NOTE

Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases

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This Note addresses the particular difficulty arbitration agreements pose to survivors of sexual harassment in the workplace. While arbitration agreements were originally intended to facilitate transactions between two commercial parties with equal bargaining power, due to the Supreme Court's expansive reading of the Federal Arbitration Act ("FAA") arbitration clauses are ubiquitous in consumer, retail, and employment contracts. Today, more than half of all employment contracts contain a mandatory arbitration provision. Despite their prevalence, employees and consumers rarely recognize the clause's implications.

Instead of filing a lawsuit in court, individuals subject to arbitration go before an arbitrator. The decision of that arbitrator is binding — there is no right to an appeal. The proceedings are private, and often confidential. Mandatory arbitration reduces an employee's opportunities to win against their employers, reduces the awards they can receive from their arbitrators,

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reduces public awareness of corporate abuse, and reduces the likelihood that an employee brings a claim at all. These consequences further deter the most marginalized survivors: queer people, people of color, and poor people.

The Supreme Court vastly expanded the power and purview of the FAA while striking down contract defenses, such as unconscionability and public policy, that were potential vehicles to dampen the effect of these provisions. As the Supreme Court does not appear to be interested in altering its understanding of the FAA, legislative action is needed to curb their prevalence and support sexual harassment survivors.

TABLE OF CONTENTS

INTRODUCTION

The #metoo movement was originally founded by the Black feminist activist, Tarana Burke, in 2006.[1] The mission of the movement was "to help survivors of sexual violence, particularly . . . young women of color from low wealth communities, find pathways to healing."[2] While Tarana Burke coined the phrase "me too" more than a decade ago, the phrase ignited the national consciousness on October 15, 2017.[3] After the *New York Times* published its exposé on Harvey Weinstein, actress Alyssa Milano invited Twitter users "to write 'me too' as a reply to [her] tweet if they had been sexually harassed or assaulted."[4] Within twenty-four hours, over 500,000 "#metoo" replies unfurled across Twitter.[5]

As survivors[6] shared their stories, the country began reckoning with the pervasiveness of sexual assault and sexual harassment in the workplace and beyond.[7] The impact of this national conversation is

[1] Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 106 n.5, 107-08 (2018) (internal quotations omitted) (describing the timeline of the #metoo movement); Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 30 n.22 (2018); *History & Vision*, ME TOO MOVEMENT, https://metoomvmt.org/about/#history (last visited Nov. 20, 2019) [https://perma.cc/E5X6-EXHK]. Please note that Tarana Burke's website states the movement was founded in 2006, while numerous articles, including Professor Onwuachi-Willig and Professor Schultz's articles, give the origin year as 2007.

[2] *History & Vision*, *supra* note 1.

[3] *See* Onwuachi-Willig, *supra* note 1, at 106.

[4] *Id.*

[5] Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?* , 54 HARV. C.R.-C.L. L. REV. 155, 193 (2019) [hereinafter *Mandatory Arbitration*].

[6] While this Note recognizes the extent of harassment against cisgender women in the workforce, this Note also acknowledges that harassment knows no gender. Harassment happens against cisgender men, gender non-binary people, transgender women, and transgender men who are often left out of the mainstream #metoo conversation. *See* Meredith Talusan, *Trans Women and Femmes Are Shouting #MeToo — But Are You Listening?*, THEM. (Mar. 2, 2018), https://www.them.us/story/trans-women-me-too [https://perma.cc/CHL9-9V9N]. This is disheartening especially because the people most left out of the mainstream conversation are often the ones most impacted and vulnerable. One study reflected that 90% of transgender individuals in the workplace encountered mistreatment or harassment in the workplace. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/ [https://perma.cc/Q3W7-M6FR].

[7] Schultz, *supra* note 1, at 33 ("The #MeToo movement has exposed sexual assaults and abuse in arenas other than workplaces, such as schools, churches, fraternities, families, and prisons.").

multifaceted and complex.[8] This Note focuses on one of those facets: how mandatory or forced arbitration in employment contracts shelters serial sexual harassers and predators in the private, and often confidential, arbitral process.[9] This Note hones in on both the #metoo movement and its impact, as well as on arbitration agreements and the use of mandatory arbitration in employment contexts.[10] This Note is

[8] *See* Onwuachi-Willig, *supra* note 1, at 106-08 (describing how the #MeToo movement erases the voices of women of color); Eric Bachman, *In Response To #MeToo, EEOC Is Filing More Sexual Harassment Lawsuits and Winning*, FORBES (Oct. 5, 2018, 11:20 AM), https://www.forbes.com/sites/ericbachman/2018/10/05/how-has-the-eeoc-responded-to-the-metoo-movement/#55ca7fb57475 [https://perma.cc/9PW9-2N9H] (discussing how the #metoo movement has led to an increase in EEOC filings, including a "50% increase in suits challenging sexual harassment over FY 2017"); Graham Bowley, *Bill Cosby, Citing #MeToo Bias, Files New Appeal*, N.Y. TIMES (Jan. 9, 2020), https://www.nytimes.com/2020/01/09/arts/television/bill-cosby-appeal.html?searchResultPosition=1 [https://perma.cc/P34F-E9ZW] (noting that Bill Cosby's attorneys appealed his conviction arguing "#MeToo hysteria" improperly influenced the trial court's evidentiary rulings); KC Clements, *In The #MeToo Conversation, Transgender People Face A Barrier To Belief*, THEM. (Apr. 18, 2018), https://www.them.us/story/believe-trans-people-when-we-say-me-too [https://perma.cc/D6QJ-SRQT] (explaining how non-binary and transgender people are left out of the #metoo movement); Vanessa Friedman, *Airbrushing Meets the #MeToo Movement. Guess Who Wins.*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/fashion/cvs-bans-airbrushing.html [https://perma.cc/45AM-8EVD] (analyzing how the #metoo movement impacts the beauty industry); Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html [https://perma.cc/5WMA-5C55]; *see also* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 67-72 (2018), https://www.yalelawjournal.org/forum/queering-sexual-harassment-law [https://perma.cc/UU95-5Y6L] (discussing how the #metoo movement may have inspired a judge to describe in unflinching detail the disturbing facts of the harassment of lesbian firefighter in *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018), as opposed to leaving the facts sparse as some judges want to do).

