COLLECTIVE PRECLUSION AND INACCESSIBLE ARBITRATION: DATA, NON-DISCLOSURE, AND PUBLIC KNOWLEDGE

by
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When courts enforce mandates to arbitrate, jurists describe themselves as respecting the individuals' autonomy to enter into contracts that route claimants to a process that is more user-friendly than adjudication. But those rationales are disjunctive with the practices of providers of goods and services and of employers. These companies neither offer individuals choices about dispute resolution mechanisms nor welcome the exchange of information about experiences with arbitration. Instead, companies impose obligations to arbitrate and set the terms. In addition to the increasingly commonplace bans on joint and collective actions in any forum, many providers and employers also seek to mandate a cone of silence by instructing individuals not to disclose the content of claims, the use of arbitration, or the outcomes.

But as we document in this Article, during the last decade, very few individuals filed claims, single-file, in arbitration. Given the success in precluding

[*] All rights reserved. May 2020. Thanks to Robert Klonoff for inviting us to participate in this symposium; to Mary Collishaw for her wise organization and oversight; to commentators Jennifer Bennett, Elizabeth Cabraser, Brian Fitzpatrick, and Briana Rosenbaum; to Stephen Herman for pointing us to lawyers' ethical obligations; to attendees at the 2019 Lewis and Clark Symposium; and to participants the UC Irvine Faculty Workshop at which this Article was discussed. We greatly appreciate the substantial assistance of Ryan Boyle, Vice President, Statistics and In-House Research at the American Arbitration Association (AAA), who patiently and generously helped us to understand and to use the data posted by the AAA. We are also grateful for helpful conversations from many expert litigators including Sally Abrahamson, Outten & Golden; Michael Agruss, Agruss Law Firm; Monica Balderrama; Dan Getman, Getman, Sweeney & Dunn; Brad Haskins, World Law Group; David Kassab, The Kassab Law Firm; C. Ryan Morgan, Morgan & Morgan; and Jeffrey Wilens, Lakeshore Law Center. This Article builds on the work of many former law students, including Adam Margulies, Greg Conyers, Michael Morse, and Devon Porter. We have been aided by Jason Eiseman, who is the Associate Director for Administration at the Yale Law Library and who guided the creation of the Open Source Consumer Arbitration data archive (https://osf.io/qmtsu). Thanks are also due to Denny Curtis, Myriam Gilles, and David Noll for their insights on these issues and to Bonnie Posick for expert editorial advice.

class actions and the rarity of filings, why are market actors seeking to silence the few who do arbitrate? And are such mandates enforceable by courts?

In this Article, we interrupt these silencing provisions through disseminating information about the rules of and use of arbitration. We track efforts to limit information about arbitration, outline the growing body of law on non-disclosure, and analyze the data about consumer use of arbitration. As we recount, some jurists have held non-disclosure obligations unenforceable. Yet many decisions condone their imposition despite the repeat-player advantages that accrue to the clauses' drafters, who have access to information that one-shot participants do not have.

In addition to information about efforts to silence litigants that can be gleaned from the case law, we have also mined materials posted by the American Arbitration Association (AAA), which has complied with state statutes requiring administrators of consumer arbitration to make accessible the number of claims filed and the results. The picture that emerges is that, of the millions of people using services and products, virtually none file individual arbitration claims.

Because AT&T succeeded in persuading the U.S. Supreme Court to enforce bans on collective action and require claimants to use the AAA, we researched arbitration filings against AT&T. Between 2009 and 2019, when the AT&T wireless services customer base ranged from 85 to 165 million, about 90 individuals a year filed an arbitration claim.

The available data also provide insight into why, given that remarkably low level of claims, providers of services seek to silence the few who are arbitration users. Law firms and other aggregators have begun a market in de facto collective actions by bundling similar claims against individual providers. And, outside of courts and arbitration, collective consumer action can seek remedies by putting information into the public realm that can affect purchasing decisions and press for changes in the behavior of service providers and employers.

Episodic filings through bundlers, claims pursued by government regulators when focused on consumer protection, and networking through web posts are important avenues. But the current legal landscape does not provide systematic access for consumers who have been harmed but lack knowledge of their injuries or connections to aggregators.

The privatization of process and non-disclosure mandates prevent similarly-situated individuals from learning about the potential to obtain redress and from sharing lawyers. Moreover, the development of law through cases or statutes and public debates about rights and remedies are stymied by information deficits. In short, after decades of conflicts often termed "class action wars," we are now in the "information wars," replete with energetic efforts to mandate silence that, we argue, law should rebuff.

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> "You and we agree that the arbitration will be confidential. You and we agree that we will not disclose the content of the arbitration proceeding or its outcome to anyone, but you or we may notify any government authority of the claim as permitted or required by law."
>
> American Express, "Cardmember Agreement"
> September 29, 2019[1]

I. INFORMATION-FORCING AND INFORMATION-BLOCKING

In September of 2019, American Express mailed its customers what it commended that they "read," "share" with other cardholders, and "file for future reference." American Express stated that "effective immediately," arbitrator's powers were limited to "claims between you and us alone." No claims could be "joined or consolidated," nor could any awards apply beyond a specific case. Furthermore, "you and we agree that the arbitration will be confidential," and "not [to] disclose the content of the arbitration proceeding or its outcome to anyone" unless mandated by law.[2]

What prompts the decision to impose this mandate? Is it "legal"? Who is bound? How does it affect the potential to respond to the company's subsequent mailing, appearing mid-October with another "important notice" in which American Express "updated" cardholders on "benefits" by retracting the "roadside assistance hotline," the "travel accident insurance," the "extended warranty," the "purchase protection," and the "return protection"? What are the means to enforce the mandate or to contest the unilateral changes, and what are the routes by which information about any resulting arbitration could make its way into the public realm?

In this Article, we respond by looking at case law and at other sources of information about the use of arbitration. The clause reproduced at the outset is not sui generis to American Express; indeed, other companies have put forth virtually identical mandates that have been before courts. Even after one court rejects the language as unfair to the recipient, the same company has proffered it in other jurisdictions and sometimes won, and sometimes lost.

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[1] American Express, Notice of Important Changes to Your Cardmember Agreement, September 2019. As we discuss in *infra* notes 120, 162 and accompanying text, these words reiterate a clause imposed by AT&T in 2002 that was subsequently withdrawn after litigation. That clause read: "Neither you nor [the company] may disclose the existence, content or results of any arbitration or award, except as may be required by law [or] to confirm and enforce an award." *See* Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003), discussed *infra* notes 120, 162. Further, AT&T then used the clause in Washington. *See infra* notes 158–70 and accompanying text.

[2] September mailing from "Blue Sky from American Express" (on file with authors).

Mining the case law is one way to learn about ongoing efforts to ward off public access, the entities or participants on whom silence is imposed, the scope of the information not to be disclosed, and whether such mandates have been enforced. Another route to information about arbitration comes from state laws that obligate administrators of consumer arbitrations to provide statistics on their users and the outcomes of claims.

We document that during the course of the last decade, very few consumers used single-file arbitration. Indeed, about 90 a year sought redress against AT&T, the company that succeeded in persuading the U.S. Supreme Court to enforce its ban on collective action through interpretations of the Federal Arbitration Act (FAA).[3] During that decade, AT&T had between 85 and 165 million wireless customers.[4]

That low rate of claims makes puzzling the efforts to suppress information about the experiences of arbitration. Yet the stakes of knowledge become clear through our documentation that the prohibitions on class and other joint actions have not completely cut off the bundling of claims. Lawyers and other entities enable groups of consumers and workers to file individual claims against the same respondents. Moreover, as exemplified by #MeToo, individuals disseminate information directly through the web and sometimes succeed in affecting actions by service providers and employers.

Hence, whether the focus is class actions, multidistrict litigation (MDL), or single-file claims and non-court centric pursuit of remedies, the generation, dissemination, and control over information is central. As is familiar, to bring claims requires "naming," "blaming," and "claiming," which in turn requires knowledge and resources.[5] Aggregation supplies both, as it is information-providing and information-forcing. Whether or not notices about pending cases that are delivered to individuals via electronic or paper mail prompt personal responses, those notices broadcast the pendency of claims to a wide audience.[6] Multidistrict litigation has

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[3] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340, 352 (2011).

[4] AT&T, Inc., Annual Report (Form 10-K), at 2 (Filed Feb. 25, 2010), https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?FilingId=7080600&Cik=0000732717&Type=PDF&hasPdf=1; AT&T, Inc., Annual Report (Form 10-K), at 4 (Filed Feb. 20, 2019), https://otp.tools.investis.com/clients/us/atnt2/sec/sec-outline.aspx?FilingId=13241251&Cik=0000732717&PaperOnly=0&HasOriginal=1 [hereinafter AT&T 2019 Annual Report].

[5] *See generally* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980).

[6] One focus of critics has been the low level of responses by individuals who receive notices of pending actions and of settlements. *See, e.g.*, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 10 (Dec. 2013), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf. The methodology of this discussion has been criticized. *See* Nat'l Ass'n of Consumer Advocates & Am. Ass'n for Justice, *Class Actions Are a Cornerstone of Our Civil Justice*

other means of information dissemination.[7] Individual claims are each publicly recorded on court dockets; the bulk makes them newsworthy, as reflected in the volume of tag-alongs and direct filings that follow.

Through open court procedures and formal mechanisms for notice and participation in class actions, and through inventive methods of information sharing in both class actions and MDLs,[8] the nature of underlying claims and the processes used to resolve them make their way into the public realm. The scale of litigation enables lawyers to invest in their pursuit and to obtain resources that make them significant adversaries to their well-heeled opponents.[9]

The lasts sixty years of debates about the legitimacy of aggregation is one artifact of what public knowledge can produce. Those conflicts in turn make plain that to put out information is not to control its volume or meaning. Proponents and opponents of collective action offer different readings of aggregation's impact on individuals, social justice, the economy, and the legal system.

Today's champions of collective actions are generally plaintiff-side litigants, seeking to harness its resources. Yet aggregation's benefits are not intrinsically one-sided. At points during the twentieth century, potential defendants saw the utility of bringing claimants together as a means of preempting future litigation.

A foundational example comes from the 1940s, when banks lobbied states to authorize the use of pooled trusts.[10] The results included a New York statute that permitted banks to file lawsuits to settle accounts (producing what was functionally declaratory judgments) confirming that, during a given time frame, they had been

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System: A Review of Class Actions Filed in 2009, at 21–26 (Feb. 27, 2015), https://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf. Moreover, a 2008 analysis concluded that information was too limited to enable meaningful study of the rate in which individuals in class actions made claims and were compensated. *See* Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* 34 (RAND Inst. for Civil Justice, Working Paper No. WR-599-ICJ, 2008).

[7] *See, e.g.*, Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 854 (2017).

[8] *See id.* at 856.

[9] Early proponents of aggregation saw the incentives class action fees could create for attorneys to take cases as one of aggregation's benefits. *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714 n.91 (1941).

[10] For a detailed account of the New York State Legislature's practices that led to *Mullane*, *see* John Leubsdorf, *Unmasking* Mullane*: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1693 (2015); Judith Resnik, *Vital State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1788–89 (2017); *see also* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 134–40 (2011) [hereinafter Resnik, *Fairness in Numbers*].

prudent fiduciaries.[11] The key was to bind all beneficiaries, and the mechanism was a representative action. Hence, the famous font of aggregation, the 1950 U.S. Supreme Court decision in *Mullane v. Central Hanover Bank*,[12] came into being at the behest of the banks. The Court licensed state courts to exercise nation-wide jurisdiction over beneficiaries of trusts—conditioned not on individual participation but on adequate notice.[13]

In the contemporary era, some defendants still look to aggregation as a mechanism that can provide "global peace." (Indeed, as we discuss below, as lawyers have organized to file dozens and hundreds of individual arbitrations, some defendants have again turned to aggregation.[14]) But many potential defendants seek to cut off

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[11] N.Y. BANKING LAW § 188-a (1937) (codified as revised at N.Y. BANKING LAW § 100-c (Consol. 2008)).

[12] Mullane v. Central Hanover Bank, 339 U.S. 306 (1950).

[13] *Id.* at 313, 318.

[14] For example, after thousands of workers filed arbitration claims against the food delivery companies Postmates and DoorDash, the companies proposed various collective means of testing and resolving claims, including trying subsets of representative claims through bellwether arbitrations and negotiating binding class action settlements. *See* Nicholas Iovino, *Drivers Win Bid to Probe DoorDash's Role in Arbitration Rules*, COURTHOUSE NEWS SERV. (Dec. 20, 2019), https://www.courthousenews.com/drivers-win-bid-to-probe-doordashs-role-in-arbitration-rules/; Alison Frankel, *Beset by Arbitration Demands, Postmates Resorts to Class Action to Settle Couriers' Claims*, REUTERS: ON THE CASE (Nov. 19, 2019, 5:45 PM), https://www.reuters.com/article/us-otc-massarb/beset-by-arbitration-demands-postmates-resorts-to-class-action-to-settle-couriers-claims-idUSKBN1XT2UV; Susan Antilla, *Arbitration Storm at DoorDash*, AM. PROSPECT (Feb. 27, 2020), https://prospect.org/labor/doordash-company-arbitration-storm-workers/. DoorDash refused to pay arbitral fees as required by its own provisions and attempted to impose a new procedure that enabled mass proceedings in a fashion apparently unfavorable to employees. *See* Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785, at *2–3 (N.D. Cal. Feb. 10, 2020); *see also* Ross Todd, *Gibson Dunn, DoorDash's Ties to New Mass Arbitration Protocol Can Be Explored, Judge Says*, LAW.COM (Dec. 20, 2019, 4:08 PM), https://www.law.com/therecorder/2019/12/20/gibson-dunn-doordashs-ties-to-new-mass-arbitration-protocol-can-be-explored-judge-says/; *What Is the Employment-Related Mass Claims Protocol?*, INT'L INST. CONFLICT PREVENTION & RESOL. (Nov. 4, 2019), https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol.

After a group of 5,879 couriers filed a petition seeking to compel DoorDash's compliance with its own arbitration agreement, U.S. District Judge William Alsup ordered DoorDash to arbitrate individually under the AAA rules, as DoorDash's documents had provided, with each of the 5,010 petitioners who had signed declarations attesting to the validity of their arbitration agreements with DoorDash. *See Abernathy*, 2020 WL 619785, at *2–3.

Judge Alsup also ordered the release of discovery documents that DoorDash sought to be sealed. Those documents detailed DoorDash's lawyers' involvement with the development of a new mass claims protocol at another administrator, the Institute for Conflict Prevention & Resolution, known as CPR. *See* Antilla, *supra*. At the time, DoorDash owed the AAA more than $11 million in filing fees, while the group of claimants had collectively provided $1.2 million to satisfy their obligations under the AAA rules. *Id.*

the pipeline of claims by precluding aggregation and with it, the attendant publicity and resources. To do so, service providers and employers have mandated that consumers and employees proceed single-file, in secret. The case law responding to those initiatives enables us to explore the political economy of efforts to control information about claims brought to arbitration.

As we have noted, the decision that is key to the imposition of bans on collective action is the 2011 ruling in *AT&T Mobility LLC v. Concepcion*.[15] California had a rule that permitted collective actions when potential defendants imposed bans that prevented group claims and thereby insulated themselves from liability, but the U.S. Supreme Court interpreted the FAA to preempt that state law.[16] Thus, a five-person majority held enforceable that company's mandate, which sought to prevent wireless phone service customers from pursuing relief through class actions.[17]

In the years since, the Court has continued to permit providers of goods and services to bar access to courts for a variety of claims. In 2013, the Court, again 5-4, enforced American Express's ban on collective action in the context of antitrust claims, which are famously expensive to pursue individually.[18] Another example comes from tort litigation. The Kentucky Supreme Court ruled that the FAA should not be used to send individuals alleging tortious negligence (including wrongful death) to single-file arbitration when family members signed a general statement waiving access to courts.[19] But in 2017, in *Kindred Nursing Centers Limited Partnership v. Clark*,[20] the Court concluded that owners of homes for older adults in need of care could enforce bans on bringing tort actions if individuals or those acting on their behalf signed forms stating that residents could not file lawsuits.[21] The Court soon extended its rule to the employment context. By 2017, several lower courts

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[15] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[16] *Id.* at 352. In 2005, the California Supreme Court held that collective action waivers embedded in arbitration clauses in adhesive consumer materials were unenforceable under California law. *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005). That decision relied on a California statute instructing that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." CAL. CIV. CODE ANN. § 1668 (West 1985); *see Discover Bank*, 113 P.3d at 1108. In 2011, the U.S. Supreme Court held that the *Discover Bank* rule was preempted by the FAA. *Concepcion*, 563 U.S. at 340 (quoting CAL. CIV. CODE ANN. § 1670.5(a) (West 1985)); *see also* Resnik, *Fairness in Numbers*, *supra* note 10; Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 705–07 (2012); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 88–89 (2012).

[17] *Concepcion*, 563 U.S. at 335–36, 352.

[18] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[19] Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 330 (Ky. 2015).

[20] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017).

[21] *Id.* at 1425.

had concluded that the 1935 National Labor Relations Act's protection of "joint" and "concerted activity" meant that employees could bring claims together whether joined in arbitration or in courts.[22] However, in 2018 in *Epic Systems Corp. v. Lewis*, the Court rejected that reading and held enforceable a ban on joint action for workers, even if individuals were told of such barriers to court after they were employed.[23]

In explaining these decisions, the justices writing for the majorities relied on interpretations of the FAA, the importance of contract, the utilities of arbitration, and the burdens of litigation. For example, in *AT&T Mobility LLC v. Concepcion*, the majority posited that the 1925 FAA had endorsed "bilateral" arbitration and asserted that single-file arbitration provided more access to quicker dispositions than did group processes in courts or in arbitration.[24]

These propositions have prompted a body of work that has mined the history and interpretation of the 1925 FAA and argued that, beginning in the 1980s, a majority of justices have misinterpreted that legislation.[25] Several justices and many scholars (one of us included) have viewed the Court as rewriting rather than applying the statute.[26]

One criticism is about the application of the FAA to unilaterally imposed obligations, as contrasted with negotiated contracts. As the Court concluded in 1953

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[22] *See* Morris v. Ernst & Young, LLP, 834 F.3d 975, 984 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016). *But see* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013).

[23] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[24] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347–48, 351 (2011).

[25] *See generally* THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW OF ARBITRATION (2014).

[26] Justices from O'Connor to Thomas to Stevens have criticized the expansive reading of the FAA. In 1984, when the majority held that the FAA preempted state law, Justice O'Connor concluded that the Court had "discover[ed] a federal right" not found in the text or purpose of the statute. *See* Southland Corp. v. Keating, 465 U.S. 1, 35 (1984) (O'Connor, J., dissenting). Thereafter, she saw that the Court had been "building . . . , case by case, an edifice of its own creation." *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). Justice Stevens likewise wrote that the Court had "effectively rewritten the statute" by applying the FAA to statutory claims and to employees. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 43 (1991) (Stevens, J., dissenting) (quoting Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting)). Justice Thomas has drawn on the FAA's text to argue, in dissent, that the Court erred in applying the statute to state court proceedings. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 288–91 (Thomas, J., dissenting); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting).

The Court's interpretations from the 1930s through 2015 are analyzed in Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2855–73 (2015) [hereinafter Resnik, *Diffusing Disputes*]. *See also* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); OREN BAR-GILL, SEDUCTION BY CONTRACT 185, 196–97 (2012); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MED. 56, 72–73 (2014).

in *Wilko v. Swan*, the FAA was not designed for situations of unequal bargaining power, such as when brokerage firms insisted on pushing their customers into arbitration.[27] Moreover, to call arbitration clauses in that context "contracts" is to misuse that term. The opening epigraph reproducing the words sent to people holding American Express credit cards makes the point; American Express told its customers that it had made a unilateral amendment to their "agreement."[28] As Arthur Leff said long ago, when words are neither negotiated nor negotiable, they do not form a "contract" but instead are a "thing."[29]

A second set of critiques focuses on application of the FAA to state law. As Justice O'Connor explained in dissent in the 1980s, Congress in the 1925 FAA left state contract law intact when it directed federal courts to enforce arbitration agreements; it was not clear that Congress had the power to impose the FAA mandates on state courts, even if it had sought to do so.[30]

Third, the relationship of the FAA to other federal statutes raises distinct questions. Given that Congress has created new routes to court since 1925, Justice Stevens explained in several opinions (often dissents) that the FAA ought not preclude litigation based on those federal statutory rights for which Congress specified court access.[31]

Fourth, given that the Court's post-1985 FAA opinions are often laden with policy arguments that arbitration is to be preferred to adjudication, other scholarship seeks to assess the effect of arbitration mandates on access to redress in comparison to what adjudication provides. Identifying the set of disputes of companies and employers requiring arbitration is one challenge,[32] and another is measuring the

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[27] Wilko v. Swan, 346 U.S. 427, 435 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[28] *See, e.g.*, RADIN, *supra* note 26; Robin Bradley Kar & Margaret Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019); Burt Neuborne, *Ending* Lochner *Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 184 (2015).

[29] Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970).

[30] *See Southland Corp.*, 465 U.S. at 26–27 (O'Connor, J., dissenting). Justice Thomas has continued to dissent in several cases where the Court applied the FAA to state court proceedings. *See Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1429 (Thomas, J., dissenting); *DIRECTV*, 136 S. Ct. at 471 (Thomas, J. dissenting) (citing dissenting opinions); *see also* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 664–66 (1996); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 380 (1996); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5, 8–9 (2004).

[31] *See, e.g.*, *Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 650–52 (1985) (Stevens, J., dissenting).

