

Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?

Jean R. Sternlight¹

“The arc of the moral universe is long, but it bends towards justice.”²

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¹ Michael and Sonja Saltman Professor of Law, UNLV Boyd School of Law. Professor Sternlight is a former editor-in-chief of the Harvard Civil Rights-Civil Liberties Law Review, Volume 18. She thanks the editors of Volume 54 for inviting her to author this piece and for their excellent edits. The tradition of intensive edits lives on! She also thanks her research assistants Arthur Burns, Haley Jaramillo, and Shannon Zahm for their terrific work on this Article.

² This quote is typically attributed to Dr. Martin Luther King, and he certainly did use the phrase. Mychal Denzel Smith, *The Truth About ‘The Arc of the Moral Universe,’* HUFFINGTON POST (Jan. 18, 2018), https://www.huffingtonpost.com/entry/opinion-smith-obama-king_us_5a5903e0e4b04f3c55a252a4, archived at <https://perma.cc/288W-PSVJ>. But, it appears that a similar phrase was used much earlier by Theodore Parker, a nineteenth century abolitionist and Unitarian minister. *Theodore Parker and ‘The Moral Universe,’* NATIONAL PUBLIC RADIO (Sept. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=129609461>, archived at <https://perma.cc/4PQB-TBQ9>.

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INTRODUCTION

Today our employment law provides workers with far more protection than once existed with respect to hiring, firing, salary, and workplace conditions. For example, due to complex interactions between social movements,³ lawmaking, and courts’ legal interpretations, advances have been made to eradicate sexual harassment, and better protections are now afforded to religious, racial, and ethnic minorities; women; LGBTQ employees, as well as to older and disabled persons. One only needs to watch movies or television shows portraying society in the 1950s or 1960s to be reminded how much the working world has changed in a lifetime. In contrast to those shows, featuring white working dads and stay-at-home moms,⁴ television shows today regularly feature female executives, stay-at-home dads, and diversity of many types.⁵

Despite these gains, continued progress⁶ towards justice is currently in jeopardy due to companies’ imposition of mandatory arbitration⁷ on their

³ There is no single definition of “social movement.” Tomiko Brown-Nagin defines “social movements” from a progressive political perspective as “politically insurgent and participatory campaigns for relief from socioeconomic crisis or the redistribution of social, political, and economic capital.” Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1439 (2005) (citation omitted). However, Lani Guinier and Gerald Torres emphasize that social movements can derive from either the political right or left. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2751 (2014) (mentioning social movements pertaining to abolition, women’s suffrage, property rights, and gun rights).

⁴ For example, the television series “Mad Men” portrays life in the advertising world in the 1960s, when white men made the money, white women had babies and worked as secretaries, and minorities were largely invisible. *Mad Men* (AMC television series 2007–2015). Or, similarly, the television series “Good Girls Revolt” gives a glimpse into the news room of the 1960s, when men were reporters and women (girls) were research assistants. *Good Girls Revolt* (Amazon Video 2015–2016); see also LYNN POVICH, *THE GOOD GIRLS REVOLT: HOW THE WOMEN OF NEWSWEEK SUED THEIR BOSSES AND CHANGED THE WORKPLACE* (2012).

⁵ See, e.g., *Here and Now* (HBO Entertainment 2018) (featuring adopted siblings from Liberia, Colombia and Vietnam, gay and gender-fluid characters, a stay-at-home dad, and an executive mom); *Transparent* (Amazon Video 2014–2017) (starring a transgender parent); *Brooklyn Nine-Nine* (Universal Television 2013–2018) (featuring the struggles and triumphs of an openly gay Black police captain in an interracial same-sex marriage); *The Fosters* (Disney-ABC Domestic Television 2013–2018) (depicting the lives of a likable biracial lesbian couple with four adopted children).

⁶ This author appreciates that she is making a value judgment when she calls these changes “progress,” and “better,” and she understands that some might disagree with her judgment. She is taking this perspective for granted rather than trying to convince readers that these advances are good. Of course, she is not so naïve as to believe that judicial interpretations and reinterpretations only advance rather than impede the cause of greater justice. See *infra* Part I. Indeed, the most recent Supreme Court appointment suggests that we may soon be moving backwards for a time in terms of progressive values at the federal level.

⁷ “Mandatory arbitration” refers to employers’ use of form contracts that contain provisions requiring employees to agree to arbitrate rather than litigate future disputes. By contrast,

employees.⁸ By denying their employees access to court, companies are causing employment law to stultify. This impacts all employees, but particularly harms the most vulnerable and oppressed members of our society for whom legal evolution is most important.

In recent years, there has been much debate about the nature of the interplay between social movements, lawmaking, and legal interpretation. Discouraged by the many social and economic disparities that remain in the United States despite new legislation and important court decisions, some commentators argue that progressives should expend more energy on political organizing and social activism and less on litigation and lobbying.⁹ Other scholars are more positive towards the potential impact of litigation, contending that there can be an important feedback relationship between social movements, judicial interpretations, and lawmaking that ultimately advances all three.¹⁰ For example, while recognizing that it is not enough to rely on

arbitration is sometimes entered into knowingly and voluntarily by higher level employees as well. *See infra* Part II.A. While voluntary arbitration can also lead to stultification of legal development, it is less troubling than its mandatory cousin because voluntary arbitration provisions allow employees to choose their desired dispute resolution process.

⁸ This Article draws a sharp distinction between the “employment” setting, by which it means the non-unionized workplace, and the “labor” setting, where employees are assisted and represented by their union. While arbitration often works fairly in the labor setting, this Article critiques its mandatory imposition in the non-unionized employment setting. *See generally* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2702 (2008) (discussing and ultimately critiquing the traditional distinction between employment law and labor law).

⁹ *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (summarizing the work of Critical Legal Scholars and others who argue that progressives’ frequent focus on legislative and judicial reforms, rather than other means of social action, has impeded rather than aided the cause of justice). This Law Review hosted an important conference on this issue twenty years ago. *See Symposium, Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285, 285–88 (1996). For an example of its content, see, for example Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 289 (1996), explaining that “[p]olitical lawyers use litigation, legislation, mass media, and social science research, assessing the consequences of each particular approach by reference to long-term visions of freedom, equality, and solidarity.” *See also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 44–50 (1987) (expressing frustration regarding limited progress to achieve racial justice); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 341 (1991) (asserting, based on empirical research, that it is difficult to achieve meaningful social change through the courts); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW xvi (2015) (urging “an approach [that] includes law reform work but does not center it, and instead approaches law reform work with the caution urged by the critical traditions to which trans politics is indebted and of which it is a part”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475–78 (2001) (suggesting that “a rule-enforcement approach” is not adequate to resolve modern employment discrimination).

¹⁰ *See, e.g.*, Guinier & Torres, *supra* note 3, at 2749 (defining “demosprudence” as “the study of the dynamic equilibrium of power between lawmaking and social movements”); *see also* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009); Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008). Others have similarly cautioned against overreliance on an organizing model. *See, e.g.*, Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. REV. 443, 491 (analyzing poten-

lawyers to protect “discrete and insular minorities,”¹¹ Lani Guinier and Gerald Torres argue that “[l]itigation is an essential tactic for social movements.”¹² William Eskridge, who has traced various “identity-based movements” throughout history, also recognizes that court decisions and social movements influence one another.¹³ But Eskridge also urges that “the judiciary is a necessary safety valve,”¹⁴ emphasizing the need for courts to accommodate both emerging social movements *and* countermovements to ensure the “preservation and adaptation of a peaceable pluralism.”¹⁵

Despite the significant divergences in their normative perspectives, all these commentators agree on two critically important points. First, while litigation may not be the only or best way to achieve progressive social change, it is an important means. Even if new laws are passed,¹⁶ they do not enforce

tial limits and tensions in relying too heavily on an organizing approach, and pointing out that “creative litigation and court-ordered remedies have changed many aspects of the social, political, and economic landscape”).

¹¹ Guinier & Torres, *supra* note 3, at 2749 n.27 (quoting the famous phrase from *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (spelling out a proposed theory of judicial review that relies on protecting the rights of “discrete and insular minorities”).

¹² Guinier & Torres, *supra* note 3, at 2756 n.49 (stating, however, that “litigators too often use state power in service of a principle rather than using principle in service of resistance to state power or other concentrations of power that undermine democracy”). Other scholars have made similar suggestions. *See, e.g.*, JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 4–7* (2005) (describing intersections between litigation on behalf of immigrant workers and union organizing); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 376–405* (1976) (examining historical events leading up to the *Brown* decision); Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CAL. L. REV. CIR. 157, 157 (2015) (considering “the distinct ways in which the civil rights and social movements for marriage equality helped give rise to a durable socio-political transformation, as reflected in the widespread acceptance of the Court’s decision” in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2018)); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1541–44 (2004) (examining the impact of social movements pre- and post-*Brown* on the interpretation of that decision); Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 967–72 (1997) (pondering why New Zealand, with laws that were more accepting of gay rights than the United States, nonetheless felt less gay-friendly to him than the United States).

¹³ William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423 (2001); *see also* Reva B. Siegel & Robert C. Post, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–75 (2007) (proposing a model of “democratic constitutionalism” to understand how forces of public “backlash” help inform constitutional interpretation and urging that such backlash has a constructive purpose).

¹⁴ Eskridge, *supra* note 13, at 423.

¹⁵ *Id.*

¹⁶ In the employment area such new legislation has included Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2012), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (2006), and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2012).

themselves. Laws are only as potent as they are enforceable.¹⁷ Second, social movements impact not only the steps attorneys take but also the decisions judges make. Long ago, the Legal Realists¹⁸ emphasized that judges are influenced by the “mores of the day,”¹⁹ and more recently Lani Guinier and Gerald Torres have explained that lawyers and judges both influence and are influenced by “popular mobilizations.”²⁰ Sol Wachtler took this position further, justifying judicial lawmaking by the fact that judges, even more than legislators, can see close-up how people and entities are impacted by various legal interpretations.²¹

However, as scholars have considered the appropriate relationship between social movements, legislation, and litigation, they have taken for granted a critically important predicate: the availability of a judicial forum. If companies can continue to use mandatory arbitration to eradicate access to court, where judges are potentially influenced by social movements, social movements will no longer be able to assist the overall progressive trend of our jurisprudence. While the phenomenon of mandatory employment arbitration is not new, recent Supreme Court opinions have encouraged an even greater number of employers to use this practice to force employees to take any disputes to arbitration, rather than to court.²² This Article will consider this reality and its detrimental implications for the evolution of legal precedent affecting our most vulnerable employees.

For those interested in the relationship between social movements, lawmaking, litigation, and mandatory arbitration, the current and powerful

¹⁷ See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) (discussing the critical enforcement role played by private litigation in the United States); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (same).

¹⁸ For the most famous statement of legal realism, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), in which Holmes said, “The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law.” See also BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 104 (1921); see also KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 24 (1960) (observing that legal development is affected by the surrounding occasion and epoch, as well as by pressures of legal doctrine). For a general discussion of legal realism, see Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50 (Martin P. Golding & William A. Edmundson, eds., 2005).

¹⁹ CARDOZO, *supra* note 18; see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 96–97 (1982) (explaining that “the legal fabric, and the principles that form it, are good approximations of one aspect of the popular will, of what a majority in some sense desires”); LLEWELLYN, *supra* note 18. By contrast, as many have pointed out, it is not accurate to say that Legal Realists focused on what judges ate for breakfast! See, e.g., Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1923 (2004).

²⁰ Guinier & Torres, *supra* note 3, at 2745.

²¹ Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 17 (1990) (“Unlike the legislature, in a conflict of any importance the judiciary issues an opinion which, if it is ‘worth its salt,’ positions the case in the contextual, historical, and cultural dimensions making up the legal landscape.”). For a contrary perspective on the propriety of judicial lawmaking, see Robert Justin Lipkin, *Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1132 (2006) (critiquing the practice).

²² See *infra* Parts II.A–B.

#MeToo movement offers a perfect, albeit depressing, case study.²³ While the #MeToo movement has already exposed many sordid high-profile incidents of alleged harassment, sparked substantial outrage in traditional and social media, and become a talking point in public events and workplaces throughout the country, for the most part this outrage has not yet trickled down to protect ordinary women (and men) in ordinary workplaces. To the contrary, the law of sexual harassment still has a long way to go to catch up with the sentiments being expressed in the #MeToo movement.²⁴ In the past, one might have expected that the new cultural attitudes surrounding sexual harassment might lead courts to rethink some of their prior restrictive decisions on sexual harassment.²⁵ However, to the extent that employers are using mandatory arbitration to keep employment disputes out of court, even as powerful a social force as the #MeToo movement may not produce the progressive legal changes one might otherwise have expected. What is true of the #MeToo movement is true of other existing and potential forces for social change as well, such as social movements that might advocate for greater diversity, privacy, or income equality. To the extent companies are permitted to use arbitration to eliminate access to courts, they prevent our law from evolving to become more just. Mandatory arbitration has appropriately been criticized on many constitutional, statutory and policy grounds, and indeed this author has been such a critic,²⁶ but the potential of mandatory arbitration to harm disempowered persons by stultifying legal development has not yet received sufficient attention.

The remainder of this Article will proceed in four parts. Part I will discuss the important role courts have historically played in reinterpreting existing texts to move towards greater justice. While the Article will focus on employment law, it will also provide examples of judicial reinterpretation from other contexts to demonstrate the impact of social movements on judicial decisions. Part II will then summarize employers' increasing imposition

²³ See generally L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. (forthcoming 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236309, archived at <https://perma.cc/N6KR-RLS7>.

²⁴ See *infra* Part III.B.

²⁵ See *id.* for a discussion of the disconnect between assumptions of the #MeToo movement and existing case law.

²⁶ See generally Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005) (pointing out that private companies should not be free to insulate themselves from liability); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015) (critiquing the impact of mandatory arbitration on employees); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RES. 669 (2001) (arguing that mandatory arbitration often impinges on the Seventh Amendment right to jury trial); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) (contending that the Supreme Court's endorsement of mandatory binding arbitration is erroneous as a matter of statutory interpretation and undesirable as a matter of public policy).

of mandatory arbitration clauses and explore how this phenomenon has severely limited employees' access to court, thereby impeding progressive development of law in the employment context. Part III will then discuss the #MeToo social movement as a case study of how the imposition of mandatory arbitration stymies the progressive evolution of law. It will show that while this social movement has been powerful, employers' use of arbitration clauses in the employment setting has and will significantly prevent courts from reevaluating the law of sexual harassment, thereby blocking progress that might otherwise have occurred. Finally, Part IV will call for legislative reform. Legislation has already been introduced in Congress that would limit the use of mandatory arbitration to varying degrees, and one can hope that the arguments set out in this Article will provide greater impetus to its passage.

I. COURTS' INTERPRETATIONS AND REINTERPRETATIONS (OFTEN) BRING GREATER JUSTICE

Judicial interpretations evolve, often but certainly not inevitably, in a way that reflects increasingly progressive societal values. Such rulings are particularly important for the least powerful groups within our society—such as women, racial or ethnic minorities, poor persons, undocumented immigrants, LGBTQ persons, elderly persons, and the disabled. For example, while the Supreme Court in *Plessy v. Ferguson* held in 1896 that racially segregated facilities could be permissible if “equal, but separate,”²⁷ nearly sixty years later the Court unanimously held in *Brown v. Board of Education* that “[s]eparate educational facilities are inherently unequal.”²⁸ This reversal did not result from a change in the underlying Constitutional provisions,²⁹ but instead from a new judicial interpretation of those provisions. This judicial reinterpretation was surely influenced by social movements in support of racial justice.³⁰ Similarly, whereas the Court in *Bowers v. Hardwick*³¹ found in 1986 that a ban on homosexual sodomy did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court concluded just

²⁷ *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896).

²⁸ *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

²⁹ Both *Plessy* and *Brown* were interpreting the same Fourteenth Amendment. By contrast, the Supreme Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857), that “a negro, whose ancestors were imported into [the United States] and sold as slaves,” could never be a citizen of the United States pursuant to the Constitution, was effectively reversed through ratification of the Fourteenth Amendment of the Constitution in 1868 (granting citizenship to all persons born in the United States).

³⁰ See KLUGER, *supra* note 12 (discussing social and political movements leading up to *Brown*).

³¹ 478 U.S. 186, 191 (1986) (famously stating that the Constitution did not confer “a fundamental right to engage in homosexual sodomy”).

the opposite in *Lawrence v. Texas*³² in 2003. Again, the new decision reflected judicial reinterpretation of existing language, rather than passage of new law. And again, the decision was responsive to a powerful LGBT movement.³³ In *Lawrence*, the Court explained that the Constitution protects “personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing,”³⁴ and that homosexuals, like others, “may seek autonomy for these purposes.”³⁵ Most recently the Court expressly reversed its infamous decision in *Korematsu v. United States*,³⁶ now stating that decision was “gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”³⁷

In several notable cases in the employment arena, courts have similarly enunciated new interpretations of existing statutes to provide employees with additional rights. The primary federal law protecting employees from discrimination is Title VII of the Civil Rights Act of 1964.³⁸ The key language of the statute is quite simple, stating:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment because of the individual’s race, color, religion, sex, or national origin³⁹

Although the explicit language of the statute does not apply to unconscious discrimination, sexual harassment, or the rights of LGBT persons, courts have, over time, interpreted Title VII to cover these matters and many more.⁴⁰

One early expansive judicial interpretation of Title VII was *Griggs v. Duke Power*.⁴¹ In that 1971 case, the Supreme Court was asked to address whether Title VII prohibited an employer from requiring a high school education or asking employees to pass a general intelligence test in order to be

³² 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

³³ See generally LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* (2015) (recounting history of LGBT movement both before and after *Bowers* and *Lawrence*).

³⁴ *Lawrence*, 539 U.S. at 574.

³⁵ *Id.*

³⁶ *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding the constitutionality of the executive order that ordered Japanese-Americans into internment camps during World War II).

³⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). Granted, the new *Trump* decision allows much of the odious racial profiling that made the *Korematsu* decision so ignominious.

³⁸ 42 U.S.C. § 2000e et seq. (1964).

³⁹ 42 U.S.C. § 2000e-2(a).

⁴⁰ See *infra* notes 41–88 and accompanying text.

⁴¹ 401 U.S. 424 (1971).

hired into the better-paying departments.⁴² Such a requirement did not explicitly discriminate on the basis of race, and plaintiffs could not prove that the requirements were deliberately adopted in order to disadvantage Black persons or others,⁴³ but plaintiffs claimed that the requirements had a racially discriminatory impact and ought to be proscribed.⁴⁴ The Court found that plaintiffs could prove a violation of Title VII absent proof of discriminatory intent so long as the challenged practices had a “disparate impact.”⁴⁵ It explained that because the goal of Congress was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,”⁴⁶ even tests that are neutral on their face or neutral in terms of intent “cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”⁴⁷ Thus, recognizing that the black plaintiffs had “long received inferior education in segregated schools,”⁴⁸ the Court found that mere apparent equality of opportunity was insufficient, and that practices must be non-discriminatory not only in form but also in operation.⁴⁹ Commentator William Eskridge finds that *Griggs* is best understood in political terms:

Griggs is explicable neither as an exercise in legal analysis nor as an effort by the Justices to read their own values into the statute. Instead, it reflected an emerging political consensus in Washington, D.C., that Title VII would be a dead letter unless regulators and judges could examine employment practices that had discriminatory impacts.⁵⁰

This Supreme Court decision gave rise to an entirely new line of cases that further developed disparate impact protections in employment law.⁵¹

A few years after *Griggs*, the Supreme Court addressed another critically important lacuna in federal employment discrimination law: whether

⁴² *Id.* at 426–27.

⁴³ *Id.* at 432.

⁴⁴ *Id.*

⁴⁵ See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 953–67 (2005).

⁴⁶ *Griggs*, 401 U.S. at 429–30.

⁴⁷ *Id.* at 430.

⁴⁸ *Id.*

⁴⁹ *Id.* at 431 (stating that “tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox.”). The Court explained that “[t]he touchstone is business necessity,” meaning that “[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” *Id.*

⁵⁰ Eskridge, *supra* note 13, at 495.

