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Forced Arbitration In The Workplace: A Symposium

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Mandatory Arbitration and Inequality of Justice in Employment

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The Problem of Inequality in Employment

- Growing attention to issue of income inequality.
 - Return to 1920s levels of inequality (Picketty and Saez).
- Declining unionization a cause and feature of economic inequality.
 - Long decline from 35% to 12.5% union representation.
 - Impacts on wages and political voice.
 - But also reduced access to workplace grievance and arbitration procedures provided by union labor contracts.
 - Decline in union provided representation.



Equality in Justice in Employment?

- Proposed definition: Equality in the ability of employees to have access to due process in regard to employment decisions affecting them and the ability to challenge adverse decisions.
- Declining role of unions in providing equality of justice in the workplace.
- Has expansion of individual employment rights filled this gap?
 - Problems of limitations of access to the courts; pro-employer tendencies of the judiciary (e.g. Clermont & Schwab).

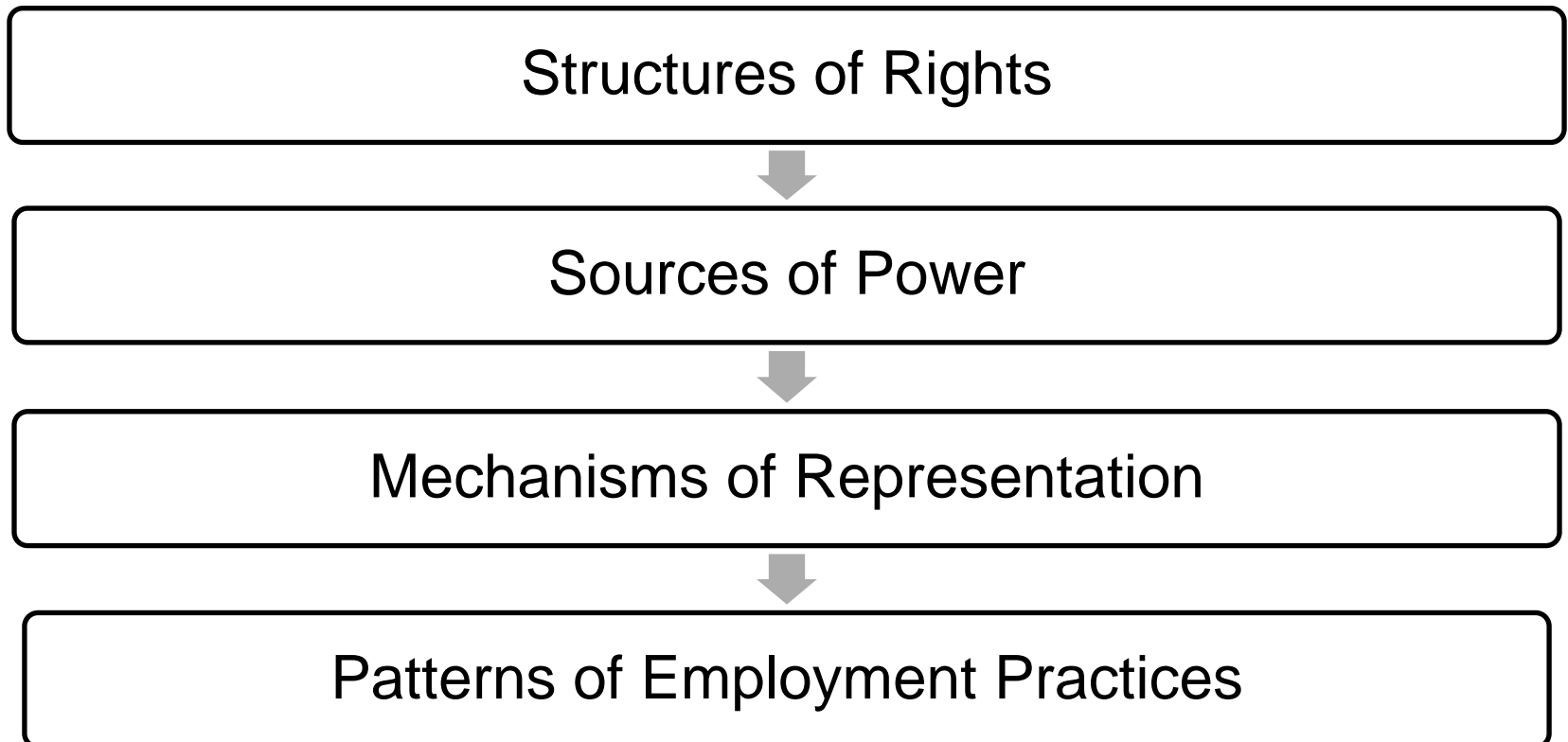


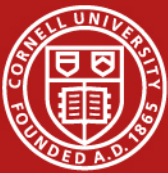
Mandatory Arbitration and Inequality

- Alternative dispute resolution procedures held out as enhancing access for a broader range of claimants – inequality reducing effects of simplicity, low cost.
- Problem of conceiving ADR as a generic category.
- Mandatory arbitration advocated as an access enhancing, inequality reducing process (Estreicher, Sherwyn et al.).
- Does it do this? What is the impact of mandatory arbitration on inequality in justice in employment?



