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

Jean R. Sternlight

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

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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.

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, 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, television shows today regularly feature female executives, stay-at-home dads, and diversity of many types.

Despite these gains, continued progress towards justice is currently in jeopardy due to companies’ imposition of mandatory arbitration on their employees. 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.

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).

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).


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.

“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,
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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. 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. 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.

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 CaroDoz. L. Rev. 2685, 2702 (2008) (discussing and ultimately critiquing the traditional distinction between employment law and labor law).


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 W. 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 adaption 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
themselves. Laws are only as potent as they are enforceable. Second, social movements impact not only the steps attorneys take but also the decisions judges make. Long ago, the Legal Realists emphasized that judges are influenced by the “mores of the day,” and more recently Lani Guinier and Gerald Torres have explained that lawyers and judges both influence and are influenced by “popular mobilizations.” 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.

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. 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

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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.


22 See infra Parts II.A–B.
#MeToo movement offers a perfect, albeit depressing, case study.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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


\textsuperscript{24} See infra Part III.B.

\textsuperscript{25} See id. for a discussion of the disconnect between assumptions of the #MeToo movement and existing case law.

\textsuperscript{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 OSNO SR. 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).
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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,” nearly sixty years later the Court unanimously held in *Brown v. Board of Education* that “[s]eparate educational facilities are inherently unequal.” This reversal did not result from a change in the underlying Constitutional provisions, but instead from a new judicial interpretation of those provisions. This judicial reinterpretation was surely influenced by social movements in support of racial justice. Similarly, whereas the Court in *Bowers v. Hardwick* found in 1986 that a ban on homosexual sodomy did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court concluded just

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29 Both *Plessy* and *Brown* were interpreting the same Fourteenth Amendment. By contrast, the Supreme Court’s infamous decision in *Dred Scott v. Sanford*, 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 origin . . . .

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

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\(^{32}\) 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.").


\(^{34}\) *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.


\(^{40}\) See infra notes 41–88 and accompanying text.

\(^{41}\) 401 U.S. 424 (1971).
hired into the better-paying departments.\textsuperscript{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,\textsuperscript{43} but plaintiffs claimed that the requirements had a racially discriminatory impact and ought to be proscribed.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{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.”\textsuperscript{47} Thus, recognizing that the black plaintiffs had “long received inferior education in segregated schools,”\textsuperscript{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.\textsuperscript{49} Commentator William Eskridge finds that \textit{Griggs} is best understood in political terms:

\begin{quote}
\textit{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.\textsuperscript{50}
\end{quote}

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

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

\begin{itemize}
\item \textsuperscript{42} Id. at 426–27.
\item \textsuperscript{43} Id. at 432.
\item \textsuperscript{44} Id.
\item \textsuperscript{46} \textit{Griggs}, 401 U.S. at 429–30.
\item \textsuperscript{47} Id. at 430.
\item \textsuperscript{48} Id.
\item \textsuperscript{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.
\item \textsuperscript{50} Eskridge, supra note 13, at 495.
\end{itemize}
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. Prior to the Court’s unanimous ruling in *Meritor Savings Bank v. Vinson*, it was unclear whether Title VII targeted only “economic” or “tangible” discrimination such as terminations, refusals to hire, or pay disparities. 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, touched her in public, exposed himself to her, and even raped her, thereby creating a “hostile work environment.” The question for the Supreme Court was whether—assuming these claims could be proven—such conduct would violate Title VII. The Justices held in 1986 that such claims were indeed cognizable under Title VII once again creating an entirely new line of jurisprudence.

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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).


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,
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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

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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.*

64 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.*

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. 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.”

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. 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.” However, drawing on the power of strong social movements, LGBTQ employees persisted in seeking the protection of Title VII, eventually securing more favorable results. In Oncale v. Sundowner Offshore Services, Inc., 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, but did not directly address the question of whether discrimination on the basis of sexual orientation was proscribed by Title VII. 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).


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 assultive 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.
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.
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.”

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.”

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 Second Circuit has 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.”

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.”

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.”

The 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.” 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.”
Considered not only the text of the statute, \textsuperscript{93} “basic principles of statutory interpretation,”\textsuperscript{94} legislative history of the Equal Pay Act,\textsuperscript{95} and decisions from other federal courts of appeals,\textsuperscript{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,”\textsuperscript{97} but rather a gap that continues to persist and “costs women in the U.S. over $840 billion a year.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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
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. 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. 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

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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.
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arbitration “agreements” come into existence. 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?” 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. 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.