[32] *See, e.g.*, Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019). Szalai looked at Fortune 100 companies and their subsidiaries or affiliates and identified 81 mandates in consumer

impact.[33] One metric to assess whether arbitration facilitates claiming is individual use—learning how many people "opt-in" to this process.[34]

We opened this Article with the proposition that information is requisite to seeking redress. To consider constraints on the production and dissemination of information entails distinguishing the interrelated deployment of privacy, confidentiality, non-disclosure, and secrecy. Each of those terms has a rich literature parsing its content and import in and beyond dispute resolution.[35] When used in this context, privacy denotes interactions shielded from third parties in order to enhance unfettered exchanges.[36] For example, in the United States, private interactions are valorized for grand juries and for judges,[37] as well as for some alternative dispute

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arbitration materials, of which 78 had class-action waivers. *Id.* at 234. The focus on workers comes from Alexander J.S. Colvin, who found that more than 50% of workers in the United States were subjected, as of July of 2017, to arbitration mandates. *See* ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2018), https://www.epi.org/files/pdf/144131.pdf.

A 2008 study made plain that the obligations companies imposed on consumers and employees were not regularly required of those same entities when bargaining with each other. When examining the contracts among major companies in the telecommunications, credit, and financial services industries, the researchers found that those agreements sometimes provided for the option of arbitration but did not rule out the use of courts. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 882–83, 888 (2008).

[33] *See* Resnik, *Diffusing Disputes*, *supra* note 26, at 2878–80, 2908–10.

[34] *See id.* at 2901–10; Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 51 (2019); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 689–700 (2018); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 79–80 (2015); Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 4 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845–46 (2010); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 813–16 (2008).

[35] *See, e.g.*, ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY, at ix–x (1988); SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 6 (1983); David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 224 (2016).

[36] *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1214 (2006); Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4, 6 (2002).

[37] Many court systems have commitments to "open courts" but close off different aspects of their proceedings, such as documents and briefs filed in court when cases are pending. *See* Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)*, *in* OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY 177, 198–200 (Burkhard Hess & Ana Koprivica, eds., 2019) [hereinafter Resnik, *Functions of Publicity*]. On the criminal side, the U.S. Supreme Court has "consistently .

resolution mechanisms promoted by courts,[38] but not when judges or juries listen to evidence or render judgments. Attitudes towards privacy are not trans-substantive but turn on the status of the participants (juveniles, families, corporations), the subject matter (mental health and disability or business transactions), and the issues or goals of information-shielding (such as future productive personal or business interactions).[39]

Confidentiality is often a method of protecting privacy. Indeed, law imposes obligations of confidentiality on a host of fiduciaries, lawyers included. "Non-disclosure" has become a term of art to keep information closed. That mandate can come from arbitration clauses or by way of individual settlements of claims brought in either courts or arbitration.

As the #MeToo movement exemplifies, these non-disclosure obligations do not always reflect agreement, which makes inapt the term "non-disclosure agreement" and its shorthand "NDA."[40] Such requirements can produce long-term secrets that, like mandates for arbitration, may not reflect decisions made by parties with equal bargaining capacity and may prevent third parties from access to information that could help them avoid harm or obtain redress.[41] Hence, critics argue, and some state legislation provides, not all non-disclosure clauses should be enforceable.[42]

Having reflected briefly on how and why information is sheltered, we turn to

. . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 (1979).

[38] *See* Judith Resnik, *Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1654 (2015) [hereinafter Resnik, *Contingency of Openness in Courts*].

[39] *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 106–07 (1979) (Rehnquist, J., concurring); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 383–84 (2006); Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 151 (2000); Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 911–12 (1998).

[40] *See* Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html.

[41] Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2538 (2018); *see also* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U.L. REV. 165, 220 (2019).

[42] *See, e.g.*, Hoffmann & Lampmann, *supra* note 41, at 169–71. In 2018, California adopted legislation that prohibited and made unenforceable provisions in settlement agreements forbidding disclosure of information related to sexual assault and harassment claims. Act of Sept. 30, 2018, ch. 952, § 3, 2018 Cal. Stat. 6262 (codified at CAL. CIV. PROC. CODE § 1001 (West 2018)). That year, 16 state legislatures considered bills to limit the enforceability of non-disclosure agreements related to harassment. *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 59 (2019).

reflect on what motivates openness in dispute resolution. The impression that adjudication (with or without aggregation) is presumptively open comes from centuries during which polities enlisted the public as spectators to witness and to legitimate acts of state authority when governments reorganized assets, families, and lives.[43] While the traditions of openness predate constitutional democracies, these public-facing practices have been enshrined in American law. The phrase "all courts shall be open" appears in dozens of state constitutions.[44] Although the federal constitution does not use those words, the commitment to third-party access to observe criminal and civil in-court proceedings and to obtain docketed materials has been embraced by federal constitutional and common law.[45]

Historically, the public also could watch some arbitrations.[46] However, by the time of the enactment of the FAA in 1925, the model of business-to-business and labor-management arbitrations shaped assumptions that arbitrations were to be closed to third parties. Since the American Arbitration Association's (AAA) founding in 1926, the AAA has described privacy as a central feature of arbitrations.[47] Indeed, arbitration is often celebrated for offering the confidentiality that courts do not.[48]

The 1925 federal statutory endorsement of arbitration did not, however, detail its attributes—such as whether it can be multi-lateral, entail discovery, include layers

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[43] *See* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 922 (2012) [hereinafter Resnik, *Childress Lecture*].

[44] *See, e.g.*, ALA. CONST. art. I, § 13; CONN. CONST. art. I, § 10. A list of those provisions can be found in Appendix I of Resnik, *Childress Lecture*, *supra* note 43, at 999–1020.

[45] *See* JUDITH RESNIK & DENNIS E. CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 288, 293 (2011). Whether those practices survive is an open question. *See* Resnik, *Contingency of Openness in Courts*, *supra* note 38, at 1635–36.

[46] *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877, at 191–92 (2017); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 468 (1984). Accounts of English arbitrations from pre-Roman Britannia through the Elizabethan Age document the mélange of public and private that endowed third-party arbitrators with authority to resolve disputes and that included public access to many of the proceedings. *See* DEREK ROEBUCK, EARLY ENGLISH ARBITRATION 3, 7 (2008); DEREK ROEBUCK, THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I 3–4 (2015). Our thanks to John Langbein for suggesting these resources.

[47] *See* FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 88, 242 (1948).

[48] *See, e.g.*, Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 525 (3d Cir. 2013) (Roth, J., dissenting).

of internal review, or take place in private.[49] Moreover, the statute provides enforcement mechanisms that bring disputes about compelling arbitration or vacating awards into public courts.[50] Furthermore, in the 1980s, Congress authorized district courts to create programs for "court-annexed" arbitration, which, while used infrequently, sometimes permits public attendance.[51] States also send cases to arbitration and, in some jurisdictions, those proceedings take place in courthouses or comparable venues that permit public attendance.[52] In short, sometimes and in some places, arbitration proceedings have been and can be open to third parties.

Yet, in the last several decades, the institutions shaping the practice of privately conducted arbitration anchored its identity as distinct from adjudication in part by limiting access to the interactions among disputants and arbitrators. That demarcation was vivid in *Delaware Coalition for Open Government, Inc. v. Strine*,[53] when the Third Circuit struck a proposed program that would have given disputants an opportunity to pay Delaware to have its chancery judges preside at private arbitrations in the state's courthouses.[54] The paying parties were also supposed to have access to Delaware's Supreme Court.[55] Whether such proceedings would also be sealed was not clear.[56] The federal appellate court concluded that the state could not close its courts to the public. Rather, the First Amendment protected the public's access to "government-sponsored arbitrations," because open courts were "deeply rooted in

[49] Federal Arbitration Act (FAA), Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. ch. 1 (2018)).

[50] The FAA permits parties to petition any federal district court that would otherwise have jurisdiction over a dispute for an order directing another party to arbitrate. *See* 9 U.S.C. § 4. Motions to vacate awards for specified grounds are governed by 9 U.S.C. § 10. *See generally* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008); Monster Energy Co. v. City Beverages, 940 F.3d 1130 (9th Cir. 2019).

[51] *See* 28 U.S.C. §§ 651–658 (2012). Details of some of its uses can be found in Resnik, *Diffusing Disputes*, *supra* note 26, at 2921–24.

[52] Illinois, for example, sends "some types of civil disputes" to arbitration to help reduce "court congestion, costs, and delay. . . . The goal of the process . . . is to deliver a high quality, low cost, expeditious hearing in eligible cases, resulting in an award that will enable, but not mandate, parties to resolve their dispute without a formal trial." ALT. DISPUTE RESOLUTION COORDINATING COMM. OF THE ILL. JUDICIAL CONFERENCE, COURT-ANNEXED MANDATORY ARBITRATION PROGRAM: UNIFORM ARBITRATOR REFERENCE MANUAL 2 (2010), http://www.dupageco.org/courts/33051/. For discussion of the Illinois program, *see* Resnik, *Contingency of Openness in Courts*, *supra* note 38, at 1652, 1667.

[53] Del. Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510, 518 (3d Cir. 2013).

[54] *Id.* at 512–13, 521. The history and details of the Delaware Chancery Program are discussed in Resnik, *Contingency of Openness in Courts*, *supra* note 38, at 1674–82.

[55] *Del. Coal. for Open Gov't*, 733 F.3d at 513; Resnik, *Contingency of Openness in Courts*, *supra* note 38, at 1674.

[56] *Del. Coal. for Open Gov't*, 733 F.3d at 513; *see also* Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 350–51 (2013).

the way the judiciary functions in a democratic society."[57] Indeed, "the exposure of parties to public scrutiny is one of the central benefits of public access."[58]

The U.S. Supreme Court has not directly addressed privacy/confidentiality/non-disclosure provisions such as those imposed by American Express. A few of the Justices' opinions include comments about confidentiality, sometimes invoked to praise it and other times to warn about its impact. In 2010, in *Stolt-Neilsen S.A. v. AnimalFeeds International Corp.*, Justice Alito expressed skepticism about class action arbitrations when he wrote for the Court about the "'presumption of privacy and confidentiality' that applies in many bilateral arbitrations."[59] In *AT&T Mobility LLC v. Concepcion*, Justice Scalia, enforcing for the majority that company's single-file mandate, wrote that a benefit of arbitration is that "proceedings [could] be kept confidential."[60] In contrast, in dissent in *American Express Co. v. Italian Colors Restaurant*, Justice Kagan expressed concern that a confidentiality provision would prevent claimants "from informally arranging with other" potential claimants to obtain evidence necessary to show a violation of the anti-trust laws.[61] Justice Ginsburg, dissenting five years later in *Epic Systems Corp. v. Lewis*, worried that "provisions requiring that outcomes be kept confidential" could lead to inconsistent application of the law.[62]

In the lower courts, many decisions have addressed disclosure bans. In some cases decided in prior decades, lower courts found silencing provisions unenforceable, often because of the resulting asymmetry in access to knowledge. Providers and their lawyers would know the portfolio of claims, while individuals would not.[63] Yet our survey of more recent cases shows that, in the wake of the Supreme Court's exuberance about arbitration, lower courts have shifted away from questioning the unfairness of these repeat-player effects that come with the imposition of privacy, confidentiality, non-disclosure, and secrecy.

A vivid example of enforcement comes from a 2004 opinion by the Fifth Circuit in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, which discussed a pre-dispute arbitration mandate instructing parties that "the existence and result of any

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[57] *Del. Coal. for Open Gov't*, 733 F.3d at 518.

[58] *Id.* at 519. The dissent argued that without confidentiality, disputants would use private providers or systems set up in other countries. *See id.* at 524, 526 (Roth, J., dissenting).

[59] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010).

[60] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011); *see also Del. Coal. for Open Gov't*, 733 F.3d at 525 (Roth, J., dissenting) ("Confidentiality is one of the primary reasons why litigants choose arbitration to resolve disputes—particularly commercial disputes, involving corporate earnings and business secrets.").

[61] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 246 (2013) (Kagan, J., dissenting).

[62] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting).

[63] *See* Pokorny v. Quixtar, Inc., 601 F.3d 987, 1002 (9th Cir. 2010); Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003), discussed *infra* notes 124, 176–82 and accompanying text.

arbitration must be kept confidential."[64] Rejecting the plaintiffs' challenge, the court commented that the requirement was "probably more favorable to the cellular provider than to its customer," yet decided that it was not "so offensive as to be invalid."[65] The consumers' "attack on the confidentiality provision" failed, the court opined, because it was "in part, an attack on the character of arbitration itself."[66] The court did not differentiate between confidentiality of the process and non-disclosure of the "existence and result" of arbitration.

As American Express's new "agreement" on arbitration reflects, providers of goods and services are expanding efforts to impose blanket prohibitions on information sharing. Indeed, we found one clause from another company that directed potential claimants to place under seal any *court* filings arising from the arbitration mandate.[67]

Litigation about arbitration is thus one route into understanding this dispute-resolution mechanism. Other sources include state statutes requiring arbitration administrators to post data about their work online. The AAA is the administrator of arbitrations brought against AT&T, which was the first entity to obtain permission from the U.S. Supreme Court to ban aggregate proceedings. In this Article, in addition to analyzing the case law on non-disclosure, we detail the methods we used to mine AAA data. In its mandate to post information, California defined the set of arbitrations as "consumer" more broadly than that term is commonly understood. The statute lists claims regarding "goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; [and] employment."[68] Here, we focus on arbitrations about consumer goods and services as distinct from the rest of those claims,[69] and we hone in on AAA-administered arbitrations that involve

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[64] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004).

[65] *Id.*

[66] *Id.*

[67] *See* Brief of Respondents-Appellants at 25, Am. Family Life Assurance Co. of N.Y. v. Baker, 778 F. App'x 24 (2d Cir. 2019) (No. 18-1960), 2018 WL 5806825. An insurance company sought to require its sales associates to "agree that all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrators' award shall be filed under seal." *Id.* With no discussion of the scope or enforceability of this broad confidentiality mandate, the Second Circuit, in an unpublished summary order, found that the confidentiality requirement did not render the arbitration agreement substantively unconscionable. *See* Am. Family Life Assurance Co. of N.Y. v. Baker, 778 F. App'x 24, 27–28 (2d Cir. 2019). However, that we were able to read the opinions and briefs in this case means that, at least in this instance, the company did not seek to enforce and the individual did not follow that mandate.

[68] *See* CAL. CIV. PROC. CODE § 1281.96(a)(3) (West 2018). The statute does not include a definition of consumer arbitration but requires data on the categories listed in the test, and the AAA has responded by complying. *See also* Horton & Chandrasekher, *supra* note 34, at 88 n.275.

[69] *See Consumer and Employment Arbitration Statistics*, AM. ARB. ASS'N, https://www.adr.org/ConsumerArbitrationStatistics (last visited Feb. 29, 2020).

AT&T.[70]

Despite "noise" in the data, we can gain some insights into the prevalence of filed arbitrations. The key point is the rarity of use by individuals of single-file arbitration during the ten years between 2009 and 2019. In prior analyses, we identified 105 individual claims filed per year against AT&T during the period of 2014 to 2017.[71] In those years, AT&T had some 120 to 140 million customers.[72] For this Article, we looked at filings from 2017 to 2019, during which time AT&T had about 140 to 165 million customers.[73] We learned that the number of individual filings against AT&T had increased somewhat; on average, 172 individuals filed claims annually during this interval.

We cannot know the baseline of potential claims, or the number settled through consumer-to-business direct interactions by individuals without or with lawyers, and by lawyers and other claims aggregators bundling claims. What we do know is that virtually no one uses individual arbitrations to seek redress for alleged injuries.[74]

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[70] *See Resolve a Dispute with AT&T via Arbitration*, AT&T, https://www.att.com/esupport/article.html#!/wireless/KM1045585 (last visited Feb. 29, 2020).

[71] Discussions about prior data analyses are in Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 650–51 (2018) [hereinafter Resnik, *A2J/A2K*], and in Resnik, *Diffusing Disputes*, *supra* note 26, at 2901–07.

[72] AT&T, Inc., Annual Report (Form 10-K), at 2 (Filed Feb. 20, 2015), https://otp.tools.investis.com/clients/us/atnt2/sec/sec-outline.aspx?FilingId=10503796&Cik=0000732717&PaperOnly=0&HasOriginal=1; AT&T, Inc., Annual Report (Form 10-K), at 2 (Filed Feb. 20, 2018), https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?FilingId=12564537&Cik=0000732717&Type=PDF&hasPdf=1 [hereinafter AT&T 2018 Annual Report].

[73] AT&T 2018 Annual Report, *supra* note 72, at 2; AT&T 2019 Annual Report, *supra* note 5, at 2.

[74] Our focus is on consumers' affirmative use of arbitral processes to pursue claims—or what Emily Taylor Poppe has referred to as "offensive consumer litigation." *See* Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 NW. J.L. & SOC. POL'Y 149, 153 (2019). We do not explore the potential of these systems to be used—as courts are—for debt collection, where default rates by consumer defendants are often high. *See id.* at 154–60.

Table 1: Number of Claims Filed Against AT&T Annually, by Filing Date, According to AAA Arbitration Database, 2009–2019[75]

	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Consumer-Filed (Per Year)	29	115	172	85
Company-Filed (Per Year)	0	0	0	0
Number of Wire-less Customers	85–120 million	120–140 million	140–165 million	

This chart looks at individuals' efforts. Combing the AAA database of filings, we also found that some law firms have become "aggregators" by bundling claims. For our research, we pegged that category at 50 or more filings by a single law firm against a particular entity. Given that state arbitration disclosure provisions have not been read to require identification of the basis for the action (as contrasted with the subcategory of claims, such as consumer or employment), the database does not tell us if the 50 or more filings relate to the same allegedly wrong practice. But based on other research as well as by speaking with lawyers in this field, the likelihood is that the same kinds of claims are involved.

Our identification of almost no individual filings is paralleled by data gathered and analyzed by both other academics and by the Consumer Financial Protection Bureau.[76] Likewise, the development of bundling in arbitration that we found has also been seen by other researchers.[77]

Whether de facto collective actions provide economies of scale depends on what parties are in focus and on how "administrative fees," imposed by entities such

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[75] This table excludes claims that were part of larger groups of 50 or more that were filed by the same firm against AT&T within a twelve-month period. Our reasoning is that these claims do not fall within the category of single-file consumer actions and were instead facilitated by a single law firm on behalf of many consumers.

[76] *See* Chandrasekher & Horton, *supra* note 34, at 60; CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 11 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[77] *See* Horton & Chandrasekher, *supra* note 34, at 94; Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 467 (2014).

as the AAA, and arbitrators' fees are paid. Under some arbitration clauses, companies and employers are supposed to pay both sets of fees, while other provisions require claimants to pay at least initial fees. Large numbers of claimants, interacting with these fee structures, have prompted some companies to agree to collective resolutions.[78] Other responses have included respondents (companies) refusing to make required payments or seeking to deter aggregators by trying to increase the costs of each claim through detailed requests for specific individualized information.[79] Yet another tactic is slow-walking the payment of fees owed (either to administrators or to arbitrators), to create disincentives to bring claims or for arbitrators to agree to hear claims.[80] Some administrators impose constraints to limit such conduct. For example, the AAA requires the payment of fees within a fixed time of a claim's filing and uses dismissal as a means of enforcement.[81] Moreover, some regulators are trying to police such action. In 2019, several attorneys general made public their call for prompt fee payments.[82]

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[78] For example, Uber settled tens of thousands of arbitration claims by drivers who claimed that the company had misclassified them as independent contractors. Andrew Wallender, *Uber Settles 'Majority' of Arbitrations for at Least $146M*, BLOOMBERG L. (May 9, 2019, 9:56 AM), https://news.bloomberglaw.com/daily-labor-report/uber-sees-wage-suits-dropped-including-12-501-arbitration-claims. A group of more than 12,000 drivers had sued to force Uber to independently arbitrate their claims—procedures that would have cost the company more than $18.7 million in filing fees alone. *Id.*

[79] *See* Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS: ON THE CASE (Dec. 2, 2019, 1:53 PM), https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8. Companies like Uber, Lyft, and Chipotle likewise have refused to pay fees mandated in their own arbitration provisions, generally arguing that they weren't shirking obligations but merely "hesitat[ing] to pay arbitration fees because they doubted the legitimacy of the claims." *See* Alison Frankel, *California Is On the Verge of a Law to Punish Companies for Stalling Arbitration Fees*, REUTERS: ON THE CASE (Sept. 24, 2019, 3:01 PM), https://www.reuters.com/article/us-otc-arbitration/california-is-on-the-verge-of-a-law-to-punish-companies-for-stalling-arbitration-fees-idUSKBN1W932T.

[80] *See* Echo K.X. Wang, *More on Mass Individual Arbitration as an Alternative to Class Arbitration*, CPR SPEAKS: BLOG CPR INST. (Feb. 15, 2019), https://blog.cpradr.org/2019/02/15/more-on-mass-individual-arbitration-as-an-alternative-to-class-arbitration/. In 2019, California enacted a statute punishing employers and consumer goods and services providers who refuse to pay or slow walk payment of arbitration fees and costs. Parties who fail to pay within 30 days after the due date can be found in breach of the arbitration agreement, and state law allows claimants, among other things, to re-file their complaint in court. *See* 2019 Cal. Legis. Serv. Ch. 870 (S.B. 707) (West) (Oct. 13, 2019) (codified at CAL. CODE CIV. P. § 1281.97).

[81] *See* AM. ARB. ASS'N, CONSUMER ARBITRATION RULE r. 54, https://adr.org/sites/default/files/Consumer%20Rules.pdf. Thanks to Ryan Boyle for enabling us to learn more about the AAA's responses to de facto group litigation. Telephone Interview with Ryan Boyle, Vice President, Am. Arb. Ass'n (Feb. 28, 2020).

