arbitration cases may never reach the break even point for our hypothetical defendant, but even the theoretical existence of the break-even point illustrates a significant limitation on the populist argument. Mandatory arbitration supporters derive an undeserved rhetorical benefit by referring vaguely to “more claims filed” without candidly acknowledging that with too many more cases, the defendant switches back to litigation. So the populist argument is less populist than it seems at first blush.

A corollary of this point is that the populist effect cannot exceed the distance between the two vertical lines: the number of arbitration cases that lie between the litigation cost maximum and the arbitration break even point represent the number of additional claims that will be tolerated by a defendant in a mandatory arbitration regime. Note that the extent of the “populist effect” (the distance between those lines) is a function of the relative steepness of the arbitration and litigation cost curves. Lowering the angle of increase of the arbitration line moves the break even line to the right, signifying more cases relative to the litigation maximum. In other words, the greater the savings per case in arbitration compared to litigation, the more extra cases can be tolerated by a defendant before it reaches the break even point.

That fairly obvious relationship signifies two important and less obvious ones. First, the more procedural fairness—via due process protocols, liberal allowance of discovery, and other litigation-type

procedures—the steeper the arbitration cost curve and the less the populist effect. The supposed greater number of arbitration cases is subsidized by holding down the costs of arbitration relative to litigation, including the costs of fairer procedures. These procedures are more at issue in high-cost/high-stakes cases.²⁴⁰ In other words, the populist effect requires withholding fair procedures from high-cost/high-stakes claimants.

Second, recall that costs are made up of both process and liability costs, and the first argument for fairness is that arbitration saves money purely on process costs. But that cost differential only takes us so far. The greater the cost savings of arbitration over litigation—and therefore the greater the populist effect—the less likely it is that the savings is accounted for only by process costs, and the more likely it is that liability costs are lower in arbitration than in the same number of litigation cases.

In sum, the populist argument works better—the populist effect will be larger—if arbitration is unfair in both the individual and collective senses.

B. Disguised Tort Reform: the Truth Behind the Pseudo-Populist Argument

The Estreicher-Sherwyn thesis asserts that the egalitarian benefits of arbitration cannot be realized unless a mandatory arbitration regime is in place.²⁴¹ They reason that parties will only agree to arbitration before a dispute arises; but with the dispute squarely before them, parties will strategically adopt opposing forum preferences, and will be unable to reach an agreement to arbitrate. Even employers who are drawn to pre-dispute arbitration clauses will prefer to litigate post-dispute if a plaintiff offers arbitration. This “because it takes two” problem, they conclude, makes voluntary, post-dispute arbitration a fantasy, and mandatory arbitration a pragmatic necessity. In this section I expose the contradictions in that argument.

1. The “Takes Two” Paradox

The Estreicher-Sherwyn “takes two” thesis assumes that plaintiffs prefer to arbitrate low-stakes and litigate high-stakes claims, while employers hold the opposite preferences.²⁴² This simplification is probably wrong. As argued above, when process costs are taken into

²⁴⁰ See *supra* Part II.B.

²⁴¹ See *supra* Part II.A.

²⁴² See *supra* note 44 and accompanying text.

account, we see that plaintiffs prefer to arbitrate low-stakes cases and litigate high-cost/high-stakes cases. Defendants prefer to arbitrate high-cost/high-stakes cases.²⁴³

But both sides should share a preference for arbitration of low-cost/high-stakes cases. If arbitration is outcome neutral, the plaintiff gains no net procedural advantage in litigation, which is simply more expensive. The defendant would not prefer litigation either, because the high liability stakes will keep the plaintiff in the game to the end—a war of attrition strategy will simply result in higher process costs without changing the liability result.