[9] *See* Ramit Mizrahi, *Sexual Harassment Law After #Metoo: Looking to California as a Model*, 128 YALE L.J.F. 121, 135, 151 (2018) ("However, in light of the #MeToo and #TimesUp movements, there is a growing effort to end forced arbitrations in sexual harassment cases.").

[10] *See generally, e.g.*, Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 10-11 (2014) (exploring the detriments of mandatory arbitration but omitting conversation of the #metoo movement); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 381 (2018) (providing context for the FAA and the Court's foreclosure of unconscionability but omitting conversation of the #metoo movement); Mizrahi, *supra* note 9 (discussing ways in which California employment law has evolved to address the concerns of sexual harassment survivors stemming from the #metoo movement); Onwuachi-Willig, *supra* note 1 (focusing on the ways in which the mainstream #metoo movement leaves out women of color); Sternlight, *Mandatory Arbitration*, *supra* note 5 (exploring mandatory arbitration and the #metoo movement but omitting conversation of unconscionability and public policy).

unique in that it specifically unpacks why the Supreme Court's misreading of the Federal Arbitration Act ("FAA") forecloses unconscionability and public policy contract defenses as avenues to curb mandatory arbitration and why federal legislative intervention is thus required.

Arbitration agreements were originally intended to facilitate transactions between commercial parties.[11] Instead of filing a lawsuit in court, individuals subject to arbitration go before an arbitrator.[12] The decision of that arbitrator is binding — there is no right to an appeal.[13]

Historically, two commercial parties — with equal bargaining power — contracted to resolve their business disputes in arbitration in order to gain a speedier and more cost-effective resolution to their disagreement.[14] Arbitration now extends far beyond this context.[15]

Today, more than half of all employment contracts contain a mandatory arbitration provision.[16] A recent study estimates that more than 60 million American employees are subject to forced arbitration.[17] Arbitration clauses are found in the fine print of consumer transactions, credit card contracts, job applications, employment handbooks, and car

[11] Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 971 (1999).

[12] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 173. Sometimes arbitration proceeds before a panel of arbitrators, not just a single individual. Sharon K. Campbell, *Going the Arbitration Route*, AM. BAR ASS'N (Jan. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/january_2012/arbitration/ [https://perma.cc/6Y63-HFK7].

[13] Comsti, *supra* note 10, at 9. While there is no right to an appeal, the FAA does provide grounds on which an award may be set aside. 9 U.S.C. § 10 (2019).

[14] Comsti, *supra* note 10, at 11.

[15] *See, e.g.*, Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. 1, 5 (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/NQX9-K4BN].

[16] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers [https://perma.cc/4XH8-6GHY] [hereinafter *Growing*] (conducting a "nationally representative survey" of private non-union employers on their practices regarding mandatory arbitration and finding that "53.9 percent . . . of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures. Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures").

[17] *Id.*

dealership contracts.[18] Despite their prevalence, employees and consumers rarely recognize the clauses' implications.

Commentators often distinguish between voluntary and mandatory arbitration. Voluntary arbitration primarily consists of arbitration clauses in agreements between two corporations or two savvy business partners where the parties have voluntarily and knowingly negotiated terms on equal footing and resources.[19] In the employment context, this may look like a high-level executive or an employee with special skills negotiating an employment contract directly with an employer.[20] In contrast, mandatory arbitration or "forced"[21] arbitration occurs when consumers or employees trade their right to a day in court for access to a product or employment.[22] In the employer-employee context, forced arbitration exists when an employee is forced to consent to an arbitration provision as a condition of their employment.[23] Individual employees often have no knowledge of these provisions, which can be buried in the fine print of job applications, employment contracts, and employment handbooks — some have even been included in company-wide emails, computerized applications on websites, and job offers.[24] Victims of sexual harassment and assault are particularly impacted by mandatory arbitration as it often shields serial harassers from public accountability.[25]

For example, events in 2016 and 2017 at Fox News ("Fox") demonstrate this reality. Fox's mandatory and confidential arbitration provisions shielded Fox's toxic corporate culture from public view for

[18] Comsti, *supra* note 10, at 6 n.3; *see, e.g.*, Mance v. Mercedes-Benz USA, 901 F. Supp. 2d 1147, 1152 (N.D. Cal. 2012) (discussing an arbitration clause in a "Retail Installment Contract" in a Mercedes-Benz dealership).

[19] Stone & Colvin, *supra* note 15, at 5.

[20] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 171.

[21] "Forced" arbitration may strike some as a polemical word choice. However, this is the current word of choice for both the media and legal scholars and thus I have chosen to use it intermittently throughout this article. *See, e.g.*, Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (Dec. 26, 2017); James Dawson, Comment, *Contract After* Concepcion*: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014) (utilizing the term "forced-arbitration clauses" throughout the article); Douglas MacMillan, *Google to End Force Arbitration for Sexual-Harassment Claims*, WALL ST. J. (Nov. 8, 2018, 7:18 PM), https://www.wsj.com/articles/google-to-end-forced-arbitration-for-sexual-harassment-claims-1541696868 [https://perma.cc/4P74-BY8S].

[22] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 203-04.

[23] *See id.* at 172 & n.110.

[24] Comsti, *supra* note 10, at 8.

[25] Mizrahi, *supra* note 9, at 134-36.

more than a decade.[26] It took the actions of Gretchen Carlson, a former Fox reporter and a current #metoo survivor and advocate, to break the silence.[27] In July 2016, Carlson filed a complaint against Roger Ailes, former Chairman and CEO of Fox.[28] A mandatory arbitration clause in her employee contract barred Carlson from suing her employer under Title VII.[29] Yet, Carlson was able to circumvent this clause by filing her complaint directly against Roger Ailes in New Jersey State Court.[30] Ultimately Carlson entered a confidential settlement[31] with Ailes, but the information in the complaint helped launch investigations into the culture at Fox.[32]

Since Carlson's complaint in 2016, dozens of women have come forward to describe sexual harassment from Roger Ailes and Bill O'Reilly, a former high-profile anchor at the network.[33] Some of the

[26] 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, 467 (2018).

