

Vindicating Statutory Employment Rights in the Age of Mandatory Arbitration: State Attorney General *Parens Patriae* Litigation as an Alternative to Class Actions

INTRODUCTION

The Fair Labor Standards Act of 1938 (“FLSA”)¹ embodied a congressional attempt to ameliorate the systematic power imbalance between employers and employees. The provisions of the FLSA, Justice Frank Murphy eloquently observed,

are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.²

However, the FLSA’s remedial purpose, along with the purposes of other remedial employment statutes, has become threatened by the rise of mandatory arbitration clauses in employment contracts. “It has become routine,” Justice Ruth Bader Ginsburg wrote in 2015, “for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses.”³ Critiquing recent Supreme Court decisions that have made class action bars in mandatory arbitration clauses nearly untouchable, she observed that those decisions “have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws.”⁴

Employment statutes such as the FLSA allow employees, through the threat of litigation, to prevent employers from abusing inherent workplace power imbalances.⁵ Individual claims,

¹ 29 U.S.C. § 8 (2012).

² *Tenn. Coal, Iron, and R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

³ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

⁴ *Id.* at 477.

⁵ Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 78 (2014).

however, particularly in the wage and hour area, are often too small to support legal representation, even on a contingent basis. Where such claims are widespread under a particular employer, a class action can allow employees to bundle their claims into aggregate litigation that is economically viable for both the employees and for their legal counsel.

Class actions, however, are increasingly unavailable to employees. Employers are increasingly requiring their employees to agree to mandatory arbitration contracts that not only preclude litigation, but bar both class action and class arbitration. Thus, where such contracts bar group actions, employees with low-value but otherwise legitimate statutory claims will be effectively prevented from vindicating those claims in any forum.⁶ Part I of this paper discusses the historical background of this problem, including the growing hostility toward class actions in the 1980s, the rise of the 1925 Federal Arbitration Act as a “superstatute” in the 1980s, and the subsequent growth of mandatory arbitration clauses by employers. Part II compares arbitration and litigation under a four-part test that judges systems of employment relations based on their effect on employees’ access to justice, concluding that arbitration produces significantly lower success rates and average damages than litigation, while replicating the adverse screening effects of litigation criticized by arbitration advocates. Finally, Part III examines *parens patriae* suits by state attorneys general under this test as a possible replacement for traditional employment class actions, comparing them both to traditional class actions and to mandatory individual arbitration. Part III concludes that while reliance on *parens* suits to replace class actions would likely lead to great disparity among states in employees’ access to justice, such suits are nevertheless a superior alternative to individual arbitration for vindicating employee statutory rights.

⁶ I will refer to class actions and class arbitrations together as “group actions.” Others have used the term “collective actions,” but that term risks confusion with the National Labor Relations Act’s guarantee of the right to concerted activity in 29 U.S.C. § 157 (2012), which is often referred to as “collective action.”

I. THE HISTORICAL BACKGROUND OF MANDATORY INDIVIDUAL ARBITRATION

The growth of mandatory individual arbitration has two primary roots in the 1980s: a growing distrust of, and even hostility toward, class actions, and the development of the Federal Arbitration Act as a “superstatute,” primarily through Supreme Court jurisprudence. This Part will examine how these two roots have combined to create a difficult environment for employees to vindicate claims against their employers, particularly claims with low individual values.

A. *The Class Action Critique*

Legal scholars have long recognized two fundamental purposes of class actions: *deterrence*, by imposing damages against defendants who violate the law, and *compensation*, by remunerating those harmed by such violations.⁷ However, the legal community has become increasingly suspicious, and even hostile, toward class actions since the 1980s.⁸ This movement largely grew out of the work of John Coffee, who stresses the compensationalist function of class actions while largely ignoring their deterrent function.⁹ Coffee analyzes the class action from an economic perspective, considering plaintiffs’ attorneys in class actions with low individual damages as “independent economic entrepreneur[s]” because these low individual damages would lead to low client control by individual plaintiffs.¹⁰ Since awarded attorneys’ fees typically decrease, as a percentage of the total award, as the total award increases, Coffee argues that plaintiffs’ attorneys are incentivized to settle for smaller total damages, whereas they might otherwise expend more resources to achieve a larger total settlement.¹¹ Thus, Coffee concludes,

⁷ A history of legal scholars’ views on class actions is beyond the scope of this paper. For a discussion of this history regarding small-claims class actions and the tension between the deterrence and compensation principles, see Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (Nov. 2006).

⁸ *Id.* at 122-31.

⁹ *Id.* at 108-16.

¹⁰ John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 (May 1986).

¹¹ *Id.* at 686.

“[i]f we assume that the plaintiff’s attorney acts as a rational entrepreneur in deciding to bring, maintain, or settle litigation, it follows that investment in class and derivative actions will tend to be underfunded in terms of the clients’ preferences.”¹² If fees are rather awarded to plaintiffs’ attorneys at an hourly rate, Coffee argues that plaintiffs’ situation goes from bad to worse. This structure, he claims, “enables collusion [between plaintiffs’ attorneys and defendants] to occur on an implicit, rather than explicit, basis,” since plaintiffs’ attorneys can accumulate billable hours while the defendant, in silent complicity, waits to offer a low settlement offer.¹³

Following Coffee’s influential critique of class actions as ineffective vehicles for individual compensation, Congress, the judicial system, and government agencies have taken significant steps to “reform” the class action.¹⁴ Following a pair of Supreme Court decisions in the late 1990s increasing the difficulty of settling class actions,¹⁵ in 2011, the Court’s conservative majority, in *Wal-Mart Stores, Inc. v. Dukes*, imported the Federal Rules of Civil Procedure’s stringent damages class certification requirements to *all* class certifications.¹⁶ This decision appears to have led to significant negative effects in the area of employment discrimination class actions. While the decision may not have increased the level of hostility in the courts toward class actions in general, it is likely responsible, at least in part, for a recent decline in the number of class filings, the decrease in the size of proposed classes, and the decreased number and size of settlements.¹⁷

¹² *Id.*

¹³ *Id.* at 718.

¹⁴ Gilles & Friedman, *supra* note 7, at 122-31.

¹⁵ Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919 (June 2000) (discussing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

¹⁶ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Ginsburg, J. concurring in part and dissenting in part).

¹⁷ Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions after Wal-Mart v. Dukes*, 48 AKRON L. REV. 802, 804 (2015). This decline is also likely attributable to the impact of *AT&T Mobility, LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*, discussed *infra* in text accompanying notes 22-30.

B. The Growth of the FAA as Superstatute

While hostility toward class actions has been rising since the 1980s, the Supreme Court has at the same time facilitated the growth of mandatory arbitration contracts, including in the employment context. In 2001, William Eskridge, Jr. and John Ferejohn described the Federal Arbitration Act (FAA) as one of a group of “superstatutes,” which they defined as statutes that can “penetrate public normative and institutional culture in a deep way,”¹⁸ that “tend to trump ordinary legislation when there are clashes or inconsistencies, even when principles of construction would suggest the opposite,” and that are often imbued with powers “beyond the four corners of [their] plain meaning[s].”¹⁹ The FAA’s superstatute status is plainly demonstrated by a string of Supreme Court decisions that dramatically expanded the FAA’s scope and power.

In 1985, the Court held in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* that the FAA extended to statutory claims, in apparent contradiction of the FAA’s plain meaning and legislative history.²⁰ The Court found that compelling arbitration of a Sherman Antitrust Act claim would not frustrate the purpose of that statute. “[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,” wrote Justice Blackmun, “the statute will continue to serve both its remedial and deterrent function.”²¹

Following *Mitsubishi Motors*, jurisdictions developed case law interpreting the FAA’s provision that agreements to arbitrate may be revoked “upon such grounds as exist at law or in equity for the revocation of any contract.”²² In 2005, for example, the California Supreme Court held that a class action waiver in an adhesion contract was unconscionable as a matter of law if

¹⁸ William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1260 (March 2001).