It is also far from clear that defendants necessarily prefer litigation in low-cost/low-stakes cases. The low-cost characterization means that the ability to drive up process costs is limited: the claimant has access to needed evidence, and proving the case is relatively straightforward. And if the stakes are low enough, a rational employer should prefer to pay them rather than to incur the higher costs of needlessly complicating the process. Interestingly, it appears that many consumer arbitration clauses in recent years have created exceptions for “small claims” court: that is, many defendants require that a claimant must arbitrate rather than litigate, unless his claim fails within the jurisdictional dollar limit for a small claims tribunal.²⁴⁴ This is not a litigation preference for low stakes cases the way Estreicher-Sherwyn mean it—reliance on litigation process cost to smother or deter claims.²⁴⁵ Rather it reflects a preference for *lower* process cost in low-stakes claims combined with a recognition that small claims court is cheaper than arbitration.

In sum, rational and well informed parties should agree to voluntary, post-dispute arbitration of low-cost/low-stakes and low-

²⁴³ See *supra* Part II.A.2.

²⁴⁴ For examples of consumer arbitration clauses exempting small claims matters from mandatory arbitration, see *Dale v. Comcast Corp.*, 498 F.3d 1216, 1221 (11th Cir. 2007); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 872 (11th Cir. 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 175 n.19 (5th Cir. 2004); *Smith v. Steinkamp*, 318 F.3d 775, 776 (7th Cir. 2003). The AAA Consumer Due Process Protocol provides that a fair consumer arbitration agreement should have such a carve-out for small claims. AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL principle 5 (1998), *available at* <http://www.adr.org/sp.asp?id=22019>.

²⁴⁵ See, e.g., Estreicher, *supra* note 8, at 567 (stating that where plaintiffs have not obtained counsel, employers will prefer to keep the case in a litigation system where the case will languish or be dismissed); Sherwyn et al., *supra* note 8, at 1580 (claiming that mandatory arbitration prevents employers from defeating meritorious claims by “delaying or ‘big firming’ the employee into a withdrawal or substandard settlement”).

cost/high-stakes claims—if arbitration is as fair as, and cheaper than, the alternatives. Only if arbitration is unfair to plaintiffs would they prefer to litigate low-cost claims and only if arbitration is more expensive than its alternatives would defendants resist an arbitration preference of low-cost/low-stakes claimants.

Proponents of the “takes two” thesis rely heavily on the believed low incidence of post-dispute arbitration agreements as empirical support of their claim, which one study puts at around six percent of all arbitrated cases.²⁴⁶ But that statistic is itself fraught with paradox. Remember that only fifteen to twenty-five percent of employers adopt mandatory arbitration regimes.²⁴⁷ That suggests that the majority of employment defense lawyers prefer litigation over arbitration and do not advise their clients to adopt a mandatory arbitration regime; and this implies that these lawyers prefer litigation to arbitration, both as a pre-dispute and a post-dispute matter. At the same time, the majority of plaintiffs’ lawyers prefer litigation because they believe arbitration to be unfair, relatively speaking.²⁴⁸ Cases between these litigation-preferring lawyers will always be PLDL cases, and are irrelevant to the mandatory arbitration question. Instead, the relevant universe of actors to test the “takes two” hypothesis is the set of employment defense lawyers who advise their clients to adopt mandatory arbitration—that is, who prefer arbitration from a pre-dispute perspective. What percentage of these lawyers prefers to litigate post dispute? For all we know, lawyers who recommend pre-dispute arbitration clauses to their clients would be overwhelmingly likely to agree to voluntary post-dispute arbitration as well—but that issue rarely if ever arises, since their cases are most likely already subject to pre-dispute arbitration clauses. The “takes two” hypothesis thus lacks empirical support.²⁴⁹

²⁴⁶ See Maltby, *supra* note 166, at 319–21.

²⁴⁷ See *supra* note 86 and accompanying text.

²⁴⁸ See *supra* note 31 and accompanying text.

²⁴⁹ Sherwyn claims to have empirically supported his “takes two” hypothesis with an attitudinal survey of 288 Chicago employment defense and plaintiff’s lawyers. See Sherwyn, *supra* note 9, at 38–50. The survey showed a tendency of both plaintiffs’ and defense lawyers to believe that arbitrators were likely to be predisposed against them. See *id.* at 46 tbl.2. The study is not well-constructed to tell us anything valid about post-dispute arbitration preferences. Suffice it to say that Sherwyn should have limited his defense lawyer sample to those who recommend pre-dispute arbitration clauses to their employer clients. By surveying a general sample of defense lawyers, Sherwyn necessarily winds up with a majority who would eschew both pre- and post-dispute arbitration agreements.

