Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not be Subjected to Arbitration Proceedings

Matthew DeLange[*]

Trigger Warning: This note discusses issues related to sexual assault and other sexual misconduct that may be triggering for some readers.

---

[*] J.D., The University of Iowa College of Law, 2020; B.A., Brigham Young University. I would like to thank all the editors and student writers of the Journal of Gender, Race, & Justice for their invaluable support and input in editing this Note. Also thank you to my friends and family for their consistent support and help throughout the process of writing this Note. Most importantly, a final thank you to my incredible wife, Mandy DeLange. Without her support and sacrifice none of this would be possible.

at Fox News, and in particular against CEO Roger Ailes.[7] One would hope Ms. Carlson could attain justice and vindication through the court system and show the world the continuous pattern of sexual harassment at Fox News. Unfortunately, Ms. Carlson's story is not one of justice. Instead, Fox News compelled Ms. Carlson to remove her lawsuit from court to arbitration.[8] Ms. Carlson had signed an arbitration agreement as part of her employment contract—which employees are often required to do as a condition of employment.[9] An employee who has signed an arbitration agreement contractually agrees to place "total control of the dispute into the hands of a third party," which largely eliminates the employee's ability to sue in court.[10] The arbitration agreement that Ms. Carlson signed prevented her from asserting her right to be free from sexual harassment in a court of law and forced her into a private arbitration room to resolve her disputes.

Fox News employee contracts containing an arbitration clause is not surprising or abnormal. Mandatory arbitration agreements cover more than sixty million employees in the United States.[11] Eighty of the one hundred largest companies in America have their employees sign arbitration agreements as a condition of employment,[12] and Gretchen Carlson's story is just one that represents the tens of millions of people who are bound by arbitration agreements.[13] Like Fox News, companies impose these arbitration agreements because they prefer using arbitration to resolve disputes rather than litigation.

---

[7] Gabriel Sherman, *6 More Women Allege That Roger Ailes Sexually Harassed Them*, CUT (July 9, 2016), https://www.thecut.com/2016/07/six-more-women-allege-ailes-sexual-harassment.html?mid=twitter-share-thecut **[**https://perma.cc/6WVU-RSU6].

[8] Petition to Compel Arbitration, Ailes v. Carlson, No. 1:16-cv-05671 (S.D.N.Y. July 15, 2016). The Court ultimately did not rule on the motion because the parties voluntarily dismissed the case following a $20 million settlement.

[9] Koblin, *supra* note 1.

[10] F. Denise Rios, *Mandatory Arbitration Agreements: Do They Protect Employers from Adjudicating Title VII Claims?*, 31 ST. MARY'S L.J. 199, 210–11 (1999).

[11] ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2017), https://www.epi.org/files/pdf/135056.pdf [https://perma.cc/N2WA-E6QM**]** [hereinafter COLVIN, THE GROWING USE OF MANDATORY ARBITRATION].

[12] IMRE S. SZALAI, EMP. RIGHTS ADVOC. INST. FOR LAW & POL'Y, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES (2018), http://employeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf [https://perma.cc/93H3-FFSA].

[13] Erik Wemple, Opinion, *Roger Ailes Opts for Secrecy, Cowardice in Face of Gretchen Carlson Suit,* WASH. POST (July 9, 2016), https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/07/09/roger-ailes-opts-for-secrecy-cowardice-in-face-of-gretchen-carlson-suit/?utm_term=.af27bd3b6a54.

Ms. Carlson was a part of the #MeToo movement that swept the country in 2017 and beyond. This movement brought down powerful men as women began to step forward to share their experiences and it began a nationwide discussion about sexual harassment, particularly in the workplace.[14] Ms. Carlson's lawsuit detailed the rampant sexual harassment and retaliation she endured in the workplace at Fox News.[15] Her story also highlighted another problem: while abhorrent sexual harassment is pervasive in America's workplaces, often a court of law cannot vindicate a victim's rights because of mandatory arbitration agreements.

The United States House of Representatives and the United States Senate have recognized this injustice.[16] Both chambers have introduced the Ending Forced Arbitration of Sexual Harassment Act, which are bipartisan bills that amend the Federal Arbitration Act to exempt sexual harassment claims from arbitration.[17] The Senate and House should enact these bills as expeditiously as possible to prevent further injustice, like what Ms. Carlson endured.

Title VII was meant to protect and vindicate employees' rights, including the right to be free from sexual harassment.[18] However, the Supreme Court has interpreted the Federal Arbitration Act so excessively broad that it allows arbitration of Title VII sexual harassment claims. Arbitration is an inappropriate venue for sexual harassment claims because impermissible sexual conduct occupies a unique place in society and deserves special consideration, as well as the lack of accountability and transparency associated with arbitration, compared to federal litigation, ineffectively vindicates Title VII sexual harassment rights. The Ending Forced Arbitration of Sexual Harassment Act would exempt sexual harassment claims from arbitration—which is an important step to effectively vindicate sexual harassment protections—and, as a result, Congress should enact this Act as expeditiously as possible.

---

[14] Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/8YRG-HR9W].

[15] Complaint & Jury Demand, *supra* note 4, ¶¶ 8–28.

[16] *See* Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017).

[17] *See supra* note 16.

[18] *See generally* 42 U.S.C. § 2000e-2 (2012) (banning a variety of discrimination in the workplace); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (explaining that Title VII also covers sexual harassment and explaining that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment") (internal citations and quotations omitted).

In Section II, this Note will detail a brief history of sexual harassment in the workplace, including the #MeToo movement, and a brief history of the Federal Arbitration Act (hereinafter FAA). Section III will explain why Congress, as a matter of public policy, should pass the Ending Forced Arbitration of Sexual Harassment Act. It will further explain why neither the Congress that passed the FAA, nor modern Congresses, intended for arbitration to cover sexual harassment claims, as well as why these bills correctly single out sexual harassment claims for exemption.

II. BACKGROUND

The Background Section will first explain some of the important terms this Note will discuss. It will then give a brief overview of both the legal and social history of sexual harassment in the workplace, including the effects of the #MeToo movement. This Section will then discuss a short history of the development of arbitration in the United States, including Congress's intent when it passed the FAA, a short overview of relevant caselaw interpreting the FAA, and the winners and losers in arbitration proceedings. Finally, this Section will overview recent attempts to remedy sexual harassment and arbitration, including federal regulation and state legislative and executive action.

A. Definitions

Congress first prohibited sex discrimination in Title VII of the Civil Rights Act of 1964.[19] Title VII prohibits discrimination "because of [an] individual's . . . sex," but does not define what those prohibiting words mean.[20] When the Supreme Court first interpreted sex discrimination it found the 1964 Civil Rights Act banned two things: quid pro quo and a hostile work environment.[21] The Court found that quid pro quo is well defined—as an "if this, then that" proposition—but the Court had to define what it meant by "hostile work environment."[22] The Court held that "for sexual harassment to be actionable, it must be sufficiently severe or

---

[19] *Id.* For an interesting discussion of whether the word "sex" was included at the last minute as an attempt to sink the bill or as a result of women's groups' lobbying efforts, *compare* Erickson v. Bartell Drug Co., 141 F.Supp.2d 1266, 1269 (W.D. Wash. 2001), *with* Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409 (2009).

[20] 42 U.S.C. § 2000e-2 (2012).

[21] *Meritor Sav. Bank*, 477 U.S. at 65.

[22] Mollie H. Bowers & E. Patrick McDermott, *Sexual Harassment in the Workplace: How Arbitrators Decide*, 48 CLEV. ST. L. REV. 439, 440–41 (2000).

pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[23]

Arbitration is an alternative dispute resolution process where parties agree to have a private decision-maker resolve their disputes.[24] Some of the advantages of arbitration over litigation include quicker resolution of claims, lower cost, and easier access to dispute resolution for a wider group of people.[25] Arbitration critics argue that privatizing the law and shifting from public courts to private resolution brings a "loss of transparency and publicity."[26] The lack of accountability resulting from privatizing the law is one of the reasons critics claim that plaintiffs effectively lose their statutory rights when they are subject to mandatory arbitration.[27] Arbitration decisions are not published, meaning arbitration proceedings are not publicly critiqued or analyzed.[28] Courts will only become involved and review an arbitration decision in limited circumstances, such as if the arbitrator "manifestly disregarded" the law.[29] This standard means that even if the arbitrator was ignorant of the law or did not fairly apply the law, the court will still not review the decision and will only become involved if the arbitrator knew and deliberately disregarded the law.[30] The Tenth Circuit has called the "manifest

---

[23] *Meritor Sav. Bank,* 477 U.S. at 67 (alteration in original) (internal citations omitted).

[24] Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 657 (2018).

[25] Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 294–95 (2012).

[26] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 679 (2018).

[27] Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212 (2006). *See also* Penelope Hopper, Note, *Mandatory Arbitration and Title VII: Can Employees Ever See Their Rights Vindicated through Statutory Causes of Action*—Metz v. Merrill Lynch, Pierce, Fenner & Smith, 1995 J. DISP. RESOL. 315, 323 (listing the various criticisms of arbitration compared to litigation, including how the lack of publicity surrounding arbitration encourages repeat offenders); Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and The Public Policy Exception In The Context Of Sexual Harassment*, 6 AM. U. J. GENDER & L. 265, 281 (1998) (discussing the rarity of judicial review of arbitration awards since the privatization of dispute resolution).

[28] Schmitz, *supra* note 27, at 1215.

[29] Wilko v. Swan, 346 U.S. 427, 435–36 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989). *See* John D. Shea, *An Empirical Study of Sexual Harassment/Discrimination Claims in the Post-*Gilmer *Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review to Ensure Compliance with Statutory Standards?*, 32 SUFFOLK U. L. REV. 369, 376 (1998). Other ways to invalidate arbitration contracts include the basic contract defenses available at law, such as unconscionability. *See, e.g.*, 9 U.S.C. § 2 (2018) (describing when arbitration agreements are not enforceable).

[30] Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187, 1203 (1993). *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (finding that

disregard" standard "among the narrowest known to the law."[31] The lack of judicial review and transparency has affected a growing number of American workers[32] and American companies' use of arbitration agreements has exploded since the 1990s.[33]

B. History and Evolution of Sexual Harassment in the American Workplace

In 1975, feminist proponents used the term "sexual harassment" to describe what they had all experienced and endured during their lives.[34] They wanted to highlight what women have faced in the United States since colonial times—the need to fend off the sexual demands and overtures of those wielding power over them.[35] While sexual harassment certainly can be sexually motivated, it often has "nothing to do with sex[ual intercourse]," but also includes discrimination because of the biological sex of the women.[36] Sexual harassment has a long history and has become so ingrained

---

"manifest disregard" is the appropriate standard to use when reviewing arbitration decisions). *But see* Hall Street Assocs., L.L.C., v. Mattel, Inc., 552 U.S. 576, 585 (2008) (seemingly holding that "manifest disregard" is not a separate independent standard for judicial review but is incorporated into § 10 of the FAA); Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) (concluding that *Hall Street* overturned the use of "manifest disregard" and that it is no longer an independent source of judicial review to overturn an arbitration decision).

[31] ARW Expl. Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995).

[32] COLVIN, THE GROWING USE OF MANDATORY ARBITRATION, *supra* note 11, at 2.

[33] *See* Alexander J. S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J.L. & PUB. POL'Y 581, 586–87 (2004) (reviewing studies finding the use of arbitration agreements in the early 1991 by companies was 2.1% which had increased to 16.3% by 1998). *See also* John Thompson, *Grappling with* Gilmer*: Pre-Hire Arbitration Agreements in the Day Labor Industry*, 35 BERKELEY J. EMP. & LAB. L. 241, 247 nn.29–30 (2014) (acknowledging a wide array of scholarship finding the increased use of arbitration agreements in the 1990s); Stephen J. Ware, *Employment Arbitration and Voluntary Consent,* 25 HOFSTRA L. REV. 83, 100 n.87 (1996) (detailing studies, newspaper articles, and journal articles all finding the relatively infrequent use of arbitration before the 1990s and an explosion of arbitration use in the 1990s).

[34] CARRIE N. BAKER, THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT 1 (2008).

[35] *Id.* It is important to acknowledge that both men and women can be either the aggressors or the victims of sexual harassment. Studies suggest all victims often underreport and face social pressure from gender stereotypes. *See* Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenges Old Assumptions,* 104 AM. J. PUB. HEALTH e19 (2014); Joni Hersch, *Valuing the Risk of Workplace Sexual Harassment*, 57 J. RISK & UNCERTAINTY 111, 115 (2018). The #MeToo movement, though, has focused on women as victims sharing their personal stories of sexual harassment and that is the frame this note will use as well. *See also* Nicolette Sullivan, Note, *The Price is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not be the Price of Earning a Living,* 21 VAND. J. ENT. & TECH. L. 339, 341–42 n.8 (2018) (explaining how both men and women face sexual harassment and the specific challenges that men face in reporting sexual harassment).

[36] BAKER, *supra* note 34, at 67.

in everyday life that society has apathetically accepted its existence.[37] Because of its prevalence and apathetic acceptance, sexual harassment had "not been considered a problem," and there were few studies until the last fifty years.[38] While sexual harassment has a long history, an understanding of both its legal history and the current social awareness of sexual harassment is needed to fully grasp how sexual harassment has recently developed.

1. Legal History

The legal understanding of sexual harassment injuries has evolved from historic common law to statutory protection today.[39] Early legal claims of sexual harassment were initially understood as a sexualized tort injury.[40] However, even though the likely notion in the public mind is that sexual harassment is about sexual behavior, activists have pushed Title VII to not only include sexual harassment that is not always sexual in nature, but also discrimination that would not have happened "but for" the sex of the victim.[41] Quid pro quo claims epitomize sexual harassment where the motivation is sexual, but the Supreme Court in *Meritor Savings Bank* also accepted that not all sexual harassment is sexually motivated when it upheld sexual harassment claims that would not have occurred "but for" the victim's sex.[42] The understanding that sexual harassment is not always sexual in nature is now accepted as one of the two behaviors that Title VII prohibits.[43]

Because the Supreme Court recognizes that sexual harassment is not always sexual in nature, the Court requires sexual harassment discrimination claims to meet a "but for" test rather than an intent to discriminate, like other types of discrimination.[44] The "but for" test means that a plaintiff will

---

[37] ROSEMARIE SKAINE, POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT 34–35 (1996).