¹⁹ *Id.* at 1216.

²⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 646 (1985) (Stevens, J. dissenting) (“Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.”).

²¹ *Id.* at 637.

²² 9 U.S.C. § 2 (2012).

disputes between the parties predictably concerned small sums, and if it was alleged that the party in the superior bargaining position executed “a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”²³ But in 2011, the Supreme Court ruled, in *AT&T Mobility LLC v. Concepcion*, that state law could not declare arbitration clauses barring group actions unenforceable on grounds of unconscionability.²⁴ In that case, the plaintiffs had challenged an arbitration clause as unconscionable as applied to their low-value claims of \$30.22, because it barred class arbitration and thereby prevented them from a financially viable path to pursuing their claim. Justice Scalia, joined by Chief Justice Roberts and Justices Alito, Kennedy, and Thomas, wrote that were state law able to declare class arbitration waivers unconscionable under the FAA’s savings clause, it would allow the FAA to “destroy itself.”²⁵

While *Mitsubishi Motors* suggested that an arbitration clause that prevented effective vindication of a statutory claim might not be upheld, the Court ruled in 2013’s *American Express Co. v. Italian Colors Restaurant* arbitration clauses must be enforced even when they prevent claimants from being able to vindicate their statutory claims in a financially viable manner.²⁶ There, plaintiff restaurant owners, alleging an anti-trust violation, were barred from class arbitration of a statutory claim with maximum damages of \$38,549, which, to pursue, would likely cost them over \$1 million.²⁷ The class arbitration bar would thus prevent them from effectively vindicating their federal statutory rights, the plaintiffs argued.²⁸ Justice Scalia, writing for the same slim majority as in *AT&T Mobility*, found that only an individual’s right to *initiate* a statutory claim requires protection; thus, an arbitration clause that prohibited a particular

²³ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

²⁴ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

²⁵ *Id.* at 343.

²⁶ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

²⁷ *Id.* at 2308.

²⁸ *Id.*

statutory claim from being tried or arbitrated at all could be overturned.²⁹ While arbitration filing and administrative fees so high “as to make access to the forum impracticable” would “perhaps” be grounds to question an arbitration clause, the Court held that the cost of pursuing a potential class claim on an individual basis, with effective representation and expert witnesses, cannot be considered to prevent effective vindication of the claim.³⁰

This expansion of the FAA is particularly ironic in the employment context, because the plain language of the statute seems to exclude all employment contracts under Congress’s jurisdiction. The law’s very first section states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”³¹ Congress’s ability to regulate employment contracts is grounded in its Commerce Power to regulate foreign and interstate commerce; thus, by stating that the law does not apply to employment contracts for workers engaged in such commerce, the FAA would appear to state that all employment contracts that Congress has the power to regulate under the Commerce Clause cannot be touched by the FAA.³² This interpretation is also supported by legislative history, as the specific mention of seamen and railroad workers was inserted to allay union members’ fears that the FAA would compel workers to sign employment contracts without any procedural or constitutional protections.³³ Moreover, William H. H. Piatt, one of the FAA’s drafters, testified in Senate subcommittee hearings on the bill that it “is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants

²⁹ *Id.* at 2310.

³⁰ *Id.* at 2310-11 (citing *Green-Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

³¹ 9 U.S.C. § 1 (2012).

³² See *Circuit City Stores v. Adams*, 532 U.S. 105, 138 (2001) (Souter, J., dissenting) (“[I]t is imputing something very odd to the working of the congressional brain to say that Congress took care to bar application of the Act to the class of employment contracts it most obviously had authority to legislate about in 1925 It would seem to have made sense either to cover all coverable employment contracts or to exclude them all.”)

³³ Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 12 (2014).

the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.”³⁴

Despite evidence and legislative history to the contrary, however, the Supreme Court, in keeping with its treatment of the FAA as a superstatute, has extended the law well beyond its apparent original intent in the employment context. In 1991’s *Gilmer v. Interstate/Johnson Lane Corp.*, the Court ruled that the plaintiff could be compelled to pursue his statutory age discrimination claim through arbitration under an arbitration clause contained in a securities application.³⁵ The Court claimed that “by 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.”³⁶ The Court dismissed Gilmer’s arguments that arbitration is an inherently inferior venue to litigation: “Such generalized attacks on arbitration ‘rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, they are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’”³⁷

The *Gilmer* majority refused to consider Justice Stevens’s dissenting argument that the FAA was not intended to cover employment contracts, because Gilmer had not raised the argument on appeal, and because his arbitration agreement was not contained in an employment agreement, but rather a securities registration application.³⁸ However, the Court explicitly settled the question in *Circuit City Stores v. Adams*, holding that the FAA’s statement that arbitration

³⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (quoting Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923)).

³⁵ *Id.* at 20 (majority opinion).

³⁶ *Id.* at 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

³⁷ *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). Gilmer’s criticisms of arbitration were well-founded, as discussed *infra* Part II.B.

³⁸ *Id.* at 25.

agreements must be enforced “in any . . . contract evidencing a transaction involving commerce” indicated Congress’s intent that the FAA reach as far as the Commerce Clause might permit.³⁹ The Court held that when the law explicitly excluded “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from its scope, it did not mean to exclude employment contracts generally, but only those of workers engaged in transportation-related employment.⁴⁰ The Court’s 5-4 conservative majority, led by Justice Kennedy, rejected the plaintiff’s heavily originalist argument regarding legislative intent, as “[i]t would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment.”⁴¹ Thus, the door was flung open to allow mandatory arbitration in employment relations.

C. The Effect of Supreme Court Arbitration Jurisprudence on Employment Claims

Since the 1990s, mandatory arbitration has exploded, likely bolstered by the Court’s slim but ardent pro-arbitration majority. In a 1995 study of 195 graduates of various industrial relations and graduate programs, only 2% of respondents indicated that their firms used mandatory arbitration to resolve disputes involving non-unionized employees.⁴² In 2003, a survey of 291 telecommunications employers found that 14% used mandatory arbitration; however, since the larger firms tended to be the ones using such agreements, nearly 23% of employees were subject to mandatory arbitration.⁴³ A 2010 survey by Fulbright & Jaworski LLP

³⁹ *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001) (quoting 9 U.S.C. § 2).

⁴⁰ *Id.* at 109 (quoting 9 U.S.C. § 1).

⁴¹ *Id.* at 117.

⁴² Comsti, *supra* note 33, at 6 (citing Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. OF MGMT. 27, 31-32, 36 (1995)).

⁴³ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, Economic Policy Institute Briefing Paper #414 at 15 (Dec. 7, 2015) (citing Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11.2 EMPLOYEE RIGHTS AND EMP. POLICY J. 405 (2008)).

indicated that 27% of employers required mandatory arbitration for non-union disputes.⁴⁴ In 2015, Katherine V.W. Stone and Alexander J.S. Colvin estimated that 25% or more of all employees in nonunion workplaces are covered by mandatory arbitration agreements.⁴⁵

The rapid expansion of mandatory employment arbitration clauses (many, if not most, of which likely contain group action bars), alongside the increasing power of these clauses under recent Supreme Court decisions, paints a disturbing picture for employee rights advocates. If employees are denied access to the courts and to group action by mandatory individual arbitration clauses, there would seem to be *de facto* immunity, in terms of private enforcement, for employers who engage in widespread violations of wage and hour laws, so long as the expected value of each individual claim is less than the cost to the employee of pursuing the claim in arbitration. Indeed, the lower an individual worker's wage (and potential individual claim), the more effective a mandatory arbitration clause will be in preventing employer accountability. The *Gilmer* Court's reassurance that "[s]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" provides cold comfort if an employer may simply price an employee out of her claim with a mandatory group action bar.⁴⁶

This growth in mandatory individual arbitration, when combined with increasing hostility toward class actions and the heightened certification standards required by *Dukes*, likely explains the lower number of class filings, smaller proposed classes, and fewer (and smaller) settlements

⁴⁴ Comsti, *supra* note 33, at 7 (citing Fulbright & Jaworski LLP, *Fulbright Litigation Trends*, Fulbright's Seventh Annual Litigation Trends Survey Report 43 (2010)).