Nor does the low incidence of post-dispute arbitration agreements necessarily support the “takes two” hypothesis. That six percent statistic, see Maltby, *supra* note

2. The Failure to Consider Alternatives

The Estreicher-Sherwyn thesis holds that defendants must be compelled to arbitrate if low-stakes claimants are to have any access to dispute resolution.²⁵⁰ But why must high-stakes plaintiffs also be compelled to arbitrate?

We can readily imagine a variety of legal rules that would protect the rights of low-stakes claimants in a more direct way without the side effect of diminishing the rights of high-cost/high-stakes claimants. First of all, as Sternlight has argued, pre-dispute arbitration clauses could be made enforceable *against* defendants but not against objecting plaintiffs.²⁵¹ Alternatively, mandatory arbitration clauses could be enforced as they are now, raising the possibility of enforcement by low-stakes claimants, while employing res judicata and collateral estoppel doctrines to permit claimants, but not defendants, to relitigate the arbitrated claims—in effect, to allow claimants an appeal de novo to the courts.²⁵² More widespread use of judicially annexed arbitration, with incentives to accept the award voluntarily—and perhaps at an early stage of discovery—is yet another possibility.²⁵³ Yet another alternative is to experiment with expanding the jurisdiction of small claims courts, perhaps with cases

166, at 319–21, may merely reflect the near-universal rejection of arbitration by plaintiffs’ lawyers combined with the majority view of defense lawyers. It is not inconsistent with the possibility that defendants who use pre-dispute arbitration agreements tend to prefer arbitration post-dispute in most cases as well.

²⁵⁰ See *supra* Part II.A.

²⁵¹ See Sternlight, *supra* note 12, at 85–87.

²⁵² This is the current state of the law governing arbitration of employment discrimination claims by union members under collective bargaining agreements. Compare *McDonald v. City of W. Branch*, 466 U.S. 284, 288–92 (1984) (holding that a § 1983 claim is not precluded by prior grievance arbitration), *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 734–46 (1981) (holding FLSA claim is not precluded by grievance arbitration), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding Title VII suit not precluded by arbitration), with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34–35 (1991) (limiting *McDonald-Barrentine-Alexander* to union grievance arbitration rather than private mandatory arbitration). See generally Schwartz, *supra* note 17, at 63 (discussing the “exception to the general rule that arbitration awards have full preclusive effect” created by *Alexander* and its progeny).

²⁵³ Michael Green’s proposal to induce employers to agree to arbitrate post dispute by eliminating punitive damages in voluntary arbitrations makes no sense from claimants’ point of view: it simply gives defendants more tort reform than they would get with mandatory pre-dispute arbitration. See Green, *supra* note 17, at 467–70; Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L. REV. 58, 77–80 (2007).

adjudicated by volunteer attorneys rather than paid arbitrators.

Mandatory arbitration supporters might try to justify their failure to endorse such proposals, or even seriously consider them, by arguing that they would represent a departure from judicial doctrine or that they are not provided for in the FAA. But that excuse dodges the true policy debate among legal scholars: what *should* the law provide? It would not require farfetched statutory interpretation to construe the FAA to achieve some version of the rule changes suggested above. And even if it did require such an interpretation, legal scholars are permitted to consider legislative changes as well.

Nor is it particularly convincing for mandatory arbitration supporters to argue that the current structure of the problem—a financially incentivized, legally-blessed protocol that allows defendants to put mandatory arbitration in place with the stroke of a word-processor, without further legislative or judicial involvement—is too opportune and practical to consider other, more politically challenging approaches. It may well be that, as a matter of politics, employers could not be induced to buy into a populist arbitration regime without significant financial inducement. But, again, in a policy debate in academic circles, political feasibility is a factor to be considered in *evaluating* policy alternatives, not a justification to ignore them entirely. And it is not so clear that these proposals are politically infeasible; defendants do not always win in Congress, and the Arbitration Fairness Act of 2009²⁵⁴ would go even farther by making mandatory arbitration clauses unenforceable.²⁵⁵

So why do defendants need to be bought off with cost savings in high-cost/high-stakes cases in order to promote access to justice for low-stakes claimants? The truth is that mandatory arbitration supporters offering the populist argument have some explaining to do. A suspicion begins when we notice that they argue for the fairness of the very cost shift that defendants take out of their own self-interest—from PLDA to PADL cases. It grows as we examine it further. *These mandatory arbitration supporters are rationalizing defendants' self-interest.* If they were concerned about the rights of low-stakes claimants, they would find ways to address those without jumping straight to inducements for the defendant.