[82] Press Release, Office of D.C. Att'y Gen. Karl A. Racine, AG Racine Leads 12-State

In addition to delaying payments, ongoing litigation has focused on one company that tried to avoid its obligation to pay individual fees by switching to an entity willing to administer arbitrations with an alternative fee arrangement. The example comes from DoorDash, a delivery company that was faced with thousands of claims by drivers alleging they had been misclassified as independent contractors. In February of 2020, a federal district court unsealed emails (produced through discovery) that discussed negotiations between lawyers for DoorDash and the International Institute for Conflict Prevention and Resolution, Inc. (CPR) to create a customized mass claims protocol.[83] As one CPR employee put it, DoorDash was "dissatisfied with the AAA's due process protocol requirements," was distressed about the filing fees, and was "scared to death about being inundated with mass arbitration filings."[84]

These reported interactions around aggregators reflect another feature of the landscape produced by the Court's FAA doctrine and strategic interaction about which little is public—the bundling before claims are formally filed either by lawyers or by non-lawyer aggregators. From interviews with some lawyers in this market, we know that they group claims, seek responses from companies, and offer to resolve a group of disputes without going to arbitration. And, from the media and the internet, we also know of non-lawyer aggregators. But insofar as we are aware, no systematic account of the parameters of these pre-filing activities exists to illuminate whether and how these processes enable access to remedies.

Moving from filing to processing, more can be learned from the AAA data (albeit with important caveats about gaps in the information) into the length of time that arbitration takes and the amounts awarded. Since 2015, in the subset of cases administered by the AAA, the median length from filing to disposition had increased from five to seven months. From 2009 until 2019, 47,671 claims were filed, of which 21,124 were consumer claims. AAA data indicated that, during that time period, 2,661 of those claims went to an award. Within that set, 50% of the awards fell between $2,300 and $20,000. Because we have identified outliers and have questions about the data, the accuracy of the recorded amounts is not clear.[85]

Coalition to Ensure Workers Can Resolve Employment Disputes Fairly and Quickly in Arbitration (Nov. 12, 2019), https://oag.dc.gov/release/ag-racine-leads-12-state-coalition-ensure-workers [hereinafter Racine 12-State Coalition].

[83] *See* Alison Frankel, *The Problem with Outsourcing Justice to Mass Arbitration Services*, REUTERS: ON THE CASE (Feb. 27, 2020, 4:18 PM), https://www.reuters.com/article/legal-us-otc-mass-arbi-lawsuits/the-problem-with-outsourcing-justice-to-mass-arbitration-services-idUSKCN20M00Z; [Unredacted] Declaration of Aaron Zigler in Support of Petitioners' Reply in Support of Amended Motion to Compel Arbitration, Abernathy v. DoorDash, Inc., No. 3:19-cv-07545 (N.D. Cal. Feb. 26, 2020), ECF NO. 180-3, https://static.reuters.com/resources/media/editorial/20200228/doordash--unsealedemails.pdf.

[84] Declaration of Aaron Zigler, *supra* note 83, at 11.

[85] The partial picture may be correct, as some of the larger awards could stem from claims

Correlation is not causation, and we do not have the data (nor are all the relevant variables readily identified and the requisite information available) to do analyses to make causal claims about what an optimal level of filings would be. Nor do we argue that aggregate and single-file litigation in courts is the only mechanism by which information reaches the public. (See #MeToo!) Moreover, in this world of disinformation, trolls, and web-harassment, we are not asserting that disclosure necessarily produces more egalitarian rules or outcomes or that it is costless for claimants and respondents.

What we can conclude is that the argument put forth by arbitration's proponents (including Supreme Court Justices) that single-file arbitration produces more readily usable processes than do courts is not borne out by the number of users.[86] Further, the celebration of arbitration has prompted some entities to seek to widen their preclusion net by layering non-disclosure mandates on top of non-aggregation mandates. Thus far, courts have not been a robust source of protection of rights to give or get information about arbitration.

As the clauses mandating non-disclosure become bolder and broader, it is possible that reviewing courts will find unlawful some of the bans, such as those aiming to prevent blanket non-disclosure after arbitrations have ended. Courts could do so by relying on a mix of sources that include the FAA's express invitation to use courts when contesting arbitration or seeking to vacate awards, federal and state common law, rules regulating lawyer ethics, and federal and state constitutional rights. Moreover, consistent even with current expansive FAA interpretations, legislatures can limit, as some have, enforcement of certain non-disclosure mandates.

Further, as we noted, the market in aggregation has not ended. Entrepreneurial lawyers and other repeat-player aggregators have filed tens and hundreds of "individual" arbitrations against specific respondents, and some of those companies have, in turn, sought to avoid such claims or limit their impact. Yet even when successful, these ad hoc groupings cannot, as court-based filings can, broadcast to the public the efforts underway to obtain redress. The privatization of process and expansive

about consumer fraud against financial services. Telephone Interview with Ryan Boyle, Vice President, Am. Arb. Ass'n (Feb. 28, 2020). If underlying materials were available, we would be able to know more about the different kinds of claims and awards.

[86] Our findings comport with those in the study by Andrea Cann Chandrasekher and David Horton of arbitrations conducted by the American Arbitration Association, the Judicial Arbitration and Mediation Services, ADR Services, Inc., and the Kaiser Office of the Independent Administrator. Chandrasekher & Horton, *supra* note 34, at 9. The authors found only a "modest uptick" in the number of cases filed after *Concepcion*, despite the increasing use and enforceability of arbitration mandates. *Id.* Because Chandrasekher and Horton identified a pattern of repeat-player plaintiffs' law firms successfully filing groups of arbitration claims, they argued that arbitration could only increase access if lawyers had more incentives to file cases that took advantage of economies of scale. *Id.* The authors proposed an "arbitration multiplier" to prompt lawyers to file arbitrations of appropriate claims. *Id.* at 10.

silencing mandates prevent others, similarly situated, from learning about the alleged harms and from sharing lawyers with others to seek remedies.

Turn then from the (wobbly) "is" of the law to the "ought." The political and social conflicts about the scope of aggregate litigation fueled the "class action wars," and MDLs are now becoming embattled.[87] Related conflicts are underway about information gained in arbitration. Single-file arbitration requirements are one way to lower the visibility of disputes and of the means of resolving them. When information is suppressed, the chance for more people to follow in the footsteps of the very few who pursue remedies is reduced, as is the chance for public oversight of either the decision-makers or the disputants. Moreover, while we can identify individual interests in keeping information about some aspects of consumer interactions outside the public realm, it is difficult to see how the individual consumers gain benefits by being bound not to disclose the fact or outcome of arbitrations.

We have already referenced Marc Galanter's phrase "repeat players," whom he explained can gain advantages by being able to shape rules.[88] Courts in the last decades have acknowledged his insight while at times ignoring his concerns. Rather than seek to level playing fields, judges have permitted asymmetries to remain in place. In contrast, some state legislatures have intervened and more such proposals are under consideration.

The term "preclusion" is often linked in law to court decisions specifying that one individual is estopped from bringing claims in light of prior efforts to use courts. What we document here is an expansive effort at generic preclusion that walls off access and information. Our hope is that, by providing a picture of the extent of the "information wars," we can help courts, legislators, and potential disputants to see and to limit the unfairness that is being baked into arbitration and that does harm to arbitration itself.

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[87] See the Fairness in Class Action Litigation Act of 2017, which included proposals to make both class actions and MDLs more difficult to bring by imposing obligations to ascertain the identities of group members and limiting fee recoupment until after all distribution. *See* H.R. 985, 115th Cong. §§ 103(a), 105 (2017). Thereafter, efforts to regulate MDLs have come through proposals to amend federal civil procedural rules. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 2 (Dec. 4, 2018); Alison Frankel, *Defense Group Argues New MDL Stats Prove Need to Change Rules for Mass Torts*, REUTERS: ON THE CASE (Oct. 4, 2018, 2:29 PM), https://www.reuters.com/article/legal-us-otc-mdl/defense-group-argues-new-mdl-stats-prove-need-to-change-rules-for-mass-torts-idUSKCN1ME2EJ.

[88] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

II. THE PRACTICES OF INFORMATION ACCESS, DISSEMINATION, AND NON-DISCLOSURE IN ARBITRATION

In this segment, we sketch the regulation of arbitration that exists and the source of rules that govern access to information about arbitration. We begin with federal and state statutes and then turn to the rules drafted by entities such as the AAA that administer arbitrations.

A. Government Mandates and Information Access

Arbitration comes in many forms, and some of it is required or sponsored by federal and state courts. For example, in what is called "court-annexed arbitration," courts send parties who have filed lawsuits to lawyers who serve as arbitrators and are authorized to render decisions that could end the dispute. These arbitrations are governed by court-produced public rules, and some of them take place in courthouses or other venues to which the public may have access.[89]

In addition, what could be termed "government-regulated arbitration" stems from statutes imposing a public regime of rules for these processes. For example, the Securities and Exchange Commission has to approve the procedures the Financial Industry Regulatory Authority (FINRA) uses to conduct investor-securities arbitrations. FINRA arbitrators are required not to disclose information about the proceedings,[90] while the results are made public in online databases.[91]

Congress has also sought to regulate the use of and access to information about privately provided arbitration. During the last decade, a series of "Fairness in Arbitration Acts" (with variations in title and range of applications) have been introduced. In 2019, both the Senate and the House of Representatives considered bills to limit the enforceability of arbitration mandates.[92] One proposal included requirements that consent to arbitrate be given after a dispute arose and that arbitrators

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[89] See, for example, Illinois's mandatory, court-annexed arbitration, in which arbitrations are open and often are conducted in courthouses or special centers. *See, e.g.*, HON. ANN B. JORGENSEN & HON. HOLLIS L. WEBSTER, STATE OF ILL., CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT, COUNTY OF DUPAGE COURT-ANNEXED MANDATORY ARBITRATION PROGRAM, ARBITRATOR'S BENCH BOOK 14 (3d rev. 2011), http://www.dupageco.org/Courts/Docs/34145/. The "use of courthouse facilities provides a desirable quasi-judicial atmosphere" and easier ability to monitor the progress of cases. *See* ILL. SUP. CT. R. 88 cmt. (West 2009).

[90] *See* Administrative FAQ, FINRA (2019), https://www.finra.org/arbitration-mediation/overview/additional-resources/faq/administrative (last visited Feb. 29, 2020).

[91] *See* FINRA Code of Arbitration Procedure for Customer Disputes § 12904(h) (2018).

[92] Several witnesses testified in support of the proposals, including the Forced Arbitration Injustice Repeal Act (H.R. 1423, 116th Cong. § 3 (2019)), the Restoring Justice for Workers Act (H.R. 7109, 115th Cong. § 3 (2017)), and the Justice for Servicemembers Act (H.R. 2631, 115th Cong. § 2(c)(1) (2017)). Concerns about public information about disputes were part of the discussion. *See, e.g.*, *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing*

"provide the parties to the contract with a written explanation of the factual and legal basis for any award or other outcome, which shall not be made under seal by the arbitrator or a court."[93]

Proposed executive action under the Obama Administration also sought to regulate arbitration.[94] For example, in July of 2017, the Consumer Financial Protection Bureau (CFPB) promulgated a multi-pronged rule that included requirements for arbitration administrators to submit redacted records about cases concerning consumer financial products, including information about claims, counterclaims, answers, the existence of predispute arbitration agreements, judgments or awards, and communications about certain fee payment disputes.[95] In November of 2017, however, a joint congressional resolution rescinded that provision.[96] The Fair Pay and Safe Workplaces Executive Order would have required federal contractors to disclose violations of a number of different federal labor laws and executive orders—including when substantiated by "arbitral award or decision."[97] After litigation and a change in administration, the provision, too, was rescinded.[98]

States are an important source of regulation, as reflected in our opening discussion of data on consumer filings. State statutes address a variety of issues, including imposing conflict-of-interest rules on arbitrators, setting default process rules about

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Before the H. Subcomm. on Antitrust, Commercial & Admin. Law (May 14, 2019) (statement of Myriam Gilles, Paul. R. Verkuil Research Chair in Pub. Law, Cardozo Law School), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-GillesM-20190516.pdf.

[93] Safety Over Arbitration Act of 2019, S. 620, 116th Cong. § 2 (2019). In an earlier Congress, several Senate Democrats introduced a bill that would have specifically amended the FAA to prohibit and make unenforceable predispute arbitration agreements covering consumer, civil rights, or employment disputes if they contained a confidentiality clause. *See* Mandatory Arbitration Transparency Act of 2017, S. 647, 115th Cong. § 2 (2017). Although neither of these transparency-focused reforms have moved forward, the House of Representatives enacted an FAA reform bill in 2019. The House passed the Forced Arbitration Injustice Repeal Act, which would amend the FAA to make unenforceable predispute arbitration agreements or predispute "joint-action" waivers in employment, consumer, antitrust, and civil rights disputes. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 3 (2019). As of May 2020, the Senate Judiciary Committee had taken no action on the bill.

[94] For an argument supporting federal agencies' statutory authority to regulate arbitration, *see* David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 670–73 (2018).

[95] *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,430 (July 19, 2017).

[96] *See* H.R.J. Res. 111, Pub. L. No. 115-74, 131 Stat. 1243 (2017).

[97] Exec. Order No. 13,673, 3 C.F.R. § 2 (2014).

[98] In October 2016, a federal judge enjoined enforcement because the court concluded it exceeded the President's authority and impermissibly mandated speech that the First Amendment protected. *See* Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *7–9 (E.D. Tex. Oct. 24, 2016). President Trump later issued an Executive Order rescinding the regulation. *See* Guidance for Executive Order 13673, "Fair Pay and Safe Workspaces," 82 Fed. Reg. 51,358 (Nov. 6, 2017).

notice and hearing requirements, and mandating the publication of data on arbitration processes and outcomes.[99] Furthermore, in the fall of 2019, a coalition of state attorneys general, who had received complaints from employees about the costs of and length of time taken to arbitrate, suggested the need for regulation or voluntary changes by the companies that insisted on the use of arbitration.[100] In Part IV.A, we explore the data produced through state disclosure and reporting requirements about the fact and outcomes of arbitrations.[101]

Some states have also responded to the #MeToo movement by considering legislation to limit the enforcement of non-disclosure provisions in sexual harassment cases.[102] Several have put provisions into place.[103] For example, Washington made "void and unenforceable" as against public policy any provision in an employment contract that "requires an employee to waive the employee's right to publicly pursue a cause of action arising under" state or federal antidiscrimination laws or

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[99] *See* Alyssa S. King, *Arbitration and the Federal Balance*, 94 IND. L.J. 1447, 1470, 1474, 1476 (2019).

[100] *See* Racine 12-State Coalition, *supra* note 82.

[101] *See* King, *supra* note 99, at 1476.

[102] *See generally* Wexler, Robbennolt & Murphy, *supra* note 42, at 59; *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/.

[103] Among the states that have enacted legislation limiting the use of confidentiality clauses are California, New Jersey, Maryland, New York, and Tennessee. California provides that claimants cannot be prevented from disclosing factual information about actionable behavior, and labels efforts to mandate non-disclosure through signed agreements as unfair employment practices. CAL. GOV'T CODE § 12964.5(a)(2) (West 2019). New Jersey's statute renders unenforceable any employment contract or settlement agreement "which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." Act of Mar. 18, 2019, 2019 N.J. Sess. Law Serv. ch. 39 (West) (codified at N.J. STAT. ANN. § 10:5-12.8 (2019)). Maryland's statute, among other things, requires large employers to report to the State Commission on Civil Rights information about the settlement of sexual harassment claims and the use of confidentiality clauses in such settlements. Disclosing Sexual Harassment in the Workplace Act of 2018, 2018 Md. Laws 3837 (codified at MD. CODE ANN., LAB. & EMPL. § 3-715 (2018)). In 2018, New York removed the authority of employers, when settling claims "the factual foundation for which involves discrimination," to include "any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference." Act of Apr. 12, 2018, ch. 57, 2018 N.Y. Laws 104, 170 (codified at N.Y. C.P.L.R. § 5003-b (McKinney 2018)). Tennessee law prohibits employers from requiring employees to sign non-disclosure agreements regarding sexual harassment as a condition of employment. *See* TENN. CODE ANN. § 50-1-108 (2018). Provisions enacted in Maryland, New Jersey, New York, Vermont, and Washington specifically addressed arbitration mandates related to limiting access to courts for sexual harassment claims. *See* Erik Christiansen, *New State Laws Expand Workplace Protections for Sexual Harassment Claims*, 45 ABA LITIG. NEWS, Winter 2020, at 11, 13.

"resolve claims of discrimination in a dispute resolution process that is confidential."[104] Moreover, in 2018, 50 attorneys general signed a letter to Congress calling for (unspecified) legislative limits on non-disclosure in sexual harassment employment litigation.[105]

B. Administrators' and Obligators' Rules

Institutions that administer arbitrations are central sources of regulation, and mandates to arbitrate either incorporate those rules by reference and/or impose their own regime. Two of the prominent private providers of arbitration services are the AAA and JAMS. The rules of both organizations insist on the privacy of proceedings but not the fact of their existence. (Indeed, their businesses require some way to advertise the scope and use of their services.)

Provisions promulgated by the AAA and JAMS to govern consumer arbitrations are illustrative. Both sets instruct that arbitrators not be the source of information about the proceedings unless required by law.[106] As the AAA's Statement of Ethical Principles also outlines, it is "AAA staff and AAA neutrals [who] have an ethical obligation to keep information confidential."[107] In addition, both the AAA and JAMS authorize arbitrators to bar non-parties from attending proceedings.[108] These standing rules do not, however, address obligations of parties to keep information about arbitrations secret. Further, the AAA's Ethical Principles also note that "parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement"; the AAA expressly "takes no position" on whether such party-centered obligations should or should not be made.[109]

What obligations, then, do parties put into place? Both the AAA and JAMS

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[104] WASH. REV. CODE ANN. § 49.44.085 (2018).

[105] *See* Letter from Nat'l Ass'n of Attys. Gen., to Congressional Leadership, Mandatory Arbitration of Sexual Harassment Disputes (Feb. 12, 2018), https://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf.

[106] *See* AM. ARB. ASS'N, CONSUMER ARBITRATION RULES 24 (2014), https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf ("The arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public."); JAMS, COMPREHENSIVE ARBITRATION RULES & PROCEDURES 29 (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.").

[107] *AAA Statement of Ethical Principles*, AM. ARB. ASS'N, https://www.adr.org/StatementofEthicalPrinciples (last visited Feb. 29, 2020).

[108] AM. ARB. ASS'N, *supra* note 106, at 24; JAMS, *supra* note 106, at 29.

[109] *AAA Statement of Ethical Principles*, *supra* note 107.

offer model language for confidentiality provisions.[110] The AAA's example comes close to blanket closure, albeit framed as a genuine choice for parties negotiating clauses. If parties wish to "impose limits . . . as to how much information regarding the dispute may be disclosed outside the hearing," a clause could say: "[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties."[111] JAMS's suggested language outlines the "confidential nature of the arbitration proceeding and the Award, including the Hearing," but does not direct parties to maintain the secrecy of the existence of a dispute.[112] The JAMS clause also carves out information from confidentiality as necessary to "prepare for or conduct the arbitration hearing on the merits," or "as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision."[113]

How often do provisions impose barriers to information disclosure? One study comes from the Consumer Financial Protection Bureau (CFPB), which, between 2010 and 2013, reviewed more than 250 documents, that covered credit card, checking account, prepaid card, storefront payday loan, private student loan, and mobile wireless services.[114] The CFPB's 2015 arbitration study reported that "most arbitration clauses in the sample were silent on confidentiality and did not impose any non-disclosure obligation on the parties."[115] Yet litigation about the enforcement of such clauses (and American Express's new "amendment") suggest that they are becoming more common.

Despite the deployment of silencing provisions, proponents of arbitration have argued against regulation. For example, in 2019 hearings on arbitration that were prompted by proposals to amend the FAA to limit its scope,[116] a lawyer representing the U.S. Chamber of Commerce's Institute for Legal Reform argued that concerns about closing off information about arbitration were overblown.[117] He asserted that

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[110] *AAA-ICDR® Clause Drafting*, AM. ARB. ASS'N, https://www.adr.org/Clauses (last visited Feb. 29, 2020); *JAMS Clause Workbook*, JAMS, https://www.jamsadr.com/clauses/#Confidentiality (last visited Feb. 29, 2020).

[111] *Alternative Dispute Resolution Clause Builder® Tool*, AM. ARB. ASS'N, https://www.clausebuilder.org/cb/faces/index (last visited Apr. 27, 2020).

[112] *JAMS Clause Workbook*, *supra* note 110.

[113] *Id.*

[114] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) app. a, at 136 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[115] *See id.* § 2, at 51–52.

[116] On September 20, 2019, the House of Representatives approved one of the bills discussed during that hearing, the Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

[117] *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing Before the*

claims about how "arbitration imposes confidentiality obligations that allow wrong-doers to cover up their offenses" were "simply false."[118] More than that: if "an arbitration agreement purported to impose a 'gag order,' . . . that restriction would be invalidated in court."[119]

But American Express and Cingular Wireless have imposed broad "gag orders" on their customers, and, as we have discussed and detail below, some courts have left them in place. Before turning to the case law, distinctions need to be drawn among non-disclosure mandates. Some restrictions are couched in general terms, such as an AT&T consumer arbitration provision from 2002 instructing that neither "you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award."[120] The breadth of that language could suggest one cannot tell anyone (from family members to lawyers) about an arbitration—absent a specific legal mandate to do so.

Drafters of other such clauses have added more directions. For example, the marketing firm Quixtar put prohibitions into place that were triggered as soon as any claimant became "aware of a potential . . . claim,"[121] and that dictate that claimants were not to disclose "to any other person not directly involved in the conciliation or arbitration" a broad range of information, including "(a) the substance of, or basis for, the claim; (b) the content of any testimony or other evidence presented at an arbitration hearing or obtained through discovery; or (c) the terms [or] amount of any arbitration award."[122] A Pfizer, Inc. employment agreement, likewise, required parties to "maintain the confidential nature of the arbitration proceeding and

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Subcomm. on Antitrust, Commercial & Admin. Law (May 16, 2019) (statement of Andrew J. Pincus, U.S. Chamber Inst. for Legal Reform), https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-PincusA-20190516.pdf.