⁴⁵ Stone & Colvin, *supra* note 43, at 15.

⁴⁶ Individual legal claims are often discussed as a type of property right. *See, e.g.,* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059 (May 2012). An analysis of whether group action bars in mandatory arbitration employment contracts might deprive employees of a property right might be fruitful, but is beyond the scope of this paper.

observed by Selmi and Tsakos.⁴⁷ If individual arbitration is unlikely to provide a claimant employee with an award or settlement that exceeds the cost of bringing the arbitration, then it is not in the employee’s economic interests to pursue the arbitration. Since arbitration advocates frequently argue that arbitration reduces financial barriers to justice for employees with small claims, Part II will compare individual arbitration to litigation through a model of employee rights, including a comparison of average employee awards across the two systems, to determine which system better provides employees with access to justice.

II. ARBITRATION, LITIGATION, AND EMPLOYEE ACCESS TO WORKPLACE JUSTICE

A. The Rationale for Arbitration

The enforcement of mandatory arbitration clauses is frequently justified on the principle of freedom of contract. The Supreme Court, in one of its early decisions in the “superstatute” era of the FAA, upheld the enforcement of a mandatory arbitration clause on these grounds, finding that “[a]rbitration . . . is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”⁴⁸ Despite the fact that most mandatory arbitration clauses are not individually negotiated, but are rather adhesive form contracts, the Court has not been sympathetic to attempts to invalidate arbitration agreements on such grounds. This is likely because, as the *AT&T Mobility* majority noted, “the times in which consumer contracts were anything other than adhesive are long past.”⁴⁹ Therefore, if the fact that an arbitration agreement was part of a contract of adhesion were sufficient to challenge its validity, the entire field of consumer contracts (and most employment contracts) would be vulnerable.

⁴⁷ See *supra* note 17 and accompanying text.

⁴⁸ *Volt Info Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989).

⁴⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (citing *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004)).

The *AT&T Mobility* Court instead focused on perceived advantages of individual arbitration over class arbitration, finding that allowing class arbitration would “sacrifice[] the principal advantage of arbitration—its informality—and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁵⁰ While the Court did not cite the work of Samuel Estreicher in its decision, its reasoning in this area owes a great deal to his 2001 comparison of arbitration to litigation. Estreicher likens litigation to a “Cadillac,” with its benefits available only to a privileged few: “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.”⁵¹ In contrast, in the absence of arbitration, most claimants, whose “stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources,” are denied a venue in which to pursue their claims effectively.⁵² However, Estreicher argues, arbitration, with its significantly lower average time from the filing of a claim to its disposition than in litigation, is more affordable for employees with smaller claims. Furthermore, Estreicher points to data suggesting that claimants’ success rates are at least as high, if not higher, in arbitration than in court cases.⁵³ Thus, he argues, since arbitration is a more informal process than litigation, and a quicker one, less lawyer time is required, making it a “Saturn”—an affordable car for the masses, and a better vehicle than the “rickshaw” of administrative agency filings available to claimants with relatively small-value claims.⁵⁴

⁵⁰ *Id.* at 348.

⁵¹ Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

⁵² *Id.*

⁵³ *Id.* at 564.

⁵⁴ *Id.* at 563-64. Estreicher’s critique of litigation, like Coffee’s critique of class actions, is largely grounded in the compensationalist mentality, and similarly ignores the deterrent rationale for employment litigation.

B. Arbitration Offers Employees Less Access to Workplace Justice than Litigation

Despite Estreicher’s rosy view of arbitration as a more accessible dispute resolution format for the average employee claimant, empirical research comparing outcomes in mandatory arbitration to those in litigation in the employment context paints a very different picture. Alexander Colvin and Kelly Pike, while crediting Estreicher for taking a more nuanced, policy-based approach than other arbitration advocates, observe that he wrote before much empirical research on arbitration had taken place, and relied on statistics compiled before many employers had adopted mandatory arbitration procedures.⁵⁵ Thus, his argument, as well as many other early studies of employment arbitration, examined statistics from individually negotiated arbitration agreements, not arbitration procedures promulgated by employers.⁵⁶ “Individually negotiated agreements,” they find, “are likely to involve wealthier, more sophisticated employees who are more likely to be able to retain better legal counsel,” who are likely to bring claims based on individually negotiated employment contracts.⁵⁷ Such claims are likely significantly easier to prove than claims based in statutory rights, which would explain why the research upon which Estreicher relied found comparable success rates in arbitration and litigation, whereas Colvin and Pike’s research finds considerably higher success rates in litigation.⁵⁸

Colvin and Pike also find that arbitration, despite its supposed informality, is, like the courts, an unfriendly venue for *pro se* claimants. In fact, the strongest predictive factor for employee success under an employer promulgated system, they find, is whether the employee was represented by an attorney or proceeded *pro se*.⁵⁹ Represented claimants in their data set

⁵⁵ Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 60 (2014).

⁵⁶ *Id.*

⁵⁷ *Id.* at 64.

⁵⁸ *Id.* For discussion of empirical comparisons of litigation and arbitration, see *infra* text accompanying notes 78-82.

⁵⁹ *Id.* at 78.

won nearly 28% of the time, while *pro se* claimants' win rate was only 17%.⁶⁰ Average awards across all cases, including losses, were \$27,723 for represented claimants, compared to a mere \$1,781 for *pro se* claimants.⁶¹ Thus, it would appear, arbitration is not a “Saturn”; it instead seems to replicate the same disparity that Estreicher critiqued in the litigation system—higher success rates, more lucrative awards, and better legal representation for those with sufficiently large claims, and little to nothing for those with smaller claims.⁶²

Individual damages, however, are only one measure by which arbitration should be judged. Colvin instead advocates analyzing systems of individual employment relations by examining how they affect the balance of access to justice between employees and their employers, using a model of four criteria to judge such systems.⁶³ A strict focus on deterrence risks undervaluing—and undercompensating—the harms suffered by individual employee claimants, whereas analyses such as Coffee's focus exclusively on compensation at the expense of deterrence. Colvin's model, however, provides substantial attention to both of these aspects of dispute resolution while going beyond this dichotomy, also considering the impact of dispute resolution systems on access to quality legal representation and on systems of workplace relations between employers and employees. Thus, it provides a more comprehensive understanding of how a given dispute resolution system will affect employees, both in their daily work lives and in disputes with their employers. Comparing arbitration to litigation under this model, Colvin concludes that, under mandatory arbitration, employees are likely to have weaker procedural protections, a less significant deterrent effect to employer misconduct, and a lessened

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 82.