[38] *Id.*

[39] *See* Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 70–71 (2019).

[40] *Id.* at 71.

[41] *Id.* at 71–72.

[42] *Id.*

[43] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

[44] Jaimie Leeser, *The Causal Role of Sex in Sexual Harassment*, 88 CORNELL L. REV. 1750, 1752 (2003). *See, e.g.*, L.A., Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978); Zarda v. Altitude Express, Inc., 883 F.3d 100, 116 (2d Cir. 2018), *cert. granted,* 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623) (Mem); Liles v. C.S. McCrossan, Inc., 851 F.3d 810, 819 (8th Cir. 2017); Bauer v. Lynch, 812 F.3d 340, 348–49 (4th Cir. 2016). Congress has modified the test further when it amended Title VII in 1991 and, while retaining the "but for" standard, also clarifying that Title VII is violated when the discrimination is, in part, "motivated" by the Title VII protected characteristic. 42 U.S.C. § 2000(e)-2(m) (2012).

have a successful sexual harassment claim if the plaintiff can prove that "but for" the sex of the victim the harassment would not have occurred.[45] This test is unique because the Court has traditionally required an intent to discriminate for other Title VII discrimination claims.[46] For example, the Supreme Court requires that a successful racial discrimination claim under Title VII show an intent to discriminate.[47] When courts analyze sexual harassment claims, they do not ask about the alleged perpetrator's feelings towards the sex of the victim, but rather whether the alleged harassment would have occurred "but for" the sex of the victim.[48] This "but for the sex" standard likely comes from Title VII's language declaring it "unlawful . . . to discriminate . . . because of . . . sex" that the Supreme Court incorporated into its definition of a hostile work environment.[49] The "but for" test is also an important development stemming from the feminist theory that sexual harassment is not always based on sexual motivation, but happens because of the sex of the victim and is primarily about power and control.[50]

The Supreme Court explicitly acknowledged the unique place of sexual harassment discrimination claims in *Harris v. Forklift Systems.*[51] The Court found that Harris Forklift President, Charles Hardy, violated Title VII when he created a hostile work environment by sexually harassing his employee, Teresa Harris, for more than two years.[52] Hardy subjected Harris to sexual innuendos, telling her he needed a man as manager and that she was a "dumb ass woman," as well as suggesting the two of them negotiate a pay raise at the Holiday Inn.[53] The Court "reject[ed] . . . a 'boys-will-be-boys' attitude,"[54] and held that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

---

[45] *See supra* note 44.

[46] Lucetta Pope, *Everything You Ever Wanted to Know About Sexual Harassment But Were Too Politically Correct to Ask (Or, the Use and Abuse of "But For" Analysis in Sexual Harassment Law under Title VII)*, 30 SW. U. L. REV. 253, 253–54 (2001).

[47] Washington v. Davis, 426 U.S. 229, 239 (1976). *But see* Veasey v. Perry, 29 F.Supp.3d 896, 915–16 (S.D. Tex. 2014) (finding that the Voting Rights Act superseded *Washington v. Davis*).

[48] Pope, *supra* note 46, at 254.

[49] 42 U.S.C. § 2000e-2 (2012); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

[50] *See* SKAINE, *supra* note 37, at 65–66; Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. DISP. RESOL. 27, 28, 38 (1993).

[51] Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

[52] *Id.* at 19, 23.

[53] *Id.* at 19.

[54] PETER M. PANKEN ET. AL., *SEXUAL HARASSMENT IN THE WORKPLACE: EMPLOYER LIABILITY FOR THE SINS OF THE WICKED* 4 (SG055 ALI-ABA 2002).

working environment,' Title VII is violated."[55] The Court did not inquire about sexual intent or motivation, but focused on whether an "abusive working environment" had been created;[56] the Court used a "but for" test even though it does not use this test for other types of discrimination claims.

The manner in which the Federal Rules of Evidence treat sexual crimes is yet another example that shows the Supreme Court and Congress recognize sexual impropriety as a serious and unique issue.[57] The Federal Rules of Evidence were overseen by the Supreme Court and passed into law by Congress.[58] The Rules allow the prosecution to use past evidence of sexual crimes as evidence to show the defendant is more likely guilty in the current case.[59] Conversely, the Rules ban such use of prior bad acts as propensity evidence for other crimes.[60]

The Equal Employment Opportunity Commission (EEOC) enforces Title VII and has also issued its own guidelines and definitions of what it considers sexual harassment.[61] The EEOC guidelines define sexual harassment as:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[62]

The EEOC's guidelines reflect the development of sexual harassment law that prohibits actions that are sexual in nature, as well as sexual

---

[55] *Harris*, 510 U.S. at 21 (citations omitted). *See also* Bowers & McDermott, *supra* note 22, at 440 (discussing the development of sexual harassment law).

[56] *See Harris*, 510 U.S. at 21.

[57] *See* FED. R. EVID. 413–415.

[58] *See* H.R. COMM. OF THE JUDICIARY, 115TH CONG., FED. RULES OF EVIDENCE 11 (Comm. Print 2017) (detailing that Congress enacted Rules 413–415 in 1994).

[59] *See* FED. R. EVID. 413–415.

[60] *See id.* at 404(b)(1).

[61] *See* Guidelines of Discrimination Because of Sex, 29 C.F.R. § 1604 (2018).

[62] *Id.* § 1604.11(a).

harassment that is not sexually motivated but would not have happened "but for" the sex of the victim.[63]

Other aspects of sexual harassment claims, such as defenses and standards, also show the unique place of sexual harassment in the law.[64] Perpetrators of sexual harassment often claim that the victims "wanted it," or that the other person voluntarily participated in the conduct; however, whether or not the victim voluntarily participated is not a defense.[65] The Supreme Court has adopted an "unwelcome" standard, meaning that even if the victim was voluntarily participating, if the conduct was "unwelcome," it is sexual harassment.[66] Whether conduct is "unwelcome" is considered from the victim's point of view.[67] Another example of the unique place of sexual harassment is that a "loss to an employee of tangible or economic job benefits is not a required element" of sexual harassment.[68] These developments further show the unique place that sexual harassment claims occupy in the law by eliminating the "voluntary" defense and not requiring any tangible injury.[69] The definition and understanding of sexual harassment has evolved since Title VII first prohibited it in 1964, but the changes are meaningless if plaintiffs cannot effectively pursue claims.

2. The Social Awareness of Sexual Harassment

Sexual harassment is a deep and impactful problem in society.[70] A recent poll by Stop Street Harassment found that a staggering eighty-one

---

[63] *See* Carrie G. Donald & John D. Ralston, *Arbitral Views of Sexual Harassment: An Analysis of Arbitration Cases, 1990–2000*, 20 HOFSTRA LAB. & EMP. L.J. 229, 231–32 (2003).

[64] *See id.* at 233; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

[65] Donald & Ralston, *supra* note 63, at 231–33; *Meritor Sav. Bank,* 477 U.S. at 68.

[66] *Meritor Sav. Bank,* 477 U.S. at 68.

[67] Donald & Ralston, *supra* note 63, at 231–33. *See Meritor Sav. Bank,* 477 U.S. at 68.

[68] Donald & Ralston, *supra* note 63, at 232–33.

[69] *See id.*; *Meritor Sav. Bank,* 477 U.S. at 68.

[70] *See generally* Erin M. Morrissey, Comment, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV. 177, 194 (2018) (discussing forced arbitration clauses and their contribution to the prevalence of sexual harassment in corporations); U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [https://perma.cc/E7WM-U4T8] [hereinafter EEOC TASK FORCE STUDY] (citing probability surveys showing the high rate of sexual harassment that women in the workplace experience); Rhitu Chatterjee, *A New Survey Finds 81 Percent Of Women Have Experienced Sexual Harassment*, NPR NEWS (Feb. 21, 2018), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [https://perma.cc/4VR6-ES5C] [hereinafter Chatterjee, NPR NEWS].

percent of women have encountered sexual harassment during their lives.[71] A Pew Research study found that fifty-nine percent of women have personally received unwelcome sexual advances.[72] A study of college aged students found that sixty-two percent of college students have experienced sexual harassment.[73]

Sexual harassment in the workplace is such a serious problem that the EEOC created the Select Task Force on the Study of Harassment in the Workplace.[74] The purpose of the Select Task Force was to study the reasons why, thirty years after the U.S. Supreme Court recognized sexual harassment was prohibited as discrimination by Title VII, workplace harassment, including sexual harassment, is still so prevalent.[75] The Select Task Force reviewed the available scholarship and in 2016 issued a report finding, in part, that between fifty percent and seventy-five percent of women have experienced some sort of sexual harassment in the workplace, whether women realized it or not.[76] The report found that, in 2015, between forty-four and forty-five percent of the approximately 90,000 EEOC complaints of employment discrimination from all employers were alleged sexual harassment claims.[77] While the EEOC report is an important metric to measure the prevalence of harassment, it is self-admittedly both under- and over-inclusive of the true extent of sexual harassment in the workplace.[78] The report recognizes that some claims likely do not include sexual harassment because it may not have been the primary claim; and the report also acknowledges that "approximately 90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or a complaint."[79]

These academic findings and poll data came to the forefront of an evolving nationwide social conversation when the #MeToo movement

---

[71] Chatterjee, NPR NEWS, *supra* note 70.

[72] Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (Apr. 4, 2018) http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-me too/ [https://perma.cc/7SGL-VWBP].

[73] CATHERINE HILL & ELENA SILVA, AAUW EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 15, fig. 2 (Dec. 2005), https://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf [https://perma.cc/U9DA-Z2QD].

[74] EEOC TASK FORCE STUDY, *supra* note 70.

[75] *Id. See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

[76] EEOC TASK FORCE STUDY, *supra* note 70.

[77] *Id.*

[78] *Id.*

[79] *Id.*

went viral in October 2017.[80] Tarana Burke founded the #MeToo movement in 2006 to empower survivors of sexual assault and in 2017 the movement went viral after actress Alyssa Milano tweeted #MeToo in response to an exposé of Harvey Weinstein's sexual abuses.[81] The movement encouraged women and men to share their personal experiences of sexual harassment to show the impact and prevalence of such harassment, and the floodgates opened as people shared their experiences.[82] The movement's most visible effect was the fall of powerful men accused of sexual harassment, including popular TV host Matt Lauer,[83] Senator Al Franken,[84] and Hollywood producer Harvey Weinstein;[85] but the vast majority of the movement were everyday women and men sharing their own experiences.[86] Just months after the #MeToo movement began in October 2017, a record number of women announced they were running for Congress.[87]

Examples of the social change resulting from this movement include more than a dozen states considering new legislation directed at fighting sexual harassment and the creation of a twenty-one million dollar endowment, funded by donations, to support the Times Up Legal Defense Fund, which aims to provide lawyers for victimized women unable to afford

---

[80] Louise Burke, *The #MeToo Shockwave: How the Movement Has Reverberated Around the World*, TELEGRAPH (Mar. 9, 2018, 11:08 AM), https://www.telegraph.co.uk/news/world/metoo-shockwave/ [https://perma.cc/2SQC-AFDS].

[81] Richard Feloni, *The Founder of #MeToo Explains Why Her Movement Isn't About 'Naming and Shaming,' and How She's Fighting to Reclaim its Narrative*, BUSINESS INSIDER (Apr. 16, 2019, 11:16 AM), https://www.businessinsider.com/me-too-movement-founder-tarana-burke-says-it-needs-a-narrative-shift-2019-4 **[**https://perma.cc/3V5R-GNW6**].** *See* ME TOO MOVEMENT, *About*, https://metoomvmt.org/about**/ [**https://perma.cc/R9JV-5E2R**]** (last visited Dec. 28, 2019).

[82] Burke, *supra* note 80.

[83] Aric Jenkins, *Ann Curry Speaks Out: 'I Am Not Surprised' by Sexual Misconduct Accusations Against* Today *Show's Matt Lauer*, TIME (Jan. 17, 2018, 11:24 AM) http://time.com/5105633/ann-curry-interview/ [https://perma.cc/B46S-UB2U].

[84] Brett Samuels, *Franken Makes Senate Resignation Official*, HILL (Jan. 2, 2018), https://thehill.com/homenews/senate/367105-franken-makes-senate-resignation-official **[**https://perma.cc/9QLW-4VWA**].**

[85] Elias Leight, *Harvey Weinstein Sexual Assault Allegations: A Timeline*, ROLLING STONE (May 25, 2018), https://www.rollingstone.com/culture/culture-news/harvey-weinstein-sexual-assault-allegations-a-timeline-628273/ [https://perma.cc/H69H-48WH].

[86] *See* Burke, *supra* note 80.

[87] In fact, a record number of women were subsequently elected to Congress in the 2018 midterm elections. Drew Desilver, *A Record Number of Women Will be Serving in the New Congress*, PEW RES. CTR. (Dec. 18, 2018), http://www.pewresearch.org/fact-tank/2018/12/18/record-number-women-in-congress/ [https://perma.cc/8FRM-XDLE]. Women comprise nearly twenty-five percent of Congress, with more than one-third of those women being freshmen members. *Id.*

representation.[88] Time Magazine even announced these "Silence Breakers" as its 2017 Person of the Year.[89] In addition, several large companies have announced they will strengthen their anti-sexual harassment guidelines, including Microsoft,[90] Google,[91] Uber,[92] and Lyft,[93] as well as law firm[94] giants Sidley Austin,[95] Kirkland & Ellis,[96] and Munger, Tolles & Olson,[97] whom have all voluntarily ended their policies of forcing arbitration for sexual harassment claims.