⁵¹ CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 167–229 (9th ed. 2017). See generally Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972) (telling the story, from a litigation perspective, of how advocates convinced the Supreme Court to adopt a new definition of discrimination).

and how Title VII regulates sexual harassment. The Court's decisions on gender issues can be considered in the context of ongoing social and political activism pushing for feminism and women's rights.⁵² Prior to the Court's unanimous ruling in *Meritor Savings Bank v. Vinson*,⁵³ it was unclear whether Title VII targeted only "economic" or "tangible" discrimination such as terminations, refusals to hire, or pay disparities.⁵⁴ In that case, Michelle Vinson, a teller-trainee at a bank, brought a different kind of claim. She alleged that her supervisor coerced her to have sexual relations with him forty or fifty times over a three year period,⁵⁵ touched her in public, exposed himself to her, and even raped her,⁵⁶ thereby creating a "hostile work environment."⁵⁷ The question for the Supreme Court was whether—assuming these claims could be proven—such conduct would violate Title VII.⁵⁸ The Justices held in 1986 that such claims were indeed cognizable under Title VII,⁵⁹ once again creating an entirely new line of jurisprudence.⁶⁰

⁵² See, e.g., ESTELLE B. FRIEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* (2007) (placing United States' women's movement in an international and interdisciplinary context). See also CATHERINE MACKINNON, *BUTTERFLY POLITICS* (2017) (arguing that small actions taken by social and political movements have resulted in major systemic changes in the legal regimes governing women).

⁵³ 477 U.S. 57 (1986).

⁵⁴ The defendant argued that even if sexual harassment could constitute gender discrimination, it violated Title VII only when the purported victim suffered a tangible economic loss. See *id.* at 64. As Professor Vicki Schultz has explained, women lost some of the early sexual harassment claims because courts tended to reason that the women's adverse treatment was not "because of sex," as provided in Title VII, but rather because the women refused to engage in sexual relationships with their supervisors. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1701–02 (1998). See also CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 59–77 (1979) (describing rulings in some of the early Title VII cases).

⁵⁵ *Meritor*, 477 U.S. at 60.

⁵⁶ *Id.*

⁵⁷ The court of appeals found that a violation of Title VII could be predicated on two types of sexual harassment: harassment that conditioned the provision of employment benefits on giving of sexual favors; and harassment that created a hostile or offensive work environment. See *id.* at 62.

⁵⁸ The district court had denied relief on the grounds that even assuming the facts were as plaintiff alleged, "that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.* at 61. Thus, the trial court found plaintiff was not the victim of sexual harassment or sexual discrimination while employed at the bank. *Id.*

⁵⁹ The Court relied on Equal Employment Opportunity Commission ("EEOC") Guidelines defining sexual harassment and pointed out that the language of Title VII did not preclude hostile environment sexual harassment claims. *Id.* at 64–67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (explaining that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'").

⁶⁰ A few years later, in *Harris v. Forklift Sys. Inc.*, the Court further explained that a hostile environment exists where, based on consideration of various circumstances, the workplace was objectively hostile to a reasonable person and subjectively hostile to the plaintiff. 510 U.S. 17, 21–22 (1993) (noting that the circumstances to be considered include the frequency and severity of the conduct, whether the conduct was physical or verbal, and whether the conduct interfered with the employee's work performance). See generally Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 *YALE L.J. FORUM* 152,

Then, in *Price Waterhouse v. Hopkins*,⁶¹ the Supreme Court considered another crucial question that was not explicitly addressed in Title VII: whether decisions based on gender stereotyping could constitute gender discrimination. Ann Hopkins, a senior manager in a top accounting firm, was denied partnership. She claimed the denial resulted from gender discrimination evidenced by comments made by some of the male partners,⁶² and she presented expert testimony that the partnership selection process “was likely influenced by sex stereotyping.”⁶³ While it may seem obvious today, it was far from clear at the time that gender stereotyping should be recognized as a form of gender discrimination cognizable under Title VII.⁶⁴ Ruling in plaintiff’s favor on this issue, the Court proclaimed in 1989 “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype with their group.”⁶⁵ It reasoned:

An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.⁶⁶

While still requiring plaintiffs to prove that the stereotyping was more than “stray remarks,”⁶⁷ and that gender played a role in the decision,⁶⁸ this expansive decision opened the door to a broad array of approaches that employees

153–60 (2018) (discussing the line of hostile work environment sexual harassment cases following *Meritor*).

⁶¹ 490 U.S. 228 (1989).

⁶² Comments in the file from various partners, including Hopkins’s supporters, contained statements that Hopkins was “macho,” that she “overcompensated for being a woman,” that she should take “a course at charm school,” that some objected to her use of profanity “because it’s a lady using foul language,” and that Hopkins’ candidacy should be supported because she “had matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but more appealing lady ptr [sic] candidate.” *Id.* at 235.

⁶³ *Id.* The witness was Dr. Susan Fiske, who based her comments on her review of the partner comments in the file but admitted “she could not say with certainty whether any particular comment was the result of stereotyping.” *Id.*

⁶⁴ Indeed, the Supreme Court itself infamously relied on gender discrimination in *Bradwell v. Illinois*, 83 U.S. 130 (1872), when it refused to reverse the State of Illinois’s determination that Mrs. Myra Bradwell should be denied a law license. While the majority opinion based the denial on its conclusion that the right to be admitted to practice law is not one of the “privileges and immunities” afforded Constitutional protection under the Fourteenth Amendment, *id.* at 139, Justice Bradley concurring based his decision on the “wide differences in the respective spheres and destinies of man and woman,” *id.* at 141 (Bradley, J., concurring in the judgment). He stated in particular: “Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.” *Id.*

⁶⁵ *Price Waterhouse*, 490 U.S. at 251; *but cf.* *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1104–12 (9th Cir. 2006) (holding that a woman could be fired for failure to wear makeup because the company’s dress code placed an equal burden on men and women).

⁶⁶ *Price Waterhouse*, 490 U.S. at 251.

⁶⁷ *Id.* at 277 (O’Connor, J., concurring in the judgment).

⁶⁸ *See id.*

could rely on in future cases.⁶⁹ William Eskridge partially attributes the Court's more expansive approach to sexual harassment "to the normative consensus that the women's movement has brought to the issue."⁷⁰

Among the important issues left open after *Price Waterhouse* was the extent to which Title VII should be interpreted to protect gay, lesbian, and transgender persons against gender discrimination or sexual harassment.⁷¹ For a number of years, it seemed clear that "Title VII's prohibition of 'sex' discrimination applied only to discrimination on the basis of gender and should not be judicially extended to include sexual orientation or gender identity."⁷² However, drawing on the power of strong social movements,⁷³ LGBTQ employees persisted in seeking the protection of Title VII, eventually securing more favorable results. In *Oncale v. Sundowner Offshore Services, Inc.*,⁷⁴ the Supreme Court held that a man who claimed that his male co-workers had sexually harassed him could state a claim under Title VII,⁷⁵ but did not directly address the question of whether discrimination on the basis of sexual orientation was proscribed by Title VII.⁷⁶ The Court concluded that even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it

⁶⁹ *Id.* at 251–52 ("By focusing on Hopkins' specific proof . . . we do not suggest a limitation on the possible ways of proving stereotyping played a motivating role in an employment decision.").

⁷⁰ Eskridge, *supra* note 13, at 497.

⁷¹ See Sheerine Alemzadeh, *Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment*, 37 N.Y.U. REV. L. & SOC. CHANGE 339, 339 (2013) (arguing that "[s]exual harassment jurisprudence is predicated on heteronormative constructions of desire and power in the workplace" and advocating that laws be revised and enacted to better protect all workers).

⁷² *DeSantis et al. v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (rejecting claims of employees at several different companies who claimed they were fired or forced to quit because they were homosexual). The *DeSantis* court relied on *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (finding a claim of an employee who alleged discrimination on the ground that she was going through a sex change was not protected under Title VII) and *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (refusing to apply Title VII to protect claims of discrimination on the basis of sexual preference).

⁷³ See, e.g., FADERMAN, *supra* note 33; see generally ERIC MARCUS, GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS (2009).

⁷⁴ 523 U.S. 75 (1998).

⁷⁵ *Oncale*, who worked as a roustabout on an eight-man crew of an oil platform in the Gulf of Mexico, alleged that his co-workers committed numerous sex-related, humiliating actions against him, and that some physically assaulted him and even threatened him with rape. *Id.* at 77.

⁷⁶ The trial court had granted summary judgment to the employer, stating that a male has "no Title VII cause of action for harassment by male co-workers." *Oncale*, 523 U.S. at 75. But the Supreme Court found that Title VII protects men as well as women, *id.* at 78, that persons can claim sex discrimination perpetrated by persons who share their same gender, *id.* at 79, and that Title VII covers cases where it can be shown that the workplace was "permeated with discriminatory intimidation, ridicule, and insult and that that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *id.* at 78 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

enacted Title VII,⁷⁷ such claims could be brought under Title VII so long as the purported victim could show that “the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination . . . because of . . . sex.’”⁷⁸

Post-*Oncale*, as public support for LGBTQ people increased,⁷⁹ courts addressed additional questions of whether discrimination on the basis of sexual orientation or transgender status could constitute “discrimination on the basis of sex” under Title VII.⁸⁰ Acting en banc, two federal courts of appeals recently held that it could.⁸¹ First, the Seventh Circuit, in *Hively v. Ivy Tech*, took “a fresh look at [its] position in light of developments at the Supreme Court extending over two decades”⁸² and held that “discrimination on the basis of sexual orientation is a form of sex discrimination.”⁸³ Then, in *Zarda v. Altitude Express*, the Second Circuit also found that discrimination on the basis of sexual orientation is proscribed by Title VII.⁸⁴ The Second Circuit noted that it had “previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII,”⁸⁵ and that these prior decisions were consistent with “the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission

⁷⁷ *Id.* at 79 (observing, in an opinion written by Justice Scalia, that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

⁷⁸ *Id.* at 80–82 (remanding the case so that plaintiff could try to prove that the sexually assaultive conduct was engaged in “because of sex”). The Court observed that one way to prove that the conduct was “because of sex” would be to show that the perpetrator was himself homosexual, but the Court also recognized that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” *Id.* at 79.

⁷⁹ For a discussion of how LGBTQ activism influenced the fight for gay marriage, see Goldberg, *supra* note 12. With regard to social movements fighting on behalf of transgender persons, see SPADE, *supra* note 9.

⁸⁰ The Supreme Court’s *Oncale* decision had sidestepped these important issues. See 523 U.S. at 75.

⁸¹ *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 340–41 (7th Cir. 2017); *Zarda v. Altitude Express*, 883 F.3d 100, 108 (2d Cir. 2018).

⁸² *Hively*, 853 F.3d at 340–41 (reversing grant of motion to dismiss claim brought by Hively, an openly lesbian part-time professor).

⁸³ *Id.* at 341. The Seventh Circuit also took note of a prior Second Circuit decision in which a concurring opinion urged the Circuit to rethink the question of whether Title VII covers sexual orientation claims, emphasizing the changed legal landscape in the past two decades and pointing to multiple legal arguments that had not previously been considered. *Id.* at 342 (citing *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring)).

⁸⁴ *Zarda*, 883 F.3d at 108. Plaintiff Donald Zarda claimed he was fired from his job as a sky diving instructor because he came out to a client as gay, in order to put her at ease with how he would be strapped to her during the dive. *Id.* As the Second Circuit describes his claim, Zarda alleged “he failed to conform to male sex stereotypes by referring to his sexual orientation.” *Id.* at 107.

⁸⁵ *Id.*

(“EEOC”).”⁸⁶ However, the court observed “legal doctrine evolves and in 2015 the EEOC held, for the first time, that ‘sexual orientation is inherently a “sex-based consideration;”’ accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”⁸⁷ Discussing the evolution of Title VII interpretation since passage of the statute, the Second Circuit explained, “[B]ecause Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used.”⁸⁸

Expansive, progressive judicial decision-making in the context of employment law is not limited to issues pertaining to sexual harassment or LGBTQ status, or even to Title VII. The Ninth Circuit Court of Appeals recently considered changing social attitudes in *Rizo v. Yovino*⁸⁹ when it held en banc that employers can no longer evade the restrictions of the Equal Pay Act⁹⁰ by calculating employees’ salaries based on their prior salary.⁹¹ For many years it was widely assumed that prior salary was a fair measure of one’s worth, and a 1982 Ninth Circuit decision had allowed the employer to consider prior salary along with a series of other factors including “ability, education, [and] experience.”⁹² Rejecting this precedent, the *Rizo* court con-

⁸⁶ *Id.* The two prior Second Circuit cases that disallowed sexual orientation claims under Title VII were *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

⁸⁷ *Zarda*, 883 F.3d at 107 (quoting Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015)).

⁸⁸ *Zarda*, 883 F.3d at 115 (citing, also, to Supreme Court’s recognition of hostile work environment claims, even though those do not appear in the statutory text). Along similar lines, the Sixth Circuit Court of Appeals, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, found that “[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.” 884 F.3d 560, 571 (2018). The Sixth Circuit further found that “Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.” *Id.* at 577.

⁸⁹ 887 F.3d 453 (9th Cir. 2018).

⁹⁰ The Equal Pay Act provides, in relevant part, that no employer shall pay employees of one sex lower wages than those of the opposite sex for jobs of “equal skill, effort, and responsibility, and which are performed under similar working conditions,” except pursuant to a seniority system, a merit system, a system that measures quantity or quality of production, or “a differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1).

⁹¹ The Ninth Circuit held, “[P]rior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.” *Rizo*, 887 F.3d at 456–57.

⁹² *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 874, 877–78 (9th Cir. 1982). The first Ninth Circuit panel to consider *Rizo* felt compelled, by *Kouba*, to allow consideration of prior salary by employers as long as that factor “was reasonable and effectuated some business policy,” *Rizo v. Yovino*, 854 F.3d 1161, 1166 (9th Cir. 2017), *rev’d* 887 F.3d 453 (9th Cir. 2018). However, the en banc panel instead found that “*Kouba*, however construed, is inconsistent with the rule that we have announced in this opinion, [and therefore] it must be overruled.” *Rizo*, 887 F.3d at 468.

sidered not only the text of the statute,⁹³ “basic principles of statutory interpretation,”⁹⁴ legislative history of the Equal Pay Act,⁹⁵ and decisions from other federal courts of appeals,⁹⁶ but also new interpretations of public policy. The en banc panel expressly noted that “over fifty years after the passage of the Equal Pay Act, the wage gap between men and women is not some inert historical relic of bygone assumptions and sex-based oppression,”⁹⁷ but rather a gap that continues to persist and “costs women in the U.S. over \$840 billion a year.”⁹⁸ Perhaps the decision in part reflects the power of the #MeToo movement. A 2018 survey of human resources managers found that 48% of companies surveyed stated they were reviewing their pay policies to check for gender inequities.⁹⁹

As the decisions summarized above demonstrate, our understandings of statutes and constitutions evolve over time, influenced by new social perspectives and frequently (albeit not inevitably) leading to a greater protection of rights.¹⁰⁰ Not so very long ago, many in the United States assumed that it was acceptable to separate races in schools, housing, transportation, and marriage; to preclude homosexuals from marrying one another; to hire or refuse to hire people for certain jobs based on their race or gender; to state that a woman’s place was primarily in the home; to rely freely on sexual or

⁹³ Rizo, 887 F.3d at 460–61.

⁹⁴ *Id.* at 461.

⁹⁵ *Id.* at 462–64.

⁹⁶ *Id.* at 465–68.

⁹⁷ *Id.* at 468.

⁹⁸ *Id.* at 468 (quoting Brief of Equal Rights Advocates as Amicus Curiae et al. for Plaintiff-Appellee at 11, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018)) (citing National Partnership for Women and Families, *America’s Women and the Wage Gap 2* (2017), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>, archived at <https://perma.cc/KYU6-WUWX>).

⁹⁹ Julie Carpenter, *#MeToo and #TimesUp Have Pushed 48% of Companies to Review Pay Policies*, CNNMONEY (Feb. 28, 2018), <https://money.cnn.com/2018/02/28/pf/gender-pay-gap/index.html>, archived at <https://perma.cc/N4H9-SE6E> (citing Challenger, Gray & Christmas, Inc., *Pay Parity Survey: Reviewing Compensation Policies After #TimesUp*, <http://www.challengergray.com/press/press-releases/pay-parity-survey-half-companies-reviewing-compensation-policies-after-timesup>, archived at <https://perma.cc/35TD-BS2F> (reporting on survey of 150 human resources executives from companies of various sizes in industries throughout the United States)).

¹⁰⁰ Of course, it is also true that rights are sometimes contracted in the employment arena as in others, whether through legislation or court decision. For instance, the Court’s decisions in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) have widely been interpreted as letting employers largely off the hook for sexual harassment so long as the employer makes efforts to provide training and an internal complaint system. See, e.g., Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 697–715 (2000). Similarly, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) failed to recognize that sexual harassment may exist even though the harasser is not motivated by sexual desire. A number of scholars have critiqued this perspective on sexual harassment. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1701–02 (1998). Moreover, in *Vance v. Ball State U.*, 570 U.S. 421, 424 (2013), the Court held that a supervisor is defined narrowly as being someone capable of taking “tangible employment actions against the victim”; and in *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001), the Court limited employees’ ability to recover on Title VII retaliation claims.

other stereotypes; or to make sexual comments or jokes, and to engage in non-consensual touching, in the workplace setting. These dramatic evolutions in judicial thinking have not happened in a vacuum, but rather in a context of powerful social movements and cultural changes. But, with the rise of mandatory employment arbitration, it is not clear that social movements and cultural changes will continue to have the legal impact they once did.

II. THE RISE AND STULTIFYING IMPACT OF MANDATORY EMPLOYMENT ARBITRATION

For social movements and judicial decisions to influence one another, there must be opportunities for judicial intervention. Yet the rapidly growing phenomenon of mandatory employment arbitration in the United States is sharply limiting the number of employees who have access to court. Alexander Colvin has recently estimated that over 50% of the non-unionized private-sector U.S. workforce is covered by mandatory arbitration clauses.¹⁰¹ In the United States, every employee who is covered by such a clause must bring any claims against their employer via arbitration rather than in court.¹⁰² To acclimate readers to what is often an opaque system, this Part will discuss what employment arbitration is, whether it is legal, and how its impact has generally been discussed in the past. It will then analyze how the growth of mandatory employment arbitration uniquely harms the most vulnerable members of our society by stultifying the development of progressive employment law.

A. *What is Employment Arbitration?*

To appreciate the impact mandatory arbitration has on individuals and on the development of the law, one must first understand how employment

¹⁰¹ Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More Than 60 Million American Workers*, ECON. POLICY INST. 55 (Sept. 27, 2017), epi.org/135056, archived at <https://perma.cc/CET2-T2VH> (reporting results of study showing that 56% of nonunion employees in surveyed companies were subject to mandatory arbitration provisions). Colvin cites earlier work, showing much lower numbers, leading him to conclude that the use of mandatory arbitration clauses has grown very substantially in the past thirty years. *Id.* at 4. For another recent empirical study of employment arbitration, see Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies 2* (2017), THE EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, <https://ssrn.com/abstract=3063359>, archived at <https://perma.cc/RN3Z-FWM2> (finding that 80% of Fortune 100 companies, “including subsidiaries or affiliates, have used arbitration agreements in connection with workplace-related disputes since 2010” and that half of those have used arbitral class action waivers).

¹⁰² See *infra* Part II.B. It is also true that if the employer has claims against the employee, such as for breach of contract or defamation, those too must be brought in arbitration, absent a contractual exception.

arbitration “agreements” come into existence.¹⁰³ Some commentary on the subject gives the impression of an idealized model in which employees and employers sit down together and discuss how they would prefer to resolve future legal disputes, should they arise. For example, Justice Gorsuch’s opening sentence in the Supreme Court’s recent 5–4 decision in *Epic Systems Corp. v. Lewis* asks: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?”¹⁰⁴ Occasionally this idealized model may accurately reflect the way employment arbitration clauses come into existence. High-level executives or individuals with unique talents may indeed negotiate personal employment contracts, and such contracts may well include arbitration clauses.¹⁰⁵ In addition, some unions may negotiate arbitration clauses that require members to arbitrate not only disputes arising under the contract itself, but also statutory claims.¹⁰⁶

Generally, however, so-called “agreements” to arbitrate are unilaterally imposed by employers on employees who likely are not aware the terms exist, and, in any case, have little choice but to accept the provision if they want to get or keep their jobs.¹⁰⁷ While the Federal Arbitration Act does require arbitration agreements to be “written,”¹⁰⁸ they need not be signed, and courts have upheld “agreements” formed in a variety of ways.¹⁰⁹

¹⁰³ Commentators have debated whether form arbitration clauses deserve to be called “agreements.” In a legal sense, courts have made clear that they, like other contracts of adhesion, are enforceable. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW* (2014). On the other hand, it is also clear that employees do not typically “agree” to these terms in any meaningful sense, as they often are not aware of the terms much less knowledgeable about their implications. See Jeff Sovern et al., “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 2–5 (2015).