Arbitration vendors are equally to be suspected of dissimulating. The rush of many mandatory arbitration supporters to embrace the AAA Due Process Protocol or otherwise propose procedural

²⁵⁴ H.R. 1020, 111th Cong. (2009).

²⁵⁵ See *supra* note 6.

safeguards for arbitration²⁵⁶ stands as a stark admission that traditional arbitration—the cheap and speedy process that does away with pre-trial discovery, reasoned awards and appeals—is unsuitable for certain kinds of claims. It is rather astonishing to me that arbitration commentators have so consistently overlooked this point. And the question it immediately raises is: if arbitration is unsuitable for those cases, why do supporters consider solving the problem only by modifying the procedures for arbitrating the case (making them more like litigation) rather than by taking those cases out of the mandatory arbitration system?

If arbitration were the wonderful procedure its supporters claim—if it was faster and cheaper without sacrificing fairness—then unbiased arbitration supporters should be in favor of any proposal that leads to more arbitration than a system of purely voluntary arbitration, which is apparently not good enough. You would see them at least considering proposals that would gain the buy-in of the plaintiffs bar by allowing high-stakes claimants to have open access to the courts while requiring employers to arbitrate with low-stakes claimants. If in fact arbitration differed from litigation only in that its process costs were lower, then all high-stakes cases would become PADA cases. Low-stakes PADL cases could be arbitrated pursuant to legislation requiring *defendants* to arbitrate. Any true believer in arbitration should exult at such a proposal—for convenience, let us refer to it as “arbitration nirvana”—because it would lead to the complete replacement of litigation by arbitration.

Arbitration vendors may see arbitration nirvana as too uncertain as a political goal; or, more likely, they simply do not believe in it. The fact that no mandatory arbitration supporter has ever seriously advanced a nirvana proposal raises an inference that they in fact do not believe that mandatory arbitration is fair in this sense. Notwithstanding the studies discussed above, they know that arbitration suppresses liability costs in high-stakes cases, thereby setting up the economics of the scheme. On the other hand, the

²⁵⁶ See, e.g., Leader & Burger, *supra* note 17, at 117–21 (endorsing Due Process Protocol and proposing further safeguards); Rutledge, *supra* note 8, at 563–68 (arguing the Due Process Protocol satisfies many fairness objections made by mandatory arbitration critics); Theodore St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495, 525–26 (2004) (stating that with the AAA Due Process Protocol, “[a]rbitration procedures should be even more favorable for employees”); see also Richard A. Bales, *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution*, 11 EMP. RTS. & EMP. POL’Y J. 301 (2007) (summarizing developments).

current system of defendant-implemented mandatory arbitration serves their interests well enough. It creates a coherent client group to whom they can sell arbitration services through standard commercial marketing. In contrast, the legislative “nirvana” route requires the metaphorical marketing of political persuasion and interest group interaction. That they prefer to promote arbitration commercially, rather than politically, is *prima facie* proof that arbitration vendors are quite happy to exploit the resource shift away from high-stakes plaintiffs to increase their business. Fairness is simply not their concern, beyond the minimal fairness needed to pass judicial muster and keep arbitration agreements enforceable. The defense bar, likewise, is not concerned about fairness or about low-stakes claimants. They are concerned about liability costs.

This may explain the views of arbitration vendors and defendants. However, what explains academics who make the same arguments and omissions as the vendors and defense bar? You be the judge.