---

[88] David Crary, *Six Months of #MeToo: Hopes are High for Lasting Impact*, AP NEWS (Mar. 31, 2018), https://www.apnews.com/bdc1e4af81bd4e069855b891c7b023a5 [https://perma.cc/64AJ-ZVY3]. *See also* Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, BLOOMBERG L. (Oct. 3, 2018, 5:13 AM), https://news.bloomberglaw.com/daily-labor-report/states-take-up-metoo-mantle-in-year-after-weinstein [https://perma.cc/JR85-5TDU] (finding that thirty-two states have introduced #MeToo inspired legislation, about a dozen of which target both private and public employers).

[89] Stephanie Zacharek et. al., *The Silence Breakers*, TIME http://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/FD98-BGXH] (last visited Dec. 28, 2019).

[90] Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html [https://perma.cc/WC2W-SY3B].

[91] Rakeen Mabud, *Google Put an End to Forced Arbitration—And Why That's So Important*, FORBES (Feb. 26, 2019), https://www.forbes.com/sites/rakeenmabud/2019/02/26/worker-organizing-results-in-big-change-at-google/#47330da74399 [https://perma.cc/MXK9-ZNZC]. Google joined the list after growing pressure, including 20,000 employees walking out after reports that "the company had paid large exit packages to a number of male executives accused of sexual harassment." *Id.*

[92] Laharee Chatterjee, *Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims*, REUTERS (May 15, 2018), https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2 [https://perma.cc/ZGB5-FBMS].

[93] *Id.*

[94] For a look into the ongoing fight against forced arbitration in law firms, visit http://www.pipelineparityproject.org. This organization of law students advocate and pressure law firms into ending their use of forced arbitration agreements and keeps a detailed list of the several hundred largest firms in the United States and their positions on forced arbitration. *See Coercive Contracts,* PEOPLE'S PARITY PROJECT, http://www.pipelineparityproject.org/coercivecontracts/ [https://perma.cc/W3NC-RMQS] (last visited Dec. 28, 2019).

[95] Sam Skolnik, *Sidley Drops Arbitration Demand for Would-Be Associates,* BLOOMBERG LAW (Nov. 28, 2018), https://news.bloomberglaw.com/us-law-week/sidley-drops-arbitration-demand-for-would-be-associates?utm_source=rss&utm_medium=LWNW&utm_campaign=00000167-5ba3-d497-a567-5fa3ab740002 [https://perma.cc/76HM-MWY7].

[96] Kathryn Rubino, *Law School Students Stand Up to Biglaw Firm, Win*, ABOVE THE L. (Nov. 21, 2018), https://abovethelaw.com/2018/11/law-school-students-stand-up-to-biglaw-firm-win/ [https://perma.cc/DAY4-KMT4].

[97] Debra Cassens Weiss, *After Social Media Outcry, Munger Tolles Will No Longer Require Mandatory Arbitration*, ABA J. (Mar. 26, 2018), http://www.abajournal.com/news/article/after_social_media_outcry_muner_tolles_will_no_longer_require_mandatory_arb [https://perma.cc/KTR8-FAL8].

The #MeToo movement has illuminated the immense problem of sexual harassment, but it has not solved the problem.[98] There is still a long way to go; for example, one national sexual harassment hotline reported that calls increased thirty percent in December 2017 from the previous December, showing the growth of the problem as more people become aware of harassment and feel comfortable coming forward.[99] One of the most significant effects of the movement could be that it is "harder to dismiss the claims of . . . women . . . [as] lies."[100] Feminist activists have sought to define the sexual harassment experience of women since the founding of the United States, and the #MeToo movement shows a large segment of women continue to experience sexual harassment today.[101] The #MeToo movement has been extremely important in showing how common sexual harassment is in America, but ending sexual harassment still demands further action, including support and vindication from the law and legislatures.[102]

Not only has the #MeToo movement shined a spotlight on how pervasive sexual harassment is, but it has also highlighted "the legal obstacles that have sometimes prevented women from sharing their stories of sexual harassment."[103] For example, only recently did the public learn about an ongoing sexual harassment scandal at Jared and Kay Jewelers—a national jewelry chain.[104] Victims originally filed claims in 2008 from incidents as far back as the 1990s.[105] Nearly ten years ago, fifteen women came forward about sexual harassment at Jared and Kay Jewelers; however, none of them were aware of the others, and arbitration agreements legally prevented the victims

---

[98] *See* Eliana Dockterman, *Survivors Used #MeToo to Speak Up. A Year Later, They're Still Fighting for Meaningful Change*, TIME (Sept. 20, 2018), http://time.com/5401638/silence-breakers-one-year-later-2/ [https://perma.cc/SJ8C-HJA8].

[99] Lisa Lambert, *#MeToo Effect: Calls Flood U.S. Sexual Assault Hotlines*, REUTERS (Jan. 17, 2018), https://www.reuters.com/article/us-usa-harassment-helplines/metoo-effect-calls-flood-u-s-sexual-assault-hotlines-idUSKBN1F6194 [https://perma.cc/4U7J-2S65].

[100] L. Camille Hebert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?,* 22 EMP. RTS. & EMP. POL'Y J. 321, 323 (2018).

[101] BAKER, *supra* note 34; EEOC TASK FORCE STUDY, *supra* note 70; Chatterjee, NPR NEWS, *supra* note 70.

[102] Hebert, *supra* note 100, at 324.

[103] *Id.* at 333.

[104] Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html?utm_term=.620dd82bd953 [https://perma.cc/D39W-3G7C].

[105] *Id.*

from learning about each other.[106] The scandal has culminated in a private class action arbitration proceeding and now encompasses 69,000 current and former employees alleging sexual harassment, as well as other forms of discrimination such as gender pay disparities.[107] The alleged sexual harassment culture at Jared and Kay Jewelers entailed groping and sexual innuendos, as well as job benefits and promotions contingent on how the women responded to sexual demands from male managers.[108] Jared and Kay Jewelers uses arbitration agreements, which is why, as one of the victim's attorney explained, "[m]ost of [the victims] had no way of knowing that the others had similar disputes, because that was all kept confidential."[109] While the #MeToo movement has led to positive social conversations, it also underscores further problems and the continued need for positive action affecting further change.[110]

C. History and Development of Arbitration in the United States

Arbitration has become widespread in today's society; however, this ready acceptance was not always the case.[111] The law of arbitration has undergone a slow but significant evolution.[112] This Section will first discuss the intent of Congress when it passed the FAA, then this Section will give a brief overview of significant Supreme Court decisions interpreting the FAA. Finally, this Section will address a variety of studies analyzing how plaintiffs fare in arbitration versus how they otherwise would fare in federal court.

1. Intent of Congress

The United States originally "adopted the English common law rule that arbitration agreements were not enforceable prior to issuance of a final

---

[106] Yuki Noguchi, *No Class Action: Supreme Court Weighs Whether Workers Must Face Arbitrations Alone*, NPR NEWS (Oct. 6, 2017), https://www.npr.org/2017/10/06/555862822/no-class-action-supreme-court-weighs-whether-workers-must-face-arbitrations-alon [https://perma.cc/C387-4E4C].

[107] Harwell, *supra* note 104.

[108] *Id.*

[109] Noguchi, *supra* note 106.

[110] Dockterman, *supra* note 98.

[111] David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 377–78 (2018). *See also* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982–84 (2d Cir. 1942) (discussing the traditional judicial hostility toward arbitration and the change since Congress passed the FAA).

[112] Stephen A. Plass, *Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties*, 65 CATH. U. L. REV. 79, 83–84 (2015). *See* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 238–39 (2008).

award."[113] However, with the backing of business and labor organizations, arbitration gained traction in the states and New York became the first state to pass an arbitration act in 1920.[114] The New York Act attempted to put arbitration agreements on the same footing as other contracts.[115] Congress largely modeled the FAA after the New York Arbitration Act of 1920 with the same goal of equalizing arbitration agreements and other contracts.[116] One of the main drafters of the FAA, Julius Henry Cohen, explained that "the provisions of the [New York Act and the FAA] are largely identical."[117] Shortly after the New York Act and Cohen's lobbying efforts, Congress passed the Federal Arbitration Act and President Coolidge signed it into law in 1925.[118] The FAA's express purpose was to put arbitration agreements on "the same footing as other contracts," which effectively statutorily overturned the common law rule that arbitration agreements were not enforceable before the arbitrator issued a final award and created a public policy that favorably viewed arbitration agreements.[119] Section Two of the FAA provides that:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[120]

---

[113] Thomas J. Lilly, Jr., *Arbitrability and Severability in Statutory Rights Arbitration Agreements: How to Decide Who Should Decide*, 42 OKLA. CITY U. L. REV. 1, 6 (2017).

[114] Scott R. Swier, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner:* Allied-Bruce Terminix Companies, Inc. v. Dobson, 41 S.D. L. REV. 131, 150 (1996). *See* Act of Apr. 19, 1920, Ch. 275, 1920 N.Y. Laws 803; amended by N.Y. C.P.L.R. §§ 7501–14 (1980).

[115] Alessandra Rose Johnson, *Oh, Won't You Stay With Me?: Determining Whether § 3 of the FAA Requires a Stay in Light* of Katz v. Cellco Partnership, 84 FORDHAM L. REV. 2261, 2265 (2016).

[116] *Id.* at 2266.

[117] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275 (1926).

[118] JON O. SHIMABUKURO, CONG. RES. SERV., RL 30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS (2002) (summarizing legislative history of the Federal Arbitration Act).

[119] H.R. REP. NO. 68-96, at 1 (1925). *See, e.g.*, AT&T Mobility L.L.C v. Concepcion, 563 U.S. 333, 344 (2011) (acknowledging and accepting this purpose of the FAA).

[120] 9 U.S.C. § 2 (2018).

However, Congress passed the FAA in 1925 when a "transaction involving commerce" was not understood to empower the interstate Commerce Clause to reach small businesses, individual employees, or individual consumers.[121]

The legislative history of the FAA is relatively limited, but the little history available demonstrates that Congress intended a narrow FAA.[122] The lack of legislative history is, in part, because the American Bar Association and business interests largely wrote the FAA, and those interest groups' drafts were "enacted . . . into law with only minor amendments."[123] Congress' understanding of the interstate commerce power in 1925 was based on *Hammer v. Dagenhart*.[124] Under *Hammer*, Congress' power to use the Commerce Clause was extremely limited; for example, Congress could not use the Commerce Clause to ban products of child labor from crossing state lines.[125] W.H.H. Piatt, one of the proponents of the FAA, demonstrated the limited scope of the FAA when he responded to a question from Montana Senator Thomas Walsh about whether the FAA would cover insurance cases, by stating that "it is not the intention of this bill to cover insurance cases."[126] This conclusion was based on the Supreme Court's assertion that "the business of insurance is not commerce."[127] Thus, when Congress passed the FAA, it did not believe arbitration would cover interstate insurance cases, let alone statutory rights.[128]

---

[121] Horton, *supra* note 111, at 378. *See also In re* Cold Metal Process Co., 9 F. Supp. 992, 993–94 (W.D. Pa. 1935) (holding that the FAA did not control an agreement between an Ohio company and a Pennsylvania company); Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 129 n.190 (2002) (explaining that at the time Congress passed the FAA it did not consider most consumers as a part of interstate commerce and so the FAA would not apply) [hereinafter Drahozal, *Southland*].

[122] IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 85–86 (1992). *See* Drahozal, *Southland, supra* note 121, at 130.

[123] Drahozal, *Southland, supra* note 121, at 126.

[124] *Id.* at 128.

[125] Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941).

[126] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Comm. on the Judiciary*, 67th Cong. 9 (1923) (testimony of Mr. Piatt) [hereinafter Hearing, Mr. Piatt].

[127] N.Y. Life Ins. Co. v. Deer Lodge Cty., 231 U.S. 495, 506 (1913); Hooper v. California, 155 U.S. 648, 655 (1895).

[128] *See generally* 9 U.S.C. § 2 (2018); Hearing, Mr. Piatt, *supra* note 126. The founders of the FAA did not believe that arbitration would reach interstate insurance cases. *See* Hearing, Mr. Piatt, *supra* note 126. If arbitration could not even reach interstate insurance cases, the founders would likely not have thought arbitration could reach statutory rights. *See also* Mitsubishi

Because the legislative history is "exceptionally meagre," Professors MacNeil and Drahozal have argued that to understand the intent of Congress, it is necessary to understand the intent of the drafters of the FAA.[129] Julius Henry Cohen authored the first draft of the FAA and submitted a lengthy brief to Congress's hearings explaining and advocating for the FAA, which scholars generally consider "one of the most important aspects of the [FAA's] legislative history."[130] As chief proponent of the FAA, Cohen wrote that "if there be any dispute regarding the making of the contract . . . a trial of that issue by the court . . . is preserved."[131] Cohen also assured Congress of the ability to safeguard people's rights, testifying before Congress that "the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine [the] . . . claim."[132] Neither the FAA's drafters nor Congress intended the FAA to apply to non-voluntary, non-contract claims.[133] This understanding of the FAA's main drafter, and by proxy, Congress, includes a narrow and limited interpretation of the commerce power which dictates the reach of the FAA, as well as the belief that the right to trial would not be lost if the plaintiff's rights were not being justly vindicated.[134]

2. Development of the Federal Arbitration Act in Case Law

Congress passed the FAA in 1925 and it has not meaningfully changed or amended the FAA since its enactment, thus failing to keep up with changes in other areas of the law such as the introduction of personal statutory rights like Title VII.[135] Because of the lack of modification, the

---

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 657–58 (1985) (Stevens, J., dissenting) (suggesting that the FAA framers could never have even considered that the FAA could cover statutory rights).

[129] Drahozal, *Southland, supra* note 121, at 130. *See* MACNEIL, *supra* note 122, at 84–85.

[130] MACNEIL, *supra* note 122, at 97; Drahozal, *Southland, supra* note 121, at 131.