¹⁰⁴ 138 S. Ct. 1612, 1619 (2018). This case holds that companies can use arbitration clauses to prevent workers from filing joint claims or class actions, notwithstanding the protections afforded by the National Labor Relations Act to collective action. *Id.* at 1624–25.

¹⁰⁵ See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006). The arbitration clauses entered into by top Fox News broadcasters fall in this category. See *infra* Part III.C.

¹⁰⁶ See generally Floyd D. Weatherspoon, *Incorporating Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employer and the Union*, 38 DEL. J. CORP. L. 1025 (2014).

¹⁰⁷ See Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?* 29 OHIO ST. J. ON DISP. RESOL. 59, 60, 63–65 (2014) (observing that while, in early years, many employment arbitration clauses were individually negotiated by higher level executives, more recently the bulk of clauses are broadly promulgated by employers to cover lower level employees). See generally RADIN, *BOILERPLATE*, *supra* note 103; Sovern et al., “*Whimsy Little Contracts*,” *supra* note 103.

¹⁰⁸ 9 U.S.C. § 2 (2016).

¹⁰⁹ See cases cited *infra*. See also *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002) (holding that mandatory arbitration provision in employee handbook was enforceable because it was supported by adequate consideration); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (holding that arbitration clause was separate from other provisions of employee handbook and constituted an enforceable contract). *But see Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 209 (5th Cir. 2012) (finding that arbitration agree-

Mandatory arbitration “agreements” are often imposed in the fine print of employment or related applications,¹¹⁰ employee handbooks, envelope stuffers, computer click-throughs, or e-mails.¹¹¹ The dissent in *Epic Systems*, in fact, noted that the clauses at issue there were e-mailed by several companies to employees who were told if they continued to work at the companies they would be deemed to have accepted the terms.¹¹² Studies have shown that these kinds of clauses are not, in fact, generally read or understood by employees;¹¹³ certainly these are not the knowing agreements alluded to by Justice Gorsuch.¹¹⁴ Yet these are precisely the types of provisions imposed by employers in a broad array of industries, including restaurants,¹¹⁵ big box

ment in employee handbook was illusory); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997) (holding employee did not agree to arbitrate claims by acknowledging receipt of revised employee handbook).

¹¹⁰ The claims brought to the Supreme Court reflect that employer promulgated clauses are more common than individually negotiated clauses. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (noting that SEC form U-9 requires all claims by certain securities industry employees to be arbitrated); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (signed employment application); *EEOC v. Waffle House*, 534 U.S. 279, 283 (2002) (signed employment application); *Rent-a-Center West Inc. v. Jackson*, 561 U.S. 63, 73 (2010) (arbitration clause imposed as condition of employment).

¹¹¹ Alexander Colvin finds that “[a]lthough mandatory employment arbitration is usually established by having employees sign an arbitration agreement, typically at the time of hiring, in some instances businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization’s employment policies.” Colvin, *supra* note 101, at 5.

¹¹² *Epic Systems*, 138 S. Ct. at 1636 n.2 (Ginsburg, J., dissenting). Employees who continue to work for a company that has imposed arbitration may well be deemed to have “agreed” to arbitration. *See Seawright v. Am. Gen. Fin. Servs.*, 507 F.3d 967, 972–73 (6th Cir. 2007) (holding that employment arbitration provision was enforceable where employer publicized new program and mailed letters to employees notifying them that they would be covered if they did not quit); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734–36 (7th Cir. 2002) (holding employee was bound by arbitration provision imposed after her hiring, even though employee swore she had never seen the brochure introducing the program and could only have avoided program by quitting her job).

¹¹³ *See, e.g.*, Sternlight, *Disarming Employees*, *supra* note 26, at 1320. *See also* Govern et al., “*Whimsy Little Contracts*,” *supra* note 103.

¹¹⁴ *Epic Systems*, 138 S. Ct. at 1619. *Cf.* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RES. 559, 569 (2001) (recognizing that employees may well not focus on arbitration requirement in employment agreement but asserting that such provisions should nonetheless be as enforceable as other contractual terms).

¹¹⁵ *See Waffle House*, 534 U.S. at 282–83; *Hightower v. GMRI, Inc.*, 272 F.3d 239, 240–41 (4th Cir. 2001) (Olive Garden); *Dantz v. Am. Apple Grp., LLC.*, 123 F. App’x 702, 703 (6th Cir. 2005) (Applebee’s).

retail establishments,¹¹⁶ securities firms,¹¹⁷ law firms,¹¹⁸ tech companies,¹¹⁹ and start-ups like Uber.¹²⁰

So what does employment arbitration actually look like, and how does it work? Arbitration can be defined as “a process in which a third party who is not acting as a judge renders a decision in a dispute.”¹²¹ Though the details of this process will differ situation-to-situation based on how the provision is written,¹²² arbitration in the employment context tends to look a certain way. Employment arbitration is typically initiated by a pleading that looks fairly similar to a complaint that might be filed in court.¹²³ Subject matter may include statutory claims for discrimination or violations of other federal or state statutes. It can also include common law claims for breach of contract, defamation, business torts, or personal injury. Sometimes claims are brought by the employer against the employee, rather than by the employee against the employer.¹²⁴ Once the claim is filed, an arbitrator is selected, often pursuant to rules set by a private organization such as the American Arbitration Association (AAA) or JAMS (formerly Judicial Arbitration and Mediation Services) hosting the arbitration.¹²⁵ The process of arbitrator selection typically gives both sides an opportunity to select or de-select arbitrators based

¹¹⁶ See *Circuit City*, 532 U.S. at 109; *Circuit City Stores, v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 374 (4th Cir. 1998).

¹¹⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (noting that SEC form U-9 requires all claims by certain securities industry employees to be arbitrated).

¹¹⁸ See *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744 (9th Cir. 2003) (holding that law firms may require employees to sign Title VII arbitration agreements). See also Brett A. Smith & Joshua L. Schwarz, *Keeping Lawyers Out of Court? A Survey of the Prevalence of Compulsory Arbitration Agreements in Law Firms*, 7 EMP. RTS. & EMP. POL’Y J. 183, 190–95 (2003).

¹¹⁹ Microsoft recently agreed not to impose arbitration on its employees in sexual harassment claims, but many other tech companies still do so, and Microsoft presumably does as well, in non-sexual harassment claims. See *infra* note 324 and accompanying text.

¹²⁰ See Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 ARB. L. REV. 43, 45–46 (2017). See also Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. L. FORUM 205, 212 (2018).

¹²¹ CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION, BEYOND THE ADVERSARIAL MODEL* 383 (2d ed. 2011).

¹²² *Id.* at 383–84 (showing arbitration can, for example, be formal or informal, private or public, legalistic or not); see also Jean R. Sternlight, “*Arbitration Schmarbitration*”: *Examining the Benefits and Frustrations of Defining the Process*, 18 NEV. L.J. 371, 374 (2018).

¹²³ For example, the American Arbitration Association, which one study showed handles about half of filed employment arbitration disputes, ALEXANDER J.S. COLVIN & MARK D. GOUGH, *COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS AND OUTCOMES: RESEARCH REPORT TO THE ROBERT L. HABUSH ENDOWMENT OF THE AMERICAN ASSOCIATION FOR JUSTICE* 34–35 (2014), provides the demand form available here: https://www.adr.org/sites/default/files/document_repository/, archived at <https://perma.cc/UJ7D-95AV>.

¹²⁴ See Colvin & Pike, *supra* note 107, at 66 (finding that roughly 10% of employment arbitration disputes examined in a particular study involved claims by employers against employees, such as for allegedly breaching the employment contract or defaming the employer).

¹²⁵ AAA rules on employment arbitration are provided here: AMERICAN ARBITRATION ASSOCIATION, *EMPLOYMENT ARBITRATIONS RULES AND MEDIATION PROCEDURES* (Oct. 1, 2017), https://www.adr.org/sites/default/files/document_repository/EmploymentRules_Web.pdf, archived at <https://perma.cc/7P4X-KE5T> [hereinafter AAA RULES]. JAMS Employment Arbitration Rules & Procedures are set out here: JAMS EMPLOYMENT ARBITRATION RULES &

on their credentials and whatever else the parties can learn about their prior decisions.¹²⁶

After being selected, the arbitrator sets dates, may allow a limited amount of discovery, and may consider motions, including potentially motions to dismiss or for summary judgment.¹²⁷ If the matter is not resolved on a dispositive motion and does not settle, the arbitration hearing typically takes place in a conference room selected by the arbitrator.¹²⁸ The neutral arbitrator is often, but not necessarily, an attorney or a retired judge.¹²⁹ Either or both parties may be represented by an attorney, but sometimes parties appear pro se.¹³⁰ Witnesses may be called and evidence may be presented, but the rules of evidence are usually more relaxed than those that would be used in court.¹³¹

The arbitrator ultimately writes a decision, but the decision may be fairly short and will not necessarily contain extensive legal reasoning.¹³² For

PROCEDURES (July 1, 2014), <https://www.jamsadr.com/rules-employment-arbitration>, archived at <https://perma.cc/LL88-DXJD> [hereinafter JAMS RULES].

¹²⁶ AAA RULE 13, *supra* note 125, at 16; JAMS RULE 15, *supra* note 125, at 14–15. The fact that arbitrators have an incentive to write decisions that might encourage parties to hire them in the future has given rise to what critics call the “repeat arbitrator” phenomenon: as employers are typically involved in far more disputes than employees, arbitrators have more of an economic incentive to please employers than they do to please employees. See generally Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 805 (2013); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP’T. POL’Y J. 189 (1997).

¹²⁷ JAMS RULES 17 & 18, *supra* note 125, at 16–17; AAA RULES 9 & 27, *supra* note 125, at 14, 19. The arbitration clause can be drafted to allow or disallow particular types of discovery and particular kinds of motions. See Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America’s Civil Justice System*, 24 VA. J. SOC. POL’Y & L. 195, 224 (2017); John M. Townsend, *Drafting Arbitration Clauses Avoiding the 7 Deadly Sins*, 58 DISP. RESOL. J. 28, 36 (2003). Along these lines, the AAA provides a “clause builder” that encourages parties to draft the clause to fit their particular needs. Clause Builder Tool, AMERICAN ARBITRATION ASSOCIATION (Sept. 29, 2018), <https://www.clausebuilder.org>, archived at <https://perma.cc/X9BR-HAPC>.

¹²⁸ AAA RULE 11, *supra* note 125, at 14; JAMS RULE 19, *supra* note 125, at 18.

¹²⁹ AAA Rules require employment arbitrators to be “experienced in the area of employment law.” AAA RULE 12(b), *supra* note 125, at 13 (quoting Rule 12(b)). The JAMS clause drafting website notes that parties can determine what qualifications they prefer for their arbitrators. JAMS CLAUSE WORKBOOK 4 (June 1, 2018), <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>, archived at <https://perma.cc/V2VF-FY5P>.

¹³⁰ One recent study showed that roughly one third of employment arbitrations were filed by employees pro se. Colvin & Pike, *supra* note 107, at 69. When this author conducted her own small study of the 22 cases posted by AAA on Lexis for 2018 as of June 24, 2018, she found just four involved pro se employees.

¹³¹ The JAMS Rules state: “Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product.” JAMS RULE 22(d), *supra* note 125, at 19. The AAA Rules state: “The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.” AAA RULE 30, *supra* note 125, at 21.

¹³² Arbitration decisions in employment cases do, however, tend to be longer than those issued in other business contexts. See Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L. L.J. 449, 512 (2005) (“[A]rbitrators—particularly in commercial cases—are not expected to write reasoned opinions attempting to explain and justify their decisions, and the AAA in fact has traditionally discouraged them from doing so.”); Dean B. Thompson, *Arbitration Theory & Practice: A Survey of AAA Construction*

example, the AAA Rules require arbitrators to “provide the written reasons for their award unless the parties agree otherwise,”¹³³ but often the primary focus of the decision is factual, rather than legal. The AAA Rules also require that “[a]n award issued under these rules shall be publicly available, on a cost basis.”¹³⁴ Currently, AAA employment awards are available, for a fee, from LEXIS, Westlaw, BNA & Kluwer.¹³⁵ However, the fact that these decisions are available may not be well known, and other arbitration providers may not make their decisions publicly available. As binding arbitration decisions are extremely difficult to vacate, appellate courts are rarely asked to review the binding awards.¹³⁶

B. *Is Mandatory Employment Arbitration Legal?*

In the United States,¹³⁷ current law clearly permits companies to require their employees to arbitrate future disputes. Although many commentators have argued that mandatory employment arbitration is or should be proscribed by the Federal Arbitration Act (“FAA”)¹³⁸ or, in certain circum-

Arbitrators, 23 HOFSTRA L. REV. 137, 158 (1994) (summarizing survey of construction arbitrators, 69% of whom reported that they do not usually explain the reasons for their awards).

¹³³ American Arbitration Association, National Rules for the Resolution of Employment DISPUTES (Including Mediation and Arbitration Rules), R. 34(c) (Jan. 1, 2004), available at <https://www.adr.org/sites/default/files/National%20Rules%20for%20the%20Resolution%20of%20Employment%20Disputes%20Jan%202001%2C%202004.pdf>, archived at <https://perma.cc/RKE7-GUM7>. JAMS Rules similarly provide that an award shall “contain a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based.” JAMS RULE 24(h), *supra* note 125, at 22–23.

¹³⁴ AAA RULE 39(b), *supra* note 125, at 23.

¹³⁵ E-mail from AAA Vice President Rebecca Storrow to author (June 12, 2018) (on file with author). A search of the LEXIS database revealed 275 published AAA decisions from 2017, and 22 for 2018, as of June 24, 2018. Prior years’ decisions are also available.

¹³⁶ In the United States, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1–15 (2012), arbitration awards must generally be enforced unless it can be shown that the award was procured by corruption or fraud or that the arbitrators were guilty of misconduct or similar. 9 U.S.C. § 10(a) (2012). Courts have repeatedly held that “mere” errors of law or fact do not justify vacating an arbitral award. *See, e.g.,* Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 100 (7th Cir. 1995) (quoting *Gingiss Int’l, Inc. v. Bormet* 58 F.3d 328, 333 (7th Cir. 1995)) (“[F]actual or legal errors by arbitrators—even clear or gross errors—do not authorize courts to annul awards.”); *see also* MENKEL-MEADOW ET AL., *supra* note 121, at 462–65 (discussing standard for vacating arbitral awards). While some courts have allowed arbitral awards to be vacated for “manifest disregard of the law,” this is a very high standard and the Supreme Court’s decision in *Hall Street Associates v. Mattel*, 552 U.S. 576, 585 (2008), raises questions whether this challenge even continues to be viable at all under federal law.

¹³⁷ Policies in other countries are quite different. In the European Union, for example, employers may not force their employees into arbitration. *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 418 (2011) (discussing the fact that many EU jurisdictions refuse to enforce arbitration agreements in employment contracts); *see also* Jean R. Sternlight, *Is the U.S. Out on A Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 848–50 (2002).

¹³⁸ 9 U.S.C. § 1 et seq. (1925). Passed in 1925, the FAA was intended to ensure that courts would enforce arbitration clauses entered into knowingly by two business entities. Thus, many

stances, by the Constitution,¹³⁹ these arguments have usually failed. Shocking many, in *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁴⁰ a 7–2 Supreme Court ruled in 1991 that a claim brought under the Age Discrimination in Employment Act by a manager in the securities industry could be subjected to compulsory arbitration.¹⁴¹ The *Gilmer* Court justified its conclusion in part by reasoning that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹⁴²

However, subsequent decisions soon revealed that the Court prioritizes preserving arbitration over protecting employees’ rights.¹⁴³ Technically, the *Gilmer* decision was not an employment case, because Mr. Gilmer was required to arbitrate by stock exchange rules, rather than by his brokerage employer.¹⁴⁴ But, the Supreme Court soon made clear that employers could also require their employees to arbitrate claims against their employers, even though Section 1 of the FAA would seem to preclude the practice for all employees involved in interstate commerce.¹⁴⁵ That Section states: “[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or in-

commentators have argued that the FAA was never meant to support and should not support the use of mandatory arbitration, imposed by a company on employees or consumers. See, e.g., Sternlight, *Panacea or Corporate Tool?*, *supra* note 26, at 697; see also IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 192–93 (2013); Margaret Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. L. REV. 99, 157 (2006).

¹³⁹ This author has suggested possible constitutional arguments using Article III, the Due Process Clause, and the Seventh Amendment. See, e.g., Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669–733 (2001); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns*, 72 TUL. L. REV. 1, 4 (1997). But courts and some commentators have not been persuaded by these arguments. See, e.g., Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 3 (2005).

¹⁴⁰ 500 U.S. 20 (1991).

¹⁴¹ The Supreme Court relied on the 1925 Federal Arbitration Act, 9 U.S.C. § 1 et seq., to hold that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.” *Id.* at 26. The decision was surprising to many because it essentially reversed the Court’s prior holding in *Alexander v. Gardner Denver*, 415 U.S. 36, 59–60 (1974), which found that employers could not use a collective bargaining agreement to require employees to arbitrate statutory discrimination claims under Title VII. See generally Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceanera*, 81 TULANE L. REV. 331, 336–40 (2006).

¹⁴² *Gilmer*, 500 U.S. at 28.

¹⁴³ See generally Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 116 (2015) (asserting that Court has abandoned its purported concern with protecting consumers’ and employees’ ability to vindicate their substantive rights in arbitration).

¹⁴⁴ *Gilmer*, 500 U.S. at 39–40.

¹⁴⁵ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122–23 (2001). In other contexts, the Court has defined “interstate commerce” extremely broadly, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005), so such a prohibition would seemingly apply to most workers in our modern economy.

terstate commerce.”¹⁴⁶ Nonetheless, in *Circuit City Stores, Inc. v. Adams*, the Court held that employers could generally require individual employees to arbitrate, and that the Section 1 exclusion language should be interpreted extremely narrowly.¹⁴⁷ Then, in *14 Penn Plaza v. Pyett*, the Court concluded that a collective bargaining agreement could require unionized employees to arbitrate statutory employment claims so long as the “arbitration provision expressly covers both statutory and contractual discrimination claims.”¹⁴⁸ When the Court’s subsequent decision in *American Express v. Italian Colors Restaurant* found that arbitration clauses can impose class action waivers, even when such waivers effectively deny plaintiffs the practical opportunity to bring a claim,¹⁴⁹ it became even clearer that employers could use arbitration clauses to insulate themselves from liability under federal and state employment laws.¹⁵⁰

The Court’s most recent employment arbitration decision, *Epic Systems Corp. v. Lewis*,¹⁵¹ is one of its most significant and most damaging to employees. Building on *American Express v. Italian Colors*, the Court ruled (5–4) that it was permissible for companies to use mandatory arbitration clauses to prevent employees from joining together in group or class litigation, notwithstanding that the National Labor Relations Act provides all employees with a right to engage in “concerted activities.”¹⁵² It is widely predicted that this decision will lead increasing numbers of employers to use forced arbitration to prevent employees from bringing class action suits or

¹⁴⁶ 9 U.S.C. § 1 (2016). A case now pending in the Supreme Court, *New Prime Inc. v. Oliveira*, 857 F.3d 7 (1st Cir. 2017), cert. granted, 138 S. Ct. 1164 (U.S. Feb. 26, 2018) (No. 17–340), raises the question of whether this exclusion even applies to interstate truckers.

¹⁴⁷ *Circuit City*, 532 U.S. at 115–19 (interpreting Section 1’s exclusion narrowly to apply only to transportation workers—those directly engaged in interstate commerce). Most academic commentators criticized the Court’s approach. See, e.g., SZALAI, *supra* note 138, at 191–92; Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 328, 329 (1997); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 458 (2016); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision*, 1991 J. DISP. RES. 259, 279 (1991). But see Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1345, 1365–72 (1997) (arguing that Section 1 applies only to transportation workers).