⁶³ *Id.*

ability to obtain legal representation, and that mandatory arbitration does not necessarily lead to stronger internal dispute resolution procedures.⁶⁴

i. THE STRUCTURE OF RIGHTS HELD BY EMPLOYEES

Colvin’s first criterion for judging an individual employment relations system is how that system affects the structure of rights held by employees.⁶⁵ This examination includes both the substantive rights provided by federal and state law, and the procedural structures through which employees may enforce those substantive rights.⁶⁶ Arbitration typically offers claimants weaker procedural protections than does litigation, including limited discovery and virtually nonexistent appellate review.⁶⁷ Certain common characteristics of arbitration may weigh in the claimant’s favor, such as a reduced frequency of summary judgment motions and more relaxed rules of evidence.⁶⁸ However, there are no required due process protections in arbitration. Although the American Arbitration Association (AAA) provides some due process protections, employers are not required to designate the AAA or any other organization providing due process protections as their arbitrators.⁶⁹ In fact, second only to agreements that specify the AAA as arbitrator, most mandatory arbitration clauses do not specify any particular arbitrator, leaving the choice of arbitrator and control of the arbitration procedure design entirely in the employer’s hands.⁷⁰

The Supreme Court has framed this as a considered tradeoff by employees: “[B]y agreeing to arbitrate, one ‘trades the procedures and opportunities for review of the courtroom

⁶⁴ *Id.*

⁶⁵ *Id.* at 73.

⁶⁶ *Id.*

⁶⁷ *See, e.g., id.* at 74 (discussing limited discovery in arbitration); Comsti, *supra* note 33, at 10 (“Because forced arbitration is binding, there is no effective appeal from an arbitrator’s decision, which is final, even when it is legally wrong.”).

⁶⁸ Colvin, *supra* note 5, at 74.

⁶⁹ *Id.* at 77.

⁷⁰ *Id.* (citing Mark Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91 (2014)).

for the simplicity, expedition, and informality of arbitration.”⁷¹ However, in the employment context, because mandatory arbitration is nearly always imposed unilaterally by management, the frequency of mandatory arbitration does not reflect employees’ choice or consideration; it rather reflects the employer’s preference for arbitration over litigation.⁷² *Gilmer*’s narrative that employees in mandatory arbitration have agreed to arbitration after weighing it against litigation is pure fiction; rather, most employees have accepted a unilaterally imposed condition of employment, weighing mandatory arbitration not against litigation, but against the prospect of termination. Colvin finds that this one-sided balance of power leads to significant procedural disadvantages for employee claimants under mandatory arbitration compared to litigants, thus leading to inequality in such claimants’ ability to enforce their substantive employment rights.⁷³

ii. SOURCES OF EMPLOYEE POWER

Next, Colvin asks to what degree a given individual employment relation system affects the power differential between employers and employees. Traditional litigation counterbalances workplace power differentials by deterring employers from statutory violations with the threat of damages.⁷⁴ Employment statutes not only empower employees to seek individual damages, but also allow them to act as “private attorneys general” through litigation, seeking injunctive relief through the courts.⁷⁵ This deterrent power is essential for ensuring that legislative employment priorities such as anti-discrimination laws, minimum wage requirements, and overtime protections are actually implemented in the workplace. Moreover, the risk of large awards

⁷¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

⁷² Colvin, *supra* note 5, at 76.

⁷³ *Id.* at 78. Colvin notes that the only types of employees that are able to influence the structure of arbitration and ADR are those with extremely large individual bargaining power, such as executives, and those with collective bargaining power. *Id.*

⁷⁴ *Id.* at 79.

⁷⁵ Comsti, *supra* note 33, at 26.

(whether from substantial individual litigation, or from class action) incentivizes employers to act to reduce the risk of litigation, such as by implementing managerial structures that avoid age discrimination.⁷⁶ Thus, litigation is able to translate statutory rights into actual change in the workplace through “a process of contested decision-making and negotiated implementation.”⁷⁷

In mandatory arbitration, both employee win rates and average award amounts are far lower than in litigation. One study found an employee success rate of 36.4% in federal employment discrimination trials, and others have found a 57-59% employee success rate in state court non-discrimination employment cases.⁷⁸ In contrast, employees have a win rate of only 21.4% in AAA mandatory arbitrations.⁷⁹ Employees also fare worse in mandatory arbitration when it comes to damages. In Colvin’s research sample, average award amounts across all court cases, including employee losses as well as cases in which no damages were awarded, were \$143,497 for employment discrimination trials in federal court and \$328,008 for non-civil rights employment trials in state courts.⁸⁰ In AAA mandatory arbitration cases examined by Colvin, the average award is a mere \$23,548—about 1/7 of the federal average and 1/15 of the state average—reflecting both smaller awards when employees prevail and the overall lower win rate for employees in mandatory arbitration.⁸¹ With the increasing prevalence of mandatory arbitration, this disparity of outcomes between litigation and mandatory arbitration threatens to decrease the impact of employment legislation by reducing litigation’s deterrent effect.⁸²

⁷⁶ Colvin, *supra* note 5, at 79.

⁷⁷ *Id.*

⁷⁸ *Id.* at 79-80 (citing Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2003); and David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535 (2003)).

⁷⁹ *Id.* at 80, citing Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011)

⁸⁰ *Id.*

⁸¹ *Id.* at 80.

⁸² *Id.* at 81.

It is likely that mandatory group action waivers similarly reduce litigation's deterrent effect, especially in wage and hour claims. The potential individual awards in wage and hour claims are frequently too low to make individual legal representation financially viable.⁸³ Since group action waivers are enforceable even when they make individual litigation economically unviable under *Italian Colors*, then employees forced to work under such waivers would be effectively barred from bringing many, if not most, wage and hour claims. As such waivers become more common, this will further reduce the deterrent effect of wage and hour statutes.

Furthermore, such waivers likely make employees more vulnerable to retaliation for pursuing their claims against their employers. When an employer, through a pattern of action, has violated the statutory rights of a class of employees who band together in a class action, it is difficult for the employer to retaliate against those employees without drawing attention to its actions, as retaliation such as mass termination would be nearly impossible to conceal. It would be far easier to cloak retaliation against claimants acting individually, in separate actions, under the guise of alleged poor performance or insubordination. These waivers, then, are likely to have a chilling effect on employees who might willingly join a class action, but are reluctant to assert individual arbitration claims for fear of retaliation.

iii. MECHANISMS OF REPRESENTATION

To successfully pursue individual employment claims and vindicate their statutory rights, employees must be able to obtain effective representation.⁸⁴ Arbitration advocates have heralded the process as one in which employees can proceed *pro se*, leading, in theory, to employees retaining more of their awards by avoiding plaintiffs' attorneys' fees.⁸⁵ However, this tree has

⁸³ *Id.* at 82.

⁸⁴ Colvin, *supra* note 5, at 82.

⁸⁵ *Id.*

borne little fruit; *pro se* arbitration claims comprise about 25% of all employment claims, only slightly more than the roughly 20% of *pro se* employment litigation claims.⁸⁶ Employees are seeking counsel in arbitration for good reason: *pro se* arbitration claimants, like *pro se* litigants, have significantly lower rates of success (measured either as damages or a successful settlement) when compared to those with legal representation.⁸⁷ Thus, effective representation is as essential in arbitration as in litigation.

Due to the disparity in awards between litigation and mandatory arbitration, employees face significant hurdles in obtaining legal counsel in mandatory arbitration. Since most employment claims are accepted on contingency, the lower average award in arbitration reduces the ability of employees to find attorneys willing to take such cases on a contingency basis.⁸⁸ In a survey of 480 employment attorneys, Colvin found that they were nearly twice as likely to accept potential clients who were able to proceed in litigation as those who were subject to mandatory arbitration.⁸⁹ Employers, with their greater financial resources, are more likely to be represented by employment law specialists in arbitration than are employees, and are similarly more likely to be represented by attorneys with more mandatory arbitration experience, leading to a potential repeat player effect.⁹⁰ In contrast, employees are more likely to be represented by generalists, if they can obtain representation at all.⁹¹ This cuts against the public policy argument that mandatory arbitration can help to reduce the barriers against access to justice; in fact, Colvin concludes that it strengthens these barriers by reducing employees' ability to obtain legal

⁸⁶ *Id.* at 82-83.