A Model of Individual Rights Employment Relations





Structures of Rights

- Premise of mandatory arbitration that it affects process but not substantive rights (*Gilmer*).
- But modification of procedural rights central to the advantages or disadvantages of mandatory arbitration.



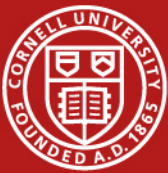
Coverage of Procedures

- Different categories of employment rights enforcement mechanisms:
 - Union represented employees.
 - Employees whose employers choose mandatory arbitration.
 - Employees whose employers do not choose mandatory arbitration, i.e. employees covered by litigation.
 - Employees who individually negotiate arbitration clauses in employment contracts, i.e. those with bargaining power.
- Employer driven variation in structure of procedural rights.



Structure of Rules

- Variation in procedures among employers adopting mandatory arbitration.
 - E.g. employer choice of class action waiver.
- Employer choice of arbitration service provider:
Colvin/Gough survey of employment attorneys:
 - AAA most common provider.
 - Ad hoc arbitration second most common.
 - JAMS third most common.
 - Variation in provider rules and due process, e.g. arbitrator fee provisions.



Sources of Power

- Strike power the source of bargaining leverage in collective bargaining
- Legal claims as a source of power in individual rights employment relations
- Employer response to legal mandates dependent on consequences of violations:
 - Outcome of potential proceedings
 - Time and cost of defending claims
 - Uncertainty and risk avoidance



Mandatory Arbitration: Impact on Sources of Power

- Gross differences in arbitral and litigation outcomes:
 - Overall 21.4% employee win rate in AAA arbitration awards (Colvin 2011) v. 36% (fed) to 57% (state) court trials
 - Average damages of \$23,548 in AAA awards v. \$143,497 (fed) & \$328,008 (state)
 - Large differences, but not controlling for case type.
- E.g. process based selection effects:
 - Could be filtering by summary judgment in litigation
 - But Colvin/Gough survey: summary judgment motions in 54% of recent arbitration cases
- Representation based selection effects?



Mechanisms of Representation

- Effective representation key to access to justice
- Mandatory arbitration as a simplified process allowing pro se representation?
 - Self-representation only in 24.9% of AAA employment arbitration cases; similar to 22.5% in litigation.
- Attorney representation in arbitration (Colvin & Pike):
 - 54.6% of employees v. 76.6% of employers represented by employment law specialist.
 - 10.7% of employees v. 54.6% of employers represented by firm handling multiple arbitration cases that year.



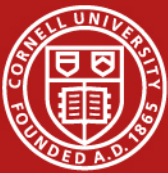
Financing Representation?

- Contingency fee mechanism key to providing access for low to mid income employees
- Impact of mandatory arbitration on contingency fee likely outcomes, averaged across wins and losses:
 - $\$23,548 \times 35\% = \$8,242$ (mandatory arbitration)
 - $\$143,497 \times 35\% = \$50,224$ (fed);
 - $\$328,008 \times 35\% = \$114,803$ (state)
- Colvin/Gough survey average percentage of potential cases accepted:
 - 8.1% in arbitration v. 15.8% in litigation



Patterns of Employment Practices: Impacts of Mandatory Arbitration

- Perceptions of fairness – Eigen and Litwin:
 - Mixed effects: decreased procedural justice; increased interpersonal justice
- Internal grievance procedures:
 - Some internal procedures adopted in conjunction with mandatory arbitration – associated with higher employee usage – possible appellate effect
 - But variation in types of internal procedures and whether or not employers adopt them
 - Inequality across organizations in access to due process



Impacts of Mandatory Arbitration

- Structure of rights:
 - Employer driven differences in processes for enforcing rights
- Sources of power:
 - Lower overall employee outcomes; reduced employer risks
- Mechanisms of representation:
 - Disruption of contingency fee representation; limited self-representation
- Patterns of practices:
 - Mixed effects: some employers enhance internal procedures; wide variation at organizational level



Conclusion: Inequality of Justice in Employment

- Mandatory arbitration disrupting existing mechanisms for enforcing employment rights
- Impact greater on low and middle income employees reliant on contingency fee arrangements for representation
- Employer driven nature of mandatory arbitration increases variation between organizations in justice in employment