[27] *Id.* at 466; *see* John Koblin, *Gretchen Carlson, Former Fox Anchor, Speaks Publicly About Sexual Harassment Lawsuit*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/business/media/gretchen-carlson-fox-news-interview.html [https://perma.cc/WRY7-23U2].

[28] Complaint and Jury Demand at 1, Carlson v. Ailes, No. L-5016-16 (N.J. Super. Ct. Law. Div. July 6, 2016).

[29] Nuñez, *supra* note 26, at 468-69. Since the parties settled Carlson's suit, we can only speculate regarding the motives of filing the suit in New Jersey State Court. *Id.* at 470.

[30] *Id.* at 468. It appears Carlson was able to sue in New Jersey State Court by not suing her employer, Fox News, directly and not suing under the federal anti-discrimination act. *Id.* at 469. Scholars suppose this strategic move allowed her to evade the arbitration clause (an option not likely for a lower income plaintiff, or a plaintiff experiencing harassment from an employee of a large corporation that does not have the ability to pay for damages like Roger Ailes did). *See id.*

[31] The practice of confidentiality provisions or non-disclosure agreements in sexual harassment suits is similarly controversial. Mizrahi, *supra* note 9, at 140-41; Nicole Hong, *End of the Nondisclosure Agreement? Not So Fast*, WALL ST. J. (Mar. 26, 2018, 5:30 AM), https://www.wsj.com/articles/end-of-the-nondisclosure-agreement-not-so-fast-1522056601 [https://perma.cc/ATA4-6CEB]. Confidential settlement agreements may prevent survivors from speaking out about the specific facts of their case. Mizrahi, *supra* note 9, at 140-41. On the other hand, the practice of non-disclosure agreements in settling sexual harassment suits may also enable victims to receive larger settlement awards in exchange for their silence. Hong, *supra*. The full complexity of this practice and how it may impact survivors is unfortunately beyond the scope of this Note.

[32] *See* Michael M. Grynbaum & John Koblin, *Gretchen Carlson of Fox News Files Harassment Suit Against Roger Ailes*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/07/business/media/gretchen-carlson-fox-news-roger-ailes-sexual-harassment-lawsuit.html [https://perma.cc/EB72-N2ZJ] (describing Carlson's complaint as "unprecedented" as Mr. Aisles "typically enjoys absolute loyalty from his employees").

[33] Nuñez, *supra* note 26, at 467.

harassment claims span more than a decade.[34] In 2017, the *New York Times* reported that the network spent 45 million dollars to settle harassment claims solely against Bill O'Reilly.[35] The earliest known settlement against Bill O'Reilly was in 2002.[36] Despite this extensive and prolonged harassment, the public (and often victims in the same company) were unaware of the pervasiveness of sexual harassment at the network.[37] This was primarily due to the fact that arbitration clauses in victims' employee contracts barred them from suing in court.[38]

Publicity was ultimately the key to ensuring Fox acted to protect its workforce from a serial predator.[39] On July 21, 2016, less than three weeks after Carlson's suit, Roger Ailes resigned from Fox.[40] On April 1, 2017, the *New York Times* published an article delineating five confidential settlements Fox settled against Bill O'Reilly.[41] Following that article, more than fifty advertisers pulled out from his show.[42] On April 19, 2017, eighteen days after the publication of the initial article, Bill O'Reilly was fired.[43]

The fallout from Fox illuminates the importance of publicity and the difficulty of tracking abusers when mandatory arbitration is in play.[44]

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[34] *Id.*

[35] Emily Steel, *2 Women Who Settled with O'Reilly Over Sexual Harassment Sue for Defamation*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/business/media/oreilly-sexual-harassment-defamation.html?module=inline [https://perma.cc/376C-C2QD].

[36] *See id.*

[37] *See* Emily Steel & Michael S. Schmidt, *Fox News Settled Sexual Harassment Allegations Against Bill O'Reilly, Documents Show*, N.Y. TIMES (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/business/media/bill-oreilly-sexual-harassment-fox-news-juliet-huddy.html?module=inline [https://perma.cc/BB35-ARBW] (reporting allegations of sexual harassment against Bill O'Reilly to the public for the first time).

[38] Nuñez, *supra* note 26, at 509.

[39] *See* John Koblin et al., *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html?module=Promotron&region=Body&action=click&pgtype=article [https://perma.cc/4HNP-G5VT].

[40] *See id.*

[41] *See* Emily Steel & Michael S. Schmidt, *Bill O'Reilly Is Forced Out at Fox News*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html [https://perma.cc/C7TU-MQP9].

[42] *See id.*

[43] *See id.*

[44] *See* Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow.*, WASH. POST (Nov. 12, 2018, 1:42 PM), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.5e7ff973f96c [https://perma.cc/435G-TAZF].

Serial predators and their employers are able to capitalize on private proceedings to prevent public awareness of misdeeds.[45] In response to this concern, corporations are starting to renounce the use of forced arbitration in sexual harassment cases.[46] In 2017, Microsoft announced that it was eliminating arbitration provisions on sexual harassment claims brought by its employees.[47] Other companies have followed suit, particularly in the technology industry, including the ride-hailing companies Uber and Lyft.[48] In November 2018, 20,000 Google employees walked out of their offices to protest the company's handling of sexual misconduct.[49] A week later, Google ended the use of forced arbitration in sexual harassment and assault suits.[50] A day later, Facebook set out a similar policy.[51] Most recently, in February 2020, Wells Fargo announced it was ending the use of forced arbitration in sexual harassment cases due to pressure from stakeholders.[52]

[45] *Id.*; *see also* Terri Gerstein, Opinion, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html [https://perma.cc/ZV4G-664G].

[46] Jamie Hwang, *Uber and Lyft End Mandatory Arbitration for Sexual Assault Claims*, ABA J. (May 15, 2018, 5:19 PM), http://www.abajournal.com/news/article/uber_and_lyft_end_mandatory_arbitration_clauses_for_sexual_assault_claims [https://perma.cc/MDY9-QT2C]; 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/YMD8-GPY4].

[47] Wingfield & Silver-Greenberg, *supra* note 46.

[48] Greg Bensinger, *Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims*, WALL ST. J. (May 15, 2018, 6:00 AM), https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400 [https://perma.cc/6PQY-U9EJ].