[131] Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 149 (1921).

[132] *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 35 (1924) (statement of Julius Henry Cohen).

[133] Szalai, *supra* note 24, at 658–62.

[134] *See generally* Plass, *supra* note 112, at 95. *See also* Szalai, *supra* note 24, at 658–62 (explaining the understanding of Congress and its drafters at the time of the FAA's enactment and finding that there was no intent for the FAA to apply beyond voluntary contract claims).

[135] Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081, 1087 (2009).

judiciary has largely made the law surrounding the FAA concerning arbitration.[136] Professor Horton has called this phenomenon "a quiet coup in the U.S. civil justice system."[137] Some of the harshest critics of the Supreme Court's jurisprudence of the FAA have been dissenting Supreme Court justices themselves, including the strong condemnation from Justice Connor that "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[138] Professor Carbonneau succinctly notes that the "U.S. Supreme Court's policy on arbitration has been elaborated through some forty opinions over forty years."[139]

In one of the early major cases to interpret the FAA, the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* took "the first step in the federalization of the law of arbitration and in establishing a single national law of arbitration."[140] In *Prima Paint Corp.*, the Supreme Court considered a claim that the arbitration agreement in question was entered into by fraud in the inducement.[141] In rejecting that claim, the Court held that the FAA governs arbitration agreements.[142] This holding paved the way for the Court to find that the FAA governs all arbitration agreements and preempts law and policy to the contrary.[143]

In the next major case before the Supreme Court, and the first to consider Title VII and arbitration agreements, the Court held in *Alexander v. Gardner-Denver Co.* that a mandatory arbitration agreement could not prevent

---

[136] Plass, *supra* note 112, at 84. *See* Carbonneau, *supra* note 112, at 238–39 (arguing that at every stage of arbitration's ascendency the Supreme Court of the United States has been pushing through its own desired version of the law).

[137] Horton, *supra* note 111, at 367.

[138] *E.g.,* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring); *id.* at 296–97 (Thomas, J., dissenting) (arguing against a broad interpretation of the FAA); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132–33 (2001) (Stevens, J., dissenting). Other Courts have also rejected the broad interpretation of the FAA. *See* Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 263, 279 (W. Va. 2011), *vacated* 565 U.S. 530 (2012) (rejecting the Supreme Court's interpretation of the FAA and finding that the Supreme Court's FAA doctrine has been made from "whole cloth"); Casarotto v. Lombardi, 886 P.2d 931 (Mont. 1994), *rev'd sub nom.*, 517 U.S. 681 (1995) (refusing to follow the Supreme Court's interpretation of the FAA).

[139] Carbonneau, *supra* note 112, at 263 n.121 (cases cited within).

[140] Carbonneau, *supra* note 112, at 252. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405–06 (1967).

[141] *Prima Paint Corp.*, 388 U.S. at 396–97.

[142] *Id.* at 402.

[143] *See infra* notes 153–58 and accompanying text.

plaintiffs from pursuing their statutory rights under Title VII.[144] The Court found that "an employee's rights under Title VII may not be waived . . . [because] he is asserting a statutory right independent of the arbitration process . . . [A]rbitral procedures . . . make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[145] The Court held that an employee who had signed an arbitration agreement could still pursue his Title VII claim of racial discrimination in court.[146]

Alexander, however, was short-lived. The Supreme Court changed course and held in *Gilmer v. Interstate/Johnson Lane Corp.* that statutory rights could be subject to arbitration agreements under the FAA because that "reflects a 'liberal federal policy favoring arbitration agreements.'"[147] The Court held that an employee alleging age discrimination after his company fired him when he turned sixty-two was subject to the arbitration agreement he signed even though it covered a statutorily protected right.[148] The Court did not expressly overturn *Alexander*, but essentially narrowed *Alexander* to its facts.[149] The Court simply abandoning one direction in favor of another is one example of the danger of the Supreme Court creating arbitration law on its own without any input from Congress.[150] As the Supreme Court recognized arbitration could cover statutory rights, the Court implicitly acknowledged the FAA framer's different intent when it held that the broad modern understanding of interstate commerce governed arbitration agreements and statutory rights, and "not the narrow conception [of interstate commerce]

---

[144] Alexander v. Gardner-Denver Co., 415 U.S. 36, 49–57 (1974).

[145] *Id.* at 52–56.

[146] *Id.* at 59–60.

[147] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29, 35 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). The *Gilmer* court also declared that in order for a court to find an arbitration agreement invalid, the party opposing arbitration would have to show an explicit congressional waiver of arbitration through (1) the text of the statute, (2) the legislative history, or (3) an inherent conflict between arbitration and the statute's purpose. *Id.* at 26. *Gilmer* did not explicitly overturn *Alexander* but significantly narrowed it to the facts of that case; however, several courts have recognized that *Gilmer* implicitly overturned *Alexander*. *See, e.g,* Lynch v. Pathmark Supermarkets, 987 F. Supp. 236, 241 (S.D.N.Y. 1997); Hewes v. Keystone Shipping Co., 152 F.3d 925, *1 (9th Cir. 1998) (unpublished); Jorge-Colon v. Mandara Spa P. R., Inc., 685 F.Supp.2d 280, 286 (D.P.R. 2010). *See also* EEOC v. Waffle House, Inc., 534 U.S. 279, 295 n.10 (2002) (reaffirming "that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum").

[148] *Gilmer*, 500 U.S. at 35.

[149] *Id.* at 34–35.

[150] *See* Carbonneau, *supra* note 112, at 263 n.121 (detailing federal arbitration law has evolved through more than forty Supreme Court opinions and no congressional input).

prevailing at the time of enactment."[151] Justice O'Connor criticized this direct shift in the Court's jurisprudence, writing that "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[152]

The Court, in its latest evolution in arbitration law, has found that the FAA applies in state courts,[153] and preempts both state law[154] and public policy.[155] This series of decisions culminated in the 2018 *Epic Systems Corp. v. Lewis* decision where the Court consolidated three separate cases where employers had their employees sign arbitration agreements waiving their rights to pursue class-action claims.[156] The lower courts had held that the waiver of class action rights violated state unconscionable contract policies, as well as the National Labor Relations Act.[157] The Supreme Court, however, held that the FAA allows mandatory arbitration agreements to cover class action waivers, that the FAA preempts contrary state public policy and law, and that the National Labor Relations Act did not save the FAA.[158]

3. Who Wins and Loses in Arbitration

Individuals in arbitration are at risk of having their rights effectively nullified because "[t]here is little, if any, protection from the ignorance, incompetence, or mistakes of arbitrators."[159] Arbitrators are subject to minimal

---

[151] Drahozal, *Southland, supra* note 121, at 129. *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 274–75 (1995) (summarizing various cases expanding the understanding of "involving commerce" and holding that the broad conception of commerce power is more in line with congressional intent than the narrow conception of commerce power).

[152] *Allied-Bruce Terminix Cos.*, 513 U.S. at 283 (O'Connor, J., concurring).

[153] Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

[154] *Id.* at 11.

[155] AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the FAA preempted a California public policy holding class action waivers in arbitration agreements as unconscionable). *See id.* at 353 (Thomas, J., concurring) (succinctly writing that "courts cannot refuse to enforce arbitration agreements because of a state public policy"). *See also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237–38 (2013) (holding a class action waiver in an arbitration agreement was valid even when arbitrating each individual federal antitrust claim would be prohibitively expensive and unwieldy). For an in-depth view of the criticism of these several decisions, *see* Horton, *supra* note 111, at 367 n.33 (citing thirteen different scholars' articles criticizing these decisions).

[156] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619–20 (2018).

[157] *Id.* at 1619–22.

[158] *Id.* at 1632.

[159] Carbonneau, *supra* note 112, at 266–67.

judicial review, and only when arbitrators "manifestly disregard[]" the law.[160] The lack of publicity and published decisions "has made it very difficult for scholars to assemble data about the aggregate dimensions or consequences of arbitration in employment . . . cases."[161] This Section will overview the basics of arbitration procedure and discuss how that arbitration procedure can affect who wins and loses in arbitration. Finally, this Section will analyze several empirical studies of the outcomes of arbitration versus court proceedings.

a. Arbitration procedure

The American Arbitration Association (hereinafter AAA) is one of the leading organizations supplying arbitrators and advocating for arbitration.[162] The typical arbitration case between employee and employer begins with the employee signing an arbitration agreement at the behest of the employer, either as a condition of employment or after being employed.[163] After a dispute arises, the complaining party files an arbitration complaint and the arbitrator is then selected.[164] The parties then hold a preliminary hearing, followed by a quasi-discovery period, meaning that discovery is often more limited than in court, or is discarded altogether if the arbitration agreement reflects that.[165] The arbitrator then holds a formal hearing, and following any post-hearing supplemental information that the arbitrator or the agreement may or may not allow, the arbitrator issues a decision.[166] If a party wins an arbitration proceeding, they get a finalized order awarding the desired relief, whether that is monetary damages, reinstatement after a termination, dismissal of a claim, etc.[167]

---

[160] Shea, *supra* note 29, at 376 (quoting Wilko v. Swan, 346 U.S. 427, 435–36 (1953)). *See* Buehrer, *supra* note 27, at 281; *supra* notes 29–31 and accompanying text.

[161] Estlund, *supra* note 26, at 684.

[162] KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS, ECON. POL'Y INST. 17 (2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/5NXK-MCMX] (referencing Alexander Colvin's 2014 survey finding that the American Arbitration Association accounted for fifty percent of the recent arbitration cases).

[163] *See id.* at 4–5.

[164] *Arbitration Road Map*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/arbitration_road_map.pdf [https://perma.cc/2RJZ-DMW4] (last visited Dec. 28, 2019).

[165] *Id.*

[166] *Id.*

[167] *What Happens After the Arbitrator Issues an Award,* AM. ARB. ASS'N 1 https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf [https://perma.cc/89ZX-TMTN] (last visited Dec. 28, 2019).

Arbitration decisions are "private[,] but not confidential,"[168] meaning that decisions are not public and opinions are not published, but information could become public through future litigation or if a party willingly—and is legally able to—discloses the information.[169] This makes it difficult to study arbitration and develop an adequate understanding of who wins and loses since information rarely ends up publicly available.[170] Professor Estlund tacitly acknowledges the difficulty of studying arbitration proceedings, writing that, "[t]he private and contractual nature of arbitration makes it relatively easy for firms to prevent disclosure of just about anything."[171] Not only does the inherent privacy of arbitration make it difficult to study arbitration proceedings, it also provides an institutionalized benefit to employers.[172] Arbitration's privacy enables objectionable business practices[173] or corrosive business culture, stagnation of case law development, and denies third parties the benefit of knowing an employer has engaged in unlawful conduct.[174]

The arbitrator is a private third party who is empowered to make decisions about the case.[175] The arbitrator is compensated through fees paid by

---

[168] Schmitz, *supra* note 27, at 1211.

[169] *Id.*

[170] Estlund, *supra* note 26, at 680–81.

[171] *Id.*

[172] Thompson, *supra* note 33, at 265–66. The Supreme Court has not ruled whether a right to open civil trials exists, but every Circuit Court of Appeals to consider the issue has found that right exists. *Id.* at 265. In contrast, arbitration is inherently private, which allows employers to avoid the publicity of an open trial. *Id.* at 265 nn.143–46.

[173] For example, one of the most glaring examples of unfair business practices is the National Arbitration Forum. This organization was the nation's largest arbitration provider for consumer disputes until an investigation by several journalists and the Minnesota Attorney General revealed the Forum's business practices were "unlawfully deceptive." Daniel A. Sito, *"Integral" Decisionmaking: Judicial Interpretation of Predispute Arbitration Agreements Naming the National Arbitration Forum*, 81 U. CHI. L. REV. 1991, 1994–96 (2014). The investigations revealed that the Forum was notably biased in favor of businesses; for example, the Forum solicited business from creditors by promising them a "marked increase" in their recovery rates. *Id.* at 1995 n.25. The Forum story shows that while it held itself out as an impartial and neutral third party, one of the supposed hallmarks of arbitration, the Forum was anything but impartial and deprived a vast number of consumers of an independent decision maker for their disputes. The Forum settled against the massive backlash and agreed to a consent judgment that prohibited it from administering any further consumer arbitration disputes. Consent Judgment, Swanson v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550, 2009 WL 5424036 (Minn. Dist. Ct. July 17, 2009).

[174] Thompson, *supra* note 33, at 266.

[175] *Arbitrator*, BLACK'S LAW DICTIONARY (10th ed. 2014).

the parties.[176] In comparison, federal judges have life tenure appointments and are paid through a set scale chosen by an independent branch of government.[177]

The Supreme Court has a mechanism known as the "effective-vindication rule," which attempts to "prevent arbitration clauses [and procedures] from choking off a plaintiff's ability to enforce congressionally created rights."[178] This mechanism stems from the "yellow dog" contracts of the early 1900s when employers used them to proscribe all manner of protected activity, including statutory protections, as a condition of employment.[179] Eventually Congress banned these "yellow dog" contracts through various pieces of pro-worker legislation passed by the New Deal Congress.[180] However, Professor Estlund argues that arbitration agreements and the procedures they implement are "the modern equivalent of the pre-New Deal 'yellow dog contracts' . . . [because they] require employees to waive their statutory rights in order to obtain employment."[181] Justice Ginsburg agrees and asserts that the Supreme Court is bringing back these "yellow dog" contracts in the form of arbitration agreements because they effectively proscribe employees' statutory rights.[182]

b. Empirical studies of who wins and loses in arbitration

Even though specific numbers are difficult to find, Professor Alleyne has found an imbalance in outcomes between sexual harassment arbitration proceedings and litigation.[183] He writes that the imbalance between arbitration and litigation is, in part, "due to inadequate . . . arbitration remedies for

---

[176] *Costs of Arbitration*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs_of_Arbitration.pdf [https://perma.cc/35SZ-MM36] (last visited Dec. 28, 2019).