[118] *Id.*

[119] *Id.* However, as counsel of record on a 2018 cert petition, this advocate argued that the Hawaii Supreme Court "violated the FAA" when it held a broad confidentiality provision unconscionable, calling confidentiality "[o]ne hallmark of arbitration." *See* Petition for Writ of Certiorari at 20–21, Ritz-Carlton Dev. Co. v. Narayan, No. 17-694 (Nov. 7, 2017), *cert. denied*, 138 S. Ct. 982 (2018).

[120] *See* Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003). In *Ting*, California residential customers and a consumer advocacy group brought a putative class action that directly challenged the collective action waiver in AT&T's "consumer services agreement" under California's Consumer Legal Remedies Act and Unfair Practices Act. *See id.* at 1130. The Ninth Circuit found that the confidentiality provision in the consumer services agreement was substantively unconscionable. *See id.* at 1151–52.

[121] Pokorny v. Quixtar, Inc., 601 F.3d 987, 1001 (9th Cir. 2010).

[122] *Id.* Individual distributors of the marketing and products company Amway Corporation (through its successor-in-interest Quixtar) brought suit alleging that the defendant operated an illegal pyramid scheme in violation of the Racketeer Influenced and Corrupt Organizations Act and California law. *Id.* at 991. The Ninth Circuit affirmed a district court's ruling that the confidentiality clause was substantively unconscionable. *Id.* at 1002.

the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award."[123]

Another example comes from the insurance company Genworth,[124] which sought to prohibit employees from discussing claims outside of the formal discovery structures of the arbitration process. The clause directed "[a]ny employee who is questioned by another employee or by someone else on behalf of another employee concerning another employee's claim" not to respond directly, but instead to "direct the inquiring individual to the Company counsel so that information may be provided through the discovery process."[125] Yet another illustration comes from a CarMax store mandate that maintained that "[a]ll aspects of an arbitration pursuant to these Dispute Resolution Rules and Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public."[126]

Other clauses limit the dissemination of information related to underlying claims. For instance, a Fox News contract binding former anchor Gretchen Carlson included an arbitration provision that required "all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, . . . be held in strict confidence."[127] Some clauses also rule out talking about the decisions. In addition to the illustrations thus far, a 2009 Citibank

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[123] Pfizer, Inc., No. 10-CA-175850, 2019 WL 1314927, at *3 (N.L.R.B. Mar. 21, 2019). Two employees of a pharmaceutical company filed an unfair labor practice charge with the National Labor Relations Board after their employer required, as a condition of employment, that they sign an arbitration provision and class action waiver with a confidentiality clause. *Id.* The administrative law judge found that *Epic Systems* did not preclude the ruling that the confidentiality clause in the arbitration provision violated Section 8(a)(1) of the National Labor Relations Act. *Id.* at *14. The appeal to the NLRB was pending as of April 2020. *See Case Search Results: Pfizer, Inc.*, NLRB, https://www.nlrb.gov/case/10-CA-175850 (last visited Apr. 10, 2020).

[124] Baxter v. Genworth N. Am. Corp., 224 Cal. Rptr. 3d 556, 566 (Cal. Ct. App. 2017). *Baxter* involved an individual worker's wrongful termination and related employment claims against her former employer. *Id.* at 562.

[125] *Id.* at 566. The court found that the provision that prevented only employees but not the employer from communicating about a claim outside of formal discovery was "unfairly one-sided and therefore a substantively unconscionable provision" under California law. *Id.* at 568.

[126] CarMax Auto Superstores Cal., LLC v. Hernandez, 94 F. Supp. 3d 1078, 1120 (C.D. Cal. 2015). In *Hernandez*, CarMax filed a petition for an order compelling arbitration after a former employee sued the company in state court for claims of employment discrimination, sexual harassment and assault, retaliation, violation of California civil rights laws, and more. *Id.* at 1085–86. The former employee argued that the arbitration provision was procedurally and substantively unconscionable. *Id.* at 1102–03. The court rejected the challenge to the arbitration provision on the grounds that confidentiality clauses were "generally unobjectionable" under California law and noting that, "[i]n any event, 'the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general.'" *Id.* at 1121 (quoting Kilgore v. KeyBank Nat'l Ass'n, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013)).

[127] Noam Scheiber & Jessica Silver-Greenberg, *Gretchen Carlson's Fox News Contract Could*

arbitration provision required both parties to "keep confidential any decision of an arbitrator."[128]

A variation is that some clauses set out a default rule of disclosure but authorize any party to elect to keep information secret. An example comes from a life insurance policy, considered by the Eleventh Circuit in 2019, that directed that "[u]pon request by either party, the 'rulings and decisions of the arbitrators' must 'be kept strictly confidential.'"[129]

The scope of addressees is another question. Clauses seek to bind the parties,[130]

Shroud Her Case in Secrecy, N.Y. TIMES (July 13, 2016), https://www.nytimes.com/2016/07/14/business/media/gretchen-carlsons-contract-could-shroud-her-case-in-secrecy.html. In December of 2019, Carlson, joined by fellow former Fox News reporters Julie Roginsky and Diana Falzone, announced the formation of an organization, Lift Our Voices, to press for the end of non-disclosure obligations (including those from arbitration provisions) that are imposed on individuals who have suffered sexual harassment. *See* Gretchen Carlson, *Gretchen Carlson: Fox News, I Want My Voice Back*, N.Y. TIMES (Dec. 12, 2019), https://www.nytimes.com/2019/12/12/opinion/gretchen-carlson-bombshell-movie.html; *see also* Rebecca Keegan, *Fox News Alums Gretchen Carlson, Julie Roginsky Launch Anti-NDA Initiative*, HOLLYWOOD REP. (Dec. 10, 2019, 5:45 AM), https://www.hollywoodreporter.com/news/fox-news-alums-gretchen-carlson-julie-roginsky-launch-anti-nda-initiative-1260473; *About*, LIFT OUR VOICES, https://liftourvoices.com/about (last visited Feb. 29, 2020).

[128] Larsen v. Citibank FSB, 871 F.3d 1295, 1318 (11th Cir. 2017). In *Larsen*, an account holder filed a putative class action challenging a bank's overdraft policy. *Id.* at 1300–01. After the case was transferred to the Southern District of Florida as part of an MDL, the bank moved to compel arbitration. *Id.* at 1301–02. The Eleventh Circuit, applying Washington law, found that the "confidentiality clause would likely be considered substantively unconscionable," severed the clause, and enforced the remainder of the arbitration provision. *Id.* at 1319–20.

[129] Am. Family Life Assurance Co. of Columbus v. Hubbard, 759 F. App'x 899, 901 (11th Cir. 2019). In the per curium opinion in *Hubbard*, the Eleventh Circuit found that a group of insurance agents had waived the argument as to the unconscionability of the confidentiality provision in the insurance company's arbitration clause, but posited that it would nonetheless fail under Georgia law. *Id.* at 906.

[130] *See, e.g.*, Schnuerle v. Insight Commc'ns Co., L.P., 376 S.W.3d 561, 578 (Ky. 2012) ("[N]either you nor Insight may disclose the existence, content or results of any arbitration or award . . . ."). That putative class of Kentucky residents sued their internet service provider for violations of the Kentucky Consumer Protection Act; the bases were a series of service outages. *Id.* at 565. The Supreme Court of Kentucky held that the confidentiality provision in the provider's arbitration clause was unenforceable. *Id.* at 579.

their lawyers,[131] and witnesses in arbitration proceedings.[132] Some appear to ban disclosure after a dispute has ended, and some provisions aim to sweep courts into their closure nets. One example comes from an insurance company that told its sales associates that "all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrators' award shall be filed under seal."[133]

These many provisions may also have exceptions and caveats. In some cases, disclosure is allowed when both parties consent.[134] (Whether such consent is ever given, and what the procedures for seeking such consent would be, is hard to find in reported case law and commentary.) Many clauses (like the ones mailed out by

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[131] *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1071 (9th Cir. 2007). That clause provided:

> [A]ll claims, defenses and proceedings (including, without limiting the generality of the foregoing, the existence of a controversy and the fact that there is a mediation or an arbitration proceeding) shall be treated in a confidential manner by the mediator, the Arbitrator, the parties and their counsel, each of their agents, and employees and all others acting on behalf of or in concert with them.

Id. The Ninth Circuit analyzed this provision in the context of a lawsuit by an employee who sued the firm under the Fair Labor Standards Act and other federal and state labor law statutes to obtain overtime and remedy the alleged denial of rest and meal periods. *Id.* at 1070. The court found the confidentiality clause was substantively unconscionable because it was "written too broadly." *Id.* at 1079.

[132] *See, e.g.*, Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 556, *reconsideration denied*, 400 P.3d 581 (Haw. 2017), and *cert. denied sub nom.*, Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018). That clause provided: "Neither a party, witness, or the arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiation, mediation, or arbitration hereunder without prior written consent of all parties." The clause became an issue in a lawsuit filed by a group of condominium purchasers against the developer of a failed condominium project. *See id.* at 548–49. The Supreme Court of Hawaii found the confidentiality provision substantively unconscionable. *Id.* at 555–56.

[133] *See* Brief of Respondents-Appellants at 24–25, Am. Family Life Assurance Co. of N.Y. v. Baker, 778 Fed. App'x 24 (2d Cir. July 16, 2019) (No. 18-1960), 2018 WL 5806825.

[134] *See, e.g.*, African Methodist Episcopal Church, Inc. v. Smith, 217 So. 3d 816, 824 (Ala. 2016) ("Neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties."). This appeal consolidated two cases that challenged the denial of certain life-insurance benefits claims. *Id.* at 818–19. After the trial court denied the defendants' motions to compel arbitration, the Supreme Court of Alabama reversed. The court concluded that the confidentiality clause was not substantively unconscionable. *Id.* at 826; *see also* Guyden v. Aetna Inc., 544 F.3d 376, 384 (2d Cir. 2008) ("Arbitration decisions may not be published or publicized without the consent of both the Grantee and the Company."). In *Guyden*, a plaintiff sued her former employer, alleging her termination violated the whistleblower protections of the Sarbanes-Oxley Act. The district court dismissed the complaint and sent the claim to arbitration, and the Second Circuit affirmed. *Id.* at 379. The court rejected the argument that the confidentiality mandate conflicted with the whistleblower protection statute's underlying "purpose" of informing other employees of their rights. *Id.* at 384–85.

American Express in 2019) acknowledge that state or federal law may constrain the operative scope of such non-disclosure obligations.[135] Further, provisions may permit limited disclosure of arbitral proceedings as necessary to enforce awards, thereby acknowledging the openness of any subsequent court proceedings.[136]

In addition, some clauses reference that their mandates could be read to interfere with the practice of law. For example, a court reviewed a provision from Carmax Auto Superstores mandating that:

> All aspects of an arbitration pursuant to these Dispute Resolution Rules and Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public, except (i) to the extent both Parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the Parties, or (iii) as may otherwise be appropriate in response to a governmental agency or legal process. All settlement negotiations, mediations, and the results thereof shall be confidential. Nothing in this section shall be construed to restrict the right of an attorney to practice law.[137]

III. THE LAW OF INFORMATION ACCESS, DISSEMINATION, AND NON-DISCLOSURE IN ARBITRATION

In this Section, we provide the contours of the current law, mostly made by lower courts, on the enforceability of silencing provisions. Before turning to courts, however, a reminder is in order that voluntary compliance with mandates is the bedrock of private and public legal ordering. Indeed, studies of people who are not lawyers have found that they aim to follow terms in forms presented to them, including provisions that are not legally enforceable.[138] Therefore, when obligations

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[135] *See, e.g.*, CarMax Auto Superstores Cal., LLC v. Hernandez, 94 F. Supp. 3d 1078, 1120 (C.D. Cal. 2015) ("Procedures, including the hearing and record of the proceeding, shall be confidential and shall not be open to the public, except (i) to the extent both Parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the Parties; or (iii) as may otherwise be appropriate in response to a governmental agency or legal process.").

[136] *See, e.g.*, Ramos v. Sup. Ct. of S.F. Cty., 239 Cal. Rptr. 3d 679, 700–01 (Cal. Ct. App. 2018), *cert. denied sub nom.* Winston & Strawn LLP v. Ramos, 140 S. Ct. 108, No. 18-1437, 2019 WL 4921371 (Oct. 7, 2019) ("Except to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence.").

[137] Carmax Auto Superstores, Inc. v. Sibley, 215 F. Supp. 3d 430, 433–34 (D. Md. 2016). The court concluded that there was "nothing substantively unconscionable about the confidentiality provision. . . . A confidentiality provision that imposes a confidentiality requirement on both parties—simultaneously benefiting both parties—is not 'unreasonably and unexpectedly harsh.'" *Id.* at 436–37.

[138] *See, e.g.*, Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. (forthcoming 2020); Meirav Furth-Matzkin, *On*

not to disclose are in place, many people subject to them may not question their validity, let alone go to the expense to contest them. As a result, silencing mandates likely shield a great deal of information from the public.

Yet as the #MeToo movement exemplifies, even with non-disclosure mandates, information can make its way into the public realm through a variety of routes.[139] A contemporary example comes from investigative reports that revealed how Sterling Jewelers' mandate for private arbitration under AAA confidentiality rules sought to shield allegations of widespread sexual harassment and pay disparity from public view and resolution.[140] Even as the arbitration moved forward on a collective basis (aggregating allegations on behalf of 69,000 women), the details of the dispute remained confidential.[141] After the press and claimants' lawyers brought the issues to the fore, the company agreed to release redacted versions of hundreds of sworn statements by class members detailing the bases for their allegations.[142]

Other public outcries have prompted private entities to make changes without being required by federal or state law to do so. In the fall of 2018, for example, both Google and Facebook announced that they would stop enforcing private arbitration mandates against employees bringing sexual harassment claims.[143] Yet these examples and the case law document the myriad of restrictions in place. The success of

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the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market, 9 J. LEGAL ANALYSIS 1, 3 (2017).

[139] Conflicts over the enforceability of mandates to resolve disputes in confidential arbitration have made headlines in disputes involving Stormy Daniels and President Donald Trump, Gretchen Carlson and Roger Ailes, and others. *See, e.g.*, Maggie Astor & Jim Rutenberg, *Stormy Daniels Case Should Be Resolved Privately, Trump's Lawyers Say*, N.Y. TIMES (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/politics/stormy-daniels-trump-arbitration.html; Scheiber & Silver-Greenberg, *supra* note 127. *See generally* Hoffman & Lampmann, *supra* note 41, at 220; Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV 155, 160 (2019).

[140] *See* Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html [hereinafter Harwell, *Hundreds Allege Harassment*]; Taffy Brodesser-Akner, *The Company that Sells Love to America Had a Dark Secret*, N.Y. TIMES MAG. (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html.

[141] Drew Harwell, *Sterling Case Highlights Differences Between Arbitration Litigation*, WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/business/economy/sterling-discrimination-case-highlights-differences-between-arbitration-litigation/2017/03/01/cdcc08c6-fe9b-11e6-8f41-ea6ed597e4ca_story.html.

[142] Harwell, *Hundreds Allege Harassment*, *supra* note 140.

[143] *See* Jaclyn Jaeger, *Firms Follow Google Trend in Ending Mandatory Arbitration*, COMPLIANCE WK. (Nov. 19, 2018, 7:15 AM), https://www.complianceweek.com/opinion/firms-follow-google-trend-in-ending-mandatory-arbitration/24751.article. Some law firms have responded to distress about their policies and moved away from the use of arbitration clauses in

challenges to silencing mandates has varied widely, depending on the interpretation of state or federal common law or statutes, the information-access restrictions at issue, the remedy sought, and the background attitudes of courts toward arbitration.

In dozens of decisions, judges have assessed the specific burdens that non-disclosure provisions impose, the relevant state and federal law, the policy arguments that parties advance, and the remedies sought. Below, we summarize five facets of the emerging legal principles.

First, courts generally decline to invalidate arbitration rules put into place by providers such as the AAA, which may be incorporated by reference when companies mandate arbitration. As discussed, these rules require arbitrators to keep information confidential and preclude third parties from attending arbitration proceedings.[144] At times, when assessing these terms, judges have focused on what was disclosable as well as on what was not. One federal court, for example, approved the incorporation of AAA privacy rules in a security firm's employment contract and noted that the restrictions still "allow Plaintiffs or other potential class plaintiffs" to "investigat[e] claims, engag[e] in discovery, and discuss . . . their investigation, discovery, and arbitration outcomes with one another."[145] A parallel approach came from a California appellate court, explaining in a July 2019 unpublished opinion that the provisions posed no problem because, unlike clauses that precluded "the parties from publicly discussing the arbitration," the texts at issue did not amount to a total "gag order."[146]

employment contracts, at least prospectively. Many credit law students organizing through the People's Parity Project (formerly the Pipeline Parity Project) for this result. *See* Melissa Heelan Stanzione, *Law Students Put More Pressure on Big Law Over Arbitration*, BLOOMBERG L. (Mar. 26, 2019, 9:27 AM), https://news.bloomberglaw.com/us-law-week/law-students-put-more-pressure-on-big-law-over-arbitration.

[144] *See, e.g.*, Clotfelter v. Cabot Inv. Props., LLC, No. 5:10-cv-235-OC-10GRJ, 2011 WL 1196698, at *10 (M.D. Fla. Mar. 29, 2011). Investors in a shopping center sued the investment's promoters alleging violations of securities laws and common law negligent misrepresentation. *Id.* at *1. The district court granted the defendant's motion to dismiss and compel arbitration; the court rejected the substantive unconscionability challenge to the JAMS rule requiring that arbitrators keep the proceedings and awards "confidential." *Id.* at *10.

[145] Boatright v. Aegis Def. Servs., LLC, 938 F. Supp. 2d 602, 610 (E.D. Va. 2013). The court granted the security firm's motion to compel arbitration of the wage and hour claims that two employees had brought on behalf of themselves and a class of similarly situated individuals. *Id.* at 604–05.

[146] Bogue v. Anesthesia Serv. Med. Grp., No. D073518, 2019 WL 3214245, at *5 (Cal. Ct. App. July 17, 2019). A medical group, which had already successfully moved its former anesthesiologist employee's lawsuit to arbitration, petitioned a California court to affirm an arbitral award in its favor. *Id.* at *2–3. The California Court of Appeals affirmed the trial court's confirmation of the award. *Id.* at *1. The court held that the incorporation by reference of arbitration rules "indicat[ing] the arbitration is not a public forum" and "requir[ing] the arbitrator and arbitration administrator to maintain the confidential nature of the arbitration proceeding and any award" was not substantively unconscionable. *Id.* at *5.

Second, governing federal or state law has on occasion been the basis for rejection of prohibitions on disclosure. Illustrative is a 2019 decision from the District of Columbia; the judge refused to enforce an arbitration clause imposed by a contracting company that sought to bar a homeowner from disclosing the existence of a dispute or the result of an arbitration.[147] Such a provision, the court found, was unenforceable under section 45b(b) of the Federal Trade Commission Act, which protects consumers' rights to communicate opinions on work or services provided under a form contract.[148] As of this writing, the NLRB is considering an appeal from an Administrative Law Judge (ALJ) ruling that a broad non-disclosure mandate chilled the exercise of employees' Section 7 rights under the National Labor Relations Act, which shelters concerted action; the ALJ concluded that the clause impermissibly covered talking about conditions of employment, including arbitration activities.[149]

One might therefore assume that the subject matter of the underlying dispute is a guidepost to the rulings. However, lines cannot be drawn in the reported cases between disputes involving employees and those involving consumers. Courts have found confidentiality provisions substantively unconscionable (or not) in both. Courts have, of course, referenced the context when explaining their decisions. For example, the Washington Supreme Court has held that a confidentiality provision is substantively unconscionable in an employment contract because it "benefits only the" employer and "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations."[150] In contrast, the Eleventh Circuit has reasoned that a confidentiality agreement was "not so offensive as to be invalid" in an employment contract because in "many employment claims, both sides might well prefer confidentiality."[151] In both the consumer and employee

[147] Seibert v. Precision Contracting Sols., LP, No. CV 18-818 (RMC), 2019 WL 935637, at *1 (D.D.C. Feb. 26, 2019). The Attorney General for the District of Columbia has filed a lawsuit against the contractor seeking injunctive relief, civil penalties, and restitution for violations of the district's consumer protection act and construction codes. *See* Press Release, Office of Att'y Gen. for D.C., AG Racine Sues Precision Contracting Solutions Over Shoddy and Destructive Home Construction Work (July 31, 2019), https://oag.dc.gov/release/ag-racine-sues-precision-contracting-solutions. The government suit alleged that the company, which sought to shield any disputes from public view, had engaged in similar illegal conduct toward dozens of district consumers. *Id.*

[148] *Seibert*, 2019 WL 935637, at *7. The district court further reasoned that the confidentiality provision was inconsistent with rights that are "part and parcel" of the FAA itself: the "right to challenge its obligation to arbitrate, as here, or to get any arbitral award enforced." *Id.* at *9.

[149] Pfizer, Inc., No. 10-CA-175850, 2019 WL 1314927, at *8 (N.L.R.B. Mar. 21, 2019).

[150] Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004).

[151] Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378–79 (11th Cir. 2005). The Eleventh Circuit, invoking Georgia law, found the confidentiality provision was not substantively unconscionable and affirmed the district court opinion granting an employer's motion to compel

arenas, courts have at times referenced the kind of case to reason about the effect of confidentiality. Several courts, for example, have found that a provision was not substantively unconscionable because they believed that the repeat-player effect was diminished when fewer potential claimants would be affected.[152]

Third, when courts object to clauses, they often rely on the doctrine of unconscionability, either to render arbitration agreements entirely unenforceable or to find specific clauses mandating confidentiality unenforceable.[153] When evaluating unconscionability challenges, courts have to decide what state's law applies (including whether to enforce a choice-of-law provision), whether that law provides guidance, and then how to resolve the specific question before them.