⁸⁷ *See supra* text accompanying notes 59-62.

⁸⁸ Colvin, *supra* note 5, at 84.

⁸⁹ *Id.* at 85. Colvin found that employment attorneys accepted 15.8% of potential clients for whom litigation was an option, as opposed to only 8.1% of those under mandatory arbitration. *Id.*

⁹⁰ *Id.* at 83.

⁹¹ *Id.* (citing Colvin & Pike, *supra* note 55, at 65).

representation.⁹² This effect is almost certainly more pronounced for smaller-value wage and hour claims that are not large enough to make individual representation financially viable, but where the terms of the mandatory arbitration clause bar group action.

This finding is further supported by Colvin and Pike’s 2014 study, in which they examined the 449 AAA employment arbitration cases that terminated in 2008. They found that while 83.1% of claimants under employer promulgated systems earned less than \$100,000 per year, their claims were of relatively high value.⁹³ The median claim of this group was over \$167,000, and three quarters of the claims were above \$61,985.⁹⁴ This figure is significant, they note, because a 1995 survey of employment lawyers found that damages of at least \$60,000 were necessary to justify work on a contingent basis.⁹⁵ This likely creates a screening effect, explaining why AAA handles so few employment arbitration cases—a mere 946 in 2008, including cases that were settled or otherwise withdrawn prior to a hearing—given that employer promulgated procedures cover, in Colvin and Pike’s estimate, about 30 million employees in the United States.⁹⁶ This suggests that, contrary to Estreicher’s view of arbitration as a friendly venue for low-value claims, arbitration is subject to the same screening effects as litigation, with smaller-value claims being priced out by the cost of obtaining effective representation.

iv. PATTERNS OF EMPLOYMENT RELATIONS

Colvin’s fourth criterion for evaluating a method of individual employment relations is to what degree the method produces patterns of workplace employment relations that protect

⁹² *Id.*

⁹³ Colvin & Pike, *supra* note 55, at 67.

⁹⁴ *Id.*

⁹⁵ *Id.* (citing William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 44 (1995)). Colvin and Pike did not adjust the \$60,000 figure for inflation; if attorney requirements have held constant with inflation, Howard’s study suggests that in 2008, damages of over \$84,000 would have been required. To estimate inflation, see *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS (Jan. 15, 2018), <https://data.bls.gov/cgi-bin/cpicalc.pl>.

⁹⁶ *Id.* at 82 (citing Colvin, *supra* note 43, at 410).

employment rights.⁹⁷ Mandatory arbitration is often accompanied by internal grievance procedures involving multiple steps prior to arbitration, which can increase employee due process rights.⁹⁸ However, Colvin observes, it is not obvious that mandatory arbitration is necessary to encourage employers to implement strong internal grievance procedures.⁹⁹ Furthermore, research in this area is likely not representative of the overall state of firms with mandatory arbitration, since companies with weaker internal grievance procedures are less likely to allow researchers to study their systems, due to the potential for negative publicity.¹⁰⁰ Colvin concludes that a regime in which employers unilaterally implement rules and procedures (the regime of nearly all workplaces with mandatory arbitration) leads to significant variation in employees' access to due process rights and workplace justice.¹⁰¹ Without empirical research on the topic, it is impossible to determine what differences there might be in those workplaces that bar class actions and arbitrations through mandatory arbitration clauses and those that do not.

The *Gilmer* Court may have claimed that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute”¹⁰²; however, as this section has demonstrated, an employee’s so-called “agreement” to forgo litigation through mandatory individual arbitration may well lead to her forgoing her substantive statutory rights when her claims are too low to justify legal representation on a contingency fee basis. Part III will therefore examine whether public enforcement of these statutory rights by state AGs might serve to vindicate employee rights when private enforcement of those rights is effectively barred by mandatory individual arbitration.

⁹⁷ Colvin, *supra* note 5, at 74.

⁹⁸ *Id.* at 86.

⁹⁹ *Id.* at 87.

¹⁰⁰ *Id.* at 88.

¹⁰¹ *Id.* at 89.

¹⁰² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

III. THE *PARENS PATRIAE* POWER AS A REPLACEMENT FOR CLASS ACTIONS

To the extent that individual arbitration frustrates employees' attempts to effectively vindicate their statutory claims, mandatory individual arbitration clauses thus prevent both deterrence of future misconduct and compensation for individual harms. Where these means are no longer attainable through private enforcement of employment statutes, private enforcement has failed as a means by which employees may vindicate their statutory rights. This Part will therefore examine whether public enforcement of those rights through the state attorney general *parens patriae* power might be an effective alternative for the vindication of those rights, using Colvin's model as a lens to understand its effect on employee access to workplace justice.

A. *State Attorneys General and the Parens Patriae Power*

With the general hostility toward the class action of recent decades, and with many individually low-value employee claims effectively barred by mandatory individual arbitration clauses, some scholars have looked to state attorneys general ("AGs") as an alternative means to fulfill the purposes of employee and consumer protection statutes, as a quasi-class action.¹⁰³ The *parens patriae* power (literally "parent of the country") is rooted in English common law, in which the state could act as a guardian on behalf of minors and others deemed incapable of advocating on their own behalf.¹⁰⁴ In the United States, the doctrine has its modern origin at the turn of the twentieth century. In *Louisiana v. Texas*, the Supreme Court found that a state could have a "quasi-sovereign" interest in litigation, giving it the power to act through *parens patriae*.¹⁰⁵ What exactly the required "quasi-sovereign" interest might be lacked much definition

¹⁰³ See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (Spring 2012).

¹⁰⁴ Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850 (June 2000).

¹⁰⁵ *Id.* at 1851 (quoting *Louisiana v. Texas*, 176 U.S. 1 (1900)).

until 1982, when the Court, reviewing its previous eighty years of *parens* jurisprudence, found that successful *parens* cases included these essential characteristics:

(1) a state has a quasi-sovereign interest only when it can articulate “an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party”; (2) a state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general; (3) a state has a quasi-sovereign interest in not being denied its rightful status within the federal system and in seeing that its citizens are not denied the benefits of that system; (4) a state has a quasi-sovereign interest only if it can allege an injury to a “sufficiently substantial” segment of its population, but the Court has not attempted to draw any “definitive limits” on the proportion that must be adversely affected.¹⁰⁶

State law, however, can limit the scope of an AG’s *parens* power.¹⁰⁷ This leads to significant differences in *parens* power from state to state. In a 2002 case involving AGs from all fifty states and the District of Columbia, the court determined that “fourteen states [including the District of Columbia] . . . ha[d] expressly conferred *parens patriae* authority,” that sixteen more “ha[d] express statutory authority to represent consumers” in a “functional equivalent” of *parens* power, another thirteen had the power through court decisions or state common law, and that the final eight claimed standing under Rule 23 of the Federal Rules of Civil Procedure.¹⁰⁸

The broad scope of the *parens* power, some argue, gives state AGs the ability to pursue aggregate litigation on behalf of injured citizens while avoiding the agency costs critiqued by Coffee and others. Such policy proposals often replicate Coffee’s compensationalist view of the role of class actions, with little focus on the deterrent effects of such suits or the other aspects of employee access to justice discussed in Part II

¹⁰⁶ *Id.* at 1852-53 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982)).

¹⁰⁷ In Wisconsin, for example, the AG has no inherent power to bring *parens patriae* suits, and thus must have specific statutory authorization to act in *parens patriae*. *In re Estate of Sharp*, 63 Wis. 2d 254, 261 (1974).