3. Mandatory Arbitration as a Workers’ Compensation Bargain

At its best, the vision of mandatory arbitration offered by its supporters represents a kind of workers’ compensation bargain. It may well in fact reduce overall liability payouts for defendants, but—so this argument would go—consumers and employees benefit by means of a workers’ compensation effect. Since arbitration is purportedly faster, cheaper and less formal, more claims will be brought and recoveries, though much lower, will be more certain. The claims that would have produced large recoveries in litigation are traded in for smaller arbitration awards; but in exchange, the mandatory arbitration system will hold companies’ feet to the fire by forcing them to arbitrate claims that they might have otherwise decided could be crushed with a war of attrition litigation strategy. Low value and *pro se* claims that may never have found their way into court will have their day in arbitration. Some plaintiffs will lose their Cadillacs so that a larger number of claimants may have their Saturns.

I have argued that the empirical basis for this argument is very sketchy indeed. We simply do not know whether arbitration is significantly faster, cheaper, or more accessible than litigation. But even if it were, this workers’ compensation argument runs directly into another set of questions on which the policy result ultimately turns: is a regime of more and more certain smaller recoveries preferable to a regime of fewer and more costly but potentially larger recoveries? That constellation of questions may well be unresolvable

as an empirical matter. Are laws against consumer fraud and employment discrimination, for example, intended to compensate, only a little bit, as many victims as possible? Arguably, the prospect of a small number of large judgments by outraged juries (whether or not awarding punitive damages) are important deterrents,²⁵⁷ whereas a workers' compensation style system encourages or allows defendants to continue unlawful behaviors by projecting and internalizing their costs. And does a workers' compensation style system adequately compensate? Does it unduly suppress the development and maintenance of a plaintiff's bar to develop expertise in advocating these claims? There is disagreement over these matters. And finally, is there a valuable social signal from the occasional large jury verdict?

It is also worth noting that the workers' compensation system was designed primarily to deal with workplace accidents,²⁵⁸ and thus the great preponderance of workers' comp cases do not involve intentional torts.²⁵⁹ In contrast, employment and many consumer claims consist of intentional wrongs, and may therefore be unsuitable for societal treatment by a workers' compensation bargain. Put another way, the potential for a wide range of damages judgments characterized by high maximums may be a more effective deterrent to intentional misconduct, insofar as defendants are less able to plan actuarially for liability.

Finally, the PL to PA liability redistribution implicit in the populist argument can be exceedingly unfair in individual cases. In the abstract world of microeconomic cost curves, we are to imagine that the process of robbing PL to pay PA is handled in a smooth, graduated manner, like progressive taxation: each PL recovery is reduced by some reasonable amount and redistributed among numerous smaller claimants who would arbitrate but not litigate their claims. But that is somewhat fantastic. The reality is that some of the liability cost savings—perhaps a very significant amount—is likely to come from cases that might yield large judgments or settlements in a litigation setting but that get very small recoveries, or defense awards, in arbitration: a putative \$500,000 litigation settlement or judgment translated into a \$25,000 or even zero arbitration award, for instance.

These questions are controversial, of course. The point here is

²⁵⁷ *Cf.* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“[P]unitive damages . . . are aimed at deterrence . . .”).

²⁵⁸ *See* KENNETH M. WOLFF, *UNDERSTANDING WORKERS' COMPENSATION* 11 (1995).

²⁵⁹ *See id.* (noting that workers' compensation is provided to work-accident victims regardless of fault).

not to assert that a particular resolution is correct, but rather to show two things. First, while these questions have empirical elements, they ultimately turn on value judgments that are not empirically determined. Second, a host of normative and policy issues are swept under the rug by reducing the mandatory arbitration debate to a straightforward empirical question of relative costs coupled with an oversimplified argument that access to more claims is automatically more fair.