[177] U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78 (Alexander Hamilton); *Judicial Compensation*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/XV4A-YBWS] (last visited Dec. 28, 2019).

[178] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).

[179] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1634–36 (2018) (Ginsburg, J., dissenting) (citations omitted).

[180] *Id.*

[181] Estlund, *supra* note 26, at 707–08.

[182] *Epic Sys. Corp.*, 138 S. Ct. at 1634–36 (Ginsburg, J., dissenting) (citations omitted). *See* Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213, 224–25 (2018) (writing that based on the Supreme Court's jurisprudence "FAA contracts can practically leave consumers and workers without any forum for vindicating their claims").

[183] *See* Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 2 (1999).

sexual harassment."[184] Professor Alleyne goes on to write that arbitration agreements can "limit[] . . . monetary remedies to easily calculated, sum-certain, make-whole amounts . . . [and] [p]unitive damages are virtually unheard of in . . . arbitration cases, as are damages for pain and suffering and for emotional distress."[185] For example, one remedy Professor Alleyne found in the arbitration cases he studied was a simple cease and desist order, which is "certainly . . . inadequate as compared with what a judge or jury might award in a comparable Title VII case."[186]

Professor Shea completed an empirical study of arbitration results versus litigation results for sexual harassment cases in the securities industry using data available from 1991 to 1997 and found that the "arbitrators' written awards [do not] permit sufficient judicial review to ensure compliance with statutory standards."[187] Professor Shea analyzed written arbitration awards and since arbitration awards are not required to be published or written it further obscures arbitration proceedings and results.[188] After reviewing the results, Professor Shea found that only in "a mere 4.55%" of decisions did arbitrators engage in meaningful legal analysis and, compared to court opinions, adequately vindicate the plaintiffs' statutory rights.[189] He concluded that he doubts "based on the awards . . . reviewed, federal statutes proscribing sexual harassment and/or gender discrimination continued to serve either their remedial or deterrent functions."[190] Compared with litigation, arbitration did not effectively vindicate the plaintiffs' statutorily protected rights to be free from sexual harassment.[191]

Despite the difficulty of conducting an empirical study of arbitration awards, Professor Alexander Colvin completed one of the most comprehensive recent studies of general arbitration awards using data from the AAA in 2011.[192] The AAA is arguably the largest provider of arbitrators, so

---

[184] *Id.* (discussing arbitration in the context of labor agreements).

[185] *Id.* at 6. *See also* MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 6 (2d ed. 1991) (explaining that it is "improper to measure an award as if it were the kind of damage judgment which the courts would render")

[186] Alleyne, *supra* note 183, at 6 n.17 (finding that the average jury award in a sexual harassment case is $250,000).

[187] Shea, *supra* note 29, at 407–08.

[188] *See id.* at 406–09.

[189] *Id.* at 412–13.

[190] *Id.*

[191] *Id.*

[192] *See* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD. 1 (2011) [hereinafter Colvin, *Case Outcomes and Processes*];

AAA data provides one of the most complete data sets of information; however, the data is still under-inclusive of all arbitration proceedings that occur since it does not cover every arbitration proceeding.[193] Professor Colvin's empirical study is the most complete study of arbitration decisions to date because, under recent California Civil Procedure rules, arbitration providers in California, including the AAA, have to disclose certain information about their proceedings and decisions within the State.[194] The AAA, in its effort to fully comply with the California rule, has made a vast amount of information about its arbitration proceedings nationwide publicly available.[195] Thus, this rule has been instrumental in making more comprehensive arbitration data publicly available.[196]

Professor Colvin analyzed the AAA's nationwide data and found that between 2003 and 2007, 21.4% of employees won arbitration awards.[197] The study considered an employee to have won when he or she received some sort of the sought after relief from the arbitrator remedying their complaints.[198] When compared to data from litigation awards, Professor Colvin found an "arbitration-litigation gap" existed, meaning that employees lost at greater rates in arbitration than in litigation, and if plaintiffs did recover some award it was smaller in arbitration proceedings than what plaintiffs could likely have recovered in litigation.[199] Specifically, Professor Colvin found that the "median awards in employment litigation are around five to ten times greater than median awards in employment arbitration."[200] One potential reason that an employee who is forced into arbitration may win a smaller amount of monetary relief is because arbitration agreements can limit damages, including punitive damages courts could potentially order in litigation.[201] If the employer and employee agree to waive punitive damages as a part of their arbitration agreement, which the employee likely signed as

---

Alexander J. S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405 (2007).

193 Colvin, *Case Outcomes and Processes*, *supra* note 192, at 2.

194 *Id.* at 3–4. *See* CAL. CIV. PROC. CODE § 1281.96 (2018).

195 Colvin, *Case Outcomes and Processes*, *supra* note 192, at 4.

196 *Id.* at 3–4.

197 *Id.* at 1.

198 *Id.* at 5.

199 *Id.* at 6.

200 *Id.* at 7.

201 Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 411–12 (2004) [hereinafter Drahozal, *Federal Arbitration Act Preemption*]; Horton, *supra* note 111, at 430.

a condition of employment, the parties are free to do so and the court will likely uphold the arbitration agreement as an enforceable contract.[202]

In another study, Professor Estlund conducted a meta-analysis of both arbitration and litigation studies, including using data made available through California's laws and additional data independently made available by the AAA for scholars on the condition they maintained confidentiality and only published findings in the aggregate.[203] Professor Estlund noted that "employees won something in 19.1% of AAA arbitrations . . . [between] 2003 [and] 2013. That compares to the findings of other scholars that plaintiffs won something in 29.7% of federal employment discrimination cases."[204] Moreover, Professor Estlund found that "employees who did win something recovered much less in AAA arbitration than in litigation: The median award was $36,500 in arbitration versus $176,426 in federal discrimination cases."[205]

Another problem that highlights the "win and lose" gap between arbitration and litigation is the ability to preselect an arbitrator, as opposed to the court assigning a judge and selecting a jury of peers.[206] This phenomenon is the "repeat-player" problem,"[207] meaning "the tendency of arbitrators to favor the party that is more likely to produce repeat business," which is the employer.[208] In Professors Colvin and Gough's study, an arbitrator was preselected in about twenty-five percent of cases while another sixty-four percent of cases selected an arbitrator through a "strike list," where the parties would go back and forth over a predetermined list of arbitrators,

---

[202] Drahozal, *Federal Arbitration Act Preemption, supra* note 201, at 411–12. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (reaffirming that arbitration agreements are enforceable as contracts).

[203] Estlund, *supra* note 26, at 687. *See* Alexander J. S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 79–82 (2014).

[204] Estlund, *supra* note 26, at 688.

[205] *Id.* Professor Estlund acknowledges the high rate of settlements, summary judgment dismissals, and "the paucity of data," clouds the data. *Id.* at 689. *But cf.* Ashley Winters, *Regardless of Potential Scrutiny, the Arbitration Clause of the Fair Pay and Safe Workplaces Executive Order (2014) Should Not Have a Resounding Impact*, 31 OHIO ST. J. DISP. RESOL. 179, 194–95, 204–05 (2016). The author concludes that plaintiffs win more often in arbitration and win roughly the same amount as plaintiffs in trial. *Id.* at 205. However, the author only analyzes a few studies and acknowledges statistics that undercut the article's conclusion that arbitration is better for plaintiffs. *Id.* at 204–05.

[206] Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL.1019, 1021 (2015).

[207] *Id.*

[208] Estlund, *supra* note 26, at 686.

striking those they did not want until the parties selected one.[209] The ability to preselect, or control the selection process, exacerbates the "repeat player" problem.[210] In 2015, the New York Times ran a two-part front page series on the secrecy of arbitration and the potential conflicts of interest that exist; the report included interviews with more than three dozen arbitrators who said "they felt beholden to companies."[211] The threat of losing business, since companies have multiple arbitration proceedings while the employee likely will only have one, is one reason why arbitrators feel beholden to employers.[212] One arbitrator, Victoria Pynchon, admitted that plaintiffs have an inherent disadvantage, asking "why would an arbitrator cater to a person they will never see again?"[213]

Empirical evidence backs up these anecdotal accounts of the "repeat-player" problem.[214] Professor Bingham analyzed 203 employee-versus-employer dispute cases made available by the AAA that resulted in a monetary award, either for the plaintiff employee or the defendant company.[215] Professor Bingham's analysis found a statistically significant difference when the defendant company was a "repeat-player."[216] She concluded that the data indicates "employees lose more frequently when the arbitrator is one the employer has used at least once before."[217] One reason Professor Bingham proposed to explain this statistically significant finding may be the presence of "informal continuing relationships with institutional incumbents,"[218] highlighting the incentive of arbitrators to maintain relations with

---

[209] Colvin & Gough, *supra* note 206, at 1021.

[210] *Id.* at 1023–25. *See* Bales & Irion, *supra* note 135, at 1084; Horton, *supra* note 111, at 410–11 (explaining the incentives of arbitrators to treat repeat companies better than one-time employees who are appearing in arbitration); Estlund, *supra* note 26, at 687 (summarizing anecdotal accounts of arbitrators handling up to twenty-eight cases simultaneously for one defendant company); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238 (1998).

[211] Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/HE5M-XHJN]. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/T9ES-TFKF].

[212] *See supra* note 211.

[213] *See supra* note 211.

[214] Bingham, *supra* note 210, at 238.

[215] *Id.* at 236.

[216] *Id.* at 238–39.

[217] *Id.* at 238.

[218] *Id.* at 242.

clients for future business, an incentive that arbitrators themselves admitted to the *New York Times*.[219] Another reason that employers benefit from being a "repeat player" is because "arbitration's privacy unduly benefits repeat players by allowing them to hide unfavorable information about their discriminatory practices . . . and other legal violations,"[220] incentivizing employers to come back over and over again while facing minimal risk of exposure. Repeat business is an economic incentive in a private system of dispute resolution, as opposed to the court system.

D. Recent Attempts to Address Mandatory Arbitration of Sexual Harassment Claims Will Not be Successful

There has been both executive and legislative action at the state and federal level that has attempted to counteract the Supreme Court's broad interpretation of the FAA.[221] At the federal level in 2010, "Congress passed the Franken Amendment, which prohibited the Department of Defense from entering into contracts for more than $1 million in goods or services with entities that mandate arbitration of certain employment-related claims,"[222] such as sexual harassment claims.[223] In 2014, President Obama signed an executive order extending a similar mandatory arbitration ban to all federal agencies.[224]

Also, Congress passed the Civil Rights Act of 1991 that, in part, amended Title VII.[225] Congress passed the Act largely as a response to several Supreme Court decisions that had limited the rights of employees to sue employers for discrimination, and so Congress sought to reaffirm

---

[219] *See supra* note 211.

[220] Schmitz, *supra* note 27, at 1212. *See also* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650–61 nn.100–01 (2005) (providing an overview of the pros and cons of the "repeat player" problem).

[221] *See generally, infra* Part II.D (detailing attempted actions taken to combat mandatory arbitration of sexual harassment).

[222] Horton, *supra* note 111, at 368.

[223] *See* Department of Defense Appropriations Act of 2010, Pub. L. No. 111–118, div. A, tit. VIII, § 8116, 123 Stat. 3409, 3454–55 (2010).

[224] *See* Exec. Order No. 13,673, 3 C.F.R. § 6(a) 283, 289–90 (2015), *reprinted as amended in* 41 U.S.C. § 3101 app. at 68, 70–71 (2016). However, President Trump quickly revoked this executive order about two months after his inauguration. *See* Exec. Order No. 13,782, 3 C.F.R. § 314 (2017). These developments show the understanding of the problem, but a permanent solution is not an executive order, it is a legislative fix that a new administration could not change with a new executive order.

[225] *The Civil Rights Act of 1991*, EEOC, https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html [https://perma.cc/QN93-GEM5] (last visited Oct. 28, 2019).

employees' civil rights and their right to litigate discrimination claims.[226] Congress noted in the House Judiciary Committee report, writing as a part of its 1991 amendments of Title VII, that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."[227] Specifically, in relation to Title VII claims like sexual harassment, the Committee referred to the language in *Alexander v. Gardner-Denver* stating that statutory rights like Title VII could not be subject to arbitration, as "consistent" with their view of Title VII.[228] One commentator understood this language to mean that "Congress has shown no plan of ratifying arbitration of statutory complaints as an exclusive forum."[229]

Congress also expanded Title VII's fee shifting provisions to incentivize plaintiffs to bring these claims, indicating wider support and backing of the statutory rights that Title VII protects, in large part as a response to the Court's interpretation of previous passages of Title VII.[230] However, the Ninth Circuit concluded that because the Supreme Court has interpreted the FAA so broadly that it is unambiguous the Supreme Court prevented the Circuit from even considering the legislative history and real intent of Congress.[231] Judge Reinhardt, one of the dissenting judges on the Ninth Circuit, protested that "the majority in Congress who voted for the 1991 Civil Rights Act plainly thought that the Act did not allow employers to force their workers to . . . [forfeit] their right to trial by jury in Title VII cases."[232] But, the Supreme Court's interpretation forced the Ninth Circuit to overturn its decision in *Duffield,* where the Circuit held arbitration agreements could not cover Title VII claims.[233] Essentially, the Ninth Circuit acknowledged that the congressional legislative history shows Congress's intent that Title VII claims are not subject to arbitration, but the Supreme

---

[226] *Id.*

[227] H.R. REP. NO. 102-40(I), pt. 3, at 97 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 635.

[228] H.R. REP. NO. 101-485(III), at 76–77 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 499–500.

[229] Mtendeweka Owen Mhango, Note, *Rejecting the Myth of* Austin v. Owens-Brockway Glass Container*: Exalting the Vitality of* Gardner-Denver *and the Distinction Within* Gilmer, 7 U. PA. J. LAB. & EMP. L. 1013, 1026 (2005). *See* Mara Kent, "*Forced" vs. Compulsory Arbitration of Civil Rights Claims*, 23 L. & INEQ. 95, 112 (2005).