[49] *See* Gerstein, *supra* note 45.

[50] *See id. See also* Elizabeth Winkler, *Facebook and Google are Right to End Forced Arbitration*, WALL ST. J. (Nov. 11, 2018, 10:00 AM), https://www.wsj.com/articles/facebook-and-google-are-right-to-end-forced-arbitration-1541948401 [https://perma.cc/4XQ7-CXEL].

[51] Douglas MacMillan, *Facebook to End Forced Arbitration for Sexual-Harassment Claims*, WALL ST. J. (Nov. 9, 2018, 4:35 PM), https://www.wsj.com/articles/facebook-to-end-forced-arbitration-for-sexual-harassment-claims-1541799129?mod=article_inline [https://perma.cc/YR3K-F4SK].

[52] Jena McGregor, *New Database Aims to Expose Companies that Make Employees Arbitrate Sexual Harassment Claims*, WASH. POST (Feb 27, 2020, 4:00 AM), https://www.washingtonpost.com/business/2020/02/27/new-database-reveals-which-companies-prevent-employees-filing-sexual-harassment-lawsuits/ [https://perma.cc/2MKK-3374].

Despite these announcements, the national corporate trend is still strongly in favor of mandatory arbitration in sexual harassment cases.[53] Companies prefer arbitration for sexual harassment claims because it is understood to be more cost-effective, and confidential arbitration often spares them from bad publicity.[54] The Supreme Court's pro-arbitration stance fosters this environment by protecting employer's decisions to place arbitration provisions in any employee contract.[55]

State legislatures are attempting to curtail mandatory arbitration using the contract defenses of unconscionability and public policy.[56] However, due to the Supreme Court's broad interpretation of the federal statute governing arbitration, most legal scholars believe the laws are unenforceable.[57] Some governors are even refusing to sign them, citing preemption concerns.[58] In California, for example, lawmakers passed legislation in 2018 aimed at eliminating mandatory arbitration in sexual harassment cases, but Governor Jerry Brown vetoed the bill citing preemption concerns.[59] In October 2019, the new California governor, Gavin Newsom, appeared willing to take on critics when he signed into law a piece of legislation that bans mandatory arbitration in employment discrimination suits.[60] Within three months, the California

[53] *See* Colvin, *Growing*, *supra* note 16 (noting statistics that were updated as recently as April 6, 2018, where Microsoft announced its plan to eliminate arbitration in December 2017).

[54] MacMillan, *supra* note 51.

[55] *See, e.g.*, Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105, 119 (2001) (holding that the FAA applies to all employment contracts except ones of transportation workers).

[56] *See, e.g.*, S. 121, 218th Leg. (N.J. 2018), https://www.njleg.state.nj.us/2018/Bills/S0500/121_I1.HTM [https://perma.cc/GT29-CNWC] ("The bill also provides that a provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment, including claims that are submitted to arbitration, would be deemed against public policy and unenforceable.").

[57] *See* Sternlight, *Mandatory Arbitration*, *supra* note 5, at 189.

[58] *See* Vin Gurrieri, *Calif. #MeToo Bills May Help Harassment Suits Reach Juries*, LAW360 (Sept. 17, 2018, 6:41 PM), https://www.law360.com/articles/1082219/calif-metoo-bills-may-help-harassment-suits-reach-juries [https://perma.cc/8F7P-HJY5]; *see also* Assemb. B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

[59] *See* Gurrieri, *supra* note 58.

[60] *Assembly Bill No. 51*, CAL. LEG. INFO (Oct. 11, 2019, 9:00 PM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 [https://perma.cc/342Z-LJT2].

Chamber of Commerce challenged the bill in court citing the Federal Arbitration Act.[61] The proceedings are currently ongoing.[62]

As pressure from the public to end forced arbitration continues to build, and state legislative options are thwarted due to preemption, narrowly tailored federal legislation is imperative. This Note proceeds in five parts. Part I provides a summary of the legal landscape that grounds the origin, rise, and expansion of arbitration agreements since the Federal Arbitration Agreement of 1925.[63] Part II investigates how arbitration provisions specifically impact victims of sexual harassment.[64] Part III explores why the contract grounds of unconscionability and public policy are closed avenues to lawyers hoping to strike down arbitration provisions.[65] Part IV highlights the stark difference between the original scope of the FAA and the Court's current interpretation.[66] Part V calls upon Congress to pass federal legislation returning the FAA to its original scope, and eliminating the use of mandatory arbitration in sexual harassment suits.[67]

I. LEGAL LANDSCAPE OF THE FEDERAL ARBITRATION ACT

A. The Origins of the Federal Arbitration Act

From the inception of the country until the early twentieth century, American courts questioned the validity of arbitration.[68] American justices inherited their disdain for arbitration from their English counterparts.[69] English courts believed arbitration clauses were improper attempts to divest the court of jurisdiction.[70] English courts

[61] Laurence Darmiento, *Judge Halts California Law Banning Forced Arbitration at the Workplace*, L.A. TIMES (Dec. 30, 2019, 5:28 PM), https://www.latimes.com/business/story/2019-12-30/california-forced-arbitration-law-blocked [https://perma.cc/BJ6M-UDXC].

[62] *See id.*

[63] *See infra* Part I.

[64] *See infra* Part II.

[65] *See infra* Part III.

[66] *See infra* Part IV.

[67] *See infra* Part V.

[68] *Compare* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1034-35 (2012) (discussing anti-arbitration sentiment arising in the beginning of the 1900s) [hereinafter *Testamentary*], *with* IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 15-37 (2013) (discussing pro-arbitration sentiment in America prior to the 20th century).

[69] Horton, *Testamentary*, *supra* note 68, at 1034.