¹⁴⁸ 556 U.S. 247, 264 (2009).

¹⁴⁹ 570 U.S. 228, 233–34 (2013).

¹⁵⁰ Although *American Express* involved a claim by restaurants under antitrust law, rather than employment law, there is no reason to believe the Court would have held any differently in an employment case. See, e.g., Sternlight, *Disarming Employees*, *supra* note 26, at 1318–19 n.60 (pointing to management consulting companies’ enthusiastic embrace of the *American Express* decision).

¹⁵¹ 138 S. Ct. 1612 (2018).

¹⁵² The majority rejected employees’ argument, previously accepted by the National Labor Relations Board, that class and collective actions are “concerted activities.” *Epic Systems*, 138 S. Ct. at 1624–30. The majority also found that even if employees had a protected right it was overridden by the Federal Arbitration Act, which it interpreted as requiring enforcement of all agreements to arbitrate absent generally applicable contract defenses. *Id.*

group litigation of any type.¹⁵³ The significance of this is discussed in Part C below.¹⁵⁴

Employees have limited additional tools at their disposal to challenge the legality of mandatory arbitration requirements. Standard contract arguments like unconscionability, fraud, or lack of agreement are rarely successful.¹⁵⁵ Moreover, the Court's decisions allow employers (and others) to require that arbitrators, rather than courts, consider the question of whether the arbitration clause is enforceable.¹⁵⁶ One need not be too cynical to believe that arbitrators, whose future income depends upon the arbitration going forward, are unlikely to find that an arbitration clause is unenforceable.¹⁵⁷ In short, when United States employers require their employees to resolve claims in arbitration rather than in litigation, employees have little hope of convincing courts to instead allow them to litigate their disputes.

C. *Impact of Employment Arbitration Generally*

As many commentators have extensively discussed the overall impact of the Supreme Court's employment arbitration jurisprudence, the subject will be treated briefly. This Section will first address the critiques but then also consider some defenses of the practice.

Those skeptical of employers' use of mandatory arbitration worry that this process will substantially harm both individual employees and deterred the public.¹⁵⁸ On the individual side, critics urge that forced arbitration has and will deter meritorious employee claims.¹⁵⁹ Indeed, although more than

¹⁵³ Robert Barnes, *Supreme Court Rules that Companies Can Require Workers to Accept Individual Arbitration*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-that-companies-can-force-workers-into-individual-arbitration/2018/05/21/09a3a968-5cfa-11e8-a4a4-c070ef53f315_story.html?noredirect=on&utm_term=.21432ccf1450, archived at <https://perma.cc/T4QQ-L2HW>; Garrett Epps, *An Epic Supreme Court Decision on Employment*, THE ATLANTIC (May 22, 2018), <https://www.theatlantic.com/politics/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963/>, archived at <https://perma.cc/ZH9X-U9U5> (noting "the court's decision in *Epic Systems* will inevitably lead to an explosion of these imposed contracts").

¹⁵⁴ See *infra* Part II.C.

¹⁵⁵ See F. Paul Bland, Jr., *Is That Arbitration Clause Unconscionable? PROVE IT!*, CONSUMER ADVOC. (Nat'l Ass'n of Consumer Advocates, Washington, D.C.), July-Aug. 2002. Indeed, the Supreme Court has held that when courts are too willing to strike down arbitration clauses as unconscionable, such decisions are preempted by the Federal Arbitration Act. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

¹⁵⁶ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (holding that arbitration clause could delegate, to arbitrators, the responsibility for determining whether the arbitration clause was unconscionable, so long as that delegation was not, itself, unconscionable).

¹⁵⁷ See David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 375 (2018) ("Many plaintiffs would be surprised to find that they have entrusted an arbitrator—who, unlike a judge, bills by the hour—to decide the very question whether a dispute should be arbitrated.").

¹⁵⁸ See Sternlight, *Creeping*, *supra* note 26, at 1661–65.

¹⁵⁹ See, e.g., Sternlight, *Disarming Employees*, *supra* note 26, at 1328–29; Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 691–93 (2018).

half of the American workforce is now covered by arbitration clauses,¹⁶⁰ just a few thousand American workers file arbitration claims each year.¹⁶¹ This suppression effect is easily explained. First, employment arbitration clauses often include express language proscribing employees from participating in class or group claims in either litigation or arbitration—a practice that, as noted above, the Supreme Court has endorsed.¹⁶² In fact, Alexander Colvin recently found that roughly 40% of employees covered by arbitration clauses were subject to class action waivers.¹⁶³ This is significant because many employment claims cannot feasibly be brought individually. Such claims might be too costly, particularly in relation to expected monetary relief; employees might not even realize they had been harmed or that the harm was unlawful; or individual employees might hesitate to file due to fear of retaliation by their employer or others in the industry.¹⁶⁴ By wiping out class actions and group claims, employers can effectively insulate themselves from much employee liability.¹⁶⁵

In addition to eviscerating class actions, mandatory arbitration also suppresses claims by making it even harder for employees to retain attorneys than it otherwise would be.¹⁶⁶ Attorneys will be more reluctant to take on an employee's claim if the designated forum reduces the likelihood of success, awards lower monetary damages, and proscribes group claims and class actions.¹⁶⁷ Those few individuals who do proceed to arbitration generally fare worse than they would have in litigation. The best and most recent empirical studies show that employees both win less often and win less money when disputing claims in arbitration rather than in litigation.¹⁶⁸ While pro se repre-

¹⁶⁰ Colvin, *Growing Use*, *supra* note 101, at 1–2 (reporting that 56.2% of private-sector nonunion employees are subject to mandatory employment procedures).

¹⁶¹ Sternlight, *Disarming Employees*, *supra* note 26, at 1330 (estimating that only a few thousand employees file arbitration claims each year, even though millions of employees are covered by mandatory arbitration provisions). Though some might suggest that this is because only a minute number of employees have viable claims, the fact that thousands upon thousands of employees file claims in court (when they can) or file claims with the EEOC or state agencies shows that arbitration is truly suppressing claims. *Id.* at 1330–31.

¹⁶² *Epic Systems*, 138 S. Ct. at 1632. While the focus is often placed on class actions, employers may also use arbitration clauses to eviscerate other kinds of group claims.

¹⁶³ Colvin, *Growing Use*, *supra* note 101, at 2.

¹⁶⁴ Sternlight, *Disarming Employees*, *supra* note 26, at 1347.

¹⁶⁵ Although some continue to believe that arbitration can be a viable forum for those who have small claims and who cannot obtain legal representation, a recent study shows that very few such employment arbitration claims are filed. See Horton & Chandrasekher, *supra* note 147, at 471; see also Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011) (“Employment arbitration appears to be a dispute resolution system predominantly based on employee representation by counsel, as is the case with litigation.”).

¹⁶⁶ Sternlight, *Disarming Employees*, *supra* note 26, at 1334–36. Even absent arbitration, most employees find it hard to retain attorneys, as they often will lack savings to pay an attorney by the hour, and their damages and likelihood of success may not be sufficient to attract a contingent fee attorney. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1326; see also Horton & Chandrasekher, *supra* note 147, at 478–79 (providing detailed statistics on arbitration results).

sentation is a viable alternative in theory, in practice employees do not often attempt to represent themselves in arbitration.¹⁶⁹ This reluctance is understandable; a recent study found the pro se arbitration win rate to be just 7%.¹⁷⁰ One author has cleverly called this suppression effect the “black hole” phenomenon, because claims that might have existed simply disappear.¹⁷¹ Some critics worry much more about this suppression effect than the fact, which is also true, that those employees who end up in arbitration tend not to do very well.¹⁷²

On the other hand, mandatory employment arbitration does have its defenders. Some have argued that arbitration provides a quicker, cheaper form of dispute resolution. Professor Samuel Estreicher colorfully contended that it is better to provide Saturns (a no-frills car of its day) for everyone, than Cadillacs for the few and rickshaws for most.¹⁷³ Studies do confirm that arbitration tends to be quicker than litigation.¹⁷⁴ Supporters of mandatory arbitration also claim that the results of employment arbitration are sometimes favorable to employees,¹⁷⁵ though the studies cited tend to focus on claims brought by higher level employees with voluntarily negotiated agreements rather than on claims brought by employees covered by mandatory arbitration agreements.¹⁷⁶ Some defenders of the practice also urge that the impact of employment arbitration should be considered in the broader context of other employer human resources practices, including complaint processes and mediation, that may serve as an internal mechanism for resolving disputes.¹⁷⁷

¹⁶⁹ See generally Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 391–400 (2010) (disputing the common view that alternative dispute resolution (“ADR”) is necessarily an effective route for unrepresented parties).

¹⁷⁰ Horton & Chandrasekher, *supra* note 147, at 485. And, of course, a “win” may result in only a very small dollar recovery.

¹⁷¹ See Estlund, *Black Hole*, *supra* note 158, at 682. See generally Bales, *Quinceanera*, *supra* note 141, at 334 (“One criticism, however, has proven valid: some employers have used their superior bargaining power to impose on employees lopsided agreements that make it all but impossible for employees to pursue valid claims and that deter most employees from even trying to do so.”); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012) (critiquing Supreme Court arbitration decisions for suppressing claims).

¹⁷² See Sternlight, *Disarming Employees*, *supra* note 26, at 1312.

¹⁷³ Estreicher, *Saturns for Rickshaws*, *supra* note 114, at 563. However, studies show that employees do not bring many small claims in arbitration. Sternlight, *Disarming Employees*, *supra* note 26, at 1336; see also Colvin & Pike, *Saturns and Rickshaws*, *supra* note 107, at 61 (updating Estreicher’s thesis with the benefit of current empirical research).

¹⁷⁴ See, e.g., Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EM. RTS. & EMP. POL’Y J. 405, 426–27 (2007).

¹⁷⁵ See, e.g., Bales, *Quinceanera*, *supra* note 141, at 347–49.

¹⁷⁶ See generally Colvin, *Clarity*, *supra* note 173, at 412–24.

¹⁷⁷ W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 862–63 (2008). See also Bales, *Quinceanera*, *supra* note 141, at 343 (noting that many employers impose arbitration as part of a much broader dispute resolution process). At minimum, some commentators urge that it is difficult to assess the impact of forced arbitration, and that we should not condemn the practice without sufficient data. See, e.g., David Sherwyn, Samuel Estreicher, &

Turning to the impact of mandatory arbitration on society more generally, critics have long worried that requiring employees to arbitrate rather than litigate claims will undermine the force of law not only by suppressing claims, but also by requiring claims to be heard privately and limiting easy access to precedent.¹⁷⁸ The fear is that these effects will both undermine public policies and also lessen the deterrence effect of laws that exist but are not effectively enforced.¹⁷⁹ As Geraldine Moohr opines, “arbitration is not an effective forum in which to satisfy the public policy goals of the employment discrimination statutes.”¹⁸⁰ This concern applies to other non-discrimination workplace laws and policies as well.¹⁸¹ For example, Charlotte Garden has explained that forcing contingent workers, such as Uber and Lyft drivers, into arbitration will reduce the deterrent effect of our laws on prohibited unfair labor practices.¹⁸² Parallel arguments have been made in other countries too.¹⁸³

Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1560 (2005).

¹⁷⁸ See, e.g., Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1497 (2004) (pointing out that employment arbitration, which is typically kept private, and often results in determinations lacking in reasoned analysis, “will not have educative or precedential value”); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 704 (2004) (noting that “the lack of [judicial] opinions stunts[s] the growth of the law”). *But cf.* Sternlight, *Creeping*, *supra* note 26, at 1661–75 (setting out traditional public justice critique of arbitration, which is based on the idea that private arbitration may not provide the public good of educating society about law and justice, but also recognizing that a system of justice may also serve other purposes beyond enforcement of the law, including protecting interests in procedural justice and promoting reconciliation).

¹⁷⁹ See 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, 2838–39 (2015). See generally RADIN, *BOILERPLATE*, *supra* note 103, at 3–18.

¹⁸⁰ Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999). Professor Moohr argues that because employment arbitration is non-governmental, confidential, and final it is less effective than litigation in serving public policy purposes such as deterrence and development of precedent. *Id.* at 426–40.

¹⁸¹ For example, employees’ claims under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (2012), are increasingly being forced into arbitration. See Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1125–26 (2012). Arbitration arguably undermines public policy in other areas of law as well. See Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1241 (2016) (discussing “informational value” of public litigation). For a related argument in the securities context, see Benjamin P. Edwards, *Arbitration’s Dark Shadow*, 18 NEV. L.J. 427, 430 (2018). *Cf.* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 52 (2008) (explaining, in the business context, that arbitration frequently “blocks public access to information revealed in the arbitration”).

¹⁸² Garden, *Disrupting Work Law*, *supra* note 120, at 206, 209; see also Ruan, *supra* note 180, at 1119–21.

¹⁸³ See, e.g., ROSEMARY HUNTER, *INDIRECT DISCRIMINATION IN THE WORKPLACE* xxiii (1992) (stating that provisions for indirect discrimination are rarely publicized and even more rarely analyzed as an element of a claim). See generally Sternlight, *In Search*, *supra* note 177 (comparing U.S., British, and Australian efforts to enforce employment discrimination laws).

Still, some scholars have challenged the idea that arbitration is inherently “lawless.” As Christopher Drahozal notes, few have taken the time to try to explain what this supposed lawlessness really means, or to empirically verify the assertion that arbitration is lawless.¹⁸⁴ Is arbitration lawless because arbitration decisions do not contain legal reasoning, or because those decisions are not appealed or published? It is important to remember that arbitration varies substantially from context to context. While it has been said that “many arbitration awards contain no statement of reasons,”¹⁸⁵ in the employment field, by contrast to consumer or commercial settings, arbitrators may well write longer decisions that do contain some reasoning.¹⁸⁶ Upon reviewing the twenty-two AAA decisions made available on LEXIS as of June 2018,¹⁸⁷ this author generally found them to be well-written and several pages long. These decisions tended to focus more on facts than law, which is not surprising given that arbitration awards are equivalent to trial court decisions. Further, even if many employees are required to arbitrate their claims, presumably at least some precedent will continue to exist, because not all employers mandate arbitration of all claims by all employees.¹⁸⁸

The purpose of this Article is not to resolve these debates, though admittedly this author is convinced that mandatory employment arbitration is harmful to both individual employees and the public at large. Rather, this Article endeavors to draw attention to a less considered issue: whether forcing employment claims into arbitration is *particularly* harmful to the most vulnerable and disempowered members of our society. The terms “vulnerable and disempowered” refer to those groups who are less powerful in the social and political process, whether due to their race, ethnicity, gender, gender preference, lack of economic means, immigrant status, tenuous employment situation, or other factors. One could also call these persons “discrete and insular minorities,” the term used by the Supreme Court in its famous

¹⁸⁴ Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 189–90 (2006).

¹⁸⁵ *Id.* at 192.

¹⁸⁶ Labor arbitration awards are among those that have more detail, though the detail tends to focus on company practices and facts rather than on legal nuances of statutory interpretation. See Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 694 (1992) (summarizing review of labor arbitration awards conducted in the 1980s, and concluding that their treatment of statutory issues was often conclusory); see also Harry Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in ARBITRATION—1975: PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 59, 82 (Barbara D. Dennis & Gerald G. Somers eds., Bureau of Nat’l Affairs 1976) (concluding from survey of arbitrators that it is questionable whether arbitrators are competent to decide statutory employment issues).

¹⁸⁷ The AAA states that it makes redacted versions of all of its employment arbitration decisions available in Westlaw, LEXIS, BNA, and Kluwers databases. E-mail, *supra* note 135.

¹⁸⁸ On the other hand, it may be that employers that mandate arbitration give rise to different claims than those employers that do not mandate arbitration, in which case development of precedent will be skewed. Bales, *Quinceanera*, *supra* note 141, at 366. See also Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 887 (2004) (stating that if some employers mandate arbitration and others who are more law abiding do not mandate arbitration, the law that is made might evolve in favor of employers).

Carolene Products decision to describe persons who lacked voting power and who therefore needed particular protection from the courts.¹⁸⁹ This Article contends that these groups are harmed more than others by the imposition of mandatory employment arbitration for two reasons discussed below.

*D. Particular Impact of Employment Arbitration on
the Most Vulnerable Employees*

*1. Arbitration Clauses Are Especially Likely to Suppress Claims of
Vulnerable Employees*

As has just been discussed, forced arbitration presents an opportunity for alternative dispute resolution in theory, but actually deters the filing of claims in practice.¹⁹⁰ Compared to litigation, mandatory arbitration makes it harder for employees to secure legal representation,¹⁹¹ harder for employees to participate in class actions,¹⁹² and it remains hard for employees to bring or prevail on claims brought pro se.¹⁹³ While these burdens affect all employees, they fall most heavily on the most vulnerable members of society. The most difficult claims to bring are those that are not clearly supported by existing law,¹⁹⁴ that present evidentiary challenges,¹⁹⁵ that offer minimal or difficult to calculate monetary relief,¹⁹⁶ or that exert high personal and emotional tolls, particularly if brought individually rather than as part of a group.¹⁹⁷ There are several reasons why these factors are likely to affect the disempowered and most vulnerable more intensely than other employees. When vulnerable employees' claims are weaker, due to these factors, they will more likely be suppressed, because lawyers will not be eager to take the claims and because individual employees will hesitate to file them on their own. If the claims also cannot be brought in class actions, that augments the

¹⁸⁹ See *supra* note 11 and accompanying text.

¹⁹⁰ See *supra* notes 158–172 and accompanying text discussing suppression of claims.

¹⁹¹ As an intellectual matter, the ability to obtain an attorney is different than the ability to bring a claim. In theory, an employee might successfully bring a claim pro se, either in arbitration or in litigation. However, in the employment discrimination context the reality is that very few, if any, employees will be able to prevail or gain significant relief if they are pro se. Most employment claims are just too hard to be won pro se, in that they require both substantial legal expertise and the ability to gather and organize significant facts. See generally Sternlight, *Disarming Employees*, *supra* note 26; Sternlight, *Lawyerless*, *supra* note 168.

¹⁹² See Colvin, *60 Million American Workers*, *supra* note 101, at 6.

¹⁹³ See Horton & Chandrasekher, *After the Revolution*, *supra* note 147, at 25.

¹⁹⁴ See Sternlight, *Disarming Employees*, *supra* note 26, at 1335.

¹⁹⁵ See *id.* at 1333.

¹⁹⁶ See *id.* at 1336.

¹⁹⁷ See, e.g., Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 366 (2013) (stating that aggrieved workers “are left with a bleak choice: stay quiet and forego needed wages, try to find a private attorney willing to litigate a modest individual claim or complex class claim, or wait for one’s wage claim at a government agency that might never be answered.”).

problem. So, when the claims of the most vulnerable employees are shunted to arbitration they become even more difficult to bring than would otherwise be the case. Below, these factors are explained.

First, the claims of disempowered members of society will often tend to be weakest as a matter of law, because the lack of clear legal protection is one reason why these employees are disempowered in the first instance. Imagine that an employee goes to an attorney because she believes she has been discriminated against on the basis of a status that is not explicitly addressed under federal or state law. Knowing that the law does not provide express protection, and that judges (or arbitrators) may not be willing to interpret the law expansively to cover such a claim, the attorney may not be willing to take the case, particularly on a contingent fee basis.¹⁹⁸

Second, disempowered employees may find it particularly difficult to amass the evidentiary proof necessary to prevail in their case.¹⁹⁹ While many employees face evidentiary challenges, because they lack access to employers' documents and because fellow employees may be afraid to assist them in a claim against the employer, such challenges may well be even greater for members of disfavored groups. Where a straight white man might be able to convince other straight white men to take a bit of a risk and help him with his claim, the vulnerable employee may well face an even greater challenge convincing other people in the workplace to testify in her favor.²⁰⁰ If those other employees are not members of an oppressed group, they are less likely to bond with the complainant and take a risk to assist them. And, if those other employees are also members of an oppressed group, they may also be reluctant to help because they themselves are also at risk of mistreatment. In short, when disempowered employees seek to present claims they are particularly likely to find themselves in a situation in which even though they should prevail as a matter of law if all of the facts could be known, the reality is that all the evidence is not likely to come out. This may result in claims appearing to be frivolous, even when they are not so.