These decisions sometimes delineate between "substantive" and "procedural" unconscionability and at times muddy the sources of both. The formal distinction is that procedural unconscionability focuses on abuse or unfairness in the formation of a contract, while substantive unconscionability looks at the terms to assess whether they are unfair or unreasonably harsh.[154] Objections to unequal bargaining power could be framed as either or both kinds of unconscionability. Moreover, courts considering challenges to confidentiality provisions are not always clear about their reasoning, even as many describe themselves as focused on substantive unconscionability.

Furthermore, the case law often draws on and mixes state and federal law, even as state law was, historically, the source of contract law.[155] But the U.S. Supreme Court's expansive preemption law has eroded state courts' dominion. Moreover, at times, the Court's decisions (such as *Green Tree Financial Corp. v. Randolph*[156] and *American Express Co. v. Italian Colors Restaurant*[157]) take up the question of access to arbitration in language that resembles unconscionability.

Nonetheless, a few states have developed tests clearly predicated on their own law. Washington, for example, has consistently held that "a confidentiality clause in

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arbitration of employees' Fair Labor Standards Act, Age Discrimination in Employment Act, and ERISA claims. *Id.* at 1364, 1379.

[152] *See, e.g.*, Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) (en banc); Machado v. System4 LLC, 28 N.E.3d 401, 415 (Mass. 2015).

[153] *See, e.g.*, Hoober v. Movement Mortg., LLC, 382 F. Supp. 3d 1148, 1160 (W.D. Wash. 2019); Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 556–57 (Haw. 2017), *reconsideration denied*, 400 P.3d 581 (Haw. 2017), and *cert. denied sub nom*. Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018).

[154] *See* 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 2019).

[155] Illustrative is the unselfconscious assumption of the autonomy of state contract law in *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935), used in many casebooks to illustrate the "independent and adequate state ground" under which the U.S. Supreme Court concludes that it should stay its hand.

[156] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

[157] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

a contract of adhesion is a one-sided provision designed to disadvantage claimants and may even help conceal consumer fraud."[158] In *McKee v. AT&T Corp.*, the state's supreme court considered a clause that mirrors the American Express provision with which we began and was put forth by AT&T:

> Any arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content, or results of any arbitration or award, except as may be required by law or to confirm and enforce an award.[159]

The court found this mandate to be substantively unconscionable because it "unreasonably favors repeat players."[160] When reaching that conclusion, the court both commented that the state had "a strong policy that justice should be administered openly and publicly" and cited the state's constitutional mandate that "justice in all cases shall be administered openly."[161]

Not only have those terms reemerged, but AT&T has proffered them in other jurisdictions. The AT&T clause at issue in *McKee* was the same as the one struck under the Ninth Circuit's 2003 reading of California law in *Ting v. AT&T*. There, the Ninth Circuit commented that AT&T retracted some of those terms during the pendency of that litigation,[162] yet the company either revived the terms or kept them in place in other jurisdictions.[163] And, as exemplified by the Fifth Circuit's 2003

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[158] McKee v. AT&T Corp., 191 P.3d 845, 858 (Wash. 2008), *abrogated on other grounds by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); *see* Hoober v. Movement Mortg., LLC, 382 F. Supp. 3d 1148, 1160 (W.D. Wash. 2019). In *McKee*, a consumer filed a putative class action alleging that AT&T had wrongly charged city utility charges and usurious late fees. 191 P.3d at 378. The lower court denied the company's motion to compel arbitration on unconscionability grounds, and the Supreme Court of Washington agreed. *Id.* In an earlier decision, the Washington Supreme Court had held a confidentiality clause unconscionable in an employment arbitration provision. *See* Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 764 (Wash. 2004). Washington courts continue to apply these holdings. *See* Czerwinski v. Pinnacle Prop. Mgmt. Servs., LLC, No. 79665-8-I, 2019 WL 2750183, at *8–10 (Wash. Ct. App. July 1, 2019). In *Czerwinski*, a property manager filed a lawsuit against her employer; she alleged violations of the state discrimination law, minimum wage act, and industrial welfare act. *Id.* at *1. The Court of Appeals found the confidentiality provision substantively unconscionable under *Zuver*, but severed the provision and instructed the trial court to grant the defendant's motion to compel arbitration. *Id.* at *8–10.

[159] *McKee*, 191 P.3d at 849.

[160] *Id.* at 858; *see also Zuver*, 103 P.3d at 753.

[161] *McKee*, 191 P.3d at 858–59 (citing WA. CONST. art. 1, § 10).

[162] The clause read: "Any arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award." Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003).

[163] AT&T imposed identical obligations several years apart in the consumer documents in *Ting* and *McKee*. *See Ting*, 319 F.3d at 1152 n.16; *McKee*, 191 P.3d at 865. AT&T does not, as of April 2020, impose confidentiality obligations in its arbitration procedures. *See Resolve a Dispute*

toleration in *Iberia* of the Cingular Wireless clause with the same locution, a clause illicit in one jurisdiction can be tried—and sometimes used—in another.[164] (AT&T has since acquired Cingular.[165])

The *McKee* court reasoned that non-disclosure provisions could conceal patterns of illegal activity that would prevent potential plaintiffs from learning about meritorious claims and sharing information, discovery, or work product; repeat-player defendants, in contrast, would gain "a wealth of knowledge" about the arbitration process.[166] A federal district court in the Western District of Washington applied the *McKee* test when it held that a clause shielding from public view all "statements and information made or revealed during the arbitration process" was substantively unconscionable because claimants would be "substantially disadvantaged by the inability to benefit from repeat-player status."[167] (Not all judges, applying other states' laws, have shared that concern, and a few have recognized and named that asymmetry but have dismissed it as not worrisome.[168])

In the decade since *McKee*, state and federal courts have applied these unconscionability principles to find unenforceable clauses mandating that bank customers keep arbitrators' decisions confidential; Tesla employees bring all claims in "final, binding and confidential arbitration"; and residents keep any arbitration proceedings against an assisted living facility "confidential in all respects."[169] On the other hand, some courts have, distinguishing *McKee* and its predecessor *Zuver*, upheld

with AT&T via Arbitration, AT&T, https://www.att.com/esupport/article.html#!/wireless/KM1045585 (last visited Apr. 27, 2020).

[164] That clause read: "Any arbitration shall be confidential, and neither you nor we may disclose the existence, content or results of any arbitration, except as may be required by law or for purposes of enforcement of the arbitration award." *See* Brief of Plaintiffs/Appellees at 31, Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 2003 WL 23894400 (5th Cir. Dec. 7, 2003) (No. 03-30613).

[165] *Cingular Timeline*, AT&T, https://www.att.com/Common/merger/files/pdf/Cingular_timeline7.pdf (last visited Feb. 29, 2020).

[166] *McKee*, 191 P.3d at 858.

[167] Hoober v. Movement Mortg., LLC, 382 F. Supp. 3d 1148, 1160, 1161 (W.D. Wash. 2019).

[168] *See, e.g.*, Machado v. System4 LLC, 28 N.E.3d 401, 415 (Mass. 2015). A group of "franchisee" plaintiffs—all janitorial workers—sued both the national and regional franchisor companies, alleging that they had been misclassified as independent contractors and seeking damages. *Id.* at 404, 406. The Supreme Judicial Court rejected the claims that the arbitration provision was unenforceable. *Id.* at 416. The court concluded that the non-disclosure provision was not substantively unconscionable because the putative class included "a relatively small and known quantity" of potential claimants, and the "'repeat player effect' [was] therefore diminished." *Id.* at 415.

[169] Larsen v. Citibank FSB, 871 F.3d 1295, 1319 (11th Cir. 2017); Balan v. Tesla Motors Inc., No. C19-67 MJP, 2019 WL 2635903, at *3 (W.D. Wash. June 27, 2019); Brookdale Senior Living Communities, Inc. v. Hardy, No. C15-96 MJP, 2015 WL 13446704, at *5 (W.D. Wash. June 5, 2015).

confidentiality, finding it beneficial.[170]

Many decisions show how state and federal law are intermeshed. A sequence of Ninth Circuit opinions demonstrates the impact of federal court extrapolations from state law, which has in turn been stunted because of FAA preemption. In 2003, in *Ting v. AT&T*, the Ninth Circuit held unenforceable a clause that banned disclosure in the same fashion as the 2019 American Express provision we quoted at the outset.[171] In 2007, in *Davis v. O'Melveney & Myers*, the Ninth Circuit concluded that a law firm's dispute resolution procedure was substantively unconscionable because its provisions would "handicap if not stifle an employee's ability to investigate and engage in discovery" and would ultimately place the employer "in a far superior legal posture."[172] The court, describing itself as applying California contract law, cited Ninth Circuit cases on California law as well as a D.C. Circuit opinion and the Washington Supreme Court.[173] In 2010, the Ninth Circuit decided *Pokorny v. Quixtar, Inc.*, again invalidating a non-disclosure provision because it provided defendants with a "repeat player" advantage as to information about disputes and prevented plaintiffs from "investigating or engaging in discovery."[174] There, the court stated that it was applying California law and cited the Ninth Circuit's precedents, which also described themselves as interpreting state law.[175]

But in 2014, the California Court of Appeal for the Second District issued a brief decision finding that a provision requiring the confidentiality of the arbitration, hearing, and record was not substantively unconscionable.[176] The Ninth Circuit then used that 2014 decision in its 2017 case (*Poublon v. C.H. Robinson Co.*) to reevaluate its prior approach; the federal appellate court concluded that the 2014 state court decision was "directly on point" and stood for a rejection of the asymmetry assessment on which the court had relied in *Ting* and *Davis*.[177]

The back-and-forths did not end. Soon thereafter, a federal district court within the Circuit referenced California law when holding unconscionable a confidentiality clause that it termed to have a broader "scope."[178] The issue of non-disclosure was addressed again in 2018, when the California Court of Appeal for the

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170 Romney v. Franciscan Med. Grp., 349 P.3d 32, 41 (Wash. Ct. App. 2015); Turner v. Vulcan, Inc., No. 71855-0-I, 2015 WL 6684259 (Wash. Ct. App. 2015).

171 Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003).

172 Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007).

173 *Id.* at 1078–79 (citing *Ting*, 319 F.3d 1126, 1151–52); Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 765 (Wash. 2004)).

174 Pokorny v. Quixtar, Inc., 601 F.3d 987, 1002 (9th Cir. 2010).

175 *Id.* at 994, 996.

176 Sanchez v. Carmax Auto Superstores Cal., LLC, 168 Cal. Rptr. 3d 473, 482 (Cal. Ct. App. 2014).

177 *See* Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1266 (9th Cir. 2017) (citing *Sanchez*, 168 Cal. Rptr. at 481).

178 Fox v. Vision Serv. Plan, No. 2:16-CV-2456-JAM-DB, 2017 WL 735735, at *8 (E.D.

First Division reversed a trial court's granting of a law firm's motion to compel arbitration of an attorney's discrimination, retaliation, and wrongful termination claims.[179] Given the breadth of the closure ("requiring all aspects of the arbitration be maintained in strict confidence"), this appellate court concluded it would prevent the claimant from engaging in discovery, so it distinguished the 2014 California appellate court decision and held the provision at issue unenforceable.[180]

The ruling reflects a fourth facet of this area of law, which is that courts focus on the extent of the closure imposed. As the Supreme Court of Hawaii reasoned in its 2018 decision in *Narayan v. Ritz-Carlton Development Company, Inc.*, a clause that prevents any "party, witness, or the arbitrator" from disclosing "the facts of the underlying dispute or the contents or results of any negotiation, mediation, or arbitration" is unconscionable because it "impairs the . . . ability to investigate and pursue their claims."[181] In 2006, the Illinois Supreme Court similarly opined that a "strict" confidentiality clause "burden[ed] an individual customer's ability to vindicate this claim . . . [because it] means that even if an individual claimant recovers on the illegal-penalty claim, neither that claimant nor her attorney can share that information with other potential claimants."[182]

In contrast, courts have upheld non-disclosure requirements perceived to be less onerous. Some courts have found that clauses that "allow for disclosure as required by law or the prior written consent of both parties" pose no unconscionability problems.[183] One illustration comes from *Asher v. E! Entertainment Television, LLC*, decided in 2017; a federal district court judge ordered an employee's dispute to arbitration over an unconscionability objection to a clause prohibiting parties from sharing information generated during arbitration or the arbitrator's resulting

Cal. Feb. 24, 2017).

[179] *See* Ramos v. Sup. Ct. of S.F. Cty., 239 Cal. Rptr. 3d 679, 685 (Cal. Ct. App. 2018), *cert. denied sub nom.* Winston & Strawn LLP v. Ramos, 140 S. Ct. 108 (2019).

[180] *Id.* at 701 n.11.

[181] Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 556, *reconsideration denied*, 400 P.3d 581 (Haw. 2017) and *cert. denied sub nom*. Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018).

[182] Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 275 (Ill. 2006). The court declined to decide the issue because the company had eliminated the non-disclosure provision and agreed retroactively to waive it for pending cases.

[183] Zipkin v. Kaiser Found. Health Plan, Inc., No. B245252, 2014 WL 1219317, at *8 (Cal. Ct. App. Mar. 25, 2014); *see also* Sanchez v. Carmax Auto Superstores Cal., LLC, 168 Cal. Rptr. 3d 473, 481 (Cal. Ct. App. 2014). The appellate court reversed a trial court order denying the employer company's motion to compel arbitration of a wrongful termination suit by a former employee. *Id.* at 476, 482.

award.[184] The court reasoned that, unlike requirements the Ninth Circuit had rejected in 2007, this clause did not "prohibit mere mention of the proceedings."[185]

The sequence of California state court case law described above offers another example. In 2014, one state appellate court found a provision requiring that the proceedings be kept confidential was "not unconscionable."[186] Although federal courts applying California law discussed this decision as if it represented a sea change in state law's approach to confidentiality in arbitration,[187] other California appellate courts have since found other, more burdensome confidentiality obligations to be unconscionably "one-sided."[188]

We have used the term "unenforceable" but need to clarify what kinds of remedies are discussed in the case law when a clause is held invalid. Some courts have concluded that an unenforceable confidentiality mandate makes unenforceable the entire arbitration mandate.[189] In some opinions, the non-disclosure mandate is one of several aspects of a dispute resolution clause that renders unenforceable the arbitration mandate.[190] Other courts have determined that the unenforceable or unconscionable confidentiality provisions are severable from the arbitration mandate.[191]

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184 Asher v. E! Entm't Television, LLC, No. CV 16–8919–RSWL–SSx, 2017 WL 3578699, at *7–9 (C.D. Cal. Aug. 16, 2017).

185 *Id.* at *7 (citing Davis v. O'Melveny & Myers, 485 F.3d 1066, 1079 (9th Cir. 2007)). Other courts have also compared terms in clauses. For example, the Northern District of California found a confidentiality clause not substantively unconscionable because it was similar to the one considered in *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017), and "not nearly as broad as those" other Ninth Circuit panels had rejected in *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 (9th Cir. 2007), and *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010)). *See* Prasad v. Pinnacle Prop. Mgmt. Servs., LLC, No. 17-cv-02794-VKD, 2018 WL 4599645, at *10–11 (N.D. Cal. Sept. 25, 2018).

186 *Sanchez*, 168 Cal. Rptr. at 482.

187 *See Poublon*, 846 F.3d at 1266 (citing *Sanchez*, 168 Cal. Rptr. at 481); *Prasad*, 2018 WL 4599645, at *10 (discussing *Sanchez* and *Pokorny*).

188 Heywood v. Casa Cabinets, Inc., No. E066122, 2017 WL 6523859, at *8 (Cal. Ct. App. Dec. 21, 2017). The court affirmed an order denying a defendant employer's motion to compel arbitration of a wrongful termination action by a former employee. *Id.* at *1; *see also* Ramos v. Sup. Ct. of S.F. Cty., 239 Cal. Rptr. 3d 679, 700–01 (Cal. Ct. App. 2018), *cert. denied sub nom.* Winston & Strawn LLP v. Ramos, 140 S. Ct., 108, No. 18-437, 2019 WL 4921371 (Oct. 7, 2019).

189 *See, e.g.*, Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 556–57 (Haw. 2017), *reconsideration denied*, 400 P.3d 581 (Haw. 2017), and *cert. denied sub nom*. Ritz-Carlton Dev. Co. v. Narayan, 138 S. Ct. 982 (2018).

190 *See, e.g.*, Seibert v. Precision Contracting Sols., LP, No. CV 18-818 (RMC), 2019 WL 935637, at *9–10 (D.D.C. Feb. 26, 2019); *Narayan*, 400 P.3d at 557; McKee v. AT&T Corp., 191 P.3d 845, 861 (Wash. 2008).

191 *See, e.g.*, Hoober v. Movement Mortg., LLC, 382 F. Supp. 3d 1148, 1162 (W.D. Wash. 2019). Citing *Zuver* and *McKee*, the court found the confidentiality provision in an arbitration clause substantively unconscionable. *Id.* at 1161–62. The court also found the clause severable

And some courts have decided that the question of enforceability of the confidentiality provision itself must be remitted to the arbitrator.[192]

We have found some decisions addressing the question of a breach of a confidentiality clause. For example, in 2008, the Fifth Circuit approved a district court's permanent injunction that barred former students of a for-profit college from sharing information about their successful arbitration claims.[193] The company had imposed a confidentiality requirement and sought enforcement after learning that the claimants' counsel intended to rely on evidence and findings from these arbitral proceedings in later proceedings against the company.[194] Citing its earlier opinion holding that confidentiality obligations in arbitration did not violate public policy, the Fifth Circuit upheld the injunction.[195]

Further, some providers set forth the consequences if individuals breach the arbitration clauses' confidentiality mandates. The clothing company American Apparel told its advertising models that failures to comply with the confidentiality obligations would "constitute a material breach," giving the company the right to seek a restraining order and "all other remedies in law or in equity."[196] What the case law to date does not include are decisions awarding litigants damages for breaches of an arbitration clause's non-disclosure agreement.

Fifth, an important variable is the era in which a case was decided. Looking at the law on non-disclosure over the course of the last 20 years, the reluctance to enforce provisions exemplified by the 2003 Ninth Circuit decision rejecting non-

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and granted the defendant employer's motion to compel arbitration on an individual basis of the employees' claims for unpaid wages. *Id.* at 1162, 1163; *see also* Czerwinski v. Pinnacle Prop. Mgmt. Servs., LLC, No. 79665-8-I, 2019 WL 2750183, at *8–10 (Wash. Ct. App. July 1, 2019); Larsen v. Citibank FSB, 871 F.3d 1295, 1320 (11th Cir. 2017).

[192] *See* Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) (en banc). The Ninth Circuit instructed the district court to grant the defendant's motion to compel arbitration in a putative class action that students of a defunct flight school filed against the school's preferred lender. *Id.* at 1055–56. In a footnote, the court commented that the confidentiality provision raised fewer concerns because of "the small number of putative class members" in the case, but reminded that "[p]laintiffs are free to argue during arbitration that the confidentiality clause is not enforceable." *Id.* at 1059 n.9; *see also* Velazquez v. Sears, Roebuck & Co., No. 13-cv-680-WQH-DHB, 2013 WL 4525581, at *5–6 (S.D. Cal. Aug. 26, 2013). The district court granted Sears's motion to compel arbitration of employees' wage claims. *Id.* at *8. Citing *Kilgore*, 718 F.3d at 1059 n.9, the court found that the confidentiality provision did not render the agreement unconscionable but stated that the plaintiffs could raise these arguments in arbitration. *Id.* at *5–6.

[193] *See* ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342, 348–49 (5th Cir. 2008).

[194] *Id.* at 344.

[195] *Id.* at 348 (citing Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175–76 (5th Cir. 2004)).

[196] Complaint, Exhibit H, Lo v. American Apparel, Inc., No. BC457920 (Cal. Super. Ct. Mar. 23, 2011).

disclosure obligations that AT&T had imposed has receded in the Ninth Circuit and elsewhere.[197] More recent decisions tolerate non-disclosure, as lower courts regularly invoke the Supreme Court's pro-arbitration jurisprudence.[198]

IV. AGGREGATE INFORMATION

A. *State Legislation Regulating Disclosure*

We turn from information suppression clauses to what information *can* be learned from state mandates that providers of consumer arbitration services post reports on publicly accessible databases. As we detail below, states have played the leading role in forcing some information about arbitration into public view. (As noted, a few federal statutes require reporting, and proposals for federal law to do more are plentiful.[199])

California, Maryland, Maine, and the District of Columbia require arbitration organizations to make public some information.[200] The template from California, enacted in 2002 and amended in 2014 and in 2019, requires companies that administer consumer arbitrations to publish, on a quarterly basis on the internet, information on these arbitrations, including the name of the non-consumer party, the nature of the dispute (such as "finance," "debt collection," "employment"), the prevailing party, whether a consumer was represented by an attorney, time to disposition, kind of disposition, the amount of the claim and award, attorneys' fees, and

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[197] *See, e.g.*, African Methodist Episcopal Church, Inc. v. Smith, 217 So. 3d 816, 825–26 (Ala. 2016); Sanchez v. Carmax Auto Superstores Cal., LLC, 168 Cal. Rptr. 3d 473, 481–82 (Cal. Ct. App. 2014).

[198] *See, e.g.*, Clotfelter v. Cabot Inv. Props., LLC, No. 5:10-cv-235-OC-10GRJ, 2011 WL 1196698, at *10 (M.D. Fla. Mar. 29, 2011) (citing dicta in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010) discussing the "presumption of privacy and confidentiality that applies in many bilateral arbitrations").