[70] *Id.*

nullified arbitration clauses frequently and "allowed parties to retract their consent to arbitrate."[71]

American courts, following English precedents, adopted these practices and similarly nullified arbitration contracts even between commercial parties.[72] Prior to 1925, it was often impossible for two merchants with equal bargaining power to enter into a binding contract to resolve their future disputes through arbitration.[73] If one party decided to pursue litigation over arbitration, arbitration agreements were voided regardless of the original content of the pre-dispute agreement.[74]

This judicial practice troubled commercial parties who wanted to resolve disputes in a less burdensome and costly way than traditional litigation.[75] Seeking a more efficient and economical resolution of their commercial disputes, business groups organized and lobbied for enforceable arbitration clauses.[76] In response to this lobbying effort, a select number of state courts authorized arbitration.[77] These states allowed arbitrators to resolve factual issues and prevented parties from retracting their assent to arbitrate in certain circumstances.[78]

While arbitration gained ground in America, the rules still varied greatly by jurisdiction.[79] Instead of enduring this piecemeal approach, pro-arbitration lobbyists set their sights on a federal statute that would uphold arbitration clauses as "universally enforceable."[80] First, the lobbyists worked with an American Bar Association ("ABA") committee to produce a draft federal statute.[81] The ABA approved a draft in 1922.[82] Three years later, with very few changes to the original draft, Congress passed the Federal Arbitration Act.[83]

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[71] *Id.*

[72] *Id.*

[73] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644-45 (1996) [hereinafter *Panacea*].

[74] *Id.*

[75] *See* SZALAI, *supra* note 68, at 31.

[76] Sternlight, *Panacea*, *supra* note 73, at 645-46.

[77] Horton, *Testamentary*, *supra* note 68, at 1038.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Sternlight, *Panacea*, *supra* note 73, at 645.

[82] *Id.* at 645-46.

[83] *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219 (2013) [hereinafter *Preemption*].

B. The FAA Savings Clause

The FAA legislatively abolished judicial hostility to arbitration.[84] No matter a court's bias against arbitration, arbitration clauses were now judicially enforceable.[85] The statute's centerpiece is section 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[86]

Section 2 contains two crucial parts. The first makes arbitration clauses presumptively "valid, irrevocable, and enforceable."[87] The second consists of the savings clause — "save upon such grounds as exist at law or in equity for the revocation of any contract." The savings clause provides the mechanism for courts to strike down arbitration clauses.[88] The meaning of the savings clause is hotly debated,[89] but in today's Supreme Court jurisprudence, it includes standard contract defenses such as "fraud, duress, or unconscionability."[90]

Sections 3 and 4 of the FAA contain procedural mechanisms for enforcing agreements to arbitrate.[91] Section 3 requires that federal courts grant a stay of litigation when a lawsuit is brought over a matter covered by a valid arbitration agreement.[92] If the parties agreed to arbitrate, the court must stay litigation pending the completion of an arbitration proceeding.[93] Section 4 requires federal courts to compel arbitration if the arbitration agreement is valid.[94]

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[84] *Id.*

[85] *Id.* at 1217.

[86] 9 U.S.C. § 2 (2006).

[87] *Id.*

[88] Horton, *Preemption*, *supra* note 83, at 1228.

[89] *See id.* at 1251.

[90] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

[91] Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 722 (2015).

[92] *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2039 (2011).

[93] *See* Brief for Chamber of Commerce of the U.S. as Amici Curiae Supporting Petitioners at 4, Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524 (2019) (No. 17-1272).

[94] Friedman, *supra* note 92, at 2039.

C. Contract Defenses in Arbitration Proceedings

Section 2's savings clause provides a mechanism to nullify arbitration "upon such grounds as exist at law or in equity for the revocation of any contract."[95] The last two words of this savings clause imply that courts may only strike down arbitration provisions under rules that are extensive enough to govern any contract.[96] Although the precise definition of this phrase continues to evolve, it is generally understood to include a handful of contract defenses which govern all contracts including employment contracts, business-to-business contracts, and automobile rental agreements.[97] Contract defenses that are relevant to this Note are unconscionability[98] and public policy.[99]

Generally, courts require a showing of both procedural and substantive unconscionability to triumph on an unconscionability defense.[100] In California, the procedural element encapsulates "oppression" or "surprise" due to unequal bargaining power.[101] Substantive unconscionability focuses on "overly harsh" or "one-sided" results.[102]

For the public policy defense, a court may strike down a contract if it violates legislation enacted to "protect some aspect of the public welfare."[103] The Restatement (Second) of Contracts provides in full that a promise is void "if legislation provides that . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[104] The Restatement offers an example of two individuals betting on a basketball game in a state with a statute that makes wagering a crime.[105] In this example, the contract to pay money to the winning party of the basketball game bet is void due to the legislation.[106]

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95 9 U.S.C. § 2 (2006).

96 *See* Horton, *Preemption*, *supra* note 83, at 1219.

97 *Id.* at 1219-20.

98 *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (defining unconscionability).

99 *See generally id.* (describing public policy reasons for unconscionability).

100 *But see* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism — The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 6-7 (2012).

101 Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

102 *Id.*

103 RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

104 *Id.*

105 *Id.*

106 *Id.*

D. The Impact of the FAA

The FAA's initial influence was marginal.[107] Until the 1960s, individuals rarely utilized the FAA in state court.[108] State judges and lawmakers even adopted specific anti-arbitration rules and felt free to enforce them.[109] However, in the last half of the twentieth century, the Court profoundly expanded the scope and reach of the FAA.[110] The FAA no longer merely stands for the right of commercial parties engaging in interstate commerce to manage their disputes outside of the court system.[111] Instead, the FAA extends to cover almost every contract, including credit-card agreements, pay-day loans, employee handbooks, union employees, and computer purchases.[112] The pervasiveness of arbitration agreements in employer-employee contracts and how that impacts sexual harassment survivors is the focus of this Note.

II. MANDATORY ARBITRATION AND ITS CONSEQUENCES FOR SEXUAL HARASSMENT VICTIMS

Courts have come a long way and begun to recognize that sexual harassment is perpetrated by and against people of all genders, takes sexual and non-sexual forms, and is often motivated by hostility, not sexual desire.[113] And yet, as the #metoo movement demonstrates, the insidiousness and widespread nature of sexual harassment is far from over.[114] While the movement has inspired "the firing, resignation, or embarrassment of leading men in the world of Hollywood, politics, news media, cooking, technology, entertainment, the armed forces, [and the] law," meaningful change still feels out of reach in the workplace of regular people.[115] This is partly because the law has not caught up to the mental health and financial needs of survivors.[116] One

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107 Horton, *Testamentary*, *supra* note 68, at 1039.