¹⁹⁸ Of course, this is a challenge that may diminish over time, depending on the jurisdiction. For example, gay, lesbian, and transgender persons can now proceed more confidently in some jurisdictions on discrimination claims as states and some federal courts are increasingly revising statutes, providing new guidance, or issuing decisions that provide expanded protections. See CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 280–99 (9th ed. 2017); see also *E.E.O.C. v. Boh Brothers Construction Co., LLC*, 731 F.3d 444, 455–56 n.7 (5th Cir. 2013) (holding that “the EEOC may rely on evidence that [a supervisor] viewed [an employee] as insufficiently masculine to prove its Title VII claim”). See generally L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535 (2009).

¹⁹⁹ A claim may be valid, in some theoretical sense, but if an employee cannot provide witnesses or documents in support of their allegations, they will not be able to prevail.

²⁰⁰ See, e.g., Lea VanderVelde, *Where Is the Concept of Good Faith in the Restatement of Employment?*, 21 EM. RTS. & EMP. POL'Y J. 335, 360 (2017) (providing two examples of in-group bonding exercises in employment context); Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 38 (2015) (discussing the use of in-group bonding to maintain white supremacy).

Third, the most vulnerable employees will tend to have a particularly hard time showing substantial damages because their socioeconomic status in society is often already low due to discrimination.²⁰¹ Low provable damages, in turn, diminish access to justice, because attorneys are less likely to take low damages cases on a contingent fee basis.²⁰² If a person earning low wages is terminated from their job, denied a promotion, or not hired, their wage loss damages are lower than that of a high wage earner who is harmed in the same way. For example, if an employee earning only \$20,000 a year is fired, their backpay claim is far lower than the otherwise similar claim of someone who was fired from a job paying \$300,000 a year. This does not mean that the lower paid employee suffered less injury, but only that our system of justice is inherently biased against low-income persons.

Finally, the most vulnerable members of society often most need the opportunity to bring claims as part of a group, rather than individually.²⁰³ Disempowered people such as the poor, minority group members, or persons lacking legal immigration status are less likely to be aware of their legal rights and financially can least afford to bring a claim individually.²⁰⁴ As well, such people may more likely fear embarrassment, retaliation, deportation, or the substantial emotional burdens that inevitably come with bringing a claim against one's employer.²⁰⁵ Thus, when arbitration clauses are used to

²⁰¹ Women and minority group members, for example, are paid substantially less than white males even when they hold comparable jobs. Alexandra N. Phillips, *Promulgating Parity: An Argument for A States-Based Approach to Valuing Women's Work and Ensuring Pay Equity in the United States*, 92 TUL. L. REV. 719, 722–27 (2018).

²⁰² See Sternlight, *Disarming Employees*, *supra* note 26, at 1334–38 (discussing cost-benefit analysis used by plaintiff-side employment attorneys to decide whether to take a case on a contingent fee basis); see also Rob Rubinson, *A Theory of Access to Justice*, 29 J. LEG. PROF. 89 (2005) (explaining that while the vast majority of legal disputes involve low-income litigants, the vast majority of public and private dispute resolution resources are allocated to disputes between organizations or high-income persons, because those are the ones who can afford access to justice).

²⁰³ Group claims include class actions but also other kinds of multi-party claims, such as joinder of claims under FED. R. CIV. P. 20, collective claims under the Fair Labor Standards Act, or multi-district litigation. All these can be proscribed by arbitration provisions. See Sternlight, *Disarming Employees*, *supra* note 26, at 1343–52.

²⁰⁴ See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346–49 (2008) (reviewing empirical evidence that demonstrates how social class and socioeconomic inequalities impact an individual's access to justice); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (presenting results of empirical study showing that poor persons and minority group members are hesitant to even investigate filing civil claims, due to lack of trust in the legal system and desire to see themselves as self-sufficient).

²⁰⁵ The issue of reluctance to report or file claims has been discussed extensively with respect to workplace harassment. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/task_force_report.cfm, archived at <https://perma.cc/PT2G-6ZXH> (finding that approximately 90% of workers who say they have experienced harassment never file charges or complaints).

eliminate the right to group or collective action, again it is the most vulnerable who suffer the most.²⁰⁶

In short, while we have already seen that the imposition of arbitration suppresses claims, this burden will fall particularly heavily on disempowered employees.²⁰⁷ When an attorney sees not only a claim that is a long shot from a legal or evidentiary standard, but also a claim that must be brought in arbitration, where win rates and recoveries are lower, they are less likely to handle the case. The effect is amplified because poor people and minority group members generally have the most difficulty retaining legal representation.²⁰⁸ And, when arbitration is used to eliminate group and class claims, the impact is greatest for those disempowered employees who are least able to bring claims individually. The resulting suppression will harm not only the individual, vulnerable employees who have suffered injury in the workplace, but also other persons in such groups and the public at large by preventing further development of the law that might have otherwise occurred in court.

2. *Employment Arbitrators Are Less Likely than Courts to Issue Influential Progressive Decisions*

Let us assume that the vulnerable employee does manage to bring a claim in arbitration. Will the employee be able to win that claim? And, if they do win, will they win in a way that begins to change the law for others as well as themselves? As was previously discussed, courts often interpret statutes and constitutional provisions more expansively over time, particularly when social movements are pushing them in a more progressive direction.²⁰⁹ Unfortunately, it is highly unlikely that this progressive trend will be mirrored in the realm of arbitration. This is not because the people who are arbitrators are inherently different than the people who are judges.²¹⁰ Nor is

²⁰⁶ See Sternlight, *Disarming Employees*, *supra* note 26, at 1343–52 (discussing critical importance of class actions and group claims in employment context). See also Garden, *Disrupting Work Law*, *supra* note 120, at 205 (“[T]he ubiquity with which gig economy companies require or encourage their workforces to resolve their disputes in individual arbitration proceedings . . . make it unlikely that large swaths of gig economy workers will, as a practical matter, be able to resolve their employment status in any forum.”).

²⁰⁷ See generally Sternlight, *Disarming Employees*, *supra* note 26.

²⁰⁸ Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 705, 710, 714–18 (2012) (reporting on empirical studies showing that pro se employees in employment discrimination litigation typically fare substantially worse than represented employees, and that African Americans, Hispanics and Asian Americans were significantly more likely to be pro se than were White employees).

²⁰⁹ See *supra* Part I. Of course, there is certainly no guarantee that courts will protect the less powerful members of society. We can only say with confidence that judicial lawmaking will follow the overall trend of current culture. Wachtler, *Judicial Lawmaking*, *supra* note 21, at 14.

²¹⁰ Indeed, many arbitrators are retired judges. See James Middlemiss, *Life After the Bench: Retired Judges Embrace ADR*, FIN. POST (Mar. 19, 2014), <https://business.financialpost.com/legal-post/life-after-the-bench-retired-judges-embrace-adr>, archived at <https://perma.cc/>

this a reflection of any express contractual or regulatory limit being placed on arbitrators that would prevent them from interpreting law more expansively or writing progressive decisions. Nonetheless, for reasons discussed below, it seems quite unlikely that arbitrators would issue bold progressive decisions often enough, or with a high enough degree of impact, for arbitration to be a viable source of protection for vulnerable employees.

An employment arbitration decision rendered by an AAA arbitrator in 2018 illustrates arbitrators' reluctance to make new law.²¹¹ In this case, the claimant, who had worked as an on-camera meteorologist for a television station for twenty-nine years before her contract was not renewed, alleged that she was the victim of discrimination on the basis of sex and/or age.²¹² The arbitrator asked the parties to brief the question of whether these two types of discrimination might be combined to form a claim for intersectional discrimination—suggesting that plaintiff could try to show “discrimination against women over the age of 40.”²¹³ The arbitrator reported that claimant cited cases in which courts had recognized such an “intersectional” discrimination claim based on race and sex,²¹⁴ and that courts have also recognized a “sex plus” or “gender plus” category, where a person was discriminated on the basis of a combination of gender and a neutral unprotected category.²¹⁵ However, the arbitrator noted that the plaintiff “has not cited any case authority recognizing an intersectional claim based on sex and age.”²¹⁶ Further, the arbitrator stated that while “[t]he general definition of intersectional discrimination would *logically* apply to a claim based on the combination of any two or more characteristics protected by any statute, such as sex and age,”²¹⁷ “[t]he arbitrator is not authorized to, and will not, create a combined age and sex claim, when she has not been shown that a federal court

SHR3-QQF; *see also* Will Carless, *Judge Who Ruled Against Arbitration Activist Now an Arbitrator*, VOICE OF SAN DIEGO (Aug. 12, 2013), <https://www.voiceofsandiego.org/topics/news/judge-who-ruled-against-arbitration-activist-now-an-arbitrator/>, archived at <https://perma.cc/M79P-3YGN>; Reynolds Holding, *Judges' Action Cast Shadow on Court's Integrity / Lure of High-Paying Jobs as Arbitrators May Compromise Impartiality*, SF GATE, Oct. 9, 2001, <https://www.sfgate.com/news/article/Judges-action-cast-shadow-on-court-s-integrity-2870890.php>, archived at <https://perma.cc/E7V5-KF8C>.

²¹¹ 2018 AAA Employment LEXIS 18 (Feb. 23, 2018).

²¹² *Id.* at 1.

²¹³ *Id.*

²¹⁴ *Id.* at 2 (citing *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032–35 (5th Cir. 1980); *Harrington v. Cleburne Cty. Bd. of Educ.*, 251 F.3d 935, 937 (11th Cir. 2001); *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994).

²¹⁵ *Id.* at 2 (citing *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975)). The issue of “intersectional” discrimination claims has received substantial attention in academia after initial discussion by Professor Kimberle Crenshaw. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). For an example of a more current discussion, *see* Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107 (2017).

²¹⁶ 2018 AAA Employment LEXIS 18, at 2 (Feb. 23, 2018).

²¹⁷ *Id.*

has done so.”²¹⁸ Apparently having agonized at least a bit over this issue, the arbitrator went on to state the following in a footnote:

The arbitrator’s real world observations indicate that a person who is in more than one protected class, for example, a woman over the age of 40, or an African-American woman over the age of 40, sometimes faces barriers in employment that, for example, men over the age of 40, or women under the age of 40, or white men over the age of 40, do not experience. But the arbitrator’s personal opinion is not an appropriate substitute for legal authority, and she is not authorized to merge elements of two different statutory schemes—Title VII and the ADEA—when neither the courts nor Congress have done so.²¹⁹

Along similar lines, the arbitrator also raised the question of whether a media company would run afoul of the law by trying to cater to a younger demographic by hiring younger meteorologists.²²⁰ But again, unlike many judges might behave, the arbitrator stated she was reluctant to rule on this issue without seeing prior case law or other authorities that supported the same exact point raised by the complainant.²²¹ While this single opinion cannot be generalized to cover all arbitrators and all judges, it is a real life exemplar of the hypothesized phenomenon—an arbitrator proving unwilling to issue a decision expanding legal precedents.

To understand why employment arbitrators are less likely than judges to issue progressive decisions, consider that arbitrators face an incentive structure that tends to discourage the issuance of opinions that expand upon existing legal protections. Employment arbitrators are trying to make a living, which they do by being hired and rehired by disputants. They therefore may not want to write creative progressive decisions that present a greater risk of getting vacated.²²² Such an outcome could annoy current disputants²²³ and discourage others from hiring that arbitrator in the future. More specifically, such an outcome could displease the *employer* disputant, to the detriment of the arbitrator. Employers, particularly large corporate employers, are repeat players who frequently hire arbitrators in multiple cases; individual employ-

²¹⁸ *Id.* at 3. For those who may be curious, the arbitrator in this case was Penn Payne, a woman based in Georgia whose web site shows she has substantial experience as an attorney, arbitrator, and mediator. PENN PAYNE LLC, <https://www.pennpayne.com/profile>, archived at <https://perma.cc/4LBM-V6YK> (last visited June 24, 2018).

²¹⁹ 2018 AAA Employment LEXIS 18, at 3 n.3 (Feb. 23, 2018).

²²⁰ *Id.* at 23.

²²¹ *Id.* at 25. The arbitrator was also reluctant to allow claimant to use evidence of gendered dress expectations or environment (calling show a “boys club” and calling set a “man cave” to prove her termination was due to gender discrimination). *Id.* at 32.

²²² As previously noted, it is quite difficult to vacate arbitral awards and losing parties may not even try to get an award vacated. *See supra* note 136.

²²³ While no party likes to lose, losing is far easier to take if the award seems consistent with existing judicial precedents, rather than a creative expansion of existing law.

ees may dispute only a single claim over the course of a lifetime and thus have less market influence.²²⁴

Further, because arbitrators are hired privately they “have limited incentive to consider the effects of their awards on third parties,”²²⁵ such as on the public. As Geraldine Moohr has explained, “[b]ecause their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public.”²²⁶ These same incentives may lead arbitrators to write relatively short decisions, if they provide reasoned decisions at all. Parties are likely not eager to pay arbitrators’ hourly fees for scholarly opinions that are not necessary to resolve their own disputes.²²⁷

While some scholars have suggested that this private focus might lead arbitrators to refrain from following the law,²²⁸ others have found that arbitrators nonetheless likely do at least try to follow the law.²²⁹ Indeed, commentators who have considered this matter in depth tend to be less concerned that arbitrators will issue “lawless” decisions, and more concerned that arbitrators will be “overly cautious and slavishly follow, rather than distinguish, precedents.”²³⁰ As noted above, following existing precedent closely may be seen as more defensible than making new law. One

²²⁴ See *supra* note 126 and accompanying text (discussing the “repeat arbitrator phenomenon”).

²²⁵ Drahozal, *supra* note 184, at 192.

²²⁶ Moohr, *Goals*, *supra* note 179, at 436. Similarly, the disputants who are hiring the arbitrators are presumably interested in their own dispute, but not likely interested in paying the arbitrator extra to write a more scholarly or innovative decision that might somehow aid third parties.

²²⁷ See Moohr, *Goals*, *supra* note 179, at 457–59 (stating that parties are not likely to fund law that seriously disadvantages them).

²²⁸ Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 725 (1999) (stating “arbitrators often do not apply the law”). The idea is that arbitrators might care more about meeting the common-sense needs of disputants than strictly following legal requirements. Historically, arbitration was valued more for expertise, expediency, and common-sense solutions than for legal reasons. See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 5 (observing that historically businesses chose arbitration because it was different from litigation, offering expertise, confidentiality, and relative finality).

²²⁹ Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 514 (2005) (“Now I imagine it is fair to say that arbitrators usually do try their best to model their awards on what courts would do in similar cases—and that as often as not they succeed in doing so. That is at least what the scanty empirical evidence seems to suggest, and it corresponds as well to a plausible account of the likely nature of arbitrator incentives. What courts and codes have previously said is a natural starting point, after all—while inertia often does the rest—to the point that deciding in conformity with these rules of law will often simply appear to the arbitrator to be the path of least resistance.”); see also Drahozal, *supra* note 183, at 194 (agreeing that arbitrators most likely most often try to follow the law).

²³⁰ Moohr, *Goals*, *supra* note 179, at 436; see also Stephen A. Plass, *Privatizing Antidiscrimination Law with Arbitration: The Title VII Proof Problem*, 68 MONT. L. REV. 151, 173 (2007) (urging that whereas courts have been willing to rely on circumstantial evidence to support discrimination claims, arbitrators are less willing to do so and need to catch up with courts’ approach).

author explains that “because the prevailing party in an employment arbitration is likely to require judicial assistance to enforce the award, arbitrators can be expected to draft awards that courts will perceive as legitimate.”²³¹

Even if arbitrators were to issue scholarly decisions that advanced novel, progressive interpretations of employment law, such decisions would likely not have much precedential impact. The metaphor of the tree falling in the forest is apt: assuming that an arbitrator were to write an opinion that could potentially advance the law, it likely would not be seen by many people. As has been discussed, arbitrator awards are not necessarily published; when they are, the reality is they are not often read. Few reporters, lawyers, or even law professors are likely to dig through decisions written by individual employment arbitrators, other than the arbitrator assigned to their particular case. Unlike judicial opinions, which often get attention in blogs, newspaper articles, journals, and websites, arbitration decisions are also rarely discussed in the media.²³²

Moreover, even if substantial arbitration decisions were to receive public attention, they likely would not get much respect as potential precedent. As noted, arbitration awards are not appealable on their merits²³³ and thus will not lead to substantive appellate decisions from influential courts. The EEOC identified this problem back in 1997, when it issued its Policy Statement on Mandatory Binding Arbitration of Employment Disputes as a Condition of Employment.²³⁴ Stating that “arbitration, by its nature, does not allow for the development of law,” the EEOC explained that as judicial review of arbitral decisions “is limited to the narrowest of grounds,” “arbitration affords no opportunity to build a jurisprudence through precedent.”²³⁵ Mark Weidemaier goes further to suggest that “[i]n employment arbitration . . . efforts to create a system of arbitral precedent would . . . likely encounter skepticism or hostility, especially in substantive domains [like statutory discrimination claims] widely believed to be within the exclusive domain of

²³¹ W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1954 (2010) (arguing that arbitrators are not likely to create distinct arbitral precedent).

²³² This is something of a self-perpetuating phenomenon. Arbitration decisions are not scoured and discussed because they are not deemed important. And, arbitration decisions are not deemed significant in part because they are not regularly read and discussed.

²³³ The Federal Arbitration Act requires courts to confirm arbitration awards, with very few exceptions, and allows them to be vacated only in extreme circumstances. *See supra* note 136.

²³⁴ EEOC Notice No. 915.002 (1997), *reprinted in* 133 Daily Lab. Rep. (BNA) at E (July 11, 1997).

²³⁵ *Id.* at Section V(A)(2); *see also* Section IV(B) (discussing that the public nature of the judicial process enables public higher courts and also Congress to ensure that employment discrimination laws are properly interpreted and applied).

public adjudicators.”²³⁶ Ultimately, as Geraldine Moohr puts it, “Congress has not authorized arbitrators to develop the law.”²³⁷

Given these factors, mandatory arbitration deprives society of a forum that can respond to social momentum and develop progressive laws.²³⁸ If arbitrators do not typically issue progressive or innovative decisions, and if any such decisions are not likely to be seen or cited, those members of our society who are most in need of expanded legal protection will suffer most from its absence under mandatory arbitration schemes. Whether they be racial or ethnic minorities, women, immigrants, transgender persons, older or disabled persons, or part-time workers, those whose legal protections are fragile or nonexistent stand to lose the most when arbitration is substituted for litigation. This harm will fall not only upon those individual employees who are actually covered by arbitration clauses, but also upon other workers who might be indirectly impacted by the loss of progressive judicial precedent.

Admittedly, the preceding argument contrasts arbitral decisions with written judicial opinions, whereas juries, rather than judges, may ultimately hear those litigated employment claims that make it all the way to trial. The Civil Rights Act of 1991,²³⁹ for example, affords a jury trial to employees who claim discrimination on the basis of race, gender, ethnicity, or religion.²⁴⁰ Although arbitral decisions may not always be accompanied by substantial legal reasoning and may not be easy to access, they likely contain more reasoning than a jury award, which has none. However, this argument overlooks the fact that jury awards are often linked to judicial decisions that do contain legal reasoning. Before a case makes it to the jury, a judge will often issue a ruling on motions to dismiss or for summary judgment.²⁴¹ After

²³⁶ Weidemaier, *Toward a Theory of Precedent in Arbitration*, *supra* note 230, at 1948; *see also id.* at 1952 (“[E]mployment arbitrators in the United States are not likely to produce a system of precedent because, in this context, arbitrators will lack lawmaking legitimacy.”). In non-employment contexts arbitral decisions may also be scorned as precedent because arbitrators need not be attorneys or have legal training. Moohr, *Goals*, *supra* note 179, at 435.

²³⁷ Moohr, *Goals*, *supra* note 179, at 435.

²³⁸ Taking decisions out of courts may also affect judges’ rulings when they do hear cases. Myriam Gilles has warned that “[w]hen judges are no longer confronted regularly with the civil claims of the poor . . . they will become unversed in and desensitized to the underlying factual issues that affect lower-income groups.” Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1561 (2016).

²³⁹ Pub. L. No. 102-166, 105 Stat. 1071.