[199] As we noted, concerns about the confidential nature of arbitration helped animate several federal regulatory initiatives under the Obama administration that would have limited the imposition of pre-dispute arbitration clauses, including the Fair Pay and Safe Workplaces Executive Order, which would have required federal contractors to disclose violations of a number of different federal labor laws and executive orders—including violations substantiated by "arbitral award or decision." Exec. Order No. 13673, 3 C.F.R. § 2 (2014); *see supra* note 97. In 2019, the House of Representatives passed a bill to amend the FAA to prohibit enforcement of predispute arbitration mandates for any employment dispute, consumer dispute, antitrust dispute, or civil rights dispute. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 3(a) (2019). Several 2020 Democratic presidential candidates pledged support to ban the enforcement of arbitration clauses in employment, consumer, antitrust, and civil rights contexts. *See, e.g.*, *Corporate Accountability and Democracy*, BERNIE, https://berniesanders.com/issues/corporate-accountability-and-democracy (last visited Apr. 27, 2020); *End Washington Corruption*, WARREN DEMOCRATS (Sept. 16, 2019), https://elizabethwarren.com/plans/end-washington-corruption.

[200] *See* King, *supra* note 99, at 1476.

more.[201]

Before turning to what can be gleaned and the challenges entailed, we should note that not all providers comply, nor are disclosures complete. A 2017 report from the Public Law Research Institute at the University of California's Hastings Law School concluded that eleven of the thirty-two consumer arbitration administrators in California published some of the information required by law, and "only three firms can be said to evidence robust and full compliance with the statutory regime."[202] For example, despite statutory requirements, data may be missing about the claimed amount, the salary range in employment disputes, and the identity of the prevailing party.[203] Further, even when compliance is more complete, challenges and gaps remain, as we will explain based on our exploration of the AAA reporting.[204]

One other caveat is that, given our focus on the impact of single-file obligations and non-disclosure attempts, we did not delve into another AAA database that provides information on aggregate arbitrations. A word about what it contains is, however, in order.

The AAA offers to administer class arbitrations.[205] The U.S. Supreme Court

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[201] *See id.*; *see also* CAL. CIV. PROC. CODE § 1281.96 (West 2019). The 2019 amendment, effective January 1, 2020, seeks "[d]emographic data, reported in the aggregate, relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrator." *Id.* That legislation also requires payment within 30 days by the initiator of the arbitration of fees and costs, and if in breach, that failure precludes the right to compel arbitration. *Id.* § 1281.97. California also enacted a provision making the obligation to mandate in employment impermissible. *See* Assemb. B. 51 § 432.6(a) (Cal 2019) ("A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) . . . ."). In February 2020, a federal district judge preliminarily enjoined enforcement of the law, finding it likely preempted by the FAA. *See* Chamber of Commerce v. Becerra, No. 2:19-CV-02456-KJM-DB, 2020 WL 605877, at *10, *20 (E.D. Cal. Feb. 7, 2020).

[202] PUB. L. RES. INST., U.C. HASTINGS C.L., ARBITRATION REPORTING IN CALIFORNIA: COMPLIANCE WITH CCP § 1281.96, at 4 (2017), http://carsfoundation.org/pdf/arbitration_ UC-Hastings-report_final.pdf [hereinafter 2017 HASTINGS REPORT]; *see also* DAVID J. JUNG, JAMIE HOROWITZ, JOSE HERRERA & LEE ROSENBERG, REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96, at 1 (2014). That report noted that "[m]any published reports are incomplete, either omitting categories of information entirely or reporting information inconsistently or ambiguously." *Id.*

[203] 2017 HASTINGS REPORT, *supra* note 202, at 42–47.

[204] *See Consumer and Employment Arbitration Statistics*, *supra* note 69.

[205] *See* AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION 7 (2003), https://www.adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

had referenced the possibility of class treatment in 2010, suggesting agreement could be inferred.[206] But in 2019, in *Lamps Plus, Inc. v. Varela*, the Court limited class arbitration to instances when clauses in arbitration materials specifically permit doing so.[207] Under the Court's current reading of the FAA, parties may expressly agree to group-based arbitrations and, as we have discussed, some do.[208]

As of May 2020, the AAA's website listed 582 class arbitrations, the first of which was filed almost two decades ago, in December of 2002.[209] The AAA's posted docket includes, "to the extent known to the AAA," a copy of the demand for arbitration, the identities of the parties, the names and contact information of counsel, a list of awards made by the arbitrator, and the date, time, and place of any scheduled hearings.[210] The AAA has delineated five categories of class claims: commercial, consumer, construction, employment, and international.[211]

The AAA class arbitration docket included fifty-seven cases received in 2018 and 2019, although at least ten of those do not appear to contain any class allegations and were likely misclassified.[212] In at least one case, the posted materials did not permit analysis of the kind of claim.[213] Based on our review of individual demand forms and accompanying documents on the web and filed under the AAA's rules,[214] we found that the majority of the class claims arose in employment cases and a few involved consumers.[215] The employment claims, brought against hospitals, retail stores, and restaurants, included allegations of failures to pay wages owed

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206 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684–85 (2010).

207 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019).

208 *Id*. at 1416.

209 *Class Action Case Docket*, AM. ARB. ASS'N, https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (last visited Feb. 29, 2020).

210 SUPPLEMENTARY RULES FOR CLASS ARBITRATION, *supra* note 205, at 7.

211 *Class Action Case Docket*, *supra* note 209 (click "Case Type" dropdown menu).

212 Through our analysis of the available filings and docket entries on the website, we have identified, among those 57, six labor cases (involving individual grievances and CBA disputes); two construction disputes (which do not appear to raise any class allegations); one commercial dispute (again not raising class claims); one employee wrongful termination case (not raising any class allegations); and two additional sets of claims where there is not enough information to determine whether the claims truly raised class allegations. The materials are posted on the Yale Open Forum Consumer Arbitration Database, https://osf.io/qmtsu/.

213 *See* Docket, Fedyniak vs. Delta T, LLC, AM. ARB. ASS'N (May 31, 2018), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Fedyniak"; then follow "Isaac Fedyniak vs. Delta T, LLC" hyperlink).

214 SUPPLEMENTARY RULES FOR CLASS ARBITRATION, *supra* note 205, at 7.

215 Our thanks to Ryan Boyle for clarifying that, because of coding problems, the AAA data on class actions could not be used in its current state to search for and learn what cases involved employees or consumers. Telephone Interview with Ryan Boyle, Vice President, Am. Arb. Ass'n (Feb. 28, 2020). AAA's database includes its own filtering system, which delineates between commercial, construction, consumer, employment, and international cases. Although that

and to provide time for breaks as required by law.[216] The consumer class actions included one under the Telephone Consumer Protection Act against a restaurant chain and another set that invoked state unfair trade practices law and alleged breach by a company offering private jet membership.[217]

What happened to these claims after filing as a class action in arbitration can be gleaned from some docket entries but not all. In a few, arbitrators' decisions permitting claims to move forward on a class basis were available. For example, of the eight claim construction decisions filed in 2018 and 2019 that we reviewed, arbitrators in three allowed at least some claims to proceed on a class basis.[218] None of the

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database indicated that, as of February 2020, no new consumer claims had been filed since 2014, our review of the cases in the database identified some consumer claims. We analyzed each claim separately and recorded type based on the AAA demand form used and the underlying nature of the claims.

[216] *See* Demand for Arbitration, Flores v. Madera Cmty. Hosp., AM. ARB. ASS'N (Apr. 11, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Flores"; then follow "Carmela Flores, individually, and vs. Madera Community Hospital" hyperlink; then follow "Demand" hyperlink); Demand for Arbitration, Quijas v. Pet Food Express, AM. ARB. ASS'N (Apr. 1, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Quijas"; then follow "Eneida Quijas, individually, and vs. Pet Food Express" hyperlink; then follow "Demand" hyperlink); Demand for Arbitration, Salmon v. Ichibanya USA, Inc., AM. ARB. ASS'N (Mar. 26, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Salmon"; then follow "Anthony Salmon v. Ichibanya USA, Inc." hyperlink; then follow "Demand" hyperlink). A review of arbitrators' decisions from 2010 to 2015 to permit or deny class action status in class arbitrations was undertaken by Alyssa King. *See* Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031 (2018). King examined 64 claims and found arbitrators "split nearly 50-50 on whether ambiguous clauses permit class arbitration." *Id.* at 1031. The Supreme Court's decision in *Lamps Plus, Inc. v. Varela*, which instructs that ambiguous language cannot provide authorization for class-wide arbitration, will likely reduce the utility of the class arbitration device going forward. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019).

[217] *See* Statement of Claim, Greenberg v. Franchise World Headquarters LLC, AM. ARB. ASS'N (received Nov. 16, 2018), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Greenberg"; then follow "Charles Greenberg, and all others et al. vs. Franchise World Headquarters LLC" hyperlink; then follow "Statement of Claim" hyperlink); Demand for Class Arbitration, Davis v. JetSmarter Inc., AM. ARB. ASS'N (received Sept. 5, 2018), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Davis"; then follow "Fred Michael Davis, Anne-Marie van der et al. vs. JetSmarter Inc." hyperlink; then follow "Demand - AAA Clause Pg. 40" hyperlink).

[218] One arbitrator permitted a group of employees' Fair Labor Standards Act minimum wage and overtime claims to proceed on a collective basis, but held that state overtime and unpaid rest and meal break claims were not subject to class arbitration. *See* Clause Construction Award, Morgan v. WMS Series, LLC, No. 01-18-0003-2889 (Mar. 11, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Morgan"; then follow "Lance Morgan, on behalf of himself and vs. WMS Series, LLC" hyperlink; then follow "Clause const. award" hyperlink). The arbitrator held that a "statutory collective action" under FLSA was

three decisions posted after the *Lamps Plus* decision in April of 2019 authorized the claims to proceed as class actions.[219]

B. Understanding the AAA Data

The AAA's website on individual claims provides windows into whether, how, and how successfully individuals use the arbitrations that it administers. The data demonstrate infrequent individual use as well as that some law firms collect claims and create what we term de facto collective actions. Moreover, parsing the data makes plain the choices in interpreting the state reporting obligations as well as the errors that can make their way into the database.[220]

As we learned with the help of the AAA research staff, the AAA's coding staff receives claims and uses that information to post data.[221] The AAA coders likewise post information about outcomes, which is provided by individual arbitrators. Within the last few years, the AAA has created a coding sheet that arbitrators can use to help them report the data points. None of the data that the AAA receives, either from the parties or the arbitrators, is available for review by the public.

California's arbitration reporting statute calls for posting, "at least quarterly . . .

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distinguishable from a "class action" under federal or state rules of civil procedure, and that the agreement "contemplate[d] and permit[ted] a collective action" on those claims. *Id.* at 4.

[219] *See* Partial Final Clause Construction Award, Abreu et al. v. Fairway Market LLC et al., No. 01-19-0000-1482 (Dec. 30, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Abreu"; then follow "Jose Abreu, Sergio De Los Santos, vs. Fairway Market LLC, Fairway Group et al." hyperlink; then follow "Abreu v. Fairway - Clause Construction" hyperlink); Partial Final Clause Construction Award, Tapia v. Mercado Latino, Inc., No. 01-19-0000-8179 (Nov. 25, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Tapia"; then follow "Jose Tapia vs. Mercado Latino, Inc." hyperlink; then follow "AAA Tapia v Mercado Latino, Inc. – Partial Clause Construction Award" hyperlink); Partial Final Clause Construction Award, Hunt v. T.M. Cobb Co., No. 01-19-0000-0648 (Nov. 12, 2019), https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf (search for Party Name "Hunt"; then follow "Shiloh Hunt, individually, and on et al. vs. T.M. Cobb Company" hyperlink; then follow "Partial Final Clause Const. Award" hyperlink).

[220] For example, there are 42 consumer-initiated consumer claims in which the disposition was marked as "Awarded" and the award amount was a positive value for the consumer and a value of zero for the business. Nevertheless, the "Business" was also marked as the prevailing party. AAA staff confirmed that these records involved data entry mistakes, and that the business prevailed. E-mail from Ryan Boyle, Vice-President, Am. Arb. Ass'n (Oct. 11, 2019) (on file with authors); E-mail from Ryan Boyle, Vice-President, Am. Arb. Ass'n (Mar. 10, 2020, 4:48 PM) (on file with authors).

[221] Telephone Interview with Ryan Boyle, Vice President, Am. Arb. Ass'n (Sept. 20, 2019); Email from Ryan Boyle, Vice President, Am. Arb. Ass'n (Nov. 22, 2019) (on file with authors).

a single cumulative report that contains" detailed information "regarding each consumer arbitration within the preceding five years."[222] The AAA has interpreted this requirement to oblige it to post new data every three months; in addition, the AAA has decided to take down prior data, such that no more than five years is available on its website.

For data before July 2019, these quarterly releases include claims that have been opened and closed within the previous five years. Beginning after July 2019, the quarterly releases were to include all claims closed within the last five years, regardless of when they were filed. Each row of the dataset represents one claim, and multiple claims may be aggregated into one case. Because the data before the rolling five-year periods are not databased by the AAA, the Yale Law School Library created a data repository on the Open Science Framework website to continue to make the data available.[223] In addition, a website called "Level Playing Field" has done similar work.[224]

The AAA administers arbitration in a variety of contexts, including consumer arbitration (our focus) as well as commercial arbitration, construction industry arbitration, and employment arbitration.[225] The AAA data distinguishes among kinds of consumer claims and also has a category of "non-consumer" claims that generally includes employer arbitration. We likewise delineate between "consumer" claims and "non-consumer" claims.

The earliest dataset that we examined comes from the second quarter (Q2) beginning on April 1, 2014. This dataset includes all claims that originated and closed between 2009 Q3 and 2014 Q2. The next earliest dataset is 2017 Q1, which includes claims that originated and closed between 2012 Q2 and 2017 Q1. Beginning with the 2017 Q1 dataset, we downloaded datasets each quarter.[226] Throughout our analysis, we have grouped claims into three periods: claims that closed between 2009 Q3 and 2014 Q2; 2014 Q3 and 2017 Q1; and 2017 Q2 and 2019 Q2.

These periods correlate with prior analyses we have done of the AAA data,[227]

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[222] CAL. CIV. PROC. CODE § 1281.96(a) (West 2019).

[223] *Consumer Arbitrations with the American Arbitration Association 2009 to Present*, CTR. OPEN SCI., https://osf.io/qmtsu (last updated Feb. 15, 2020).

[224] The Yale database deposits the raw data provided by the AAA. Level Playing Field presents data in an easily-searchable format. Level Playing Field does not allow for bulk downloads of the data. *Mission Statement*, LEVEL PLAYING FIELD, https://levelplayingfield.io (last visited Feb. 29, 2020).

[225] Reflecting the California statute, the AAA dataset contains categories of claims labeled Consumer, Consumer Construction, Consumer Real Estate, Employer Promulgated Employment, Employment Issues/Commercial Contract, Other Industry, Residential Construction, and Residential Real Estate.

[226] These datasets are available at *Consumer and Employment Arbitration Statistics*, *supra* note 69.

[227] 2009 Q3 and 2014 Q2 corresponds to the original paper: Resnik, *Diffusing Disputes*,

to which we add claims closing between 2017 Q2 and 2019 Q2 to create a new overview that includes more claims and reflects what we have learned about the challenges posed by the data. (The number of claims varies slightly when the focus shifts from claims filed to claims closed.) Our analysis is current as of June 2019.

After collecting the datasets, we created an aggregated dataset by combining all available quarterly records. We include all records from the most recent dataset (2019 Q2), then append claims[228] from the second-most recent dataset (2019 Q1) that are not already present in the most recent dataset, and so on.[229] The dataset includes 44,628 cases and 47,671 claims in total, of which 19,716 cases and 21,124 claims related to consumers. More claims exist than cases because an individual case can involve more than one claim brought against more than one party.

This analysis taught us about data gaps. First, the time to disposition is an important topic of discussion; proponents of arbitration argue its speediness. Hence, comprehensive data on the length of time that cases pend would be helpful. However, the data posted by the AAA through June 2019 included only cases that were opened *and* closed within five years.[230] When cases took longer than five years, those cases were not part of the dataset. In the materials we have, we have identified more than 133 claims that took longer than 4.5 years to resolve; the longest consumer claim was resolved after 4.9 years. Given what we know, we assume that some unspecified number of other claims pend for more than five years.

Second, when posting information, the AAA sometimes updates or changes

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supra note 26, at 2899. 2014 Q3 and 2017 Q1 corresponds to Resnik, *A2J/A2K*, *supra* note 71, at 650. 2017 Q2 and 2019 Q2 is entirely new.

[228] A claim is identified by the CASE_ID variable, coupled with the filing and closing date. A case record may include multiple claims. Across the dataset, all claims associated with any given case have the same filing date, but in 0.3% of cases (151 out of 44,628 cases), a case contained claims with two different closing dates. No case contained claims with more than two different closing dates.

We considered an alternate approach that identified "cases" based on the case ID number, the business name, total fees imposed, amount claimed against the business, amount claimed against the consumer, filing date, and closing date. We decided against this approach because it appeared that AAA updates the amounts claimed, total fees, and business name from one dataset to another.

[229] This approach differs from the 2017 analysis. *See* Resnik, *A2J/A2K*, *supra* note 71, at 650 n.213 ("The caveat is that there were minor differences when information overlapped on claims in 2012-2014, and in those instances, we used the earlier posted data."). While it was possible to use the earlier posted data, updated versions of the data were likely more accurate. The number of cases affected are small.

[230] The AAA has interpreted the statute's five-year call for data in this manner, while the text of the statute does not specify that arbitration providers should report on cases both opened *and* closed within five years, nor does the statute address whether the data should be removed. *See* CAL. CIV. PROC. CODE § 1281.96(a) (West 2019). Beginning with data released in 2019 Q3, the AAA will release all claims *closed* within the previous five years, regardless of when they were filed.

what had been put up initially. Some of the changes are relatively minor (such as altering the spelling of a business name) while others are substantive (such as updating the claims or fees awarded). For example, in our 2017 analysis, we identified a significant computer coding error; several claims were reported to have outcomes in excess of $600,000.[231] Once the problem was pointed out, the AAA made corrections. However, the AAA does not flag when information has changed, nor does it archive the prior information as posted. In the set we have analyzed, we found changes in the closing date of the filing,[232] the amount of the fee awarded,[233] the name of the business,[234] and the disposition of the filing.[235] The website did not identify these alterations, nor were corrected versions of previous datasets posted or readers of the data notified about corrections made.

Below we provide a dense description of what we have learned from the AAA database. We do so to make plain both the resources it provides and the gaps in information under the parameters of state law that the AAA has interpreted.

C. Filing Trends from 2009 to 2019

Within these constraints, we have identified that the numbers of claims were small, and that the total number of reported data on non-consumer claims (such as residential construction, real estate, and employment) and consumer claims increased in absolute numbers, as we explain below. With these small numbers, the percentage of claims that are consumer claims may have slightly increased.

From 2009 Q3 to 2014 Q2, the percentage of claims related to consumers was 42.2%, while 49.0% of claims were related to consumers for the 2017 Q2 to 2019 Q2 period. The median length of arbitration (excluding those that pend for more than five years and those discussed below that were de facto collective actions) has increased since 2009 by about two months from 158 days (approximately five months) during the 2009 to 2014 period to 206 days (almost seven months) during

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[231] Details are in Resnik, *A2J/A2K*, *supra* note 71, at 649.

[232] *See, e.g.*, Case 11800019200 from 2018 Q4 data and 2019 Q2 dataset (showing that the closing date was updated from December 4, 2018 to June 3, 2019). The 2019 Q1 data did not include this case.

[233] *See, e.g.*, Case 011400001557 from 2018 Q1 and 2019 Q1 records (showing a $90 fee in the 2018 Q1 dataset but not the 2019 Q1 dataset); Case 011500035184 in the 2019 Q1 and 2017 Q4 (showing fee of $6000 in 2017 Q4 dataset and $4200 in the 2019 Q1 dataset).

[234] *See, e.g.*, Case 011400002444 from the 2018 Q1 dataset and 2019 Q1 dataset (reporting, in otherwise identical records, the business name as "Randstad" versus "Ranstad Professionals US, LP"); Case 011400005567 from the 2019 Q1 dataset and the 2017 Q4 dataset (same except business was reported as "Navient Solutions, LLC" versus "Navient Solutions, Inc.").

[235] *See, e.g.*, Case 11400021123, which was noted as "Dismissed" in the 2017 Q1, 2017 Q2 (Revised), 2017 Q3, 2017 Q4, and 2018 Q1 datasets. It was not recorded in the 2018 Q2 dataset. In the 2018 Q3, 2018 Q4, 2019 Q1, and 2019 Q2 dataset, the case was noted as "Awarded" with the consumer prevailing.

the 2017 to 2019 period.

As noted, we defined "de facto collective actions" to be instances when the same law firm brought fifty or more claims within the same twelve-month period against the same business entity. Between 2014 and 2019, we identified thirty-two such collective actions, of which eighteen were consumer claims and fourteen involved non-consumer claims.

We also saw that more information about dollar awards was provided than in prior analyses; the number of dollar awards specified on the AAA website increased since 2017. Again, these findings are subject to the caveat that the AAA appears to update and modify its data more than we had understood in the 2017 analysis.

1. Total Number of Claims

Table 2 shows the raw number of claims, the consumer claims, and the percentage of consumer claims between 2009 Q2 and 2014 Q2, 2014 Q3 and 2017 Q1, and 2017 Q1 and 2019 Q3. The claims are organized into time periods based on their closing dates. For example, a claim that was filed in 2016 Q4 and closed in 2018 Q1 was included in the 2017 Q1–2019 Q3 time period.

The proportion of consumer claims as a percentage of the AAA dataset was roughly constant between 2009 Q3 and 2017 Q1.[236] However, it appears to have risen from 2017 Q2 to 2019 Q2, although this conclusion may not hold if more claims are "backfilled" in the future due to AAA data errors.