V. NORMATIVE RESOLUTION

The scholarly entries into the mandatory arbitration debate are characterized by firm positions pro or con, no doubt informed by the authors' *a priori* opinions on such matters as regulation of contract, dispute resolution efficiency, tort reform, civil rights and justice. Position advocacy on such issues is undoubtedly the rule, rather than the exception, in legal academia, and I am hardly the person to suggest that legal scholarship should be, or has ever been, written by impartial inquiring spirits hovering above the partisan affairs of humanity. Still, it is noteworthy that virtually all the participants in the mandatory arbitration debate had their minds made up before much, if any, empirical scholarship existed to demonstrate its fairness or unfairness vis-à-vis litigation. I do not question or criticize that as prematurely reaching a conclusion; on the contrary, I believe a strong, common-sense basis has always existed on which to hold an opinion. Yet it is telling that virtually no one in the mandatory arbitration debate has ever qualified his or her opinion by saying "my view on mandatory arbitration is provisional, pending the outcome of empirical research comparing arbitration and litigation results."²⁶⁰ What it tells us is that at least some recent calls for "empirical research agendas"²⁶¹ are more likely indicative of a search for ammunition rather than revelation. It is possible that a study will be conducted that is so well devised and carefully analyzed that it will answer the arbitration-versus-litigation outcomes question beyond dispute. But I doubt it. I doubt whether the mind of a single participant in the mandatory arbitration debate has yet been changed

²⁶⁰ Professor Eisenberg did not weigh in on mandatory arbitration prior to undertaking an empirical study. His long-demonstrated, genuine interest in understanding how the litigation system really works, and seeing through popular misconceptions, shows him to be an exception to this statement.

²⁶¹ See, e.g., Ben-Shahar, *supra* note 8, at 778–79; Rutledge, *supra* note 8, at 550–52, 590; Sherwyn et al., *supra* note 8, at 1560.

by an existing empirical study, and—as I will argue—there is little reason to hope that will happen in the future

A. *Stop Waiting for Social Science*

Congress is considering amending the FAA to preclude mandatory arbitration of employment, consumer, and franchise cases.²⁶² With a new Democratic president and a Democratic majority in both houses of Congress, the prospects for enacting such a reform are better than they have been at any time since 1994, when the mandatory arbitration problem first began to gain widespread notoriety. It may be that the best empirical evidence we now have, and will ever have, about the fairness of mandatory arbitration is the behavior of the defendants who draft the clauses. Waiting for the perfect, definitive social science research before addressing the mandatory arbitration problem does not make sense—and not only because of the low likelihood of a definitive empirical answer.

But let us daydream for a moment, and imagine that all the empirical difficulties have been overcome by a perfectly designed and executed empirical study comparing arbitration and litigation outcomes. What could such a dream study actually prove? Broadly speaking there are three possible results.

1. *Mandatory arbitration favors defendants.* Suppose the study definitively proves that the critics were right all along: mandatory arbitration systematically favors defendants. It lowers liability payouts overall, and achieves considerable savings by limiting many high-cost/high-stakes claimants to very low, often zero, recoveries.

2. *Mandatory arbitration favors plaintiffs.* Average recoveries in arbitration are as good as they are in litigation. Perhaps there are no more jackpot verdicts, but deserving plaintiffs are as likely to get as substantial recoveries in arbitration as in litigation. Additionally, more plaintiffs get these recoveries because arbitration is more accessible to claimants and less likely to throw claims out on summary judgment or appeal. Overall, mandatory arbitration results in higher liability payouts by defendants.

3. *Arbitration is nirvana.* Arbitration is entirely neutral in its impact on case outcomes relative to litigation. But since it is significantly cheaper, a large process cost savings is reaped—so large, that it can pay off the arbitration awards to all those new low-income, low-stakes claimants and still leave a very nice cost savings for defendants—and of course, pay the arbitrators. Everyone wins!

²⁶² See *supra* notes 6, 254.

(Except perhaps litigators, who will have less opportunity to make money off of process costs.)

An interesting thing happens when you spell out the possible empirical research outcomes in this pronounced (somewhat stylized) way. It begins to emerge that these potential research outcomes have little or no bearing on the current policy debate over mandatory arbitration.

Suppose mandatory arbitration is proven to favor defendants. So what? It is what everyone always believed—certainly, the defendants who write arbitration clauses into their contracts. All that happens is that they shift their argument back to tort reform—plaintiffs win too much in court anyhow. Courts are unlikely to take notice of the study: due process does not require maximal recovery of case value, and what is a little less money for plaintiffs when docket-clearing is at stake? This finding merely brings us back to square one—though, perhaps, a decade or more from now.