²⁴⁰ In a sexual harassment case, for example, a jury would ultimately decide whether the work environment was “hostile” or “abusive” depending on “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

²⁴¹ *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (reversing district court grant of summary judgment, where district court had found Title VII did not give rise to harassment claim by male employee regarding harassment by males); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (reversing district court grant of motion to dismiss claim alleging discrimination against homosexual violates Title VII); *Zarda v. Altitude Express*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (reversing district court’s grant

the case is heard by the jury, the trial court may rule on a motion to set aside the jury's verdict as a matter of law.²⁴² An appellate court may be asked to review the jury's verdict²⁴³ or the jury instructions.²⁴⁴ Through these kinds of decisions, judges spell out the meaning of our employment law, and these kinds of decisions will disappear to the extent employment disputes are sent to arbitration.

Further, the fact that most litigated cases are settled or decided on motions, rather than resolved at trial²⁴⁵ does not negate the argument that arbitration stultifies progressive development of the law by denying plaintiffs access to the courts. While it is true that the vast majority of litigated cases are resolved before trial, judges do often issue many decisions along the way. These decisions, on matters such as motions to dismiss and motions for summary judgment, refine relevant law²⁴⁶ and influence the settlements that are ultimately reached.²⁴⁷ When a dispute is handled in arbitration, by contrast, any such dispositive motions are handled by arbitrators and do not ultimately get resolved by appellate courts.²⁴⁸

Does the preceding discussion reflect a real problem, or are these just musings of an academic who has been battling mandatory arbitration for

of summary judgment to employer on ground that sexual orientation claims could not be brought under Title VII); *see generally* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 549 (2010) (discussing that summary judgment motions by defendants are more likely to be filed, and granted, in employment discrimination cases than in other kinds of cases).

²⁴² *See, e.g.*, *Westmoreland v. Prince George's Cty.*, No. 09-CV-2453, 2013 WL 6629054 (D. Md. Dec. 17, 2013) (rejecting defendant's motion for judgment as a matter of law that would have overturned jury's finding in favor of plaintiff on retaliation claim).

²⁴³ *See, e.g.*, *Rubinstein v. Admin. of the Tulane Educ. Fund*, 218 F.3d 392, 402 (5th Cir. 2000) (reviewing, and ultimately affirming, jury's verdict in favor of plaintiff on Title VII retaliation claim).

²⁴⁴ *See, e.g.*, *Huff v. Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007) (reviewing and reversing trial court's jury instruction in claim regarding hostile work environment).

²⁴⁵ During the twelve-month period ending March 31, 2018, 286,595 civil cases (excluding land condemnation) were filed in the U.S. District Courts. Court action only occurred in 234,655 cases. Of those, 202,397 were terminated or resolved before trial, and 29,745 were terminated or resolved during or after the pretrial hearing. Further, of the remaining 2,513 cases, 807 were tried in bench trials, and 1,706 were tried by juries. Overall, 0.9% of the total cases reached trial. U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN—DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2018, <http://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2018/03/31>, archived at <https://perma.cc/D545-PGKZ>.

²⁴⁶ *See supra* note 239.

²⁴⁷ As with litigated disputes, many arbitration matters settle, but the settlements in the two arenas will likely be different, reflecting the fact that an employee who does not settle in litigation will have a better chance of prevailing and recovering more relief than would an otherwise similarly situated employee in arbitration. Sternlight, *Disarming Employees*, *supra* note 26, at 1322 & n. 87; *see also* Colvin, *Empirical*, *supra* note 165, at 6 (observing that differences in settlement practices between litigation and arbitration may either depress or increase the arbitration win rate relative to litigation).

²⁴⁸ *See* Sternlight, *Disarming Employees*, *supra* note 26, at 1327.

over twenty years? Let us look to the powerful #MeToo movement to see how these issues are playing out today in court and in arbitration.

III. #METOO—AN ILLUSTRATION OF HOW MANDATORY ARBITRATION STYMIES PROGRESS TOWARDS JUSTICE

A. *The #MeToo Revelations as a Social Movement*

The #MeToo movement is, without doubt, a powerful social phenomenon. When the *New York Times* and *New Yorker* magazine suddenly exposed the alleged sexual transgressions of movie mogul Harvey Weinstein,²⁴⁹ actress Alyssa Milano posted a tweet calling upon victims to reveal if they too had been sexually harassed or assaulted.²⁵⁰ Within twenty-four hours the #MeToo hashtag had been used 500,000 times.²⁵¹ The power of the resulting movement led Time magazine to name the “silence breakers” of the #MeToo movement Time’s Person of the Year for 2017.²⁵²

²⁴⁹ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES, Oct. 5, 2017, <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>, archived at <https://perma.cc/Q4NZ-J2MS>; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER, Oct. 10, 2017, <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>, archived at <https://perma.cc/AA7M-VQKU>.

²⁵⁰ Margaret Renkl, *The Raw Power of #MeToo*, N.Y. TIMES, Oct. 19, 2017, <https://www.nytimes.com/2017/10/19/opinion/the-raw-power-of-metoo.html>, archived at <https://perma.cc/23N8-RGK2>.

²⁵¹ *Id.* Ten years prior, Tarana Burke initiated a “Me Too” movement focused on women of color and other marginalized people. Zenobia Jeffries, *Me Too Creator Tarana Burke Reminds Us This Is About Black and Brown Survivors*, YES! MAGAZINE, Jan. 4, 2018, <https://www.yesmagazine.org/people-power/me-too-creator-tarana-burke-reminds-us-this-is-about-black-and-brown-survivors-20180104>, archived at <https://perma.cc/R6JU-M9Q2>; see also Abby Olhaiser, *The Woman Behind Me Too Knew the Power of the Phrase When She Created It 10 Years Ago*, DENV. POST, Oct. 19, 2017, <https://www.denverpost.com/2017/10/19/metoo-woman-sexual-harassment-assault/>, archived at <https://perma.cc/X32J-3J24>.

²⁵² Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, TIME, Dec. 18, 2017, <http://time.com/time-person-of-the-year-2017-silence-breakers>, archived at <https://perma.cc/SN6F-EPVG>. Although the #MeToo movement has primarily focused on claims brought by women against men, it is important to remember that some of the harassment allegations have been brought by men or boys against men. See, e.g., Isabel Vincent & Melissa Klein, *Legendary Opera Conductor Molested Teen for Years: Police Report*, N.Y. POST, Dec. 2, 2017, <https://nypost.com/2017/12/02/legendary-opera-conductor-molested-teen-for-years-police-report/>, archived at <https://perma.cc/PG2R-JAEA>; Lauren Holter, *Anthony Rapps’s Claims Against Kevin Spacey Are a Reminder that Sexual Assault Happens to Men, Too*, BUSTLE (Oct. 31, 2017), <https://www.bustle.com/p/anthony-rapps-claims-against-kevin-spacey-are-a-reminder-that-sexual-assault-happens-to-men-too-3067274>, archived at <https://perma.cc/FK98-THNK>. Despite Michael Crichton’s book *Disclosure* and the subsequent movie, telling the story of a woman boss harassing a male subordinate, it is rare for men to bring claims against women. See Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 476 (J. Barling & C.L. Cooper eds., 2008). But see Zoe Greenberg, *What Happens to #MeToo When a Feminist is the Accused?*, N.Y. TIMES, Aug. 13, 2018, <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>, archived at <https://perma.cc/VC23-GM58>; Jacey Fortin, *Accused of Sexual Harassment, An-*

The #MeToo movement has had broad implications throughout the world.²⁵³ Harvey Weinstein has been arrested and charged with various counts of sexual assault.²⁵⁴ We have seen the firing, resignation, or embarrassment of leading men in the world of Hollywood,²⁵⁵ politics,²⁵⁶ news media,²⁵⁷ cooking,²⁵⁸ technology,²⁵⁹ entertainment,²⁶⁰ the armed forces,²⁶¹ law,²⁶²

drea Ramsey Ends Kansas Congressional Run, N.Y. TIMES, Dec. 15, 2017, <https://www.nytimes.com/2017/12/15/us/andrea-ramsey-harassment.html>, archived at <https://perma.cc/K2B9-CCHG>.

²⁵³ See Kara Fox & Jan Diehm, *#MeToo's Global Moment: The Anatomy of a Viral Campaign*, CNN (Nov. 9, 2017), <https://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html>, archived at <https://perma.cc/56VK-5LQ3>; Catherine Powell, *How #MeToo Has Spread Like Wildfire Around the World*, NEWSWEEK, Dec. 15, 2017, <http://www.newsweek.com/how-metoo-has-spread-wildfire-around-world-749171>, archived at <https://perma.cc/4HWV-CSF4>.

²⁵⁴ Maya Salam, *Harvey Weinstein's Arrest Comes After Months Long Downward Spiral*, N.Y. TIMES, May 24, 2018, <https://www.nytimes.com/2018/05/24/us/harvey-weinstein-charges.html>, archived at <https://perma.cc/MM2T-XHV3>.

²⁵⁵ Eric Levinson & Aaron Cooper, *Bill Cosby Guilty on All Three Counts in Indecent Assault Trial*, CNN (Apr. 26, 2018), <https://www.cnn.com/2018/04/26/us/bill-cosby-trial/index.html>, archived at <https://perma.cc/R3Y5-SGDM>; Mark Kennedy, *'House of Cards' Cancelled Amid Kevin Spacey Sexual Assault Allegations*, THE STAR (Oct. 30, 2017), <https://www.thestar.com/entertainment/2017/10/30/kevin-spacey-apologizes-after-allegations-by-tv-actor-anthon-y-rapp.html>, archived at <https://perma.cc/V6AU-SBGM>.

²⁵⁶ Matt Ford, *The 19 Women Who Accused President Trump of Sexual Misconduct*, THE ATLANTIC, Dec. 7, 2017 <https://www.theatlantic.com/politics/archive/2017/12/what-about-the-19-women-who-accused-trump/547724/>, archived at <https://perma.cc/Y3ZG-38EG>; Dan Merica, *Women Detail Sexual Allegations Against Trump*, CNN, (May 10, 2018), <https://www.cnn.com/2017/12/11/politics/donald-trump-women-allegations/index.html>, archived at <https://perma.cc/RE5X-V7VS>; Meghan Keneally, *Sen. Al Franken's Accusers and the Allegations Against Him*, ABC NEWS (Dec. 6, 2017), <https://abcnews.go.com/US/sen-al-frankens-accusers-accusations-made/story?id=51406862>, archived at <https://perma.cc/3G5N-LWGN>; James Salzer, *Lobbyist Files Sexual Harassment Complaint Against Georgia Lawmaker*, POLITICALLY GEORGIA (Mar. 9, 2018), <https://politics.myajc.com/news/state-regional-govt-politics/lobbyist-files-sexual-harassment-complaint-against-georgia-lawmaker/ERcsb7xkuU8PrRA6q3wv5Ll>, archived at <https://perma.cc/5JGD-CBF7>.

²⁵⁷ Michael M. Grynbaum & John Koblin, *Anchor Ousted at Fox News Accuses Chief of Harassment*, N.Y. TIMES, July 7, 2016; John Koblin, Emily Steel & Jim Rutenberg, *As Accusations Build, Murdoch Ushers Ailes Out at Fox News*, N.Y. TIMES, July 22, 2016; Sydney Ember, *Michael Oreskes Quits NPR Amid Sexual Harassment Accusations*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/business/media/mike-oreskes-npr-sexual-harassment.html>, archived at <https://perma.cc/66ZA-FXN3>; Maya Salam, *Minnesota Public Radio Drops Garrison Keillor Over Allegations of Improper Conduct*, N.Y. TIMES, Nov. 29, 2017, <https://www.nytimes.com/2017/11/29/business/media/garrison-keillor-fired.html>, archived at <https://perma.cc/88LQ-83SL>.

²⁵⁸ Kim Severson, *After Apologies, Restaurants Struggle to Change*, N.Y. TIMES, Jan. 18, 2018 <https://www.nytimes.com/2018/01/18/dining/restaurants-sexual-harassment.html>, archived at <https://perma.cc/KD6N-VWQ6> (discussing accusations against chef Mario Batali).

²⁵⁹ Richard Morgan, *Uber CEO Takes Leave of Absence Amid Sexual Harassment Scandal*, N.Y. POST, June 13, 2017, <https://nypost.com/2017/06/13/uber-ceo-takes-leave-of-absence-amid-sexual-harassment-scandal/>, archived at <https://perma.cc/L6YL-57TA>.

²⁶⁰ Lisa Respers France, *Louis C.K. Accused of Sexual Misconduct in Bombshell Report*, CNN (Nov. 10, 2017), <https://www.cnn.com/2017/11/09/entertainment/louis-ck-sexual-misconduct/index.html>, archived at <https://perma.cc/6R7F-3HHY>.

²⁶¹ See, e.g., Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL NEWS FROM THE CTR. FOR INVESTIGATIVE REPORTING (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/>, archived at <https://perma.cc/3JPG-V7HY>.

and many other contexts.²⁶³ Oprah Winfrey announced at the Golden Globes Ceremony that “a new day is on the horizon.”²⁶⁴ While the #MeToo movement has relied extensively on social media and public demonstrations of alliance, it has also achieved institutional support. January 1, 2018 marked the founding of the Time’s Up Initiative, which created a legal defense fund that provides subsidized legal aid to victims of sexual abuse in the workplace.²⁶⁵ The fund is managed by the National Women’s Law Center, and it has expanded its mission more broadly to “address[] the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential.”²⁶⁶ Within its first five weeks of existence, Time’s Up raised \$20 million.²⁶⁷

Yet questions remain as to whether this powerful social movement will make meaningful changes in all kinds of workplaces. Many of the loudest voices in the #MeToo movement are celebrities who can galvanize the support of thousands of people with the click of a button. In contrast, victims who are farmworkers,²⁶⁸ hotel workers,²⁶⁹ autoworkers,²⁷⁰ sportswear execu-

²⁶² See, e.g., Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST, Dec. 8, 2017, https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.4426209350ef, archived at <https://perma.cc/ENB7-U8ZK>.

²⁶³ A list compiled in late February 2018 is already out of date. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (Feb. 26, 2018), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations>, archived at <https://perma.cc/P7RV-CV58>.

²⁶⁴ Sophie Gilbert & Tori Latham, *Full Transcript: Oprah Winfrey’s Speech at the Golden Globes*, THE ATLANTIC (Jan. 8, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/full-transcript-oprah-winfreys-speech-at-the-golden-globes/549905/>, archived at <https://perma.cc/MJT9-RD4L>; see also Catherine A. MacKinnon, *#MeToo and Law’s Limitations*, N.Y. TIMES, Feb. 4, 2018, at A19 (“The #MeToo movement is accomplishing what sexual harassment law to date has not.”).

²⁶⁵ TIME’S UP, <https://www.timesupnow.com/> (last visited Aug. 22, 2018), archived at <https://perma.cc/2K6U-H4F2>.

²⁶⁶ TIME’S UP, <https://www.timesupnow.com/#ourmission-anchor>, archived at <https://perma.cc/7JNJ-WE4W>; see also Alix Langone, *#MeToo and Time’s Up Founders Explain the Difference Between the 2 Movements—And How They’re Alike*, <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/>, archived at <https://perma.cc/P5LT-DVZM> (updated Mar. 22, 2018, originally published Mar. 8, 2018).

²⁶⁷ Natalie Robehmed, *With \$20 Million Raised, Time’s Up Seek ‘Equity and Safety’ in the Workplace*, FORBES (Feb. 6, 2018), <https://www.forbes.com/sites/natalierobehmed/2018/02/06/with-20-million-raised-times-up-seeks-equity-and-safety-in-the-workplace/#6c0ac277103c>, archived at <https://perma.cc/AD6M-5M8Q>.

²⁶⁸ See, e.g., Time Staff, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/>, archived at <https://perma.cc/D3NZ-VUNN>.

²⁶⁹ See, e.g., Dave Jamieson, *‘He was Masturbating . . . I Felt like Crying’: What Housekeepers Endure to Clean Hotel Rooms*, HUFFINGTON POST (Nov. 18, 2017), https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment_us_5a0f438ce4b0e97dffed3443, archived at <https://perma.cc/PX2D-M523>.

²⁷⁰ See, e.g., Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES, Dec. 19, 2017, <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>, archived at <https://perma.cc/2FRS-M2TN>.

tives,²⁷¹ tech experts,²⁷² or provide security in airports²⁷³ may not find that the #MeToo movement works immediately or easily to rid their workplaces of sexual harassment.²⁷⁴ They may, instead, need the help of the law and of lawyers.

B. *The Law of Sexual Harassment Has Not Caught Up to #MeToo*

While public opinion is waxing strongly against sexual harassment and inappropriate sexual conduct in the workplace, the law of sexual harassment has not caught up with this trend. At least not yet. Many of the actions and comments that have led to resignations, terminations, and public opprobrium would likely not produce legal liability under existing precedent.²⁷⁵ As numerous excellent scholars have already discussed this issue in depth,²⁷⁶ this

²⁷¹ See, e.g., Julie Creswell et al., *At Nike, Revolt Led by Women Leads to Exodus of Male Executives*, N.Y. TIMES, Apr. 28, 2018, <https://www.nytimes.com/2018/04/28/business/nike-women.html>, archived at <https://perma.cc/YP5D-LJB2> (detailing that while a number of male executives were eventually pushed out at Nike, it took a great deal of time and many failed efforts).

²⁷² See generally EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS' CLUB OF SILICON VALLEY (2018).

²⁷³ *This American Life: LaDonna*, CHICAGO PUBLIC RADIO (May 25, 2018), <https://www.thisamericanlife.org/647/ladonna>, archived at <https://perma.cc/ZX3W-Z325> (telling the story of an airport security worker who endured substantial sexual harassment over a lengthy period of time).

²⁷⁴ Although much of the empirical sexual harassment literature has focused on White/European American women, it may be that other groups are harassed in equal or greater numbers, and reporting behavior may also vary across racial and gender lines. See EEOC SELECT TASK FORCE, *supra* note 204, at 11 (citing Tamara A. Bruce, *Racial and Ethnic Harassment in the Workplace*, in GENDER, RACE, AND ETHNICITY IN THE WORKPLACE: ISSUES AND CHALLENGES FOR TODAY'S ORGANIZATIONS (Margaret Foegen Karsten, M. ed., 2006)). See also Cortina & Berdahl, *supra* note 251, at 477 (reporting a lack of definitive information on these issues). We also lack good empirical information on harassment experienced by members of the LGBT community. EEOC SELECT TASK FORCE, *supra* note 204, at 10–11 (summarizing an array of studies showing at least 35% of openly LGBT persons reported being harassed at work, with transgender persons reporting even higher rates of harassment).

²⁷⁵ For example, Minnesota Senator Al Franken was compelled to resign his seat for allegedly forcibly kissing a radio news anchor and subsequently groping her on an airplane. Phil McCausland, *Sen. Al Franken 'Embarrassed and Ashamed' Following Sexual Harassment Allegations*, NBC NEWS (Nov. 26, 2017), <https://www.nbcnews.com/politics/congress/sen-al-franken-embarrassed-ashamed-following-sexual-harassment-allegations-n824026>, archived at <https://perma.cc/9WVP-945N>. New York Times reporter Glenn Thrush was suspended after four women came forward, alleging that Thrush kissed and touched them without their consent. Sydney Ember, *Glenn Thrush, New York Times Reporter, Accused of Sexual Misconduct*, N.Y. TIMES, Nov. 20, 2017, <https://www.nytimes.com/2017/11/20/business/media/glenn-thrush-sexual-misconduct.html>, archived at <https://perma.cc/XBG2-XQEV>. Yet, as will be seen, unauthorized touching or even kissing is not necessarily sufficient to support a claim for sexual harassment under federal law. See *infra* notes 278–287 and accompanying text.

²⁷⁶ See, e.g., Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. (forthcoming 2019) (manuscript at 9); Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE (2018); Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN. ST. L. REV. 463 (2018); see also Sandra F. Sperino and Suja A. Thomas, *When Harassment Isn't Harassment*, N.Y. TIMES, Nov.