In this analysis, we relied on the AAA's definition of the subset of claims that are our focus: arbitrations involving individuals against businesses that are related to goods and services for personal or household use.[237] As we have discussed, the California statute mandates that the AAA database includes construction, real estate, and employment arbitrations.[238] Because the AAA data permits sorting by subcategories and has one coded as "consumer," we relied on the AAA for this level of sorting. (The reminder is that we found misclassifications in the AAA class action database and coding errors within this database.) Consistent with the AAA's categorizations, the account below does not include claims related to construction, real estate, and employment.[239]

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[236] This approach differs from the 2017 analysis, which noted an increase in consumer filings from 2014 to 2017. Here we found different results due to "backfilling" of records from employment arbitrations in the residential construction context, an error on AAA's part.

[237] Telephone Interview with Ryan Boyle, Vice President, Am. Arb. Ass'n (Feb. 28, 2020); Email from Ryan Boyle, Vice President, Am. Arb. Ass'n (Mar. 25, 2020).

[238] *See* CAL. CIV. PROC. CODE § 1281.96(a)(3) (West 2019).

[239] *See* Resnik, *A2J/A2K*, *supra* note 71, at 650 n.210.

Table 2: Number of Claims, 2009–2019

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Claims	17,359[240]	13,958	16,354	47,671
Consumer Claims	7,317	5,797	8,010	21,124
% Consumer	42.2%	41.5%	49.0%	44.3%

Figure 1 shows the number of total claims and consumer claims by quarter starting in 2011 Q1.[241] As in the 2017 analysis, we used the quarter of closing rather than the quarter of filing because it more accurately represented recent activity. If quarter of filing were used instead, many recently filed cases would not appear in the dataset because they were not closed.[242]

Figure 1: Total Claims and Total Consumer Claims, Individual and Collective

[240] This period contains 52 more records than appeared in the 2017 analysis. In datasets after 2017 Q2, 52 claims with the same filing dates and case numbers as earlier datasets had different closing dates. Because it was not clear if these updates are due to new claims, we included them, but it is possible they represent an update in the closing date.

[241] Our dataset includes claims dating to 2009. We displayed only those claims that closed in 2011 onward. We omitted earlier claims because we do not have quarterly data from 2009 to 2014, and we may have undercounted the number of claims filed during that time.

[242] To be included in the dataset, the claim must be filed after the beginning of the five-year window and be closed before the end of the five-year window.

2. Collective or Joint Consumer Action

As shown in Figure 1, the general trend in the number of filings is marked by a series of "spikes," at least some of which we believe reflect what we term "de facto collective actions." These collective actions may take one of two forms. In the first, the lawyers are the linchpin and file individual claims. The AAA data do not provide information on the nature (as compared to the category) of the claim, so we cannot verify from the website whether, as we surmise, the same lawyers are bringing the same kind of claim on behalf of different individuals said to have been harmed by a particular provider of goods or services. Tables 3 and 4 display a list of these actions, which we have defined as at least fifty filings by a single law firm against a single business within one year.[243]

Again, caveats are in order. This analysis may undercount the number of collective actions for a few reasons. First, some law firms adopt a strategy of compiling multiple arbitration claims from consumers and alerting the business before filing. Businesses may decide to settle, just as they may settle before cases are filed in court. We did learn from interviews with lawyers who do consumer arbitration that bundling of claims takes place with some regularity. Second, as a matter of data quality, the AAA database frequently lists law firms inconsistently, for example, displaying filings by "Consumer Fraud Legal Services, LLC," "Consumer Fraud Legal Services LLC," or "Consumer Fraud Legal Services." Given this variation, we counted each name separately, even as they overlapped and may be the same entity. Third, under the AAA Consumer Arbitration Rules, the parties may pick the arbitrators and, if they have not, the AAA decides who the arbitrators are and could use arbitrators as aggregators as well.[244]

Fourth, non-lawyer advocates also generate forms of coordinated filings. A leading example is FairShake, a web-based tool that helps consumers file arbitrations against companies such as Verizon, American Express, and Comcast.[245] FairShake uses online advertising to solicit consumers to file claims, automates the filing process, and shares knowledge about the process among consumers. The website provides estimates of the duration of time from filing to award and sums recouped. FairShake does not charge consumers upfront but relies on contingent fees.

Such efforts are not visible through current state regulations because statutes such as California's call for information about the "attorney" and "law firm" and

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[243] *See Arbitration Awards*, WESTLAW, https://1.next.westlaw.com (last visited. Feb. 29, 2020); *Arbitration Materials*, LEXIS ADVANCE, https://advance.lexis.com/ (last visited. Feb. 29, 2020).

[244] *See* CONSUMER ARBITRATION RULES, *supra* note 106, at 18 ("If the parties have not appointed an arbitrator and have not agreed to a process for appointing the arbitrator, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint an arbitrator from the National Roster.").

[245] FAIRSHAKE, https://fairshake.com (last visited Apr. 27, 2020).

not other kinds of representatives or assistance. As of now, private providers such as the AAA do not add information beyond what they understand the state statutes to require. FairShake reported to us that, as of the end of 2019, it had helped consumers file approximately 1,000 claims with the AAA.[246] The small uptick in the number of individual filings that we identified may be an outgrowth of this kind of help.

As we noted in the introduction, these lawyers' and non-lawyers' entrepreneurial efforts are important resources that can produce de facto collective actions. But, unlike class actions in which notice is generally mandatory, these ad hoc innovations are not leashed to a procedure that requires that they broadcast the pendency of claims to the public. Further, they proceed in a closed process, while class actions are information-forcing. What the development by lawyers and non-lawyers of markets to collect consumer claims provides, for those individuals who find their way to such resources, is guidance on how to proceed, support for doing so, and information (unless read to be banned by the clauses we have detailed) about what has occurred in past or parallel arbitrations. These de facto collective actions thus are a partial antidote to confidentiality clauses under which consumers must arbitrate without collective actions and in secret, even as the drafters of those clauses can accumulate stores of information from their own repeat playing.

Below, we detail the collective actions we identified through our own aggregation by looking at filings of fifty or more by the same law firm against the same service companies. As noted, slight variations in firm names produce separate entries that we have replicated here.

Table 3: De Facto Collective Actions by Attorneys in Consumer Claims[247]

Business	Law Firm	Num. Filings	Oldest Filing	Newest Filing
AT&T Mobility, LLC	Bursor & Fisher, PA	1095	10/15/12	11/16/12
Santander Consumer USA, Inc.	Davis & Norris, LLP	349	12/11/15	11/30/16

[246] Telephone Interview with Teel Lidow, CEO, FairShake, and Annie Wang (Nov. 15, 2019). FairShake has assisted 5,000 consumers total and has a typical settlement of $700. FAIRSHAKE, *Welcome to FairShake: Simple, Effective, Consumer Justice*, https://fairshake.com/news/hello-world (Mar. 3, 2020) (last visited May 17, 2020).

[247] To confirm that the repeat listing reflects parallel claims, we reached out to the law firms listed in this table. Thus far, Agruss Law Firm; Bursor & Fisher, PA; the Googasian Firm; a former attorney with Kershaw, Cutter & Ratinoff, LLP; the Kassab Law Firm; Lakeshore Law Center; and the World Law Group have confirmed that the individual claims were related to the same problems.

Sallie Mae, Inc.	The Googasian Firm, PC	252	8/31/12	3/4/13
American Express	Consumer Fraud Legal Services LLC	201	9/1/17	8/24/18
Discover Bank	World Law Group	186	6/21/13	6/13/14
Windstream Communications, Inc.	Davis & Norris, LLP	171	11/9/16	3/15/17
VIP PDL Services LLC	Lakeshore Law Center	140	8/18/15	7/15/16
CCA EduCorp, Inc.	Kershaw, Cutter & Ratinoff, LLP	113	4/29/11	8/26/11
Citibank, NA	World Law Group	103	12/19/12	12/6/13
Discover Financial Services	World Law Group	79	6/13/14	5/29/15
Century Negotiations, Inc.	The Scott Law Group, PS	67	1/13/12	10/22/12
TDS Telecom Service, LLC	Davis & Norris, LLP	67	5/12/18	1/18/19
John O'Quinn and O'Quinn Law Firm[248]	The Kassab Law Firm	66	9/30/13	2/7/14
American Express	World Law Group	65	7/3/13	7/1/14
Navient Solutions, LLC	Agruss Law Firm, LLC	64	5/6/16	4/19/17
FullBeauty Brands, LP	Dostart Hannink & Coveney LLP	58	3/23/17	4/7/17
Citibank, N.A.	LoScalzo & Associates, PLLC	52	3/7/11	5/4/11
Customers Bank	Legal Foundry LLC	51	7/17/17	7/18/17

[248] The name of the opponent was not disclosed in the AAA database, raising the question whether the opponent was a business or an individual. California law requires the disclosure of the non-consumer entity if the non-consumer party is a corporation or other business entity. CAL. CIV. PROC. CODE § 1281.96(a)(2) (West 2019). David Kassab of the Kassab Law Firm confirmed to us via email that these were related claims against John O'Quinn and the O'Quinn law firm.

Table 4: De Facto Collective Actions by Attorneys in Non-Consumer Claims[249]

Business	Law Firm	Num. Filings	Oldest Filing	Newest Filing
Macy's, Inc.	Initiative Legal Group APC	1583	9/23/13	10/28/13
Blazin Wings, Inc.	Outten & Golden LLP	391	10/24/17	12/16/17
Central Refrigerated Service, Inc.	Getman & Sweeney, PLLC	172	12/3/12	8/5/13
ETS PC, Inc.	Starzyk & Associates, PC	150	5/6/16	9/2/16
General Mills, Inc.	Snyder & Brandt, PA	104	3/29/17	11/10/17
Darden Restaurants, Inc.	Trief & Olk	93	2/23/16	1/9/17
Central Refrigerated Service, Inc.	Getman, Sweeney & Dunn, PLLC	87	11/15/13	11/12/14
Austin Industrial, Inc.	Reaud Morgan & Quinn, LLP	85	8/26/14	4/15/15
Maxim Healthcare Services, Inc.	Sommers Schwartz, PC	85	5/15/15	8/25/15
Solomon Edwards Group, LLC	Rob Wiley, PC	83	5/7/13	3/27/14
Darden Restaurants, Inc.	Lichter Law Firm	74	12/16/15	11/30/16
Winghouse of Daytona Beachside, LLC	Morgan & Morgan, PA	57	10/5/12	8/28/13
Mobility Plus Transportation LLC	Nelson Law Group	56	8/10/12	9/13/12
Twin Cities Community Hospital, Inc.	Teukolsky Law, APC	56	10/3/16	10/14/16

[249] To confirm that the repeat listing reflects parallel claims, we reached out to the law firms listed in this table. Thus far, Outten & Golden, LLP; Getman & Sweeney; Morgan & Morgan; and a former attorney from Initiative Legal Group have confirmed that the individual claims concerned the same problems.

Having identified these coordinated or collective efforts, we return to our focus on individual filings. Therefore, in the data accounting below, we removed instances when fifty or more claims were filed by the same attorney against the same provider. We then assessed the number of claims per year. As the chart shows, the total numbers of non-consumer and consumer claims are modest (peaking at 1,971 claims in a quarter), and the number of consumer filings has, since 2011, increased.

Figure 2: Total Claims and Total Consumer Claims, Individual Only
(Excluding 50 Claims or More Filed by the Same Firm
Against the Same Provider)

3. Duration of Pending Arbitration Claims

Table 5 shows the median time period from filing date to closing date by quarter of closing. For both consumer and non-consumer claims, the median duration of an arbitration claim increased between 2009 and 2019. This data is subject to the reminder that cases pending more than five years are not provided by the AAA, so the actual median duration may be longer than we found. We use median rather than the average length of arbitration to avoid skews from outliers, and we exclude de facto collective claims to learn about the process.

Table 5: Median Duration of Claims by Closing Date
(Excluding 50 Claims or More Filed by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Consumer Claims (Total)	5,548	5,248	7,031	17,827
Median Duration of Consumer Claims (Days)	158	176	206	182
Num. Non-Consumer Claims (Total)	9,969	6,370	7,133	23,472
Median Duration of Non-Consumer Claims (Days)	220	274	287	253

4. *Amount Sought and Awarded*

Under the California statute, administrators of consumer arbitrations are to provide "[t]he amount of the claim," "the amount of any monetary award," and the arbitrator's "total fee" for the case.[250] (No information is required on the payment of fees to the administrator, like the AAA, of the arbitration.) We sought to understand when the AAA recorded the amount requested, the dollar award, and the fee charged by the arbitrator.

Across the entire dataset, 71.1% of all records contain an amount sought. The remaining 29.9% of records either had a missing value or a value of zero. The California statute requires that administrators of consumer arbitrations disclose "whether equitable relief was requested or awarded."[251] According to the AAA, a value of zero indicates that the cases were filed, but the amount claimed was not disclosed.[252] The AAA also explained that a claim amount left blank could mean that 1) the claimant asked for equitable relief; 2) the claimant sought both equitable

[250] CAL. CIV. PROC. CODE § 1281.96(a)(10), (11) (West 2019).

[251] *Id.* § (10).

[252] Email from Ryan Boyle, Vice President, Am. Arb. Ass'n (Mar. 25, 2020) (on file with authors).

and monetary remedies but did not disclose the amount, or 3) a coder for the AAA had erred in not using a zero to indicate that the claim amount was not disclosed.[253] Given this uncertainty, our analysis defines a claim to record the claim amount if the claim amount includes a number greater than zero.

Table 6 details how many consumer claims recorded by the AAA include the amount that was sought in the claim.[254] In the last two years, the percentage of consumer claims where an amount was recorded has diminished from roughly 70-75% in the 2009–2017 period to 68%.

Table 6: Amount Consumers Sought
(Excluding 50 Claims or More Filed by the Same Firm Against the Same Provider)

	Consumer Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims	5,548	5,248	7,031	17,827
Claims with Amt.	3,925	3,971	4,771	12,667
% Amt.	70.7%	75.7%	67.9%	71.1%
Median Claim (among amts 0+)	$15,724	$17,000	$19,936	$17,182

Tables 7 and 8 show how many claims "terminated by an award" include a dollar figure and the amount.[255] As in our discussion of the duration that arbitration claims were pending, we report the median rather than mean value to account for any outliers. These outliers might result from unusual claims or data entry errors. Given the assumption that all claims seek monetary awards, all terminated claims should record a dollar amount or that no funds were awarded.

Before turning to the data, we need to explain that we defined a claim as resulting in an award if an "Awarded" disposition was recorded in an AAA field about

[253] *Id.*

[254] We defined a "claim" with an amount as a claim that has a non-zero, non-missing value listed in the "claim_amt_consumer" field.

[255] We defined an "award" in this context as a non-zero amount listed in the "award_amt_business" or "award_amt_consumer" fields (in contrast to values that are zero or missing).

the "type of disposition," along with an award amount. From 2009 to 2019, of the 17,827 consumer claims closed (excluding claims involving collective actions), 4,823 of them were marked by the AAA as terminated by an award in the "type of disposition" field. However, half of these claims (2,451 out of 4,823) were dismissed, and no award was granted to either party.[256]

Caveats are in order. Many claims that have an award amount listed for either the consumer or the business did not list that party as the "Prevailing Party" in the AAA dataset. For example, 1,236 consumer claims (excluding those part of collective actions) were listed with an award amount for the consumer. But only 605 (49%) listed the consumer as one of the prevailing parties. In the 2017 analysis, as we noted, we also found a significant coding error, in which several awards were listed with the same amount in excess of $600,000. We did not find a similar red flag in the more recent analysis, but less vivid errors would be difficult to identify.

Within the constraints of the potential inaccuracy of the information provided, the amount of consumer awards reported varied widely, from $1 to more than $22 million. In this subset of claims for which we have data (that may not be representative of the whole), fewer than one percent of consumer awards were less than $10, and about half fell between $2,300 and $20,000. About a quarter were more than $20,000. The median award for the business also appeared to have increased in both consumer and non-consumer claims, but this increase could be due to the lack of information in more than half the outcomes as well as then-pending claims. If recent ongoing claims had lower awarded amounts than closed claims, the median award value in recent years would decrease.

[256] According to the AAA, claims may be marked as terminated by an "award" even when those claims are dismissed. The AAA uses the notation of "zero" as the amount awarded. Email from Ryan Boyle, Vice President, Am. Arb. Ass'n (Mar. 2, 2020) (on file with authors). Almost no claims included missing award amounts. Of the 4,823 consumer claims coded as terminated by award, none had no values for consumer awards, and two had values missing for the business award amount.

Table 7: Amounts Consumers Awarded
(Excluding 50 Claims or More Filed by the Same Firm Against the Same Provider)

	Consumer Claims with Awards Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Claims "Awarded"[257]	2,353	1,375	1,095	4,823
Consumer Award[258]	508	346	382	1,236
Business Award[259]	665	328	186	1,179
% Indicating Prevailing Party[260]	33.3%	46.2%	73.3%	46.1%
Median Consumer Award[261]	$5,260	$7,498	$11,226	$6,831
Median Business Award	$10,457	$8,874	$11,713	$10,088

[257] This figure refers to the total number of claims that were labeled with "Awarded" in the "type of disposition" field.

[258] This figure refers to the total number of claims that were labeled with "Awarded" in the "type of disposition" field and had a non-zero, non-missing value recorded in the consumer award amount field.

[259] This figure refers to the total number of claims that were labeled with "Awarded" in the "type of disposition" field and had a non-zero, non-missing value recorded in the business award amount field.

[260] This figure refers to the total number of claims that were labeled with "Awarded" in the "type of disposition" field and had a non-blank entry in the "prevailing party" field.

[261] The median award amount is the sum of any award to the business and any award to the consumer where an award was reported.

Table 8: Amounts Non-Consumers Awarded[262]
(Excluding 50 Claims or More Filed by the Same Firm
Against the Same Provider)

	Non-Consumer Claims with Awards Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Claims "Awarded"	2,539	1,415	1,261	5,215
Consumer Award	940	574	701	2,215
Business Award	443	337	316	1,096
% Indicating Prevailing Party	33.4%	43.2%	67.1%	44.2%
Median Consumer Award[263]	$24,652	$22,940	$30,488	$25,520
Median Business Award	$16,100	$21,000	$20,514	$18,940

5. Arbitrators' Fees

California requires information on arbitrators' fees and attorney's fees,[264] but does not seek data on administrative fees charged by the arbitration administrator or who paid them. For consumer claims, the AAA has set its own filing fee at $200.[265] For employees, the AAA charges a filing fee of $300.[266] As noted, some arbitration mandates provide that companies or employers pay such fees.[267] Both AAA's consumer and employer arbitration rules generally require companies to pay

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[262] For definitions of the fields employed in this table, please see notes 257–61.

[263] The median award amount is the sum of any award to the business and any award to the consumer among records where the total award is greater than zero.

[264] CAL. CIV. PROC. CODE § 1281.96(a)(10)–(11) (West 2019).

[265] *Consumer Arbitration Rules: Costs of Arbitration*, AM. ARB. ASS'N (Sept. 1, 2018), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf.

[266] *Employment/Workplace Fee Schedule*, AM. ARB. ASS'N (Nov. 1, 2019), https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19_0.pdf.

[267] *See* Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS: ON THE CASE (Dec. 6, 2018, 11:58 AM), https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-cases-idUSKBN1O52C6.

any required fees or costs beyond the filing fee.[268] Individual mandates that do not use the AAA need not comport with those requirements. State law may also limit the fees charged.[269]

The AAA website records "total fees" (not including its administrative fees) and "attorney's fees." The attorney's fees field refers to fees designated to offset the expenses of the attorney. The "total fees" field refers to arbitrator's fees. Under the AAA rules, the entity obliging the use of the services (such as AT&T) has to pay the fees of arbitrators but not the filing fees to the AAA. Thus, when lawyers represent tens or hundreds of people in this system, each claimant has to pay a filing fee (unless a pre-dispute document shifts the payment to the respondent).

The AAA regulates the charges for its arbitrators and, as of the fall of 2019, the fee was $2,500 per day of hearing for an in-person arbitration and $1,500 for a document-only arbitration.[270] And again, since the respondent pays those fees, when multiple claims are filed, some respondents apparently have slowed down payments to individual arbitrators and thereby sought to discourage their taking such claims.

Again, data questions exist. The amount of the arbitrator's fee in a given case appeared to change when quarterly updates were made to the AAA website. According to the AAA, the changes reflect receipt of updated information from arbitrators, such as fees that had been imposed but then cancelled for reasons such as the amount of activity changed.[271]

Tables 9 and 10 describe our findings. We identified that 70.7% of all claims (29,215 out of 41,299 total claims, excluding those claims part of a collective action) resulted in reported fees.

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[268] CONSUMER ARBITRATION RULES, *supra* note 106, at 33–35; EMPLOYMENT/WORKPLACE FEE SCHEDULE, AM. ARB. ASS'N (Nov. 1, 2019), https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf.

[269] For example, California requires waiver of administrator fees—though not fees paid directly to arbitrators—for indigent consumers, defined as those earning less than 300 percent of the federal poverty level. *See* CAL. CIV. PROC. CODE § 1248.3(b)(1) (West 2019). The statute also forbids arbitrators from administering consumer arbitrations under provisions that require shifting the fees and costs to a losing consumer. *See id.* § 1248.3(a).

[270] CONSUMER ARBITRATION RULES, *supra* note 106, at 35.

[271] Email from Ryan Boyle, Vice President, Am. Arb. Ass'n (Sept. 23, 2019) (on file with authors).