¹⁰⁸ *In re Lorazepam & Clorazepate Antitrust Litig. V. Mylan Labs*, 205 F.R.D. 369, 386-87 (D.D.C. 2002) (citations omitted).

of this paper.¹⁰⁹ Shortly after *AT&T Mobility*, Myriam Gilles and Gary Friedman argued, from a deterrent perspective, that the *parens* power could also circumvent mandatory individual arbitration agreements, because state AGs would not be barred by such agreements under agency principles.¹¹⁰ Moreover, they argue that the *parens* power would be beyond the reach of the tightening restrictions of class action certification after *Wal-Mart v. Dukes*, and would also not be subject to the same notice requirements as a damages class action because state AGs do not have the obligation to distribute damages to individual victims with any precision—or to distribute damages at all.¹¹¹ Far more concerned about the loss of the deterrent effect of the class action than its goal of compensation, they claim that “[l]iberal use of *cy pres*, escheatment to the public fisc, and the application of rough justice principles in distributing awards” would constitute sufficient compensation of individual victims.¹¹²

B. Parens Patriae and Employee Access to Workplace Justice

Advocates of the *parens patriae* power as a replacement for traditional class actions have focused either on the compensationalist or the deterrent functions of litigation, typically arguing for the importance of one or the other.¹¹³ This section will rather employ Colvin’s more nuanced model discussed in Part II to explore the effect of *parens* suits by state AGs on the equality of access to justice between employees and employers. It will compare *patriae* suits to traditional

¹⁰⁹ See, e.g., Ratliff, *supra* note 105, at 1848 (asking why state AGs do not pursue damages through the *parens* power after obtaining injunctive relief, instead of allowing private attorneys to “tak[e] a bite of a million or so . . . in attorneys’ fees” by developing a damages class action); Brunet, *supra* note 15, at 1919 (claiming that *parens* suits would lessen the agency cost of class actions, and would remove any financial incentive by private attorneys to minimize damages in exchange for larger fees).

¹¹⁰ Gilles & Friedman, *supra* note 103, at 664.

¹¹¹ *Id.* at 665-66.

¹¹² *Id.* at 666.

¹¹³ See *supra* notes 109-112 and accompanying text.

class actions and to individual mandatory arbitration of low-value claims under a class arbitration waiver.

i. THE STRUCTURE OF RIGHTS HELD BY EMPLOYEES

Colvin first asks what types of procedural rights a given dispute resolution system offers. Under this criterion, *parens* suits differ substantially from class actions in several respects. First, to the extent one accepts Coffee’s critique of the agency costs of class actions, *parens* suits may address that concern by removing the temptation of private counsel to reach “coupon” settlements alongside substantial attorneys’ fees or to forgo injunctive relief in favor of higher damages.¹¹⁴ However, the interests of employees involved in a *parens* suit will not necessarily align with those of the prosecuting AG.¹¹⁵ In fact, to proceed in a *parens* suit, the state must show an interest that is distinct from the interests of the citizens in the suit.¹¹⁶ The state’s action must be taken on behalf of the interests of all state residents, not just particular individuals, and must address the type of general public welfare that the state might “address through its sovereign lawmaking powers.”¹¹⁷

When the interests of affected individual employees conflict with an AG’s conception of the general welfare of her state’s citizens, it is unclear how she should balance these competing interests.¹¹⁸ Acting on behalf of her state’s citizens, she might prioritize injunctive relief, whereas the injured individuals might likely prefer a focus on damages.¹¹⁹ This difficulty is likely to increase in the employment realm, where the majority of an AG’s potential *parens* suits will be against employers in her own state. An AG pursuing a *parens* claim against an out-of-state

¹¹⁴ Gilles & Friedman, *supra* note 103, at 671.

¹¹⁵ Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

¹¹⁶ *Id.* at 494 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982)).

¹¹⁷ *Id.* at 495 (quoting *Snapp*, 458 U.S. at 592).

¹¹⁸ *Id.* at 514.

¹¹⁹ Lemos, *supra* note 115, at 541.

product manufacturer need not worry about the impact of a significant award on the welfare of her state's citizens. But how would the same AG analyze a similarly large award against a local employer, which might reduce that employer's ability to hire additional employees, or even put the employer out of business?¹²⁰ This difficulty is increased when the political considerations of state AGs are considered, particularly in the forty-three states where AGs are directly elected.¹²¹ The need to secure and retain political support from prominent state business owners may lead state AGs to seek lighter fines against employers, or even to decline to pursue a *parens* suit at all.¹²² Thus, while the *parens* doctrine may appear at first blush to be an improvement over class actions' supposed high agency costs, it has its own threats to employees' procedural rights.

Moreover, *parens* suits lack key procedural protections of class actions. To certify a class in a damages suit, the court must find that the class's shared questions of law or fact predominate, and that a class action is superior to other available methods to resolve the dispute.¹²³ Such requirements are absent in *parens* suits.¹²⁴ Similarly, there is no *parens* parallel to the Rule 23(c) notice requirement for damages class actions.¹²⁵ However, despite the lack of these procedural protections, the general rule is that *parens* suits preclude any future class action litigation just as a prior class action would.¹²⁶ An injured employee may therefore be barred from

¹²⁰ *Id.*

¹²¹ For the election and selection criteria for state AGs, see *Attorney General (state executive office)*, BALLOTPEDIA (Jan. 15, 2018), [https://ballotpedia.org/Attorney_General_\(state_executive_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)).

¹²² Margaret Lemos, *State Enforcement of Federal Law*, 86 N.Y.U.L. REV. 698, 728-29 (2011). Gilles and Friedman, in contrast, point to the populist publicity advantages of large awards to a state AG. Gilles & Friedman, *supra* note 103, at 671-72.

¹²³ *Fed. R. Civ. P.* 23(b)(3).

¹²⁴ Lemos, *supra* note 115, at 505.

¹²⁵ *Id.* at 507 (citing *Fed. R. Civ. P.* 23(c)(2)(B)).

¹²⁶ *Id.* at 500 (citing Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State AGs*, 68 FORDHAM L. REV. 361, 362 (1999)). However, Gilles and Friedman claim that *res judicata* only applies when *parens patriae* suits have complied with Rule 23's notice requirements. Gilles & Friedman, *supra* note 103, at 667 (citing *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992)).

future class action litigation by a state AG suit that subordinates her individual interests to those of the state's citizenry or of her employer, or even to the AG's political ambitions.¹²⁷

When compared to the procedural disadvantages of mandatory individual arbitration, however, *parens* suits begin to regain their luster. They retain the significant procedural strengths of litigation, such as expansive discovery and appellate review of unfavorable decisions, as well as due process protections that may be absent in mandatory arbitration.¹²⁸ Most fundamentally, the possibility of a *parens* suit offers employees a viable procedure by which to vindicate wage and hour claims too small to pursue individually when class action and class arbitration are barred. While such employees will have no right to control the method by which the suit proceeds, and may have fewer rights than Rule 23 class members, a *parens* suit at least offers the possibility of meaningful injunctive relief and a financially viable path to individual damages.

ii. SOURCES OF EMPLOYEE POWER

Colvin's second criterion of analysis is the effect of a given individual employment relations system on employee power to vindicate statutory rights and ensure employer compliance. Under this criterion, *parens* suits may seem appealing to employee rights advocates, allowing advocacy-focused state AGs to use the power of the state to secure justice for employees. However, relying on state AGs to use their *parens* power against employers to enforce employment laws could cause significant variance among the states in how effectively the purposes of these laws are fulfilled, particularly in the wage and hour area.