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. While the Federal Arbitration Act does require arbitration agreements to be “written,” they need not be signed, and courts have upheld “agreements” formed in a variety of ways.

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.


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.


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 (5th 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, employee handbooks, envelope stuffers, computer click-throughs, or e-mails. 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. Studies have shown that these kinds of clauses are not, in fact, generally read or understood by employees; certainly these are not the knowing agreements alluded to by Justice Gorsuch. Yet these are precisely the types of provisions imposed by employers in a broad array of industries, including restaurants, big box
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retail establishments, securities firms, law firms, tech companies, and start-ups like Uber.

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." Though the details of this process will differ situation-to-situation based on how the provision is written, 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. 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. 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. The process of arbitrator selection typically gives both sides an opportunity to select or de-select arbitrators based

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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).
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.
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 N.Y.U. J.L. & PUB. POL’Y 371, 374 (2018).
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).
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


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


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,” 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.” Currently, AAA employment awards are available, for a fee, from LEXIS, Westlaw, BNA & Kluwer. 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.

B. Is Mandatory Employment Arbitration Legal?

In the United States, 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") or, in certain circumstances, of which reported that they do not usually explain the reasons for their awards).

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%2001%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.

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%2001%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 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.

135 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 misdeeds. 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 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, these arguments have usually failed. Shocking many, in *Gilmer v. Interstate/Johnson Lane Corp.*, 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. 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.”

However, subsequent decisions soon revealed that the Court prioritizes preserving arbitration over protecting employees’ rights. 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. 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. 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).


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, 356–40 (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).


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." 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. 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.” 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, it became even clearer that employers could use arbitration clauses to insulate themselves from liability under federal and state employment laws.

The Court’s most recent employment arbitration decision, *Epic Systems Corp. v. Lewis*, is one of its most significant and most damaging to employees. Building on *American Express v. Italian Colors*, the Court ruled 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.” 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

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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).


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.*
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. 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. 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. 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. On the individual side, critics urge that forced arbitration has and will deter meritorious employee claims. Indeed, although more than

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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.

half of the American workforce is now covered by arbitration clauses, just a few thousand American workers file arbitration claims each year. 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. In fact, Alexander Colvin recently found that roughly 40% of employees covered by arbitration clauses were subject to class action waivers. 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. By wiping out class actions and group claims, employers can effectively insulate themselves from much employee liability.

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

164 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.”).

165 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.

166 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. This reluctance is understandable; a recent study found the pro se arbitration win rate to be just 7%. One author has cleverly called this suppression effect the “black hole” phenomenon, because claims that might have existed simply disappear. 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.

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 Satans (a no-frills car of its day) for everyone, than Cadillacs for the few and rickshaws for most. Studies do confirm that arbitration tends to be quicker than litigation. Supporters of mandatory arbitration also claim that the results of employment arbitration are sometimes favorable to employees, 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. 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.

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 Sterlighb, 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).


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, &
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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. 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. As Geraldine Moohr opines, “arbitration is not an effective forum in which to satisfy the public policy goals of the employment discrimination statutes.” This concern applies to other non-discrimination workplace laws and policies as well. 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. Parallel arguments have been made in other countries too.


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).


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.


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.\textsuperscript{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,”\textsuperscript{185} in the employment field, by contrast to consumer or commercial settings, arbitrators may well write longer decisions that do contain some reasoning.\textsuperscript{186} Upon reviewing the twenty-two AAA decisions made available on LEXIS as of June 2018,\textsuperscript{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.\textsuperscript{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

\textsuperscript{185} Id. at 192.
\textsuperscript{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, \textit{How Do Arbitrators Treat External Law?}, 45 \textit{Indus. & Lab. Rul. 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, \textit{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).
\textsuperscript{187} The AAA states that it makes redacted versions of all of its employment arbitration decisions available in Westlaw, LEXIS, BNA, and Kluwer databases. E-mail, \textit{supra} note 135.
\textsuperscript{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, \textit{Quinceanera}, \textit{supra} note 141, at 366. See also Scott Baker, \textit{A Risk-Based Approach to Mandatory Arbitration}, 83 \textit{Or. L. Rev.} 861, 867 (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).
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. Compared to litigation, mandatory arbitration makes it harder for employees to secure legal representation, harder for employees to participate in class actions, and it remains hard for employees to bring or prevail on claims brought pro se. 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, that present evidentiary challenges, that offer minimal or difficult to calculate monetary relief, or that exert high personal and emotional tolls, particularly if brought individually rather than as part of a group. 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

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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.\textsuperscript{198}

Second, disempowered employees may find it particularly difficult to amass the evidentiary proof necessary to prevail in their case.\textsuperscript{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.\textsuperscript{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.