Article will lightly cover the subject as background to the arbitration discussion.²⁷⁷

Title VII of the Civil Rights Act of 1964 governs claims for sexual harassment under federal law.²⁷⁸ Under this law, to prevail on a claim that inappropriate comments or physical contact created a “hostile work environment,”²⁷⁹ the plaintiff must show that the conduct was more than “merely offensive.”²⁸⁰ Rather, such conduct must be “severe and pervasive,” “unwelcome,”²⁸¹ and “because of sex.”²⁸² Although this may not sound like too high a standard, the law books are replete with cases that apply these standards in an extremely demanding fashion to reject claims many #MeToo activists would have assumed constitute sexual harassment. For example, affirming a grant of summary judgment on plaintiff’s hostile work environment claim, the Eighth Circuit discussed multiple prior decisions in which plaintiffs failed to prove a hostile work environment despite seemingly favorable evidence. In the first case plaintiff had “evidence that a supervisor sexually propositioned her, repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualification for a posi-

29, 2017, at A31 (observing that “courts routinely dismiss cases brought by workers who claim their supervisors propositioned them, kissed them or grabbed their breasts”); Catherine A. MacKinnon, *#MeToo and Law’s Limitations*, N.Y. TIMES, Feb. 4, 2018, at A19; Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts>, archived at <https://perma.cc/5AEW-QVUG>.

²⁷⁷ Both the Stanford Law Review and the Yale Law Journal recently published online symposia devoted to the implications of the #MeToo movement for sexual harassment law. See generally *#MeToo and the Future of Sexual Harassment Law*, <https://www.stanfordlawreview.org/metoo-symposium/>, archived at <https://perma.cc/UGA2-TFR7>; *#MeToo and the Future of Sexual Harassment Law*, <https://www.yalelawjournal.org/collection/MeToo>, archived at <https://perma.cc/R8TB-EYA7>.

²⁷⁸ 42 U.S.C. §2000(e) et seq. While alleged victims can potentially state claims under state statutes or common law as well, depending on the circumstances, this analysis will focus on claims brought under federal law.

²⁷⁹ As has already been discussed in this Article, see *supra* notes 53–60 and accompanying text, even the recognition of hostile environment claims was a significant advance in the interpretation of Title VII, as for some time prior courts viewed supervisors’ insistence that subordinates sleep with them or be fired as mere personal conduct, rather than workplace discrimination. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 54, at 1701–04. Note that sexual harassment claims can also potentially be brought where the plaintiff alleges sex was demanded as a quid pro quo for obtaining or retaining the job or employment benefits. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). However, those cases can also be very hard to win because courts often find alleged conduct has not affected the plaintiff’s “employment benefits.” See, e.g., *Jones v. Clinton*, 990 F. Supp. 657, 679 (E.D. Ark. 1998) (finding that, even assuming Clinton engaged in inappropriate sexual conduct with Paula Jones, Jones could not prevail on claims either that the conduct was a quid pro quo for employment or that she had suffered employment detriments).

²⁸⁰ *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993).

²⁸¹ *Meritor*, 477 U.S. at 67–68 (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”).

²⁸² *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 75 (1998) (finding that same sex harassing conduct can only violate Title VII if it is “because of” sex, and that Title VII is not a “general civility code”).

tion, displayed a poster portraying the plaintiff as ‘the president and CEO of the Man Hater’s Club of America,’ and asked her to type a copy of a ‘He–Men Women Hater’s Club’ manifesto.”²⁸³ In the second case, “a supervisor had rubbed an employee’s back and shoulders, called her ‘baby doll,’ ‘accus[ed] her of not wanting to be “one of [his] girls,”’ suggested once in a long-distance phone call ‘that she should be in bed with him,’ and ‘insinuat[ed] that she could go farther in the company if she got along with him.’”²⁸⁴ Then, in the third cited case, the court had ruled that a plaintiff “had not established actionable harassment” even though he “asserted that a harasser asked him to watch pornographic movies and to masturbate together, suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm, kissed the plaintiff on the mouth, ‘grabbed’ the plaintiff’s buttocks, ‘brush[ed]’ the plaintiff’s groin, ‘reached for’ the plaintiff’s genitals, and ‘briefly gripped’ the plaintiff’s thigh.”²⁸⁵ Considering all of this precedent, the Eighth Circuit in 2013 similarly found the trial court had not erred in granting summary judgment to defendant on plaintiff’s hostile work environment claim, even though plaintiff provided evidence that her supervisor had put his arms around her on two occasions, kissed her face, and demanded she use tweezers to remove an ingrown facial hair from his chin.²⁸⁶ Nor is the Eighth Circuit uniquely hostile to sexual harassment claims; other jurisdictions have issued plenty of similar decisions.²⁸⁷

In addition to facing an uphill battle to show that alleged conduct is “severe,” “pervasive,” and “unwelcome,” plaintiffs in sexual harassment cases face other significant hurdles due to courts’ interpretations of Title VII. For example, plaintiffs will fail if they complain about sexual harassment

²⁸³ *McMiller v. Metro*, 738 F.3d 185, 188 (8th Cir. 2013) (per curiam) (quoting *Duncan v. General Motors Corp.*, 300 F.3d 928, 931–35 (8th Cir. 2002)) (affirming grant of summary judgment on hostile work environment claim but remanding for consideration of quid pro quo harassment claim).

²⁸⁴ *McMiller*, 738 F.3d at 188–89 (quoting *Anderson v. Fam. Dollar Stores of Ark., Inc.*, 579 F.3d 858, 862 (8th Cir. 2009)).

²⁸⁵ *Id.* at 189 (quoting *LeGrand v. Area Res. for Cmty. and Hum. Serv.*, 394 F.3d 1098, 1100–03 (8th Cir. 2005)).

²⁸⁶ *Id.* at 188 (affirming grant of summary judgment on hostile work environment claim but remanding for consideration of quid pro quo harassment claim).

²⁸⁷ *See, e.g., Paul v. Northrop Grumman Ship Sys.*, 309 F. App’x 825, 829 (5th Cir. 2009) (holding that single instances of offensive touching including supervisor rubbing pelvic region against employee’s hips and buttocks and touching employee’s stomach and wrist are not objectively offensive or severe enough to support a claim of sexual harassment); *Bowman v. Shawnee St. Univ.*, 220 F.3d 456, 464 (6th Cir. 2000) (affirming summary judgment for a woman accused of sexually harassing a male employee in part because the abuse was not pervasive enough, even though woman had rubbed male employee’s shoulder, grabbed his buttocks, and made sexually charged comments); *Adusumilli v. City of Chicago*, 164 F.3d 353, 361–62 (7th Cir. 1998) (finding that ‘simple teasing,’ offhand comments, and four “isolated” incidents of touching of the hand, arm and buttocks by another co-worker did not constitute severe and pervasive sexual harassment). *See also* SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 32–40 (2017).

either too soon²⁸⁸ or too late.²⁸⁹ Also, the Supreme Court has issued two decisions that allow companies to elude liability in sexual harassment cases as long as they can show that they took reasonable steps to prevent and correct any hostile work environment (for example, by instituting a training program) and that the victim failed to take advantage of internal mechanisms designed to prevent harassment.²⁹⁰ Case law also makes it very difficult for sexual harassment victims to prove that any negative employment consequences were caused by gender-related harassment.²⁹¹

Also, while Title VII proscribes retaliation against those who complain of sexual harassment or other forms of discrimination,²⁹² courts' interpretations of Title VII have also made it tough for plaintiffs to win these claims.²⁹³ Plaintiffs' retaliation claims fail, for example, if the initial conduct complained of was not sufficiently egregious,²⁹⁴ if the plaintiff cannot show a

²⁸⁸ A claim is essentially brought too soon if the employee has complained of conduct that the court ultimately finds was not sufficiently severe to count as "severe and pervasive" under Title VII. For example, Kate Nunez explains that much of the conduct endured by female reporters at Fox News might not have been sufficient to support a legal claim. Nunez, *supra* note 275, at 493.

²⁸⁹ It is easy to file too late, as plaintiffs must file a charge of discrimination with the Equal Employment Opportunity Commission within either 180 or 300 days of at least one of the acts of which they complain, depending upon the jurisdiction. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002). This time period can be quite short, particularly if a victim is agonizing over whether filing a complaint may further harm her employment situation or prospects. *See, e.g., Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287, 1307 (11th Cir. 2007) (finding plaintiff's claim was untimely where she waited three and a half months to report the conduct, even though she delayed "because she feared being fired and felt that silence would best serve her career interests").

²⁹⁰ *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013) (holding that an employee is a "supervisor," whose actions potentially make an employer vicariously liable, only when the employer has empowered that harassing employee to take tangible employment actions against the victim); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (holding that employers are subject to vicarious liability for supervisors' sexual harassment, but are able to assert an affirmative defense that the employer's conduct was reasonable in attempting to prevent harassment of which the plaintiff employee unreasonably failed to take advantage).

²⁹¹ Alleged victims face multiple problems in proving causation. They must show that any alleged negative employment consequences were attributable to harassment, and they must also prove that the nature of the harassment was attributable to sex. *See* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1703 (2002).

²⁹² 42 U.S.C. § 2000e-3(a).

²⁹³ *See* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, STAN. L. REV. ONLINE (2018), <https://www.stanfordlawreview.org/online/ending-harassment-by-starting-with-retaliation/>, archived at <https://perma.cc/LA58-8F9X>.

²⁹⁴ *See, e.g., Grosdidier v. Broad. Bd. of Governors*, 709 F.3d 19, 24 (D.C. Cir. 2013) (affirming grant of summary judgment on retaliation claim because "no reasonable employee could believe that the conduct about which she complained amounted to a hostile work environment under Title VII"). Most courts do not require that the complained of conduct be unlawful, so long as the employee reasonably and in good faith believed it to be unlawful. *See, e.g., EEOC v. Rite Way Serv.*, 819 F.3d 235, 237 (5th Cir. 2016). However, the Supreme Court has left open the possibility that perhaps retaliation protection is afforded only where the conduct is actually unlawful. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001); *see generally Deborah L. Brake & Joanna L. Grossman, The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 924 (2008) (retaliation claim fails if harassment is not sufficiently severe).

materially adverse employment action was taken against her,²⁹⁵ or if the plaintiff cannot sufficiently prove a causal relationship between her complaints and any action taken against her.²⁹⁶ Former Fox News anchor Megyn Kelly explained the dilemma faced by many victims:

I knew the reality of the situation: if I caused a stink, my career would likely be over. Sure they might investigate, but I felt certain there was no way they would get rid of him, and I would be left on the wrong side of the one man who had power at Fox. I'd get labeled a troublemaker, someone who is overly sensitive—all the things we too often hear about women who don't tolerate harassment. I didn't want any of that. I just wanted to do my job.²⁹⁷

In short, these cases demonstrate that the law of sexual harassment is not yet in sync with the notions of justice demanded by the #MeToo social movement. Still, a number of commentators have expressed hope that the #MeToo social movement will eventually encourage courts to interpret sexual harassment law more sympathetically to victims.²⁹⁸ As Rebecca Hanner White has emphasized:

A law's interpretation can shift and change over time, and it is possible that the #MeToo movement will lead judges (and juries should a case proceed past summary judgment to trial) to think differently, and more empathetically, about how workplace harassment affects women and to assess whether it is actionable accordingly.²⁹⁹

Sandra Sperino and Suja Thomas have similarly expressed hope that the #MeToo movement will encourage judges to rethink earlier cases that have led them to dismiss so many claims of harassment as not sufficiently severe or pervasive to be legally cognizable:

In the early and mid-1990s, the federal courts wrestled with the meaning of the “severe or pervasive” standard, and judges during that period created a very high bar for plaintiffs to meet. Unlike typical workers, these judges had lifelong job security and power-

²⁹⁵ See, e.g., *Higgins v. Gonzalez*, 481 F.3d 578, 585–86, 590 (8th Cir. 2007) (finding that withholding of mentoring is not a sufficiently materially adverse act to count as retaliation under Title VII).

²⁹⁶ See Nunez, *supra* note 276, at 484–85 (discussing difficulty in proving causation in retaliation claims under Title VII).

²⁹⁷ MEGYN KELLY, *SETTLE FOR MORE* 302 (2016) (discussing why Kelly did not file a formal complaint against Roger Ailes).

²⁹⁸ Of course commentators also hope that the #MeToo movement will lead judges and others to better understand the factual perspective of alleged victims, and to more frequently believe their accounts, in addition to interpreting the law more favorably.

²⁹⁹ White, *supra* note 276, at 3. White quotes Professor Deborah Rhode as stating: “Often times it takes a kind of cultural consciousness raising moment like the one that we’re having now to force a reevaluation of standards.” *Id.* at 3 n.9.

ful positions. They also did not have the benefit of deliberating with a large group of people with different experiences as a jury does. These early cases have cast a long shadow, and today, some judges appear to simply be following the standards set by earlier courts. These standards have not aged well.³⁰⁰

Catherine MacKinnon also expresses optimism: “[s]exual harassment law can grow with #MeToo. Taking #MeToo’s changing norms into the law could—and predictably will—transform the law as well.”³⁰¹

There are early signs that the #MeToo movement is already beginning to have some influence on judges. In a recent decision, the Third Circuit Court of Appeals reversed a trial court decision granting summary judgment to the employer in a sexual harassment case, holding that a jury must be given a chance to opine on whether the employee acted reasonably when she failed to report the sexual harassment through an internal reporting mechanism.³⁰² The court specifically alluded to the #MeToo movement in its analysis, stating “[t]his appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by victims.”³⁰³ In particular, the court found that while Supreme Court case law generally protects employers from liability when employees fail to timely report their claims, recent news stories and studies show that the failure to report is widespread and can be justifiable.³⁰⁴ This is a clear example of how social movements can impact the development of law. Unfortunately, however, given the arbitration landscape discussed in this Article and applied to the sexual harassment context below, these moments of judicial reinterpretation in the area of sexual harassment may be few and far between. Many judges may not even get a chance to rethink these older standards.

C. Arbitration Clauses and the #MeToo Movement

Arbitration clauses are already significantly constraining the claims that might have arisen out of the #MeToo movement, thereby stagnating the development of sexual harassment law. In 2016, then Fox News star Gretchen Carlson filed a complaint against Roger Ailes, at that time Chairman and CEO of Fox News, in New Jersey Superior Court.³⁰⁵ Carlson alleged that Ailes had made numerous inappropriate comments and sexual advances, and also retaliated against her for complaining about her co-host’s sexist behav-

³⁰⁰ Sperino & Thomas, *supra* note 276, at A31.

³⁰¹ MacKinnon, *supra* note 275, at A19.

³⁰² *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 306 (3rd Cir. 2018).

³⁰³ *Id.* at 313 n.12.

³⁰⁴ *Id.*

³⁰⁵ Nunez, *supra* note 276, at 467; Complaint and Jury Demand, *Carlson v. Ailes*, No. 2:16-cv-04138 (D.N.J. July 6, 2016), <https://assets.documentcloud.org/documents/2941030/Carlson-Complaint-Filed.pdf>, archived at <https://perma.cc/X5UJ-DMEL>.

ior.³⁰⁶ It is likely that Carlson sued only Ailes, and not Fox News itself, in an effort to elude the arbitration clause contained in her contract,³⁰⁷ but Ailes still sought to have the lawsuit dismissed so that any issues would be resolved in arbitration.³⁰⁸ Ultimately, because Fox News and Carlson settled, the courts did not decide whether the claim would have been heard in arbitration rather than litigation.³⁰⁹ However, when another Fox News host, Andrea Tantaros, brought a sexual harassment lawsuit against Roger Ailes, Ailes and the other defendants won a motion in court relegating the matter to confidential arbitration.³¹⁰ Fox News ultimately settled these and other claims and eventually terminated alleged perpetrators Bill O'Reilly and Roger Ailes,³¹¹ but only after the allegations received substantial public attention and a public outcry led advertisers to withdraw sponsorships.³¹²

The link between sexual harassment and mandatory arbitration has also gained a lot of attention in the tech world. Susan Fowler, who wrote a now famous blog blowing the whistle on sexual harassment committed against female engineers at Uber,³¹³ has also been extremely active in drawing the connection between ongoing sexual harassment and forced arbitration. For example, Fowler filed an amicus curiae brief in *Epic Systems*, urging that the Supreme Court prohibit companies from using forced arbitration to prevent employees from bringing group or class claims.³¹⁴ In the brief, Fowler explains that she, like hundreds of thousands of other Uber workers, was required to sign an arbitration provision including a class action waiver.³¹⁵ She also notes that many other tech companies, including Google and Facebook, require their workers to agree to arbitration including class action waivers.³¹⁶ Fowler urges that taking away the class action from tech workers is particularly harmful because, in the “gig economy,” workers realistically lack other economic weapons of concerted action such as the strike or picket line.³¹⁷

³⁰⁶ Nunez, *supra* note 276, at 467–68.

³⁰⁷ *Id.* at 469.

³⁰⁸ John Koblin, *Lawyers for Fox News Chairman Want Harassment Suit in Arbitration*, N.Y. TIMES, July 9, 2016, at B6.

³⁰⁹ Nunez, *supra* note 276, at 469–70.

³¹⁰ *Id.* at 471–72.

³¹¹ *Id.* at 465. Emily Steel & Michael Schmidt, *Fox News Ousts O'Reilly, A Host Central to Its Rise*, N.Y. TIMES, Apr. 20, 2017, at A1.

³¹² Nunez, *supra* note 276, at 465. See also Jim Dwyer, *Ex-Host Charges Fox News with Retaliation for Harassment Complaints*, N.Y. TIMES, Aug. 23, 2016, at B3; Michael M. Grynbaum & John Koblin, *Anchor Ousted at Fox News Accuses Chief of Harassment*, N.Y. TIMES, July 7, 2016, at A1.

³¹³ Susan J. Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN J. FOWLER BLOG (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>, archived at <https://perma.cc/ML5C-EC2Z>; see also Mike Isaac, *Uber Fires 20 Amid Investigation into Workplace Culture*, N.Y. TIMES, June 6, 2017, at A1.

³¹⁴ Brief for Susan Fowler as Amicus Curiae in Support of Respondents, *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018) (No. 16-285), 2017 WL 4325881, at *2–3.

³¹⁵ *Id.* at *2, *5–6.

³¹⁶ *Id.* at *7 n. 8.

³¹⁷ *Id.* at *9 (explaining that workers who do not come into a physical office have fewer opportunities to do old-fashioned picketing or engage in other kinds of concerted activity).

Fowler has also been working with the California Labor Federation in support of a proposed California statute intended to block forced arbitration.³¹⁸ She has stated, “[f]orced arbitration is a kind of legal loophole that these companies could use—companies like Uber—to cover up illegal behavior.”³¹⁹ And Ms. Fowler also wrote an op-ed for the *New York Times* urging that Congress adopt legislation ending the use of mandatory arbitration to block sexual harassment claims.³²⁰

While employees in certain high profile industries may be reasonably well positioned to gain substantial attention for their claims despite being covered by private arbitration clauses, most employees do not have this advantage of a public platform to raise these issues. News media realistically cannot and will not give coverage to most allegations of sexual or other misconduct brought by lower level employees in businesses throughout the economy. For this reason, a number of advocates, including Gretchen Carlson herself, have urged companies throughout the economy to stop forcing their employees into arbitration. She tweeted: “EVERY organization should end forced arbitration because keeping victims silent is how sexual predators can get away with it for years (or decades).”³²¹

Other advocates have similarly drawn a direct connection between sexual harassment and binding arbitration clauses, demanding that companies change their practices.³²² For example, actress Reese Witherspoon, who has been speaking out about sexist behavior in Hollywood, has stated, “[n]o more forced arbitration agreements for sexual harassment cases makes a safer work environment.”³²³ Numerous advocacy organizations joined together to write a letter to Google in February 2018 urging that company “to end the use of forced arbitration provisions in your employee contracts and to restore your employees’ rights to access the court system after disputes

³¹⁸ Johana Bhuiyan, *Susan Fowler’s Next Act: Ending Forced Arbitration, Which Blocks Workers from Suing Their Employers*, RECODE (Apr. 18, 2018), <https://www.recode.net/2018/4/18/17252032/susan-fowler-uber-forced-arbitration-labor-bill-california>, archived at <https://perma.cc/89C9-2MYG>.

³¹⁹ *Id.*

³²⁰ Susan Fowler, *I Wrote the Uber Memo. This is How to End Sexual Harassment*, N.Y. TIMES, Apr. 12, 2018, <https://www.nytimes.com/2018/04/12/opinion/metoo-susan-fowler-forced-arbitration.html>, archived at <http://perma.cc/86KA-BZB4>.