Table 9: Number of Consumer Claims with Recorded Fees by Closing Date

(Excluding 50 Claims or More Filed by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	5,548	5,248	7,031	17,827
Claims with Fee	4,282	3,216	4,083	11,581
% Claims with Fee	77.2%	61.3%	58.1%	65.0%
Median Total Fee (Among Claims with Fee)	$750	$750	$1,250	$750

Table 10: Number of Non-Consumer Claims with Recorded Fees by Closing Date

(Excluding 50 Claims or More Filed by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	9,969	6,370	7,133	23,472
Claims with Fee	8,144	4,578	4,912	17,634
% Claims with Fee	81.7%	71.9%	68.9%	75.1%
Median Total Fee (Among Claims with Fee)	$5,337	$1,739	$1,800	$2,925

Who pays? In the 11,581 consumer claims with non-missing and non-zero fee information (and were not part of a collective action), the fees were allocated to the business 73.4% of the time (8,504 of 11,581 claims). In 10.5% of cases (1,217 of 11,581), the report indicates that fees were evenly split between the business and the consumer. In 14% of cases (1,623 of 11,581), the fee was split in some other way between the consumer and business. We found 2.1% of cases (237 of 11,581) reporting that consumers paid all the fees. Without underlying documents, we were not able to learn whether parties paid as required.

D. Consumer Claims Involving AT&T

At the outset, we provided an overview of the claiming rates against AT&T. Between 2017 and 2019, AT&T had about 140-165 million wireless subscribers.[272] For this Article, we looked at filings from 2017 to 2019 and learned that, during that interval, an average of 172 individuals filed claims each year. (The numbers shift somewhat when the focus is on filings as compared to closed claims and awards.)

In 2017 Q1, the number of claims spiked. Ten appear to have been brought by Consumer Fraud Legal Services; those ten have different filing dates and amounts sought. The number of claims also spiked in 2018 Q4 and 2019 Q2, and no single law firm brought more than four claims during this period.

To summarize, during the 2009 Q3 to 2019 Q2 period, we identified a total of 849 consumer claims that closed against AT&T (excluding those brought as part of a collective action). Between 2014 and 2017, on average, 115 consumers brought claims per year. Between 2017 and 2019, an average of 172 consumers brought claims per year. Over the same period, we did not locate any claims brought by AT&T against a consumer. Of the 849 claims, 69.8% (593 claims) were reported as settled, and 11.3% (ninety-six claims) were described as terminated in an award. The remainder were either dismissed, withdrawn, or coded as "administrative." Of the claims that were terminated in an award and whose award value was non-zero and non-missing, the median award was $576, and the maximum award was $20,000.[273]

Figure 3 shows the number of consumer claims against AT&T by quarter. The more than 1,000 claims filed as collective actions by attorneys have been removed, as they were for the prior analyses of this data. In the 2017–2019 period, no one law firm filed fifty or more claims against AT&T.[274]

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[272] AT&T 2018 Annual Report, *supra* note 72, at 23.

[273] One consumer award was listed as $70,000, but AAA staff confirmed that this award was in error because that figure was the amount claimed, not the amount awarded.

[274] Further, as noted in the 2017 analysis, we found coding problems in the 2017 Q1 and 2017 Q2 releases. *See* Resnik, *A2J/A2K*, *supra* note 71, at 649.

Figure 3: Total Claims Against AT&T by Quarter of Closing
(Excluding 50 Claims or More by the Same Firm Against the Same Provider)

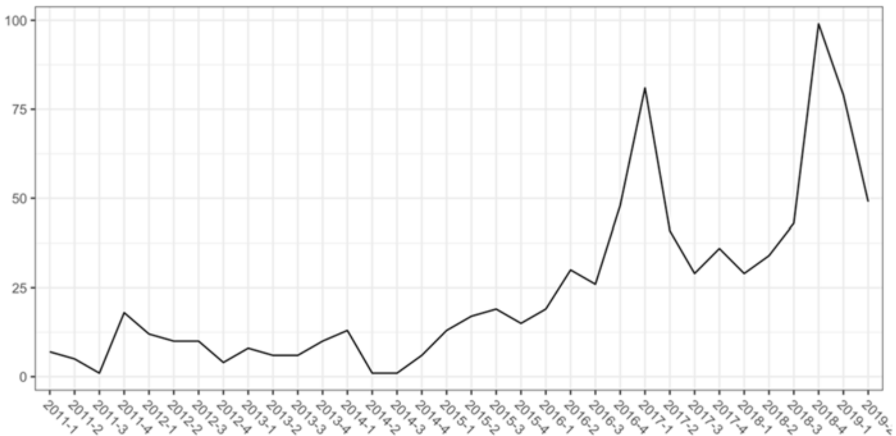

Table 11 displays the number and percentage of claims brought against AT&T by individuals who were not listed as represented by lawyers.[275] (The reminder is that if FairShake or other non-lawyer services were providing assistance, such information would not be in the database.) Most claims (two-thirds to three-quarters) reported were brought by lawyer-less individuals. In the 2009–2014 period, 66.7% were without lawyers. From 2017 to 2019, 76.3% were without lawyers.

Table 11: Consumer Claims Against AT&T by Representation Status
(Excluding 50 Claims or More by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	135	275	439	849
Self-Represented	90	213	335	638
% Self-Represented	66.7%	77.5%	76.3%	75.1%

[275] The representation status of one record (out of 849) was left blank. Since no firm or attorney is listed on this record, we categorize it as a self-represented claim.

Table 12 shows how many consumer claims against AT&T included the amount that was sought in the claim. Table 13 describes how many consumer claims against AT&T that were "terminated in an award" included the amount awarded. Table 14 displays the number of consumer claims against AT&T that disclosed the amount of the arbitrator's fees.

Compared to consumer claims generally, a higher percentage of consumer claims against AT&T included the claim amount (86.2% for claims against AT&T as contrasted with 71.1% overall) and the prevailing party (67.7% of AT&T contrasted with 46.1% overall). In addition, even though the AAA data indicates that all of the claims were initiated by the consumer, the AAA records suggest that, in some claims, AT&T received an award amount. According to the AAA, this result may stem from when businesses had a counter-claim in response to the consumer's initial claim.[276] Consumer claims against AT&T were also less likely to display the arbitrator's fee (30.3% versus 65%). In the partial picture of outcomes that emerges, the median AT&T consumer award amount was $576.

Much more needs to be known (and complete award information is required) before the impact of lawyers can be assessed. In this data slice, claims brought by self-represented individuals appear to be slightly less successful than claims brought by those represented by an attorney. The AAA data included a field called "settled" that bears on the account of outcomes related to representation. According to the AAA data, 2.4% of claims brought by self-represented claimants result in an award, and 68% were settled. By contrast, 4.3% of claims brought by individuals with legal representation resulted in an award, and 75.4% were settled.

Table 12: Consumer Claims Against AT&T with Claim Amounts by Closing Date

(Excluding 50 Claims or More Filed by the Same Firm Against the Same Provider)

	Consumer Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Num. Claims	135	275	439	849
Claims with Amt.	124	251	357	732
% Amt.	91.9%	91.3%	81.3%	86.2%
Median Claim (among amts 0+)	$1,380	$1,250	$2,000	$1,500

[276] Email from Ryan Boyle, Vice President, Am. Arb. Ass'n (Mar. 10, 2020) (on file with authors).

Table 13: Amount Consumers Awarded Against AT&T

(Excluding 50 Claims or More by the Same Firm Against the Same Provider)

	Consumer Claims with Awards Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Claims "Awarded"	29	32	35	96
Consumer Award	5	7	12	24
Business Award	1	3	5	9
% Indicating Prevailing Party	48.3%	71.9%	80.0%	67.7%
Median Consumer Award[277]	$566	$465	$945	$576
Median Business Award	$1,287	$837	$1,252	$1,252

Table 14: Number of Consumer Claims Against AT&T with Fees by Closing Date

(Excluding 50 Claims or More by the Same Firm Against the Same Provider)

	Claims Closing Between			
	2009 Q3 and 2014 Q2	2014 Q3 and 2017 Q1	2017 Q2 and 2019 Q2	Overall
Total Claims	135	275	439	849
Claims with Fee	83	67	107	257
% Claims with Fee	61.5%	24.4%	24.4%	30.3%
Median Total Fee (Among Claims with Fee)	$750	$750	$1,250	$750

[277] The median award amount is the sum of any award to the business and any award to the consumer among records where the total award is greater than zero.

V. KNOWLEDGE, POWER, AND LEGITIMACY

The access to justice movement has self-consciously shifted away from a singular focus on courts and lawyers to reflect that commitments to remedies need not be court- or judge-centric.[278] Keenly aware of the many ways in which law is relevant but lawyers inaccessible, a good deal of work addresses the many "paths to justice" of which dispute resolution in courts or arbitration are but two examples.[279]

Yet, whether focused on courts, their alternatives, or forms of help from venues not readily equated as "legal," "law" information is the predicate to understanding whether to seek redress. What we have documented is a wave of activity aiming to suppress knowledge.

This accounting makes plain the critical roles played by repeat players and by legal mandates for information. We identified state regulation, the uneven implementation of such statutes, and their gaps. As of now, they do not call for needed information such as the substantive bases for the claims filed, whether arbitration mandates include rules that require service providers to pay fees and costs, and whether non-lawyers assisted in filing claims. The case law—itself always a fragmented and skewed resource—documents that efforts are ongoing to reduce information all the more.

The reporting that does take place under state statutes and the doctrine makes plain the impact of disaggregation and privatization. Very few people use the mandated system. Were one to believe that over-claiming is an underlying problem, that self-regulation by corporate actors is desirable, and that dispute processing costs are passed on to the consumers who do not benefit from the filing by others of claims, then the lack of use of arbitration and the efforts to limit access are important correctives. From such vantage points, our analysis would then be evidence of the success of diffusing disputes and dissipating the capacity to pursue alleged wrongdoing.

Were one, however, committed to enhancing individual autonomy, the capacity to shop for goods and services, and incentives for services to diversify, then the tight regulatory hold by a few companies on certain services is cause for concern. Furthermore, the redundant clauses could reflect forms of collusion that antitrust

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[278] *See generally* Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49 (2019); Lincoln Caplan, *The Invisible Justice Problem*, 148 DAEDALUS 19 (2019); David F. Levi, Dana Remus & Abigail Frisch, *Reclaiming the Role of Lawyers as Community Connectors*, 148 DAEDALUS 30 (2019); Gillian K. Hadfield, *More Markets, More Justice*, 148 DAEDALUS 37 (2019); David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2019 J. DISP. RESOL., Fall 2019, at 77; *What We Do*, HAGUE INST. INNOVATION L., https://www.hiil.org/what-we-do/ (last visited Apr. 10, 2020).

[279] *See generally* HAZEL GENN, PATHS TO JUSTICE (1999); BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016); Martha Minow, *Foreword*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016).

law once regulated.[280] Moreover, for those committed (as we are) to enabling debates about rights, remedies, and the processes provided to allocate responsibility, this account substantiates the need for more targeted regulation. For example, statutes that require five-year data posting have been interpreted as permitting administrators to remove information as new materials are posted. Federal and state statutes should instead require arbitration providers to produce, archive, and provide ready access to all information, going back to when the obligation was imposed. Further, information about more aspects of the process—such as help by non-lawyers or filing fees paid or waived to arbitrator administrators—should be required.

States responding to these issues have to be mindful that the U.S. Supreme Court has chastised rules which the Court perceived to undercut what the Court has called the "liberal" federal arbitration policy.[281] Therefore, any state regulations around non-disclosure obligations should be directed not only at arbitration, but also at courts. Furthermore, as illustrated by the letter in which 50 attorneys general joined to call for limiting the secrecy of resolutions of sexual misconduct claims,[282] prohibitions could be area-specific—such as elaborating rules related to sexual harassment claims. Further, common law and legal ethics should be deployed as sources of constraint[283] on what Professor David Hoffman and Erik Lampmann have termed "hushing contracts"[284] which, they argued, should be unenforceable as a matter of "public policy" under state contract law.[285]

Moreover, ethical rules about lawyering could also block information suppression. The ABA Model Rules instruct attorneys not to offer or to make agreements that restrict a lawyer's right to practice.[286] In ethics opinions, the ABA and state boards of professional conduct have explained that settlement agreements seeking to prevent a lawyer from using information gained during litigation in later representations run afoul of this obligation.[287] The effort to suppress information through arbitration provisions that impose similar confidentiality mandates can be understood as falling within this prohibition. Indeed, the clause we quoted from one com-

[280] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018).

[281] *See* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[282] *See* Racine 12-State Coalition, *supra* note 82.

[283] *See* RICHARD MOORHEAD, CTR. FOR ETHICS & L., ETHICS AND NDAS 8–9, (Apr. 2018), https://www.ucl.ac.uk/laws/sites/laws/files/ethics_and_ndas.pdf.

[284] Hoffman & Lampmann, *supra* note 41, at 214–15.

[285] *Id.*

[286] *See* MODEL RULES OF PROF'L. CONDUCT r.5.6(b) (AM. BAR ASS'N 2019).

[287] *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000); Ohio Bd. Prof'l Conduct, Advisory Op. 2019–04 (2019), https://ohioadvop.org/wp-content/uploads/2019/06/Adv-Op-2019-04-Final.pdf.

pany acknowledges as much, as it states that its disclosure ban shall not "be construed to restrict the right of an attorney to practice law."[288]

State constitutional law has played and could continue to play a major role in limiting silencing provisions. The leading example comes from Washington's "open courts" provision, which the state's Supreme Court invoked when it held unenforceable an arbitration mandate that demanded complete confidentiality.[289] The FAA specifically provides that litigants can file claims in courts to enforce, modify, or vacate awards.[290] Given these provisions, the FAA should not be interpreted to preclude disclosure of information about the pendency or outcomes of arbitration. Nor should the FAA be read to mandate that the facts of arbitration, the issues, or the outcomes have to be confidential.

Yet another source of regulation is federal constitutional law. Peter Rutledge has argued that for federal judges to delegate adjudication to arbitrators in federal claims violates Article III.[291] Further, as outlined in *Diffusing Disputes*, the impoverished processes of arbitration turn the mandate to use it into a deprivation of property (the legal claims at issue) without sufficient process, in violation of protections in the Fifth and Fourteenth Amendments.[292] The information suppression activities detailed here also raise the possibility of First Amendment arguments that court enforcement of arbitration information bans interferes with the federal constitutional right to petition for redress. And, as for silencing that prevents public comments about government entities, the First Amendment has been read to constrain enforcement of a nondisparagement clause that was part of a civil rights settlement against the City of Baltimore.[293]

Return then to the American Express September 2019 mailing, beginning with its assertion of "changes . . . effective immediately." Might an individual consumer want to keep private information about conflicts with this credit card company? Possibly, and if so, American Express could acquiesce in response, just as it could also request closure in a particular instance. In contrast, its blanket bar on disclosure is neither a "contract," nor is American Express acting because of its desire to respect individuals' privacy, autonomy, agency, or to nurture and preserve future relationships for generative interactions. Rather, imposing silence is in service of limiting opportunities to know about challenges to its actions. (As noted, a month later,

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[288] Carmax Auto Superstores, Inc. v. Sibley, 215 F. Supp. 3d 430, 434 (D. Md. 2016).

[289] McKee v. AT&T Corp., 191 P.3d 845, 861 (Wash. 2008), discussed *supra* notes 158–70.

[290] *See* 9 U.S.C. §§ 4, 10 (2018).

[291] *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 25 (2013); Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1191–93 (2008).

[292] Resnik, *Diffusing Disputes*, *supra* note 26, at 2823.

[293] Overbey v. Mayor of Baltimore, 930 F.3d 215 (4th Cir. 2019), discussed at Recent Case Comment, 133 HARV. L. REV. 1460 (2020).

American Express unilaterally retracted some of the "benefits" of its credit card.)

The closure and silencing reflect that, like the many corporate policies we have cited, these companies do not perceive the *need* to legitimate their imposition of private dispute resolution. These acts of authority come with no public face seeking to anchor it in fairness or justice through some forms of accounting of the decisions made. An ironic contrast comes from Google, which since 2015 has had to respond to a decision from the Court of Justice of the European Community (CJEU) that, on occasion, items have to be removed from the web as part of what is sometimes called the "right to be forgotten."[294]

To do so, Google and other providers of search engines have generated procedures that make them like courts, in that they must decide how to apply the obligation to balance data protection rights with commitments to public access to the information in question. After the CJEU ruling, the company created an ad hoc Advisory Council that proposed guidelines, many of which were adopted.[295] One can read these provisions as alternative rules of civil procedure, and, given the volume of claims, they govern a court-like institution of considerable girth.[296]

Requests to take down information come from individuals as well as governments arguing security needs.[297] When URLs are taken down, no review by state agencies is available. However, refusals to delist are appealable to data protection agencies at the national level. That asymmetrical oversight may prompt Google, as a repeat player, to develop presumptions of taking down information.[298]

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[294] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317.

[295] *See* LUCIANO FLORIDI, SYLVIA KAUFFMAN, LIDIA KOLUCKA-ZUK, FRANK LA RUE, SABINE LEUTHEUSSER-SCHNARRENBERGER, JOSÉ-LUIS PIÑAR, PEGGY VALCKE & JIMMY WALES, ADVISORY COUNCIL TO GOOGLE ON THE RIGHT TO BE FORGOTTEN (Feb. 6, 2015), https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/adzvisory-report.pdf.

[296] A host of alternative dispute resolution, and now online dispute resolution procedures likewise augment and supplant court-based procedural rules. *See* Resnik, *Diffusing Disputes*, *supra* note 26, at 2850–55.

[297] *See Government Requests to Remove Content*, GOOGLE: TRANSPARENCY REP., https://transparencyreport.google.com/government-removals/overview (last visited Apr. 27, 2020) [https://perma.cc/FD4H-Q6PK]; *Requests to Delist Content under European Privacy Law*, GOOGLE: TRANSPARENCY REP., https://transparencyreport.google.com/eu-privacy/overview (last visited Apr. 27, 2020) [https://perma.cc/9F3N-5RC3].

[298] *See, e.g.*, Daphne Keller, *The New, Worse "Right to be Forgotten*," STANFORD CTR. INTERNET & SOC'Y BLOG (Jan. 27, 2016), http://cyberlaw.stanford.edu/publications/new-worse-%E2%80%98right-be-forgotten%E2%80%99 ("A platform that simply erases users' content on demand risks nothing."); Daphne Keller, *Empirical Evidence of "Over-Removal" by Internet Companies Under Intermediary Liability Laws*, STANFORD CTR. INTERNET & SOC'Y BLOG (Oct. 12, 2015, 8:23 AM), http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws (discussing how in the notice-and-

In addition, Google decided to put a public face on its processes developed in service of the CJEU mandate to make some information private. Google created what it terms a "transparency report" to explain that it makes decisions on a "case-by-case basis," that it sometimes asks for more information, and that requests are not "automatically rejected by humans or by machines."[299] Further, Google described the process as "complex," requiring evaluation of factors such as the "requester's professional life, a past crime, political office, position in public life," and the authorship of the materials.[300] Google's self-account provided examples that included the delisting, at the behest of the wife of a deceased individual, of information on alleged sex offenses, and decisions that delisted some URLs but not others related to individuals who were in political life.[301] As of November 2019, Google reported that it had received nearly three million requests for delisting and responded by removing more than 45%, or some 1.3 million URLs.[302]

Much more could be and has been said about whether and why to equate Google with courts and the complex interactions of public and private domains and their regulation.[303] Our point here is that Google perceived itself as in need of a mechanism to speak to the public in an effort to legitimate its adjudicatory activities, and that it has done so by naming its accounting a "transparency report." Moreover, Google is not alone in linking publicity and legitimacy, as can be seen in rules promulgated in Europe that address alternative dispute resolution[304] and transnational efforts to increase the transparency of sovereign state investment arbitrations.[305] These provisions aim to open up and to regulate decision-making of non-court but court-like adjudicatory bodies.

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takedown context for illegal content, the most risk-avoidant path for any technical intermediary is simply to process a removal request and not question its validity).

[299] *See European Privacy Requests Search Removals FAQs*, GOOGLE (last visited Apr. 27, 2020), https://support.google.com/transparencyreport/answer/7347822?hl=en.

[300] *Id.*

[301] *Requests to Delist Content Under European Privacy Law*, GOOGLE: TRANSPARENCY REP. (last visited May 18, 2020), https://transparencyreport.google.com/eu-privacy/overview?delisted_urls=start:1401321600000;end:1575158399999 [https://perma.cc/N7KC-KYPL].

[302] *Id.*, with a chart mapping the requests from May 2014 to November 2019.

[303] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); Resnik, *Functions of Publicity*, *supra* note 37, at 200.

[304] *See* Directive 2013/11, of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/63).

[305] In 2013, the United Nations Commission on International Trade Law (UNCITRAL) adopted a set of amended arbitration rules that require, subject to some exceptions, disclosure of documents submitted to the tribunal and open hearings. *See* G.A. Res. 68/109, United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) (Dec. 16, 2013); *see also* Kathleen Claussen, *The International Claims Trade*, 41 CARDOZO L. REV. (forthcoming 2020).

Return then to where we began—a ban on disclosure—and reflect on the breadth of the power asserted through such prohibitions. Instead of wanting users of alternative dispute systems to talk about their experiences as one way to legitimate that process or even to develop other methods to engage the public, American Express, AT&T, and the many other companies putting forth those mandates have so much confidence in their authority that they do not see themselves as in need of justifying their power.

Contrast that attitude with the tradition of public processes in courts, which stem from centuries when governments presented spectacles to impress on the public that sovereignties had the power to make and to enforce their laws, including implementing edicts through force. In the last three centuries, democratic obligations changed the norms of judging. Instead of obligations to prove allegiance and loyalty to gods and kings, judges are supposed to demonstrate their independence from the states that empower them. With the rise of popular sovereignty and of democratic egalitarianism, the "rites" of watching sovereign power became "rights" of access not only to observe but also to criticize the exercise of power that adjudication entails. That participation is what the many purveyors of bans on making public information about arbitration aim to shut down.