What if mandatory arbitration turns out to favor plaintiffs? Somewhat paradoxically, this is really not a compelling policy argument in favor of mandatory arbitration—not the mandatory arbitration in the form of adhesion contracts imposed by defendants. The problem is that defendants will regard this definitive proof as bad news—and switch back to litigation. At that point, the only way to impose this plaintiff-friendly form of dispute resolution on defendants would be by means of broad legislation requiring arbitration without their consent.

Here, of course, is the contradiction that lies at the heart of the pro-plaintiff policy argument for mandatory arbitration. It only works by fooling defendants. The argument is premised on the idea that defendants are misinformed about the true costs of arbitration and therefore adopt it despite the fact that it increases their disputing costs. It is hard to argue for a policy of systematically fooling one side of the dispute, and even harder to see why proponents of that position would push for empirical studies that would give the game away.²⁶³

²⁶³ Actually, I am just being polite: it is not at all hard to see why. Those advancing the pro-plaintiff argument for mandatory arbitration merely pretend to express concern for plaintiff's interests in order to promote a tort reform agenda. They do not actually believe in the empirical studies showing arbitration to be fair. If Michael Delikat, Chair of the Global Employment Law Practice at Orrick, really believed that plaintiffs did as well in arbitration, why would he advise his clients to go to the trouble of adopting it? *See supra* note 29 and accompanying text; *see also* Delikat Bio, *supra* note 125 (describing Delikat's practice including representative clients). Because of pure process cost savings (arbitration nirvana)?

Maybe arbitration is dispute resolution nirvana. I do not think it is, nor do I imagine any but the most besotted arbitration vendor seriously suggesting that it is. But the key point here is that that is not an argument for *mandatory* arbitration. If arbitration is nirvana, it should replace litigation across the board, not merely in those instances where a defendant chooses to write up an arbitration clause. The exceedingly unlikely and counterintuitive possibility of arbitration nirvana should not hold up reform of mandatory arbitration today. If it turns out that litigation should broadly be phased out in favor of arbitration due to some as yet unforeseen empirical results, then legislation will be needed at that future time to implement the change in any event.

B. A Political Solution

Perhaps the solution to the mandatory arbitration problem is best found by a return to first principles. The regime of FAA arbitration may well resemble a dispute resolution system worth trying out and even worth keeping, but it may not. We do not know that for sure. But what we do know is that the process that established FAA arbitration is deeply flawed. And that, I argue, is enough of a reason to throw the whole thing out and start over.

If we were trying to develop a dispute resolution system to address any of the problems that arbitration supporters claim are addressed, what would it look like? It would be a faster, cheaper system that moves cases off of court dockets. If that is the goal, exactly what advantages are gained by placing the power to enter the alternative system squarely, and only, in the hands of regulated defendants?

The system is set up to produce skewed, pro-defendant results, because defendants are buyers in the market for private judging: the initial choice of private judging over public dispute resolution belongs solely to the defendants. Plaintiffs only participate in the market when it is a question of picking particular arbitrators, after the decision to select arbitration has already been made. This means that arbitration vendors' biggest marketing incentive is to make arbitration attractive to defendants—more attractive than courts.

At the end of the day, what is really wrong with compelled arbitration is the same, obvious thing that bothered its critics most from the outset. The FAA regime empowers defendants unilaterally to opt out of public dispute resolution. Entities whose contracts are regulated precisely because they have historically demonstrated

tendencies to overreach²⁶⁴—often motivated by rational profit-maximizing behavior—can use those very same bargaining power advantages to require arbitration rather than court. And because the contracts are adhesive, imposed on consumers or employees as a condition of doing business, the FAA in effect authorizes any such entity to impose the arbitration-for-court substitution on everyone whom it employs or to whom it sells. Arbitration is a procedural system for dispute resolution whose decisions are binding; in this sense, it is as much a system of law and government as the courts.