³²¹ Danielle Paquette, *Microsoft Just Handed #MeToo a Major Victory*, WASH. POST, Dec. 20, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/12/20/microsoft-just-handed-metoo-a-major-victory/?utm_term=.1543045cdc7e, archived at <https://perma.cc/S2KT-NU52>.

³²² As will be discussed, advocates including more than fifty attorneys general have also asked Congress to protect victims of sexual harassment by passing legislation to limit companies’ use of forced arbitration. See *infra* notes 346–347 and accompanying text; see also Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J., Jan. 25, 2018, <https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201>, archived at <https://perma.cc/UH37-QR3B>.

³²³ Paquette, *supra* note 321.

arise with your company.”³²⁴ Also, Gizmodo asked ten major tech companies to ban forced arbitration in order to fight sexual harassment in Silicon Valley.³²⁵

In a few instances, companies have agreed to act in the public interest (or have given in to public shaming, depending on one’s degree of cynicism) to abolish forced arbitration for certain types of claims. Microsoft ended its use of forced arbitration clauses with respect to sexual harassment claims in December 2017.³²⁶ Similarly, Uber and Lyft have now ended forced arbitration of sexual harassment and assault claims by employees, drivers, or customers, though Uber still blocks class actions in both arbitration and litigation.³²⁷ Meanwhile, several major law firms agreed to stop using forced arbitration to require summer associates and others to arbitrate sexual harassment and other claims, after a Harvard Law School Lecturer tweeted about the clauses.³²⁸ Heightening the pressure, fourteen top law schools have asked law firms that interview on campus to disclose whether or not they plan to require summer associates to agree to arbitration.³²⁹

While social pressure has been effective in the aforementioned contexts, many and likely most companies still force sexual harassment victims and other employees to bring any claims they may have in arbitration, rather

³²⁴ Letter from more than forty public interest organizations to Larry Page (Feb. 7, 2018), https://www.citizen.org/sites/default/files/employment_arb_sign-on_letter_google.pdf, archived at <https://perma.cc/3AFV-HE83>.

³²⁵ Melanie Ehrenkranz, *Silicon Valley Needs to Ban Forced-Arbitration Agreements. We Asked 10 Tech Companies if They Will*, GIZMODO (Feb. 9, 2018), <https://gizmodo.com/silicon-valley-needs-to-ban-forced-arbitration-agreemen-1822313732>, archived at <https://perma.cc/2ERP-NC2S>.

³²⁶ Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT BLOG (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/>, archived at <https://perma.cc/N7BH-3AE3> (blog from Microsoft President Brad Smith stating “we are waiving the contractual requirement for arbitration of sexual harassment claims in our own arbitration agreements for the limited number of employees who have this requirement”); Paquette, *supra* note 321. Microsoft also announced its support of a proposed federal law, discussed *infra* note 346, that would bar most companies from employing forced arbitration in employment cases. Smith, *Microsoft Endorses, supra*.

³²⁷ Staff, *Uber and Lyft End Forced Arbitration of Sexual Harassment and Assault Claims*, CEB GLOBAL (May 15, 2018), <https://www.cebglobal.com/talentedaily/uber-ends-forced-arbitration-of-sexual-harassment-claims-pledges-transparency/>, archived at <https://perma.cc/TVA2-PYED>.

³²⁸ See Debra Cassens Weiss, *After Social Media Outcry, Munger Tolles Will No Longer Require Mandatory Arbitration*, A.B.A. J. (Mar. 26, 2018), http://www.abajournal.com/news/article/after_social_media_outcry_munger_tolles_will_no_longer_require_mandatory_arb, archived at <https://perma.cc/AA9C-DU7K>. See also Stephanie Francis Ward, *Orrick Follows Munger Tolles in Dropping Mandatory Arbitration Agreements: Will More Firms Follow?*, A.B.A. J. (Mar. 28, 2018), http://www.abajournal.com/news/article/orrick_follows_munger_tolles_in_dropping_mandatory_arbitration, archived at <https://perma.cc/WKT2-DC8D>.

³²⁹ Meghan Tribe, *Top Law Schools Ask Firms to Disclose Summer Associate Arbitration Agreements*, AM. LAW. (May 14, 2018), <https://www.law.com/americanlawyer/2018/05/14/top-law-schools-ask-firms-to-disclose-summer-associate-arbitration-agreements/>, archived at <https://perma.cc/TW2E-F4WP>.

than litigation.³³⁰ When Gizmodo reached out to ten major tech companies and asked them to get rid of their forced arbitration clauses, the request had limited success.³³¹ Amazon and Verizon denied using such clauses, and none of the additional major companies agreed to get rid of the provisions.³³²

Given these circumstances, the #MeToo movement provides a clear, real-time example of the individual and societal consequences of mandatory arbitration discussed throughout this Article. By preventing historically disempowered female workers from gaining access to court, many American companies suppress their employees' ability to pursue relief for their injuries and prevent the development of more progressive law that might otherwise have occurred in light of widespread social momentum.

IV. CALL FOR LEGISLATIVE REFORM

So, what is to be done?

A. Congress Can Fix This

In one sense, the reform is easy. The Supreme Court's arbitration jurisprudence derives from one statute, the 1925 Federal Arbitration Act.³³³ While many, including this author³³⁴ and multiple current or former Supreme Court Justices,³³⁵ believe the Court has grossly misinterpreted this statute, it seems highly unlikely the Court and its newest members will change their approach any time soon. However, the good news about errors in statutory interpretation is that passage of new laws can fix them. To this end, over a period of now more than sixteen years, legislators have introduced various Arbitration Fairness Acts that would prevent companies from using form contracts to impose arbitration on consumers and employees.³³⁶ While such

³³⁰ The last major study on the question of how many companies impose mandatory arbitration on their employees was published in 2017 by Alexander Colvin and showed that 56% of companies did so. See Colvin, *Growing Use*, *supra* note 101. While it is conceivable that this number might have shrunk, it is also quite possible it has risen, particularly as companies have been reassured by the Supreme Court in *Epic Systems* that it is permissible to use mandatory arbitration to insulate themselves from employment class actions. See *supra* notes 152–153 and accompanying text. An accurate current count of the number of companies that force arbitration on their employees must await new empirical research.

³³¹ See Ehrenkranz, *supra* note 325.

³³² *Id.*

³³³ 9 U.S.C. § 1 et seq.

³³⁴ See Sternlight, *Panacea or Corporate Tool?*, *supra* note 26, at 697; see also SZALAI, *supra* note 138; Moses, *supra* note 138, at 157; Schwartz, *Claim-Suppressing Arbitration*, *supra* note 171, at 244; Gross, *Justice Scalia's Hat Trick*, *supra* note 143, at 145.

³³⁵ Moses, *supra* note 138, at 122–30 (mentioning several Supreme Court Justices who have taken issue with the Court's interpretation of the Federal Arbitration Act).

³³⁶ Such proposals have taken various forms since the Arbitration Fairness Act was first introduced in 2002. Sometimes such proposed statutes have also included protections for franchisees or those who would present civil rights claims. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. See generally Jean R. Sternlight, *Hurrah for the Consumer Financial*

Acts have varied somewhat in their details,³³⁷ they have shared the same fate: none has been passed by, or even come close to passing, either House of Congress.³³⁸ The Chamber of Commerce, as well as others, have firmly resisted such legislation,³³⁹ and while Democrats have tended to be supportive,³⁴⁰ Republicans have not.³⁴¹

The #MeToo movement has given energy to an effort to pass a narrower law focused on protecting court access for victims of sexual harassment.³⁴² A bill entitled the Ending Forced Arbitration of Sexual Harassment Act of 2017,³⁴³ was introduced in both the House and the Senate at the end of 2017.³⁴⁴ Significantly, the bill was sponsored not only by Democrats, such as Senator Kristen Gillibrand, but also by Republican Senator Lindsey Graham. The key provision of the bill provides that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.”³⁴⁵ The bill received a letter of support from fifty-six

Protection Bureau: Consumer Arbitration as a Poster Child for Regulation, 48 ST. MARY'S L.J. 343 (2016) (discussing policy justifications for regulating mandatory arbitration).

³³⁷ The most recent proposed Arbitration Fairness Act, H.R. 1374 & S. 2203, would prohibit a pre-dispute arbitration agreement from being enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong.

³³⁸ H.R. 1374 (introduced in Mar. 2017, only 81 cosponsors); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (introduced in Dec. 2017, only 17 cosponsors).

³³⁹ The most recent version of the Arbitration Fairness Act has no Republican co-sponsors in either House of Congress. Cosponsors: H.R. 1374—115th Congress (2017–2018), CONGRESS.GOV, <http://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors>, archived at <https://perma.cc/S3KQ-GSBF>; Cosponsors: S. 537—115th Congress (2017–2018), CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/537/cosponsors>, archived at <https://perma.cc/42WZ-G4Y2>.

³⁴⁰ The Chief sponsors of this bill were Senator Al Franken and Representative Hank Johnson.

³⁴¹ Cosponsors: H.R. 1374—115th Congress (2017–2018), CONGRESS.GOV, <http://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors>, archived at <https://perma.cc/S3KQ-GSBF>; Cosponsors: S. 537—115th Congress (2017–2018), Congress.gov, <https://www.congress.gov/bill/115th-congress/senate-bill/537/cosponsors>, archived at <https://perma.cc/42WZ-G4Y2>.

³⁴² This smaller bill follows in the tradition of some other smaller bills that Congress has passed to eliminate mandatory arbitration in particular subject areas. For example, in the wake of the financial crisis Congress passed legislation proscribing the imposition of mandatory arbitration with respect to consumer mortgages. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Another statute blocks federal contractors from using mandatory arbitration provisions to prevent victims of sexual assault from bring claims in court. See Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409 (2009). A third law prevents payday lenders from imposing mandatory arbitration on members of the armed services. See Military Lending Act, 10 U.S.C. § 987 (2006); see also Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed. Reg. 43560-01 (2015).

³⁴³ S. 2203, 115th Cong. (2017); H.R. 4570, 115th Cong. (2017).

³⁴⁴ Although the title of the bill and the lobbying on its behalf have focused specifically on sexual harassment, in fact the bill language is somewhat broader and would protect all claims of sex discrimination, not just those involving sexual harassment.

³⁴⁵ Arbitration Fairness Act of 2017, S. 2203, 115th Cong. § 402(a).

attorneys general—those from all fifty states and also a number of U.S. territories.³⁴⁶ The letter stated:

While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.³⁴⁷

This legislation has also received support from many other advocates and organizations.³⁴⁸ Nonetheless, this bill, like the Arbitration Fairness Act, has not yet made it out of committee in either the House or Senate due to opposition from Republicans and the business community.³⁴⁹ With greater political action, perhaps the Arbitration Fairness Act, or at least the narrower bill focused on sex discrimination, will eventually be passed by Congress and signed by a President. Such corrective legislation is critically important to protect our progress towards greater justice.

Some may suggest that the Arbitration Fairness Act is too extreme and that rather than proscribing mandatory employment arbitration altogether we should simply regulate the practice, perhaps to lessen its impact on vulnerable employees. While this purportedly moderate solution may initially sound appealing, this author has explained elsewhere why it is ultimately unavailing. So long as employers are imposing arbitration, they will always have an incentive to devise a process that protects themselves at the expense of their employees. And, even the wisest of regulators will likely not be able to solve this problem. First, employers and their lobbyists will resist serious regulation such as the elimination of class action waivers. Second, for every meaningful regulation imposed, employers will likely be able to think of another way to skew the process. And third, as a logistical matter, it is very difficult to imagine either a government agency or private attorneys general who could meaningfully review employer arbitration programs on an individual

³⁴⁶ Debra Cassens Weiss, *Give Victims of Workplace Sexual Harassment Access to Courts*, 56 *U.S. Attorneys General Tell Congress*, A.B.A. J., (Feb. 13, 2018), http://www.abajournal.com/news/article/give_victims_of_workplace_sexual_harassment_access_to_courts_56_us_at_torney, archived at <https://perma.cc/SJW7-ELS7>.

³⁴⁷ Letter from the National Association of Attorneys General to Congressional Leadership, NAAG (Feb. 12, 2018), <https://coag.gov/sites/default/files/content/uploads/ago/press-releases/2018/03/03-14-18/finalletter-naagsexualharassmentmandatoryarbitration1.pdf>, archived at <https://perma.cc/S8LV-Z8ZG>. The bill has also been supported by Microsoft. See *supra* note 326.

³⁴⁸ See, e.g., Employee Rights Advocacy Institute for Law & Policy, *The Facts on Forced Arbitration: How Forced Arbitration Harms America's Workers*, <http://employeerightsadvocacy.org/wp-content/uploads/2017/12/The-Institute-Faces-of-Forced-Arbitration-Sexual-Harassment-Fact-Sheet.pdf>, archived at <https://perma.cc/LU6H-626U> (“The time has come to shine a light on workplace sexual harassment and drive offenders out of the shadows. So long as courts embrace forced arbitration clauses and endorse class and collective action bans, pervasive workplace sexual harassment will continue to go unchecked Tell Congress to end forced arbitration in the American workplace today.”).

³⁴⁹ *Supra* note 338.

basis. In short, while it may sound appealing to solve the mandatory employment arbitration problem through regulation rather than through elimination, upon reflection, regulation proves to be quite infeasible.³⁵⁰

B. Alternatives to Federal Legislation

If Congress fails to pass legislation proscribing the use of mandatory arbitration in the employment setting, it will be very difficult to protect employees' interest in justice and to ensure that employment law can continue to evolve.³⁵¹ Although one might reasonably believe that individual states could pass laws to protect their employees from forced arbitration,³⁵² the Supreme Court has made it clear that the Federal Arbitration Act preempts most state legislation in this area. In a controversial series of decisions, the Court has proclaimed repeatedly that states cannot legislate to undermine the viability of arbitration "agreements."³⁵³ Nonetheless, mandatory arbitration opponents have tried to develop legislation states could pass that would not be deemed preempted.³⁵⁴ However, states have been reluctant to adopt such legislation,³⁵⁵ so whether it would pass the Supreme Court's preemption test remains to be seen.

A second alternative to federal legislation is federal administrative regulation. For a short time under President Obama, various federal agencies were on a path to rein in mandatory arbitration in particular contexts.³⁵⁶ Aca-

³⁵⁰ See Sternlight, *Disarming Employees*, *supra* note 26, at 1353–54.

³⁵¹ Some commentators are more optimistic than this author that states or federal administrative agencies might step in to defeat the use of mandatory arbitration in the employment setting. See Garden, *supra* note 120, at 226–32 (discussing possible regulation by federal agencies and possible use of representative suits like California's Private Attorney General Act); Nunez, *supra* note 276, at 510–12 (discussing proposed Model State Consumer and Employee Justice Enforcement Act).

³⁵² See generally Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY: A J. OF IDEAS, Spring 2017, No. 44 (urging that substantial progressive change can be accomplished at the state level).

³⁵³ See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995) (holding an Alabama statute proscribing enforcement of pre-dispute arbitration agreements was preempted); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that Montana statute requiring arbitration clauses in franchise contracts "be typed in underlined capital letters on the first page of the contract" was preempted because provision applied only to arbitration agreements).

³⁵⁴ See MODEL STATE CONSUMER & EMP. JUSTICE ACT (Nat'l Consumer Law Ctr. 2015); David Seligman, *The National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 63 (2016).

³⁵⁵ California passed a law of this sort a couple years ago but the Governor refused to sign it into legislation. Edward Lozowicki, *Governor Brown Vetoes California Bill Prohibiting Arbitration of Employment Claims*, A.B.A. (Jan. 15, 2016), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2016/gvr-brown-vetoes-ca-bill-prohibiting-arbitration-employment-claims.html>, archived at <https://perma.cc/JC8E-T4HL>.

³⁵⁶ The best known of these efforts was the regulation almost adopted by the Consumer Financial Protection Bureau, which would have prevented companies from using arbitration clauses to eliminate financial consumers' opportunity to participate in class actions. The CFPB had put such a proposed notice out for public comment and was poised to adopt the rule, but

demics were excited about the possibilities,³⁵⁷ which might have extended to employment. However, in the current political climate it no longer seems imminent that any federal agency will seek to limit companies' use of forced arbitration. To the contrary, several efforts that were far underway were reversed by the Trump administration in fairly short order.³⁵⁸

In sum, while a federal legislative "fix" for mandatory arbitration does not appear to be imminent, it nonetheless is clear that Congress is our last best hope for restoring employees' access to court and protecting the continued evolution of employment law.

CONCLUSION

There are many good reasons to critique mandatory employment arbitration. This author has been challenging courts' acceptance of mandatory arbitration for more than twenty years on a variety of policy and Constitutional grounds. As previously explained, companies' use of mandatory arbitration harms individual employees, and also harms the larger public.

This Article offers a critique of the practice of mandatory employment arbitration from a fresh perspective. While employment arbitration hurts all employees, it particularly harms the most vulnerable members of our workforce. Social movements may galvanize support for individuals who, on their own, are politically and economically disempowered.³⁵⁹ Courts can play a key role in converting the momentum of social activism into meaningful legal change. But in order to do so, claims need to get through the courthouse door. As we are witnessing in real-time with #MeToo, mandatory arbitration prevents employees from bringing claims in court, thereby blocking judges from considering evolving social mores when reviewing older

then President Trump's appointees pulled the proposed regulation. Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, THE HILL (Nov. 1, 2017), <http://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking>, archived at <https://perma.cc/7CT7-73KS>.

³⁵⁷ See, e.g., David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 988 (2017); Daniel Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991 (2017); Sternlight, *Hurrah*, *supra* note 336, at 375 (discussing various agencies' efforts to limit or eliminate mandatory arbitration in areas such as consumer finance, education, and medical care).

³⁵⁸ Julia Horowitz, *Trump Kills Rule That Made It Easier for People to Sue Banks*, CNN MONEY (Nov. 1, 2017), <https://money.cnn.com/2017/11/01/news/trump-repeals-cfpb-arbitration-rule/index.html>, archived at <https://perma.cc/E749-PG4X>; Mark Kantor, *Department of Education Suspends Arbitration Regulation*, A.B.A. (July 7, 2017), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2017/department-of-education-suspends-arbitration-regulation.html>, archived at <https://perma.cc/S99L-ZZS6>; Robert Pear, *Trump Moves to Impede Consumer Lawsuits Against Nursing Homes*, N.Y. TIMES, Aug. 18, 2017, <https://www.nytimes.com/2017/08/18/us/politics/trump-impedes-consumer-lawsuits-against-nursing-homes-deregulation.html>, archived at <https://perma.cc/QR54-K7JQ>.

³⁵⁹ Of course, as has been noted, social movements may also sometimes go in an anti-progressive direction—limiting abortion, attacking immigration, and advocating gun rights. See Guinier & Torres, *supra* note 3. While the progressive trend is not inevitable, the point of the Article is that it will be impeded by mandatory arbitration that denies access to courts.

legislation. In this way, mandatory arbitration is stymying the very evolution of law.

By focusing on #MeToo as well as the numerous empirical studies undertaken in this area, we can see that mandatory arbitration does not provide a viable alternative to court. Individual arbitrators may be progressive and willing to respond to new ways of thinking, but it is not realistic to rely on arbitrators to issue the next groundbreaking decisions expanding the rights of transgender persons, victims of sexual harassment, or any other vulnerable group. These issues will rarely make their way to arbitration due to the plethora of hurdles in complainants' ways. And even if they do, arbitrators are far less likely than judges to issue creative and forward-thinking interpretations of existing laws. That has not been and likely will never be the role of arbitrators, who by the nature of the job are more cautious and incentive-driven. Moreover, even if an arbitrator were to issue a bold decision, it would be seen by few and have little if any impact on the further development of the law.

For those who believe that the arc of the moral universe bends towards justice, mandatory arbitration is demolishing that arc. Therefore, those who care about the most vulnerable members of our society must continue to call upon Congress to pass legislation to eliminate the use of mandatory arbitration.³⁶⁰ Only in this way can we hope to ensure that that social movements and courts continue to reinforce one another and thereby keep our moral universe progressing towards justice.

³⁶⁰ While this Article has focused on the use of mandatory arbitration in the employment context, its use in consumer and other settings has a similar impact, undercutting progressive legal developments. So, the conclusion calls for elimination of mandatory arbitration generally rather than only in the employment context.