108 *Id.*

109 *Id.*

110 *See infra* Part III.

111 *See* SZALAI, *supra* note 68, at 9-10; Comsti, *supra* note 10, at 11.

112 *See* Alex Brunino, Comment, *A Modest Proposal: Review of the National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act*, 95 OR. L. REV. 569, 570 (2017); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2907 (2015).

113 Mizrahi, *supra* note 9, at 121-22.

114 *Id.* at 121.

115 Sternlight, *Mandatory Arbitration*, *supra* note 5, at 194-96.

116 *Id.* at 196-201.

way to hasten justice is to address how mandatory arbitration further diminishes the rights of sexual harassment survivors.[117]

As discussed in the Introduction,[118] arbitration is a method of dispute resolution in which a private and objective third person, or a panel of such persons, determines the outcome of a disagreement between two parties.[119] Arbitration occurs outside of the traditional courtroom litigation process,[120] and the regular rules of procedure and evidence do not apply.[121] Proceedings and damage awards are private,[122] and decisions by the arbitrator are typically binding and afford no right to an appeal.[123]

Commentators distinguish between two types of arbitration proceedings: voluntary and mandatory. In an employer-employee context, mandatory arbitration exists when an employee is forced to either consent to an arbitration provision in their contract or be denied employment with a company.[124] Arbitration clauses in employee contracts often hide in boilerplate language. When employees review their contract or handbooks, most do not realize that the language exists or understand how arbitration may affect them.[125] Arbitration clauses may be hidden in company orientation materials or employee applications,[126] where employees do not think to look for contractual information that waives their right to sue in court.[127]

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117 *See infra* notes 130–202 and accompanying text.

118 *See supra* INTRODUCTION.

119 *See, e.g.*, *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining arbitration as "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute").

120 *See* John H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration or Through the Courts?* , *in* HANDBOOK ON ARBITRATION PRACTICE 3 (2d ed. 2016).

121 Louis L.C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, *in* HANDBOOK ON ARBITRATION PRACTICE, *supra* note 120, at 15.

122 *Id.*

123 *See* Comsti, *supra* note 10, at 9-10.

124 Stone & Colvin, *supra* note 15, at 4-5.

125 *Id.* at 4; *see also* Dov Waisman, *Preserving Substantive Unconscionability*, 44 SW. L. REV. 297, 308 n.12 (2014).

126 *See* Marmolejo v. Fitness Int'l LLC, 2018 WL 1181240, at *4 (Cal. Ct. App. filed Mar. 7, 2018) (holding an arbitration contract in employee application valid); Johnson v. Vatterott Educ. Ctrs., Inc., 410 S.W.3d 735, 738 (Mo. Ct. App. 2013) ("[A]n arbitration agreement contained within an employee handbook may constitute an enforceable agreement . . . ."). *But see* Shockley v. PrimeLending, 929 F.3d 1012, 1019-20 (8th Cir. 2019) (finding an arbitration clause in employee handbook invalid because employee did not sign the handbook or objectively manifest acceptance).

127 Stone & Colvin, *supra* note 15, at 4-5.

This is in sharp contrast to voluntary arbitration.[128] Voluntary arbitration primarily consists of arbitration clauses in agreements between two corporations or individuals with equal bargaining power.[129] The impact of this difference is stark. In a study comparing the success rates of mandatory arbitration versus individually negotiated arbitration, the employees who had the ability to negotiate their employment contracts and arbitration agreements had nearly a forty percent higher win rate.[130] Additionally, these actively negotiating employees were better-paid, received higher damages (on average), and were more likely to be represented by an attorney.[131] While the FAA was originally intended to cover voluntary arbitration between merchants, today's mandatory arbitration looks vastly different from the arbitration lawmakers originally intended to protect.[132]

Mandatory arbitration provisions impact employees in a number of ways. First, arbitration reduces employee's opportunities to win against their employers.[133] Second, it reduces the awards they can receive from their arbitrators.[134] Third, it reduces public awareness of corporate abuse.[135] Fourth, especially combined with class action waivers, it reduces the likelihood that an employee brings a claim at all.[136] This is especially true for low-income workers.[137] Fifth, it prevents the creation

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[128] *Id.* at 5.

[129] *Id.*

[130] Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 75-76 (2014) [hereinafter *Inequality*].

[131] *Id.*

[132] *See infra* Part III.

[133] Comsti, *supra* note 10, at 9-10 ("A recent social science study found that employees are almost twice as likely to prevail in federal court than in forced arbitration.").

[134] *Id.* ("In addition, judges and juries awarded employees damages that were 150 percent greater than those received in arbitration.").

[135] *Id.*

[136] Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J. (Jan. 25, 2018, 5:30 AM), https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201 [https://perma.cc/FML3-NZ88].

[137] Stone & Colvin, *supra* note 15, at 22 ("Whereas on average plaintiffs' attorneys accepted 15.8% of potential cases involving employees who could go to litigation, they accepted about half as many, 8.1%, of the potential cases of employees covered by mandatory arbitration. Thus, in addition to producing worse case outcomes than litigation, mandatory arbitration also reduces the likelihood of obtaining the legal representation that will help employees bring a claim in the first place."); *see also* Colvin, *Growing*, *supra* note 16 ("Of the employers who require mandatory arbitration, 30.1% also include class action waivers in their procedures—meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through

of precedent because the entire process occurs outside of a judicial system.[138] These negative consequences affect all types of individuals, but they compound to produce particularly painful effects on sexual harassment victims.[139]

Statistically, arbitration decreases employee's likelihood of success against their employers.[140] In a 2011 study evaluating outcomes of 1,213 mandatory arbitration cases administered over five years, employee win rates in mandatory arbitration was 21.4%.[141] This was compared to 38% in state courts and 59% in federal courts.[142] In a 2014 study, plaintiff-side attorneys provided information regarding their most recent employment cases in litigation and mandatory arbitration.[143] In these cases, attorneys reported a 32% lower win rate in mandatory arbitration compared to litigation.[144]

Mandatory arbitration also decreases the average damages award for employees.[145] In the previously cited 2011 study, the median award in mandatory arbitration was $36,500.[146] In comparison, the median federal court employment award was $176,426 and $85,560 in state court.[147] Thus, not only are arbitration claims less likely to succeed than similarly situated claims brought in federal or state court, but when employees do beat the odds and win, they are awarded significantly smaller damages.[148] Some attorneys suggest one reason for the skewed

collective legal action."); Terri Gerstein & Sharon Block, Editorial, *Supreme Court Deals a Blow to Workers*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/opinion/supreme-court-arbitration-forced.html.