Enforcement of mandatory arbitration clauses has become a highly partisan issue. For example, the twenty-four Senate cosponsors of the 2013 Arbitration Fairness Act were all

¹²⁷ Gilles and Friedman suggest that, were the frequency of aggregate *parens* suits to increase, courts would adopt similar due process protections to the Federal Rules of Civil Procedure. Gilles & Friedman, *supra* note 103, at 667. Such a development would certainly address these concerns.

¹²⁸ See *supra* notes 65-73 and accompanying text.

Democrats; moreover, left-leaning groups such as the AFL-CIO, the ACLU, and the NAACP supported the legislation, while conservative organizations like the U.S. Chamber of Commerce and National Association of Manufacturers opposed it.¹²⁹ While initial Supreme Court majorities on pro-arbitration cases were more ideologically diverse, more recent mandatory arbitration cases such as *AT&T Mobility* and *Italian Colors* have routinely divided the Court along traditional liberal-conservative ideological lines.¹³⁰ Since every state AG but one is either directly elected in a partisan race or appointed by a partisan governor or legislative body,¹³¹ there is thus the potential for a partisan divide in the willingness of state AGs to initiate *parens* suits to circumvent mandatory arbitration clauses.

Moreover, the general partisan divide among state AGs seems to be increasing. Margaret Lemos and Kevin Quinn, in a study of Supreme Court *amici* briefs filed by state AGs between the Court's 1979 and 2013 terms, have found that while signs of partisanship in Supreme Court *amici* by state AGs briefs were low prior to 2000, partisanship has increased since then:

To our surprise, we found relatively low rates of interstate conflict in our set of state amicus briefs. States agreed far more often than they disagreed, and - until recently - most multistate briefs represented bipartisan, not partisan, coalitions of AGs. In about 94% of the cases in which any state wrote a merits brief, there was no explicit disagreement among the state AGs. Further, for the first twenty years of our study [1979-1999], the cosigners of these briefs were generally indistinguishable from a random sampling of AGs then in office. The picture changes after 2000, when the coalitions of cosigners became decidedly more partisan, particularly among Republican AGs.¹³²

¹²⁹ Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 Harv. J. on Legis. 711, 719 (Summer 2016).

¹³⁰ *Id.*

¹³¹ Forty-three AGs are directly elected, six are appointed by their states' governors or legislatures, and one is chosen by the state's Supreme Court. Ballotpedia, *supra* note 121. As of January 15, 2018, twenty-seven state AGs were Republicans, twenty-one were Democrats, one was independent, and one was nonpartisan. *Id.*

¹³² Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U.L. REV. 1229, 1234 (2015). Professor Lemos kindly provided the raw data from this study, for which I am grateful.

Although few cases involve states taking opposing positions in *amici* briefs, within that subset of cases, AGs tend to band together in partisan groups, with a similar increase in partisanship after the mid-1990s.¹³³ Lemos and Quinn note that primarily Democratic coalitions tended to file *amici* briefs on civil litigation issues, notably including cases involving the relationship between arbitration and class actions.¹³⁴ This group of cases included *AT&T Mobility*, in which partisan groups of state AGs filed *amici* briefs on both sides, with the Republican-dominated coalition arguing for the enforceability of the mandatory arbitration agreement and the Democratic-dominated coalition arguing for its unconscionability.¹³⁵ *Italian Colors* did not feature opposing state AG briefs, but a large group of state AGs filed a brief in support of the plaintiffs, arguing that where individual claims are financially unviable, mandatory class action and class arbitration waivers should be found unenforceable.¹³⁶ Of the twenty-one AGs joining in the brief, seventeen were Democrats and only four were Republicans.¹³⁷ Lemos and Quinn’s findings, coupled with the partisan divisions among state AGs and the highly partisan nature of the arbitration dispute, thus suggest that partisanship is likely to play a role when state AGs consider whether to use the *parens* power to pursue collective litigation on behalf of employees barred from group action. If this does become a partisan issue, it would likely lead to a disparity in employee power among the states based on the partisan affiliation of each state’s AG.

Moreover, further disparities are likely to arise among employees from different states depending on the scope of each state AG’s *parens* power. The Louisiana constitution, for example, grants that state’s AG extremely broad authority, “[a]s necessary for the assertion or

¹³³ *Id.*

¹³⁴ *Id.* at 1260.

¹³⁵ *Id.*

¹³⁶ *American Express Co. v. Italian Colors Restaurant*, Br. of the State of Ohio and 21 Other States as *Amici Curiae* in Supp. of Resp’ts, 2013 U.S. S. Ct. Briefs LEXIS 673 (Jan. 29, 2013).

¹³⁷ *Id.*

protection of any right or interest of the state, . . . to institute, prosecute, or intervene in any civil action or proceeding. . . .”¹³⁸ The Wisconsin AG, in contrast, lacks any inherent power beyond what is explicitly granted by statute to act in *parens patriae*.¹³⁹ Thus, even if partisan considerations do not prevent a state AG from bringing *parens* suits, the AG might lack the ability to bring a given suit depending upon state law.

Organized business interests might also deter state AGs from initiating *parens* suits against employers (particularly large ones) within their states.¹⁴⁰ Whereas a state AG initiating a *parens* suit within a consumer context is likely to be suing a corporation based outside of her state, or even outside of the country, it stands to reason that the overwhelming majority of potential *parens* employment actions would be against in-state employers.¹⁴¹ If a *parens* suit were to yield significant damages against a prominent employer, perhaps leading to layoffs by that employer, an elected state AG would be susceptible to attack, either from direct political opposition from the employer or from large contributions to opposing political action committees.¹⁴² Indeed, while all fifty states and the District of Columbia eventually joined the action against the tobacco industry, many major tobacco-producing states refused at first to join the litigation.¹⁴³ Thus, just as state AGs might seek lighter fines against in-state employers,¹⁴⁴ they might also decline entirely to bring such suits.

¹³⁸ Louisiana Constitution, Art. IV, Sec. 8.

¹³⁹ *In re Estate of Sharp*, 63 Wis. 2d 254, 261 (1974).

¹⁴⁰ Presumably the forty-three directly elected state AGs would be more vulnerable to such pressure, although the six others appointed by state governors or legislatures would likely also feel political pressure to avoid harm to prominent in-state employers.

¹⁴¹ What would matter, for these purposes, is not where the employer is incorporated, but rather where the employer employs residents of the AG’s state.

¹⁴² See Gilles & Friedman, *supra* note 103, at 674.

¹⁴³ Lemos, *supra* note 122, at 729.

¹⁴⁴ See *supra* notes 118-122 and accompanying text.

If there is in fact a partisan divide among state AGs in their willingness to pursue *parens* suits on behalf of employees, that divide could perhaps be ameliorated, to the extent that it results from a desire to avoid the political consequences of pursuing such suits against employers, by empowering independent review commissions to determine which suits to pursue. Such commissions could act as a clearing house by soliciting employee claims, reviewing their validity, and recommending—or ordering—that the state AG act or not act upon them. Depending on state law, forming such commissions would either require action by the state AG or the state legislature, meaning that partisan resistance to the expansion of *parens* suits would have to be overcome one way or another. But once a commission was in place, the state AG would be largely insulated from the decision to pursue a *parens* suit.¹⁴⁵

However, under the status quo, state AGs would presumably be responsible for the decision to take up any *parens* suits that they are empowered to bring. Thus, to the degree that *parens* suits become the dominant method of vindication of employees' statutory rights, there is a significant risk of wide disparities across state lines based on the state AGs' partisan affiliation, the scope of their *parens* powers, and their vulnerability to political pressure from in-state employers. This potential disparity is less significant, however, than that between employees who are barred from group action and those who are not, since *parens patriae* gives employees barred from group action at least some chance at an economically viable path to vindication.