[230] EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 747 (9th Cir. 2003).

[231] *Id.* at 752–53. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1185 (9th Cir. 1998) (holding that defendants could not compel arbitration for Title VII claims), *overruled by Luce, Forward, Hamilton & Scripps*, 34 F.3d at 749.

[232] *Luce, Forward, Hamilton & Scripps*, 345 F.3d at 766 (Reinhardt, J., dissenting).

[233] *Id.* at 752–53. *See Duffield*, 144 F.3d at 1185 (holding that defendants could not compel arbitration for Title VII claims).

Court's broad reading of the FAA precluded courts from considering Congress's contrary intention.[234]

Individual states have also tried to address sexual harassment claims and arbitration.[235] Thirty-two states have pursued some type of #MeToo inspired legislation, including seven targeting non-disclosure agreements involving sexual harassment, and four states have passed laws restricting or ending the use of mandatory arbitration agreements for sexual harassment claims.[236] In an implicit endorsement of these laws, over 250 law professors around the country have signed an open letter urging legislation as an appropriate and one of the most effective ways to combat sexual harassment in the workplace.[237] The law professors advocated for ending mandatory arbitration agreements that cover sexual harassment cases.[238] Also, all fifty state Attorneys General, as well as the District of Columbia's and chief legal officers of all United States territories, signed a letter to Congress urging an end to mandatory arbitration agreements for sexual harassment claims.[239]

---

[234] *See Luce, Forward, Hamilton & Scripps*, 345 F.3d at 752–53; *Duffield*, 144 F.3d at 1185 (holding that defendants could not compel arbitration for Title VII claims); *Luce, Forward, Hamilton & Scripps*, 345 F.3d at 767 (Reinhardt, J., dissenting). Essentially, the Ninth Circuit found an arbitration agreement was invalid under one of the ways that the Supreme Court set out in *Gilmer* as a way to find such agreements as invalid. *See* Section II.C.2, *supra* notes 147–55 and accompanying text. Yet, the Supreme Court, by holding the FAA's reach so broadly, has prevented the courts from even considering the additional information.

[235] Disclosing Sexual Harassment in the Workplace, MD. CODE ANN., LAB. & EMP. § 3–715 (West 2018).

[236] Wells, *supra* note 88. Those states are Maryland, New York, Washington, and Vermont. The California legislature passed a similar bill that would limit mandatory arbitration agreements for sexual harassment claims, but Governor Jerry Brown vetoed that bill on September 30, 2018, citing concerns that the FAA would preempt the bill. *See Measures to End Forced Arbitration of Sexual Harassment Claims, Extend Statute of Limitations Vetoed by Gov. Jerry Brown*, L.A. TIMES (Sept. 30, 2018) http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-measures-to-end-forced-arbitration-of-1538341555-htmlstory.html (last visited Oct. 28, 2019) [hereinafter *Gov. Jerry Brown Veto*].

[237] U.S. Law Professors, *Open Statement on Sexual Harassment*, GOOGLE FORMS, https://docs.google.com/forms/d/e/1FAIpQLSeL_lvqRQNrax-tQIz82pVQGVEF0_61vNRohL-GbVFI---xsHQ/viewform [https://perma.cc/K7BC-HJWS] (last updated Oct. 5, 2018) [hereinafter U.S. Law Professors]; Opheli Garcia Lawler, *250 Law Profs Release Statement: 'The Problem with Sexual Harassment is Sexism'*, CUT (Oct. 4, 2018), https://www.thecut.com/2018/10/150-law-professors-share-statement-against-sexual-harassment.html [https://perma.cc/C4FD-GF4E].

[238] U.S. Law Professors, *supra* note 239.

[239] *Mandatory Arbitration of Sexual Harassment Disputes*, NAT'L ASS'N OF ATT'Y GEN. (Feb. 12, 2018), http://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf [https://perma.cc/6DSJ-VDBU].

While some states have pursued action pushing back on the Supreme Court's interpretation of arbitration agreements, change remains improbable.[240] One reason the changes are likely ineffective is because the FAA and the Supreme Court's interpretation of the Act almost certainly preempts any state legislative action.[241] Because states cannot offer effective recourse to employees, and the courts have endorsed a full-throated embrace of broad arbitration power,[242] this Note argues that the only practicable way to protect sexual harassment claims from arbitration lies in federal legislation.

III. ANALYSIS

In this Section, this Note will argue why Congress should enact the Ending Forced Arbitration of Sexual Harassment Act, in its current form, to immediately begin helping sexual harassment victims. First, it will analyze why exempting sexual harassment claims would not contradict the intent of Congress or the original intent of the FAA. Next, it will explain why the Act appropriately exempts sexual harassment specifically, largely because of the uniqueness of sexual harassment. Finally, this Section will analyze why the Supreme Court is mistaken to allow arbitration of sexual harassment claims. It will also advocate why, as a matter of public policy, arbitration is an inappropriate venue for considering sexual harassment claims. Due to the lack of publicity and transparency, the institutionalized "repeat player" effect, the lack of adequate judicial review, and the important public policy of effectively combating sexual harassment, arbitration does not effectively vindicate Title VII's sexual harassment protections.

A. Exempting Sexual Harassment from Arbitration Agreements is Not Contrary to the Intent of Congress

The Supreme Court has broadly interpreted the FAA to put arbitration agreements on the same level as contracts, even if the agreements cover statutory rights.[243] The Supreme Court has justified its rulings by assuming that interpreting the FAA otherwise would contradict Congress' intent. However, the Supreme Court is mistaken—exempting sexual harassment claims from arbitration agreements would not contradict Congress's or the FAA framers' intent.

---

[240] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018); *supra* Section II.C.2. *See also Gov. Jerry Brown Veto*, *supra* note 236 (reporting California Governor Jerry Brown's veto of one of these bills exempting sexual harassment because of the Governor and his legal team's belief that the FAA preempts the bill).

[241] *See supra* note 240.

[242] *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1632.

[243] *See supra* Section II.C.2; *supra* notes 136–58 and accompanying text.

The FAA was not meant to give arbitration agreements the power to cover sexual harassment claims. Congress passed the FAA in 1925 and Title VII in 1964.[244] The basic time difference shows that the framers could not have intended the FAA to cover Title VII since it did not exist when Congress passed the FAA. Thus, the framers of the FAA could not have considered these types of claims. Further, the framers of the FAA had a narrow understanding of what types of disputes arbitration agreements would cover.[245] Their understanding of the Commerce Clause was limited—they did not think that they were giving arbitration agreements the power to govern interstate insurance agreements, let alone statutory rights.[246] Also, the legislative history of the FAA shows that the framers explicitly meant to preserve the right to a trial and that arbitration agreements would not take away the right to litigate.[247] However, through the Supreme Court's jurisprudence, courts cannot even consider this clear intent from the original Congress.

The Supreme Court has acknowledged that statutory rights and contractual rights are different.[248] In his dissenting opinion, Justice Stevens recognized that the framers of the FAA could never have anticipated that arbitration would cover statutory rights.[249] The framers of the FAA understood that they were elevating arbitration agreements for contractual and labor disputes and could not have meant to empower arbitration of statutory rights as well, as they did not exist at the time.[250] Understanding the FAA's legislative history shows that the framers of the FAA intended the Act to govern contractual and labor disputes, not statutory rights, such as Title VII sexual harassment claims.

The framers of the FAA could not have considered that arbitration agreements would cover sexual harassment claims. Even if the FAA framers had considered how much arbitration agreements would expand, they made

---

[244] *See* 42 U.S.C. §2000e (2012); SHIMABUKURO, *supra* note 118, at 2.

[245] *See* 9 U.S.C. § 2 (2018); Hearing, Mr. Piatt, *supra* note 126. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 657–58 (1985) (Stevens, J., dissenting) (suggesting that the FAA framers could never have even considered that the FAA could cover statutory rights).

[246] Hearing, Mr. Piatt, *supra* note 126.

[247] *See* Section II.C.1, *supra* notes 127–34 and accompanying text.

[248] *See* McDonald v. City of West Branch, 466 U.S. 284, 290 (1984) (finding that arbitration of contractual disputes is more appropriate than arbitration of statutory claims); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 736–37 (1981) (recognizing that contractual disputes are usually appropriate for arbitration but that may not be so for statutory rights).

[249] *Mitsubishi Motors Corp.*, 473 U.S. at 657–58 (Stevens, J., dissenting).

[250] *Id.*

it clear that the right to a jury trial was preserved.[251] Understanding this should inform the Court that the framers' intent does not support the Court's extension of arbitration enforcement to Title VII sexual harassment claims. The Court has supplanted the FAA framers' understanding of interstate commerce, extended the FAA's control to rights that did not exist when Congress passed the FAA, and rejected the framers' express reservation of the right to trial. The Court has justified these decisions by holding that the FAA framers intended to put arbitration "upon the same footing as other contracts."[252] In doing so, the Court mistakenly assumes that one intention of the framers automatically preempts another express intention, even though the Court recognizes that contractual and statutory disputes are different. It is a mistake to assume that the intent of the FAA framers is a zero-sum calculation, because both of these intents can exist at the same time. The intent to put arbitration on the same footing as contracts can exist alongside the intent to preserve the right to trial or the intent to have arbitration agreements apply only to contractual and labor disputes. Simply because Congress intended to elevate arbitration agreements to the same footing as contracts does not give arbitration agreements near all-encompassing power.

While appearing to ignore the problems that the FAA framers' intent presents, the Court has said that it needs a modern manifestation of congressional intent to reverse its understanding of the FAA.[253] Beyond the proposed congressional bills to exempt sexual harassment, there have been other instances of congressional intent to restrain the Court's broad interpretation. In 2010, Congress passed the Franken Amendment, which prohibits the Defense Department from entering into contracts for more than $1 million with contractors that mandate arbitration for sexual harassment claims.[254] Congress largely passed the Civil Rights Act of 1991 in response to the Supreme Court limiting the right of employees to sue their employers for discrimination and reinforced the right to trial for these statutory rights protecting employees from discrimination.[255] In the Act's legislative history, Congress specifically made note that submitting these discrimination claims to arbitration did not preclude the employees from the right to a trial and

---

[251] Cohen, *supra* note 131, at 149–50.

[252] *E.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (internal citation and quotation omitted) (acknowledging this purpose of the FAA).

[253] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018).

[254] *See* Department of Defense Appropriations Act of 2010, Pub. L. No. 111–118, div. A, tit. VIII, § 8116, 123 Stat. 3409, 3454–55 (2010).

[255] EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 747 (9th Cir. 2003). *See also* H.R. REP. NO. 101-485(III), at 76–77, *as reprinted in* 1990 U.S.C.C.A.N. 499–500 (overturning part of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) by stating that if discrimination is *a* motive then Title VII's burden is met).

approved *Alexander*'s holding that arbitration did not prohibit a plaintiff from asserting his or her Title VII rights.[256] Also, Congress expanded Title VII's fee shifting provisions, indicating further support for those statutory rights.[257] The Ninth Circuit even acknowledged that this legislative history shows that Congress did not intend mandatory arbitration to cover Title VII statutory rights.[258] However, because the Supreme Court has interpreted the FAA both broadly and as unambiguous, the courts are unable to consider any of these examples of modern Congress' direct contrary intent. This creates a sort of legal paradox where the Supreme Court will not change unless shown direct contrary congressional intent yet prevents other the courts from considering any such intent because it has interpreted the FAA so broadly. This creates a framework where only the Supreme Court can change the law. The only other action that would force the Court to take notice is direct congressional legislation.

The Supreme Court has mistakenly viewed the intent of the FAA as a zero-sum calculation and has decided that the only intent that matters is the FAA's intent to place arbitration on the same footing with contracts. Thus, the Court has found no ambiguity in the FAA. Courts cannot consider Congress's contrary intent, defeating the purpose of ascertaining Congress's intent. The only way to change the Supreme Court's view is an express manifestation of congressional intent by amending the FAA explicitly to exempt sexual harassment claims from arbitration. This essential legislative action is why Congress should pass the Ending Forced Arbitration of Sexual Harassment Act.

B. The Ending Forced Arbitration of Sexual Harassment Act Appropriately Exempts Sexual Harassment Claims Because Sexual Impropriety Occupies a Unique Spot in the Law and in Society

Title VII creates an express public policy against sexual harassment.[259] The Ending Forced Arbitration of Sexual Harassment Act advances this public policy by appropriately exempting sexual harassment claims from arbitration agreements. The pervasiveness and scope of the #MeToo movement is an example of the urgent need to end sexual harassment and why it is a public policy issue. Sexual harassment occupies a unique space in the law, culture, and society and this Act appropriately understands that by specifically targeting this problem.

---

[256] *See supra* note 255.

[257] *Luce, Forward, Hamilton & Scripps*, 345 F.3d at 747.

[258] *Id.* at 767 (Reinhardt, J., dissenting).

[259] Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994).

Due to the unique aspects of sexual harassment, which demand special and sensitive consideration, arbitration is not an appropriate forum to resolve these claims. Society understands the gravity of sexual harassment, shown by the #MeToo movement that has become a national movement toward ending sexual harassment. One reason that sexual harassment in the workplace is unique is that these instances are rarely about sexual gratification, but are more about power and violence that use a fundamentally vulnerable and private part of human identity as its target.[260] Most cases of sexual harassment in the workplace "are similar in power structure to domestic violence or criminal assault matters"[261] and so contain an element of safety and dignity, as opposed to a contractual or consumer dispute. The presence of this power dynamic inherent in sex-based discrimination sets it apart as unique when compared to disputes of contract language. Sexual harassment cases go beyond simple disputes about money, property, or contractual disagreements, that are more appropriate for an arbitral process; rather they involve elements of "power, fear, and coercion,"[262] as well as personal well-being and safety. Because of these elements, sexual harassment cases are about more than finding the appropriate remedy for a broken contract but reflect how society values sexual harassment survivors, often whom, are women.[263] This makes sexual harassment unique to other disputes that may be more appropriate for arbitration.