138 *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* , 57 STAN. L. REV. 1631, 1634 (2005) [hereinafter *Creeping Mandatory Arbitration*].

139 While I focus on the impacts of mandatory arbitration on sexual harassment victims, I agree with many other activists and organizers that mandatory arbitration is painful for most employees. I believe that mandatory arbitration should be barred in many additional instances including discrimination suits and disability suits. However, the full impact of mandatory arbitration is beyond the scope of this Note. *See, e.g.*, Gerstein, *supra* note 45.

140 *See* Stone & Colvin, *supra* note 15, at 19.

141 *Id.*

142 *Id.*

143 *Id.* at 20.

144 *Id.*

145 *Id.* at 19.

146 *Id.* at 20 tbl.1.

147 *Id.*

148 *See* Colvin, *Inequality*, *supra* note 130, at 80-81.

results are that companies hire the same arbitrator in multiple cases which may produce an economic incentive for the arbitrator.[149]

Mandatory arbitration also reduces public awareness of corporate abuse.[150] This effect is particularly poisonous in sexual harassment cases.[151] As events at Fox and the Weinstein Company demonstrate, public awareness of corporate misconduct ensures companies take action to protect their employees.[152] Fox settled lawsuit after lawsuit for Bill O'Reilly — only in the face of public outcry did scales tip toward protecting vulnerable employees.[153] In contrast, in 2008, sixty former employees of a national jewelry company, Signet, alleged in arbitration proceedings that the company fostered rampant sexual harassment and discrimination.[154] However, news of this did not break until 2017 when the *Washington Post* gained access to arbitration documents made public by the employee's attorneys.[155] For almost ten years, the public was unaware of allegations against the company — including the alleged annual manager meetings described as a 'sex fest' where attendance was mandatory and women were aggressively pursued, grabbed, and harassed."[156] Once the report was released, Signet's stock dropped to an annual low.[157] The published documents also likely spurred the CEO, who was named in the suit, to step down.[158] Despite the company being aware of the allegations in 2008, it took the public pressure of the released documents to move the corporate needle and effectuate

[149] Genie Harrison, *INSIGHT: Forced Arbitration Is Bad News for Employees, California Stats Show*, BLOOMBERG L. (Aug. 15, 2019, 1:01 AM), https://news.bloomberglaw.com/business-and-practice/insight-forced-arbitration-is-bad-news-for-employees-california-stats-show [https://perma.cc/768W-626L].

[150] *See* Comsti, *supra* note 10, at 10.

[151] *See*, Nuñez, *supra* note 26, at 467-75.

[152] *See supra* INTRODUCTION.

[153] *See* Sternlight, *Mandatory Arbitration*, *supra* note 5, at 202.

[154] 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=.7f4bc0423a61 [https://perma.cc/E3S8-87MK].

[155] *Id.*

[156] *Id.*

[157] Daphne Howland, *Signet Jewelers Losing Customers Over Sexual Harassment Claims*, RETAIL DIVE (Dec. 15, 2017), https://www.retaildive.com/news/signet-jewelers-losing-customers-over-sexual-harassment-claims/513134 [https://perma.cc/RPV2-Z9KJ].

[158] While Light stepped down six months prior to the *Washington Post* publishing the documents, for his "health," the documents were released only upon agreement between both party's lawyers. It is highly probable the resignation was planned in advance. *See id.*

change.[159] Without sunshine, arbitration proceedings can nullify the important deterrent effect that results from public enforcement of employee protection laws.[160]

Arbitration also affects the most marginalized and vulnerable workers.[161] Employers are most likely to impose mandatory arbitration on their lowest-paid employees.[162] In Professor Colvin's 2018 study, he found that individuals who are paid less than $13 an hour have the highest rate of mandatory arbitration.[163] While the most public faces of the #metoo movement have been primarily white and high-income earners, arbitration agreements disproportionally impact low-wage workers who are already disadvantaged in finding legal assistance.[164] While high-income earners such as Gretchen Carlson may obtain relief via expensive legal battles to circumvent arbitration clauses, that type of creative and costly legal strategy is unavailable to most marginalized and vulnerable workers.[165]

For low-wage earners, the cost is compounded when class action waivers enter the mix.[166] Class action waivers are provisions that waive an individual's ability to bring a claim against an employer with other similarly impacted employees. For example, in 2013, an employee of Waffle House alleged that the diner fired her in 2012 after she reported that her boss texted her images of his penis and then threatened her with a knife if she complained about him. [167] Her job paid $3.95 an hour.[168] When her attorney uncovered that she, like other Waffle House workers, signed an arbitration agreement he advised her that the claim was not worth pursuing.[169] The employee reflected, "I knew I couldn't

[159] *See* David Gelles & Rachel Abrams, *Hundreds of Workers Allege Sex Bias by Jeweler, Files Show*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/business/sterling-kay-jewelers-jared.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/G6R3-7RUA].

[160] *See* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 138, at 1662; *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting).

[161] *See* Colvin, *Growing*, *supra* note 16, at 9.

[162] *See id.*

[163] *Id.* at 9 tbl.4.

[164] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 183-84.

[165] *See id.* at 183-86. Additionally, it feels important to note that a 2015 study of practicing employment arbitrators paints another concern about mandatory arbitration. Of the arbitrators surveyed, 74% were male and 92% were white. Stone & Colvin, *supra* note 15, at 18.

[166] *See* Sternlight, *Mandatory Arbitration*, *supra* note 5, at 183-84.

[167] *See* Gershman, *supra* note 136.