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\textsuperscript{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 H´ebert, Transforming Transsexual and Transgender Rights, 15 WM. & MARY J. WOMEN & L. 535 (2009).

\textsuperscript{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.

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{205} Thus, when arbitration clauses are used to

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\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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-6ZKH (finding that approximately 90% of workers who say they have experienced harassment never file charges or complaints).
\end{footnotesize}
eliminate the right to group or collective action, again it is the most vulnera-
ble who suffer the most.206

In short, while we have already seen that the imposition of arbitration sup-
presses claims, this burden will fall particularly heavily on dis-
empowered 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 in-
jury 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 other-
wise 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, particu-
larly when social movements are pushing them in a more progressive direc-
tion.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, Dis-
rupting Work Law, supra note 120, at 205 (“[T]he ubiquity with which gig economy compa-
nies 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 Representa-
tion 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
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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

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).
188 Harvard Civil Rights-Civil Liberties Law Review [Vol. 54

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 disputants 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 MICH. 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. L. REV. 449, 514 (2005) (“‘Now I imagine it is fair to say that arbitrators usually do try to do 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

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.
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).
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public adjudicators." Ultimately, as Geraldine Moohr puts it, "Congress has not authorized arbitrators to develop the law." Given these factors, mandatory arbitration deprives society of a forum that can respond to social momentum and develop progressive laws. 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, for example, affords a jury trial to employees who claim discrimination on the basis of race, gender, ethnicity, or religion. 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.

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).


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 verdict 243 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 trial 245 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 law 246 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).

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.
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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. #MEETO—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 phenome-
on. When the New York Times and New Yorker magazine suddenly exposed
the alleged sexual transgressions of movie mogul Harvey Weinstein,249 ac-
tress 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 Accus-
weinstein-harassment-allegations.html, archived at https://perma.cc/Q4NZ-J2MS; Ronan Far-
row, From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their
gressive-overtures-to-sexual-assault-harvey-weinstein-s-accusers-tell-their-stories, archived at
https://perma.cc/AA7M-VQKU.

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 Re-
minds 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, DESV, Pst, Oct. 19, 2017, https://www.denverpost.com/2017/10/19/metoo-

252 Stephanie Zacharek et al., Time Person of the Year 2017: The Silence Breakers, TIME,
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 harass-
ment 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.
for-years-police-report/, archived at https://perma.cc/PG2R-JAEA; Lauren Holter, Anthony
Rapp’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 Lila M. Cortina & Jennifer L. Berdahl, Sexual Harassment
in Organizations: A Decade of Research in Review, in 1 THE SAGE HANDBOOK OF ORGANIZA-
TIONAL 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://
https://perma.cc/VC23-GM58; Jacey Fortin, Accused of Sexual Harassment, An-
The #MeToo movement has had broad implications throughout the world. Harvey Weinstein has been arrested and charged with various counts of sexual assault. We have seen the firing, resignation, or embarrassment of leading men in the world of Hollywood, politics, news media, cooking, technology, entertainment, the armed forces, law, and more.

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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-


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_5a0f438ce4b0c97dfced3443, archived at https://perma.cc/PX2D-M523.

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).


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).


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. Tippett, 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.
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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-


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).


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 Oncle 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 ‘in-
sinuat[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 to-
gether, suggested that the plaintiff would advance professionally if the plain-
tiff 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 Con-
sidering 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, 758 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 Cnty. 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 ob-
jectively 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 “iso-
lated” incidents of touching of the hand, arm and buttocks by another co-worker did not con-
stitute severe and pervasive sexual harassment). See also Sandra F. Sperino & Suja A.
Thomas, Unequal: How America’s Courts Undermine Discrimination Law 32–40
(2017).
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either too soon\footnote{288} or too late.\footnote{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.\footnote{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.\footnote{291}

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

\footnote{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, \textit{supra} note 275, at 493.

\footnote{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, \textit{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”).

\footnote{290} Vance \textit{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 \textit{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).