Numerous other examples show how society recognizes the unique attributes of sexual harassments and the serious responses needed to combat it. The recent passage of a multitude of bills by state legislatures targeting sexual harassment, every state Attorneys General advocating to exempt sexual harassment claims from arbitration, congressional passage of the Franken Amendment, a $21 million dollar legal endowment established to help victims afford representation funded solely by donations, Time Magazine's recognition of the "Silence Breakers," and the #MeToo movement in general all demonstrate the public's awareness of how important it is to fight sexual harassment, and the long way society still has to go.[264] Also, several large companies including Microsoft, Uber, Lyft, and several large law firms, have recognized the unique aspects of sexual harassment and have ended their policies of forcing arbitration for sexual harassment claims.[265] These

---

[260] *See* BAKER, *supra* note 34, at 67; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (discussing the Title VII's unique definition of "sexual harassment" in the workplace).

[261] Irvine, *supra* note 50, at 28.

[262] *Id.*

[263] *See id.*

[264] *See supra* Section II.B.2; supra notes 80–89 and accompanying text.

[265] *Supra* Section II.B.2; *supra* notes 90–97 and accompanying text.

examples all demonstrate society's awareness of the seriousness and unique position that sexual harassment has in society.

The courts also recognize the unique elements of sexual harassment. Sexual harassment claims "remain[] fundamentally unlike other discrimination claims . . . [because] courts recognize sexual harassment without comparable evidence of discriminatory intent."[266] For discrimination claims, courts typically require an intent to discriminate based on a particular trait, but for sexual harassment discrimination claims courts require no intent to discriminate.[267] Instead, the courts ask only whether the discrimination would have occurred "but for sex."[268] Sexual harassment is unique, and the courts do not require discriminatory intent, because "a primary objective of Title VII is . . . to remove the barriers that have operated to favor . . . male employees over other employees."[269] Comparing Title VII sexual harassment claims to racial discrimination claims also shows how courts uniquely treat Title VII sexual harassment claims. While the court only does a "but for" analysis for sex discrimination, the court requires an intent to discriminate for racial discrimination claims under Title VII.[270] The courts only require "but for" rather than intent to discriminate, which highlights that sexual harassment is different than other types of Title VII claims. Sexual harassment claims, therefore, demand special attention and should not be subject to arbitration like a typical contract injury.

The criminal justice system in general also recognizes that sexually motivated crimes occupy a special place in society. The Federal Rules of Evidence allow the prosecution to use evidence of the defendant's past sexual crimes as propensity evidence in the current case, while the Rules prohibit such use of past "bad acts" as propensity for all other crimes.[271] The Rules of Evidence are examples that the Supreme Court and Congress have both affirmed that sexual crimes are unique and deserve special treatment. This difference in the Federal Rules is yet another instance demonstrating that the courts, Congress, and society all understand that sexually motivated impropriety occupies a unique space.

---

[266] Pope, *supra* note 46, at 253.

[267] *Id.* at 253–54.

[268] *Id.* at 254. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

[269] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977).

[270] *See* Section II.B.1; *supra* notes 46–49 and accompanying text.

[271] Section II.B.1; *supra* notes 59–60 and accompanying text.

All of these instances are examples that the law and society recognize that sexual harassment requires special attention. That is why the Ending Forced Arbitration of Sexual Harassment Act appropriately singles out sexual harassment specifically to exempt from arbitration. The Supreme Court sees, and approves, of the special place that sexual impropriety plays within the criminal setting but apparently declines to acknowledge this in the civil justice realm. This disconnect prevents victims of sexual harassment from having their Title VII rights vindicated in the civil court system.

Arbitration proceedings should treat sexual harassment claims no differently. Sexual harassment cases are "unlike the grievances ordinarily addressed through the arbitration process . . . [because] [t]he informalities and esoteric culture of . . . arbitration . . . make it ill-suited to address the kind of serious allegations involv[ing] sexual harassment. . . . Sexual harassment claimants should avoid . . . arbitration . . . for all but very minor claims."[272] All aspects of society—from the public to the government and the courts—recognize that sexual harassment is deserving of special focus. Sexual harassment needs unique treatment to address these types of claims because of their serious nature and arbitration is an inappropriate and ineffective venue for these claims. The Ending Forced Arbitration of Sexual Harassment Act appropriately singles out sexual harassment from arbitration agreements and thus Congress should enact it as law as quickly as possible.

C. Arbitration Proceedings are an Inappropriate Venue for Sexual Harassment Cases as a Matter of Public Policy

Public policy supports the freedom to pursue sexual harassment claims in court, rather than an arbitration agreement forcing them into a private room. A public policy must be "explicit, well defined, and dominant. It must be ascertained by reference to the laws and legal precedents."[273] Title VII protects the public from sex discrimination and sexual harassment, and as a result, ending sexual harassment satisfies the public policy requirements and constitutes an express public policy.[274] Because of this public policy against sexual harassment, rights that are designed to further that policy should be protected and vindicated, not abrogated. Arbitration allows employers to dodge public accountability, weakens statutory protections, and influences who will win due to potential future business for arbitrators. Sexual harassment claims are less successful in arbitration and when they are successful,

---

[272] Alleyne, *supra* note 183, at 17 (discussing arbitration in the labor context).

[273] *E.g.*, E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000) (citations and quotations omitted).

[274] Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994). *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–68 (1986).

outcomes are for a lesser amount than what courts often award.[275] These findings show that, despite the Supreme Court's assurances that "a party does not forgo the substantive rights afforded by . . . statute; it only submits to . . . resolution in an arbitral, rather than a judicial, forum,"[276] sexual harassment rights are not effectively vindicated through arbitration. The Supreme Court claims that arbitration does not affect substantive rights, only the choice of forum; however, the Court appears to contradict itself by "recogniz[ing] that the choice of forums inevitably affects the scope of the substantive right to be vindicated."[277] Apparently, in the eyes of the Supreme Court, substantive rights are not lost in the arbitration context because of a change of forum, but in other instances a change of forum inevitably affects the vindication of statutory rights. Because of the lack of accountability, including the privatization of the justice system, unjust incentives, lack of a truly neutral decisionmaker, and lack of judicial review, victims of sexual harassment face a greater burden in an arbitration venue than in a court.

1. Lack of Accountability

There is a lack of accountability in the arbitration system. Because the system incentivizes employers to keep information of its own misdeeds private there is no public accounting. Similarly, there is a built-in economic incentive for both the employers and the arbitrators. This mutually beneficial system is not held accountable because arbitration procedure often provides no practicable remedy or appeal if a sexual harassment victim receives an adverse decision.

a. Privatization of the law

Arbitration is private, which means that arbitration is not open to the public and opinions are not published. This privacy is a "fundamental attribute of arbitration,"[278] and while a hallmark of arbitration, it also allows employers to avoid accountability. Employers are not faced with public knowledge of what may be happening in their company and so avoid outside pressure to change. Arbitrators themselves are also "not accountable to a larger public . . . And there is no legislative arena in which unpopular

---

[275] *See supra* Section II.C.3.b.

[276] *E.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[277] U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359–60 (1971) (Harlan, J., concurring).

[278] Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 167 (2014). *See also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685–86 (2010) (acknowledging privacy as a fundamental part of arbitration).

decisional trends can be challenged."[279] Without this accountability, there is little to check the power of an arbitrator to decide cases or to check a toxic company culture. Arbitrators are only "accountab[le] . . . to private appointing authorities," so although they may be applying the law, they are accountable to private parties.[280] Deferring to arbitrators for their own accountability privatizes the law, justice, and public accountability. This disconnect clouds the legitimacy of the arbitrators' decisions as transparent, just, accountable, and ultimately fair.

Allowing mandatory arbitration agreements, with their ability to insulate companies from publicity and claims, essentially creates a free insurance policy for employers.[281] Indeed, one industry survey found that parallel to the increasing strength afforded to arbitration agreements by the Supreme Court, the use of mandatory arbitration agreements rose from sixteen percent to almost forty-three percent between 2012 and 2014.[282] The private aspect of arbitration, combined with mandatory arbitration as a condition of employment, lets the employers dodge public accountability. Arbitration agreements are essentially low-cost protection plans against the employer's own misdeeds.

b. Employer incentives

Employers are also able to keep sexual harassment claims private, which incentivizes companies to use arbitration agreements. As a result, real change in the workplace will not occur since employers rarely face any real public accountability.[283] Professor Schmitz argues the lack of public accountability is a public health problem because the danger of repeat violations has the potential to dramatically harm a vast amount of people.[284] Recent sexual harassment coverups, enabled by mandatory arbitration agreements at the nationwide jewelry chain Jared and Kay Jewelers[285] and

---

[279] Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1046–47 (1996).

[280] Malin & Ladenson, *supra* note 30, at 1208–09.

[281] Estlund, *supra* note 26, at 706.

[282] *Id.* at 706–07.

[283] Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN. ST. L. REV. 463, 465–66 (2018) (detailing the long history of sexual harassment cases and coverups at Fox News through the use of mandatory arbitration agreements); Szalai, *supra* note 24, at 654 (detailing how the use of mandatory arbitration agreements enabled the vast amount of sexual harassment cases against Jared and Kay Jewelers).

[284] Schmitz, *supra* note 27, at 1229.

[285] Szalai, *supra* note 24, at 654; Nuñez, *supra* note 283, at 475.

Fox News Corporation, supports the concern of repeat violators because of the lack of public accountability.[286] Six women at Fox News came forward after Ms. Carlson's sexual harassment terror became public, while hundreds of women at Jared and Kay Jewelers came forward with sexual harassment allegations.[287] How many women may have avoided horrible sexual harassment at Jared and Kay Jewelers or Fox News if early victims had access to the public justice system and the courts? It is not hard to imagine that the publicity of the cases would not have required these companies to make changes. Perhaps those changes would have prevented the later victims from enduring sexual harassment at work. But that did not happen. Mandatory arbitration agreements kept those initial claims private and caused the women who were suffering similar harassment to suffer alone. It is certainly a matter of public policy to try to avoid public health crises. The examples of Fox News and Jared and Kay Jewelers, where mandatory arbitration agreements enabled sexual harassment to persist and likely hurt more people than if the victims were able to publicly litigate their sexual harassment claims, demonstrate the public health risk of letting arbitration control sexual harassment claims.

While some defenses of arbitration for sexual harassment argue that not all women may want their experiences made public, that critique skips the crucial "mandatory" step. Whether women pursue litigation for their sexual harassment claims may be their own choice, but mandatory arbitration prevents them from even having that choice in the first place. If even one woman had chosen to publicly litigate the harassment occurring at Jared Jewelers, perhaps many others would not have had to suffer silently, but the use of mandatory arbitration agreements prevented any of them from publicly taking their abuse to the justice system.

c. Lack of a neutral decision maker

Another problem that arbitration agreements present for sexual harassment claims and why arbitration is an inappropriate forum for their resolution is that employers can dodge the accountability of facing a truly neutral decision maker. The "repeat player" problem incentives arbitrators to favor the party that represents repeat business for them, typically the employer.[288] One arbitrator candidly confessed that the "repeat player" problem is real, admitting that plaintiffs are inherently disadvantaged because "why would

---

[286] Sherman, *supra* note 7. *See* Nuñez, *supra* note 283, at 475.

[287] Nuñez, *supra* note 283, at 475; Harwell, *supra* note 104; Sherman, *supra* note 7.

[288] *Supra* Section II.C.3.b; *supra* notes 206–21 and accompanying text.

an arbitrator cater to a person they will never see again?"[289] This anecdotal confession from an arbitrator is borne out by Professor Bingham's empirical study showing that employees lose more often when the arbitrator is someone the employer has used at least once before.[290] That inherent incentive to favor the party most likely to bring further business creates a cloud of illegitimacy and uncertainty that questions whether justice was actually achieved.

Sexual harassment claims that are heard by a judge do not pose the same "repeat player" problem. One of the fundamental reasons the judiciary system is a separate branch of government, and why federal judges are appointed for life, is to avoid even the appearance of judges being beholden to something other than justice.[291] The framers of the Constitution considered neutrality so vital that decision makers not even have the appearance of loyalty to anything other than fairness and justice that they created a separate branch of government and lifetime appointments to insulate judges. The Supreme Court claims that no substantive rights are lost in arbitration, just a change of venue to resolve claims.[292] If that were true, society would demand the same level of accountability and transparency from arbitrators that society demands of judges, and there would be no inherent advantages afforded to repeat players by decision makers.

d. An uneven playing field

It also goes against public policy when companies are able to "tilt the playing field in favor of corporate interests and against vulnerable consumers and employees."[293] Courts have accepted employers framing more favorable arbitration agreements for themselves. Examples of how corporations can tilt the playing field through arbitration agreements include "shorten[ed] time period allowed by law[,] . . . limitation on damages or remedies[,] . . . imposition of prohibitive costs or fees[,] . . . [specific and inconvenient] location[,] . . . prospective waiver of rights[,] . . . limitation on discovery rights[,] . . . [and] confidentiality."[294] Professor Sternlight summarizes

---

[289] Silver-Greenberg & Corkery, *supra* note 211. *See* Silver-Greenberg & Gebeloff, *supra* note 211.

[290] Bingham, *supra* note 210, at 236–39.

[291] *See, e.g.*, U.S. CONST. art. III; THE FEDERALIST No. 78 (Alexander Hamilton); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1259–60 (2008).

[292] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[293] Szalai, *supra* note 24, at 655.

[294] *Id.* at 667–68.

these strategies, writing that "[t]here are virtually an infinite number of ways in which a company, as the drafting party, can try to use an arbitration clause to gain the upper hand."[295] The intent behind these different mechanisms "is to limit the ability of the . . . employee to file a claim and limit the plaintiff's damages."[296] The ability to write an agreement to the advantage of one party may be a distinguishing factor for attorneys who draft transactional contracts, but it should not be one when it comes to statutorily protected rights.