iii. MECHANISMS OF REPRESENTATION

Compared to a private class action, *parens patriae* suits would at first seem to reduce the ability of employee claimants to ensure that they have skilled legal representation. In a *parens* suit, the attorney for the “class” is the state AG's office (or any private counsel they choose to

¹⁴⁵ Such commissions would, of course, likely raise state constitutional questions to the extent that they limited AG power, but such considerations are beyond the scope of this paper.

contract with); employee claimants would have no control over their representation.¹⁴⁶ In a class action, of course, few (if any) class members actively choose their counsel. However, the Federal Rules of Civil Procedure requires that the court appoint class counsel that is able to “fairly and adequately represent the interests of the class,” including a consideration of counsel’s experience in class actions and other complicated litigation, relevant law, and available resources.¹⁴⁷ The *parens* framework, in contrast, lacks any formal equivalent of a Rule 23 challenge to the adequacy of counsel.¹⁴⁸ Lemos suggests that the best available option to challenge adequacy of counsel in a *parens* suit would be a subsequent private suit attempting to relitigate the subject of the *parens* suit.¹⁴⁹ However, in a *parens* suit, there is a rebuttable presumption that government representation is adequate.¹⁵⁰ Most courts set a high bar to rebut this presumption, requiring “a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant.”¹⁵¹ Thus, employees seeking to improve the quality of their counsel in a *parens* suit will likely face an uphill battle through private litigation to overcome the presumption of adequacy of counsel by state AGs.

However, while members of a private class action do have broader formal rights under Rule 23 than individuals covered by a *parens* suit, those rights are rarely enforced. Robert Klonoff, in an extensive study of hundreds of class certification decisions published between 1994 and 2003, found that “the vast majority” of class certifications contained “little or no

¹⁴⁶ At the Supreme Court level, at least, state AGs have had a reputation as weak (and underfunded) litigators compared to experienced private counsel well into the 1980s. Lemos & Quinn, *supra* note 132, at 1236-37. However, this has been improved by increased funding for state AGs and by coordination through the National Association of Attorneys General Supreme Court Project. *Id.* at 1237-38.

¹⁴⁷ *Fed. R. Civ. P.* 23(g)(1).

¹⁴⁸ Lemos, *supra* note 115, at 503.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 509 (citing 6 James Wm. Moore et al., *Moore’s Federal Practice*, § 24.03 (3d ed. 2007)).

¹⁵¹ *Id.* (quoting *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)).

analysis” of class counsel adequacy.¹⁵² He also found that many courts employed the same presumption of adequacy critiqued by Lemos in the *parens* context, rather than requiring an affirmative showing of adequacy by prospective class counsel.¹⁵³ Moreover, courts often use a highly limited definition of inadequacy, such as finding inadequacy only when there is a clear conflict of interest.¹⁵⁴ Therefore, the difference between private class actions and *parens* suits—on this criterion, at least—seems to be more theoretical than practical.

Moreover, other options for ensuring adequate counsel remain if an understaffed or underfunded state AG is willing to cooperate with private firms. In such situations, states could contract private firms with class action expertise on a contingency fee basis to prosecute *parens* actions, as many states did in the tobacco lawsuit.¹⁵⁵ To increase employee control over the choice of counsel, state AGs could involve affected employees in the contracting decision in some way, such as inviting them to participate in interviews of prospective counsel or to provide feedback on application proposals, thereby increasing their agency under Colvin’s third criterion.

Gilles and Friedman argue that state AG oversight of any settlements reached by contracted private class counsel would address Coffee’s concern that class counsel would act in its own financial best interest at the expense of the interests of the class.¹⁵⁶ They note, however, that such arrangements might risk “pay-to-play” abuses in which political donors are favored in selection of private counsel.¹⁵⁷ This problem would not be unique to *parens* suits, since states routinely contract work out to the private sector and must deal with the danger of corruption.¹⁵⁸

¹⁵² Robert H. Klonoff, *The Judiciary’s Flawed Application of Rule 23’s “Adequacy of Representation” Requirement*, 2004 MICH. ST. L. REV. 671, 673 (Fall 2004).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Gilles & Friedman, *supra* note 103, at 668-69.

¹⁵⁶ *Id.* at 671.

¹⁵⁷ *Id.* at 670.

¹⁵⁸ See, e.g., Jody Freeman, *Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (March 2003). Privatization of state services is, of course, not without its

However, any involvement of affected employees in the contracting process should be carefully considered to ensure that it does not lead to increased opportunities for corruption.

To the extent that the state effectively performs oversight in other contracting situations, *parens* suits should not present any unusual problems or difficulties. Thus, even if there is some difference in employees' ability to ensure adequate representation through class actions or *parens* suits, that can be addressed through the use of private counsel in *parens* suits. When *parens* actions are compared to individual private arbitration of low-value claims under this criterion, the balance weighs heavily in favor of *parens* suits, since employees would be unlikely to attract competent representation with such claims; representation provided by the state will certainly be better than no representation at all.¹⁵⁹

iv. PATTERNS OF EMPLOYMENT RELATIONS

Colvin's final criterion is whether a system of dispute resolution produces patterns of employment relations in the workplace that advance employees' rights. Comparison of class actions, *parens* suits, and mandatory individual arbitration will necessarily be speculative, since the use of *parens* suits to address large-scale employee statutory right violations has been very limited. It seems logical, however, that to the extent that *parens* suits are comparable to class actions in their success in vindicating employees' statutory rights, they would exert similar pressures on employers to develop robust alternative dispute resolution mechanisms to resolve individual complaints before they could be bundled together into a group action, regardless of whether that action is public or private in nature. *Parens* suits would thus, like class actions, seem far more likely than mandatory individual arbitration to create such pressure with regards

own controversies. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (Oct. 2003) (analyzing privatization as a form of delegation of state power, and questioning whether accountability structures can be created to monitor whether such delegation is done constitutionally).

¹⁵⁹ *See* discussion *supra* Section II.B.iii.

to statutory rights that tend to create low-value claims, since the chances of success in a group *parens* action would be higher than through individual arbitration.

CONCLUSION

If employers' use of mandatory arbitration clauses with group action bars continues to increase, and if the FAA continues to enjoy its status as a superstatute, *parens patriae* litigation seems to be the best available method for employees to vindicate claims that are too individually small to attract competent legal representation, and thus unlikely to succeed in individual arbitration. However, it does not appear that *parens* suits will be nearly as effective as class actions in addressing the power differential between employers and employees and effecting the statutory purposes of the FLSA and other employment statutes. If *parens* suits are indeed going to fill the gap left by employment class actions, it is likely that significant disparities will develop across state lines based on state AG partisanship, resources, and inherent powers. Moreover, while *parens* suits might perform a similar deterrent function to class actions, they lack the procedural protections of the compensation function of class actions. If state AGs do not use their *parens* powers thoughtfully, the doctrine could be vulnerable to many of the same critiques as class actions, particularly from a compensationalist perspective, which could lead to state legislatures moving to curtail these powers.¹⁶⁰ Despite these difficulties, however, for employees barred from group action but hoping to vindicate low-value statutory claims, a *parens patriae* suit might be the only game in town.

¹⁶⁰ This risk could be reduced if the National Association of Attorneys General (NAAG) were to serve as a clearinghouse for best practices in state *parens* suits, which could mitigate some aspects of the risk of procedural disparities developing among states. The NAAG could, for example, develop guidelines for balancing individual compensation with injunctive relief (*see supra* text accompanying notes 118-122), create model legislation for independent review commissions for potential *parens* suits (*see supra* text accompanying note 145), and promulgate best practices for the selection of private counsel (*see supra* text accompanying notes 155-158).