\footnote{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. \textit{See} David S. Schwartz, \textit{When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law}, 150 U. Pa. L. Rev. 1697, 1703 (2002).

\footnote{292} 42 U.S.C. § 2000e-3(a).


\footnote{294} \textit{See}, \textit{e.g.}, Grosdidier \textit{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. \textit{See}, \textit{e.g.}, EEOC \textit{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. \textit{See} Clark Cty. Sch. Dist. \textit{v.} Breeden, 532 U.S. 268, 270 (2001); \textit{see generally} Deborah L. Brake & Joanna L. Grossman, \textit{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,\textsuperscript{295} or if the plaintiff cannot sufficiently prove a causal relationship between her complaints and any action taken against her.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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).

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

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

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{300} Sperino & Thomas, supra note 276, at A31.
\textsuperscript{301} MacKinnon, supra note 275, at A19.
\textsuperscript{302} Minarsky v. Susquehanna Cty., 895 F.3d 303, 306 (3rd Cir. 2018).
\textsuperscript{303} Id. at 313 n.12.
\textsuperscript{304} Id.
\textsuperscript{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-ComplaintFiled.pdf, archived at https://perma.cc/X5UJ-DMEL.
ior.\textsuperscript{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,\textsuperscript{307} but Ailes still sought to have the lawsuit dismissed so that any issues would be resolved in arbitration.\textsuperscript{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.\textsuperscript{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.\textsuperscript{310} Fox News ultimately settled these and other claims and eventually terminated alleged perpetrators Bill O’Reilly and Roger Ailes,\textsuperscript{311} but only after the allegations received substantial public attention and a public outcry led advertisers to withdraw sponsorships.\textsuperscript{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,\textsuperscript{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 \textit{Epic Systems}, urging that the Supreme Court prohibit companies from using forced arbitration to prevent employees from bringing group or class claims.\textsuperscript{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.\textsuperscript{315} She also notes that many other tech companies, including Google and Facebook, require their workers to agree to arbitration including class action waivers.\textsuperscript{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.\textsuperscript{317}

\textsuperscript{306} Nunez, supra note 276, at 467–68.
\textsuperscript{307} Id. at 469.
\textsuperscript{309} Nunez, supra note 276, at 469–70.
\textsuperscript{310} Id. at 471–72.
\textsuperscript{315} Id. at *2, *5–6.
\textsuperscript{316} Id. at *7 n. 8.
\textsuperscript{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.\textsuperscript{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.”\textsuperscript{319} And Ms. Fowler also wrote an op-ed for the \textit{New York Times} urging that Congress adopt legislation ending the use of mandatory arbitration to block sexual harassment claims.\textsuperscript{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).”\textsuperscript{321}

Other advocates have similarly drawn a direct connection between sexual harassment and binding arbitration clauses, demanding that companies change their practices.\textsuperscript{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.”\textsuperscript{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.”

\textsuperscript{319} Id.
\textsuperscript{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. \textit{See infra} notes 346–347 and accompanying text; \textit{see also} Jacob Gershman, \textit{As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle}, \textit{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.
\textsuperscript{323} Paquette, \textit{supra} note 321.
arise with your company.” Also, Gizmodo asked ten major tech companies to ban forced arbitration in order to fight sexual harassment in Silicon Valley.

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. 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. 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. 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.

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

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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-endorse 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.


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than litigation. 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. Amazon and Verizon denied using such clauses, and none of the additional major companies agreed to get rid of the provisions.

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. While many, including this author and multiple current or former Supreme Court Justices, 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 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. 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,\textsuperscript{337} they have shared the same fate: none has been passed by, or even come close to passing, either House of Congress.\textsuperscript{338} The Chamber of Commerce, as well as others, have firmly resisted such legislation,\textsuperscript{339} and while Democrats have tended to be supportive,\textsuperscript{340} Republicans have not.\textsuperscript{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.\textsuperscript{342} A bill entitled the Ending Forced Arbitration of Sexual Harassment Act of 2017,\textsuperscript{343} was introduced in both the House and the Senate at the end of 2017.\textsuperscript{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.”\textsuperscript{345} The bill received a letter of support from fifty-six

\textit{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).\textsuperscript{346}

\textsuperscript{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.


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


\textsuperscript{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 bringing 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).


\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{347}

This legislation has also received support from many other advocates and organizations.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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.


\textsuperscript{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

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).
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 Assoc., Inc. 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).
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
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demics were excited about the possibilities, 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 cases.

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).


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.