There is no real accountability though—besides basic contract defenses, such as unconscionable claims, that are rarely[297] successful—to hold these arbitration agreements as unfair. In federal court, it would be unthinkable for the defendant to dictate who would decide the case, where the case would be held, the damages they potentially might have to pay, or limits to the plaintiff's discovery rights. Yet, in adhesion arbitration agreements, the employer can effectively do all of that. Tilting the scales of justice is not justice. Justice is supposed to be blind, but in the realm of arbitration employers can rig the process in their favor by crafting an arbitration agreement with both eyes wide open at the expense of the individual employee. It is against the public policy of combating sexual harassment to allow employers to create institutionalized disadvantages that make it harder to pursue sexual harassment claims.

e. Lack of judicial review

One final way that employers dodge accountability is through the lack of judicial review available in arbitration. Once a plaintiff has endured all of the institutionalized advantages the employer enjoys, navigated through the

---

[295] Sternlight, *supra* note 220, at 1649–50.

[296] Szalai, *supra* note 24, at 670.

[297] *See, e.g.*, Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law,* 83 N.Y.U. L. REV. 1420, 1442 (2008) (explaining that unconscionability arguments are rarely successful). Unconscionability in arbitration agreements is a complex issue in itself and is not addressed in depth in this note. *See, e.g.*, Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters,* 79 FORDHAM L. REV. 2035 (2011). Some scholars have found that unconscionable cases and successes in arbitration are increasing, however these claims are still relatively rare. *See also, e.g.*, Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism,* 91 OR. L. REV. 129, 159 (2012); Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions,* 2016 BYU L. REV. 427, 447 (2016). *But see, e.g.*, Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements,* 97 MARQ. L. REV. 751 (2014); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device,* 46 SAN DIEGO L. REV. 609 (2009). *Cf.* Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (one of the few cases holding that an arbitration agreement was so one-sided as to lack basic even-handedness, which resulted in violations of basic contract rules of good faith and fairness).

stacked deck of justice, and received a final arbitration decision, the plaintiff will discover little recourse for judicial review. Courts will only intervene in an arbitration decision if the arbitrator displayed a "manifest disregard" for the law, meaning the arbitrator knew the law and chose to ignore it.[298] The Supreme Court has endorsed the "manifest disregard" standard, which the Tenth Circuit has called the "narrowest" standard known in the law.[299] Courts already face such a narrow standard to overturn an arbitration decision, and because arbitration decisions are not published or written the lack of an opinion or record hampers a court's review if the court was even considering overturning an arbitration decision. The lack of judicial review, and such a narrow standard by which courts could overturn an arbitrator's decision, means a plaintiff "effectively [has] no right to appeal to a court."[300] The lack of any meaningful judicial review effectively completes the privatization of the law, where the public cannot hold employers accountable. Forcing sexual harassment claims into the public realm of the court would increase accountability, transparency, and fairness—yet another reason why the Ending Forced Arbitration of Sexual Harassment Act should pass.

2. Ineffective Vindication of Statutory Rights

Arbitration does not effectively vindicate statutory rights, and as a matter of public policy, Congress should strengthen sexual harassment protections. While the Supreme Court has the "effective vindication" mechanism to protect statutory rights, Justice Kagan laments that the Court holding that the FAA essentially preempts contradicting federal law has effectively destroyed the "effective vindication" rule.[301] In essence, if a federal law gives a right and an arbitration agreement forces a different result, the arbitration will win, essentially elevating the FAA above federal statutory protections.[302] For the Supreme Court, an arbitration agreement does not prevent the "effective vindication" of a right unless the agreement explicitly denies that right.[303] The Court, however, misses the point of "effective" vindication.

---

[298] Wilko v. Swan, 346 U.S. 427, 435–36 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 479 (1989). *See* Shea, *supra* note 29, at 376; Malin & Ladenson, *supra* note 30, at 1203.

[299] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995); ARW Expl. Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (internal citations and quotation omitted).

[300] Stone, *supra* note 279, at 1018.

[301] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240–41 (2013) (Kagan, J., dissenting).

[302] *Id.* at 240 (explaining how the majority holds that the FAA pushes the Sherman Antitrust Act to the side). *See also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) (explaining the same phenomenon with the majority's holding that the FAA is essentially pushing the National Labor Relations Act to the side).

[303] Estlund, *supra* note 26, at 705.

Indeed, Justice Kagan succinctly concludes that the Court has allowed arbitration agreements to "[prevent] effective vindication of federal statutory rights."[304]

The need to vindicate statutory rights ensures that "arbitration remains a real, not faux, method of dispute resolution. . . . Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights."[305] Professor Estlund and Justice Ginsburg recognize the similarities between arbitration agreements preventing effective vindication of statutory rights and the early 1900s "yellow dog" contracts.[306] In the same way that employers once used "yellow dog" contracts to prevent employees from realizing all of their statutory protections, employers today use arbitration agreements that effectively prevent vindication of statutory rights.[307]

Employers used these "yellow dog" contracts to prevent workers from asserting their rights until Congress prohibited them.[308] But Justice Ginsburg is correct, the Supreme Court is effectively bringing these "yellow dog" contracts back through arbitration agreements. By allowing arbitration agreements to cover statutory rights, such as Title VII sexual harassment claims, the Court is allowing employers to effectively weaken their employee's statutory rights. The implicit approval of these arbitration agreements cuts against the public policy to fight sexual harassment. As a matter of public policy, the Court should strengthen these statutory rights, and passage of the Ending Forced Arbitration of Sexual Harassment Act would force the courts to do just that.

Further, empirical studies show arbitration agreements do not effectively vindicate Title VII sexual harassment rights.[309] While the difficulty of effectively studying arbitration proceedings—since they remain shrouded in secrecy—has been discussed, the data that is available is adequate to understand that plaintiffs with sexual harassment claims recover less in arbitration proceedings than they would have in litigation.[310] The most basic measurement of whether a venue or a mechanism is truly immaterial is how the same

---

[304] *Am. Express Co.*, 570 U.S. at 241.

[305] *Id.* at 244.

[306] *Epic Sys. Corp.*, 138 S. Ct. at 1634–36 (Ginsburg, J., dissenting) (citations omitted); Estlund, *supra* note 26, at 707–08.

[307] *Epic Sys. Corp.*, 138 S. Ct. at 1634–36 (Ginsburg, J., dissenting) (citations omitted).

[308] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1634–36 (2018) (Ginsburg, J., dissenting) (citations omitted).

[309] *See* Colvin, *Case Outcomes and Processes*, *supra* note 192, at 5–6; Shea, *supra* note 29, at 412; Alleyne, *supra* note 183, at 6, 6 n.17; Estlund, *supra* note 26, at 688.

[310] *See* Estlund, *supra* note 26, at 688; Colvin, *Case Outcomes and Processes*, *supra* note 192, at 11.

claim fares in one compared to the other. Several independent professors have conducted empirical studies investigating this question.[311] These professors studied sexual harassment and arbitration claims in a variety of industries, in a variety of years, and using a variety of data. While the incompleteness of data may make it harder to rely on a single study, when viewed together these studies come together to paint a comprehensive picture of arbitration's effect on sexual harassment claims. All of the professors found that arbitration did not effectively vindicate plaintiffs' statutory rights.[312] The comparison of outcomes for similar claims in two different venues shows that the Supreme Court is mistaken. Employees do appear to give up some substantive rights when they are forced into arbitration. Arbitration is not a mere change of venue to hear the dispute; it does not vindicate a plaintiff's rights.

The "arbitration-litigation gap" shows that arbitration does not effectively vindicate statutory rights, including Title VII sexual harassment claims, and weakening these sexual harassment protections is directly contrary to the public policy of fighting sexual harassment. Congress passed Title VII to protect citizens from sexual harassment and establish a public policy against the pervasiveness of sexual harassment. Allowing this "arbitration-litigation gap" to persist directly contradicts that public policy and reverses what Congress sought to do when it passed Title VII.

As a matter of public policy, Congress should strengthen, not weaken, sexual harassment protections. That is exactly what the Ending Forced Arbitration of Sexual Harassment Act would do. This Act exempts "sex discrimination"[313] disputes from mandatory arbitration and uses language that clearly references Title VII's "discriminate . . . because of . . . sex" language.[314] The clear reference to Title VII adequately communicates that this Act would exempt from mandatory arbitration any Title VII sex discrimination claim. Since Title VII's sex discrimination ban is accepted and understood, attaching the Ending Forced Arbitration of Sexual Harassment Act's "sex discrimination" language to Title VII's prohibition of discrimination "because of . . . sex" language is valuable since parties would not waste time or cost litigating over the meaning and effect of new terms if this Act was substantively amended. Passing the Ending Forced Arbitration of Sexual

---

311 *See* Colvin, *Case Outcomes and Processes*, *supra* note 192, at 5–6; Shea*, supra* note 29, at 412; Alleyne, *supra* note 183, at 6, 6 n.17; Estlund, *supra* note 26, at 688; Bingham, *supra* note 210, at 238–39.

312 *See supra* note 311.

313 Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017).

314 42 U.S.C. §2000e-2 (2012).

Harassment Act as is[315] would immediately begin protecting victims and is the right first step toward combating the pervasive problem of sexual harassment by allowing victims the option of suing perpetrators and the companies that enable them in open court. The Ending Forced Arbitration of Sexual Harassment Act would strengthen the public policy against sexual harassment and help victims immediately.

IV. CONCLUSION

The Ending Forced Arbitration of Sexual Harassment Act would strengthen sexual harassment protections. This Act would exempt sexual harassment claims from mandatory arbitration agreements.[316] Plaintiffs would have the choice to pursue sexual harassment claims in a public venue—in a court that could effectively vindicate their statutory rights. Arbitration may be appropriate for contractual disputes, but it is inadequate for sexual harassment claims because arbitration does not effectively vindicate the statutory rights of sexual harassment victims. The Ending Forced Arbitration of Sexual Harassment Act appropriately singles out sexual harassment because of the unique place that sexually based transgressions occupy in society and the law. The courts, Congress, the criminal justice system, and society in general all recognize the unique nature of sexual harassment and, thus, singling these claims out is the right first step to protect and vindicate these statutory rights. Ending mandatory arbitration for these claims would protect future victims of sexual harassment as well. It is not difficult to imagine what might have been different at Fox News and Jared and Kay Jewelers if those first victims had been able to come forward. Imagine if they had the ability to go public with their experiences how many later victims might not have had to endure the ongoing culture of sexual harassment at those two companies.

---

[315] Sullivan, *supra* note 35, at 371–73. This insightful article advocates for passage of the Ending Forced Arbitration of Sexual Harassment Act with several amendments. *Id.* This Note disagrees with the proposed amendments and argues that Congress should enact the Act into law as written. The Act is already self-limiting by attaching "sexual discrimination" to Title VII, since if the claim could not be raised under Title VII, then this Act would not affect its arbitrability. Also, non-disclosure agreements are an important and related issue and the author is correct that they should be addressed, but that issue is beyond the scope of the present Note. Finally, this Note disagrees that "sexual discrimination" in the Act should be changed to "sexual violence" because that would add confusion and potentially delay protection as the courts may need to figure out what exactly the new language means and covers. Passing the Ending Forced Arbitration of Sexual Harassment Act as is would use terms that are readily accepted and understood. The Act would immediately protect victims while avoiding costly and long litigation and potentially jeopardizing broad bipartisan support.

[316] Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017).

Arbitration is not an appropriate place to hear these sexual harassment claims. The lack of accountability, transparency, and fairness is apparent through both anecdotal admissions from those working within the arbitration system, as well as empirical studies. The Supreme Court claims that plaintiffs do not lose any substantive rights in arbitration and are instead just changing the venue to resolve claims. If that were true, one would expect no significant difference in (1) award amounts, (2) whether plaintiffs win or lose, and (3) whether defendant employers can tilt the playing field. However, all those things happen in arbitration.

The Supreme Court appears unfazed by this disconnect though, holding to the refrain that Congress intended the FAA to elevate arbitration agreements to the same footing as enforceable contracts. This Note has argued that the Court has mistakenly interpreted the FAA because the framers could not have perceived they were approving of arbitration for statutorily protected rights, and likely would not have agreed to that since the framers made it clear plaintiffs did not lose their right to trial and vindication in the courts. Even if the intent of the FAA framers were to cover all employment statutory rights disputes, modern Congresses have expressed a contrary intent that the Supreme Court has ignored and has prevented itself, and other courts, from even considering. Congress expressly approved of the Court's decision in *Alexander*, which held arbitration agreements could not exclusively cover Title VII claims and maintained that plaintiffs did not give up their right to trial for Title VII rights when Congress passed the Civil Rights Act of 1991. More recently, Congress passed the Franken Amendment that clearly rejected arbitration for sexual harassment claims for defense contractors. Yet, the Supreme Court has stuck with its mantra that arbitration agreements are nearly always enforceable, even if it pushes aside other federal laws. The only way to make it any clearer to the Court is to enact the Ending Forced Arbitration of Sexual Harassment Act, amend the FAA, and remove sexual harassment claims from the purview of arbitration agreements.

The Supreme Court is also mistaken that the change of forum from litigation to arbitration will not affect substantive rights, as the Court acknowledges that the choice of forum has a wide effect on substantive rights in other areas. In addition, the Supreme Court is mistaken to assume that the intent of the FAA's framers to put arbitration on the same footing as contracts and their intent to limit arbitration to contractual disputes cannot co-exist. Direct legislation is the only way to move the Supreme Court from its mistakes and correct its arbitration jurisprudence.

Congress should enact the Ending Forced Arbitration of Sexual Harassment Act into law because it is a matter of public policy to protect Title VII sexual harassment rights as vigorously as possible. The #MeToo movement has shown how pervasive the problem of sexual harassment is in this

country, specifically in the workplace, and how much further society has to progress to eradicate sexual harassment. Enacting the Ending Forced Arbitration of Sexual Harassment Act into law would help this country move one step further toward the goal of eliminating sexual harassment.