It may well be that the current system of state and federal courts can be improved upon and, in particular, that certain classes of disputants would benefit from a system that deviated from current judicial procedures with faster and cheaper alternative procedures. And it may well be that the court system needs—perhaps even desperately, though that is much disputed—new tools to control its caseload. And it may well be that the best system for docket relief would entail certain classes of disputants submitting their disputes to private, hired “judges.”

But our system of government is based on the idea that institutions gain authority because they are subject to the clash of interests in a political process. Courts are an independent branch, but their jurisdiction and procedures are overseen by legislative bodies. Major reforms to the judicial process require legislative acts. Indeed, that is undoubtedly why the courts have resorted to the FAA—because of a frustrated wish for legislative reforms to help them with a perceived docket crisis.²⁶⁵

The problem with FAA arbitration is that an entire dispute resolution system, one that effectively works a major judicial reform, has been undertaken in a way that bypasses normal political processes. Courts have authorized defendants to create the system and write the rules subject to limited judicial oversight. Defendants can look after their interests in writing the contracts; courts have looked after their interests in docket control by the doctrine of vigorous enforcement of arbitration clauses.²⁶⁶ But the other side of

264 See Schwartz, *supra* note 1, 55–56 & n.63.

265 See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1139–45 (2006) (suggesting that hostility to litigation may provide an explanation for the Rehnquist Court's pro-arbitration jurisprudence).

266 See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001) (Stevens, J. dissenting) (stating that a number of Supreme Court decisions had “pushed the pendulum far beyond a neutral attitude [of arbitration] and endorsed a policy that strongly favors private arbitration”).

the litigation—employees and consumers—has not had much of a seat at that table. Their interests have been accounted for only indirectly, filtered through the more “enlightened” arbitration vendors.

An alternative dispute resolution system designed to deal with contemporary problems—large judicial dockets, and numerous public laws at the state and federal level protecting weaker parties in regulated relationships—might look like current FAA arbitration. Then again, it might not. The only way to find out is to send the matter back to the legislative drawing board.

The courts have gone too far down this road to correct the course themselves. Moreover, they are not neutral arbiters of this controversy, but have a stake in promoting arbitration. Simply put, the FAA regime makes judges lives easier by reducing their caseloads,²⁶⁷ and more lucrative by giving them post-judicial career opportunities as arbitrators. They should not be entrusted with this important policy choice.

CONCLUSION

Social science methods offer us powerful tools to learn more about the social realities of the legal system and to debunk misconceptions about it. This article is not an argument against empirical legal studies, a form of scholarly research I strongly support. Nor is it a call for further empirical research before undertaking policy reform. I think it unlikely that empirical comparisons of the arbitration and litigation systems can tell us anything that would be decisive in the mandatory arbitration debate. And it is regrettable that calls for empirical research have been used strategically to trip up arguments for reform.

Perhaps mandatory arbitration offers certain attractions as an expedient for reducing judicial caseloads. Perhaps its widely-held effect as “do-it-yourself tort reform”²⁶⁸ is economically efficient. Perhaps adhesion contract terms should be enforced unless they “shock the conscience.” These points are debatable, and ultimately depend on value judgments.

But whatever else mandatory arbitration may be, there is no evidence that it is fair. Real world actors who impose or resist

²⁶⁷ See Kenneth F. Durham, *Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?*, 3 J. AM. ARB. 187, 246 (2004) (“The courts appear to have a vested interest in seeing that arbitration continues because it eliminates numerous cases from their overcrowded dockets.”).

²⁶⁸ See, e.g., Sternlight & Jensen, *supra* note 220, at 103.

mandatory arbitration clauses uniformly behave as though mandatory arbitration is not fair. Empirical researchers who say otherwise have not met their burden of proving that the widespread belief is a misconception. The pseudo populist argument that mandatory arbitration creates a more egalitarian system of dispute resolution than the default system—litigation, administrative, and small claims tribunals—is at best poorly reasoned and empirically unfounded. At worst, that argument is a ploy.

Nothing concerning the current state of our knowledge—or lack of knowledge—about the comparative merits of the litigation and arbitration systems justifies policy inertia. The well-founded belief that mandatory arbitration is unfair is enough to act on.