[168] *Id.*

[169] *Id.*

fight it so I just let it go . . . [i]t was a humiliating situation. I felt like I was nobody and didn't have a chance."[170] As Justice Ginsburg underlined in her scorching dissent in *Epic Systems Corp. v. Lewis*, the result of class waivers in mandatory arbitration provisions is "the inevitable decline of private representation" and in turn, the decline of "the enforcement of federal statutes."[171]

Class action waivers not only discourage low-wage earners, but employees of any pay range from coming forward.[172] Individuals fear retaliation and dread proceeding with their claims alone.[173] Additionally, attorneys are less likely to represent them if class actions are barred.[174] Regardless of the reasoning behind this depression of claims, the impact is harrowing for a nation genuinely interested in addressing its sexual harassment crisis.[175] If America is truly striving to

[170] *Id.*

[171] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646-47 (2018) (Ginsburg, J., dissenting) ("If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries.").

[172] *Cf.* COLVIN, GROWING, *supra* note 16, at 11 ("In an earlier study, Colvin and Gough (2015) found an average of 940 mandatory employment arbitration cases per year being filed with the American Arbitration Association (AAA), the nation's largest employment arbitration service provider . . . . Other research indicates that about 50 percent of mandatory employment arbitration cases are administered by the AAA. This means that there are still only about 1,880 mandatory employment arbitration cases filed per year nationally. Given the finding that 60.1 million American workers are now subject to these procedures, this means that only 1 in 32 employees subject to these procedures actually files a claim under them each year . . . . These findings indicate that employers adopting mandatory employment arbitration have been successful in coming up with a mechanism that effectively reduces their chance of being subject to any liability for employment law violations to very low levels.").

[173] *Lewis*, 138 S. Ct. at 1647.

[174] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

[175] Many Americans appear committed to addressing sexual harassment, though it is certainly not the entire nation. *See* Margie Omero & Christine Matthews, Opinion, *#MeToo Is One of Many Issues Driving American Women to Vote*, HILL (Dec. 22, 2017, 12:00 PM), https://thehill.com/opinion/civil-rights/366158-metoo-is-one-of-many-issues-driving-american-women-to-vote [https://perma.cc/4YQB-SD2H]. *But see* Tovia Smith, *A Year Later, Americans Are Deeply Divided over the #MeToo Movement*, NPR (Oct. 31, 2018, 4:54 PM), https://www.npr.org/2018/10/31/662696717/a-year-later-americans-are-deeply-divided-over-the-metoo-movement [https://perma.cc/Q4YV-WF3G].

create a more safe world for women and survivors, we want to encourage people to come forward — not the other way around.[176]

Lastly, the loss of precedent is harmful to sexual harassment victims on an individual basis and to society as a whole.[177] No precedent is created in these black box proceedings.[178] This impedes society's ability to develop a nationwide solution to address pervasive sexual harassment.[179] Professor Jean Sternlight argues arbitration stymies the development of progressive laws.[180] Since arbitrators are seeking to resolve individual crises, they are not interested in figuring out how one individual case may shape future cases.[181] Further, there is no incentive for arbitrators to create innovative laws.[182] This mindset further discourages a national response to the epidemic of sexual harassment.[183]

Proponents of arbitration clauses may argue that arbitration itself is not harmful as it is confidentiality that suppresses these important narratives.[184] They can point to how the majority of litigable cases are settled prior to trial.[185] Since many of those settled cases will include

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[176] *See* Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet*, N.Y. TIMES (Sept. 23, 2018), https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html [https://perma.cc/8YAA-28ZV].

[177] Elizabeth Dias & Eliana Dockterman, *The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard*, TIME (Oct. 21, 2016), http://time.com/4540111/arbitration-clauses-sexual-harassment [https://perma.cc/JM3N-6G3X].

[178] Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 703-11 (2004) (critiquing mandatory arbitration in part because it erodes public knowledge and precedent).

[179] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 190-91 (citing EEOC Notice No. 915.002 (1997), *reprinted in* 133 Daily Lab. Rep. (BNA) at E (July 11, 1997)).

[180] *Id.* at 191-201.

[181] *See id.* at 189 (citing Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 436 (1999)).

[182] *See id.* at 190.

[183] *See id.* at 189 ("Further, because arbitrators are hired privately they 'have limited incentive to consider the effects of their awards on third parties,' such as on the public . . . . [b]ecause their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public.'") (first quoting Christopher R. Drahozal, *Is Arbitration Lawless?* , 40 LOY. L.A. L. REV. 187, 192 (2006), then quoting Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 436 (1999)).

[184] Danielle Paquette, *How Confidentiality Agreements Hurt — and Help — Victims of Sexual Harassment*, WASH. POST (Nov. 2, 2017, 9:40 AM), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment/?utm_term=.e9552600fd10 [https://perma.cc/PH6T-EPUM].

[185] *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling [https://perma.cc/R6EH-7AFF].

confidentiality agreements between parties, banning mandatory arbitration does not address the root of the problem.[186]

There are a number of responses to this argument.[187] First, while the parties are not bound to confidentiality, according to arbitration regulations, the arbitrator must keep all matters confidential.[188] The American Arbitration Association Code of Ethics states: "Unless otherwise agreed by parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."[189] Secondly, unlike courtroom litigation, arbitration hearings are private and neither the public nor the press may observe the proceedings.[190] While court proceedings are recorded through court reporters, arbitration proceedings are almost never transcribed.[191] Therefore, while arbitration does not bind the parties to confidentiality, it certainly prevents the public from gaining access to the proceedings by its very nature.[192]

Unlike the private proceedings of arbitration, courtroom documents are generally available to public.[193] Anyone has the right to review the court file and attend court proceedings, unless a case is sealed which is an arduous and rare process.[194] Judges also make many decisions as a civil case progresses, beyond just the final judgment.[195] These decisions — such as summary judgments or evidentiary rulings — are all crucial to developing precedent. [196] Lastly, for the cases that do go to trial, they

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[186] *See, e.g.*, Bryan Logan, *The Weinstein Co. Just Canceled Every Nondisclosure Agreement Between Harvey Weinstein and the Women Who Accused Him of Sexual Misconduct*, BUS. INSIDER (Mar. 19, 2018, 9:11 PM), https://www.businessinsider.com/harvey-weinstein-non-disclosure-agreements-with-victims-canceled-2018-3 [https://perma.cc/8KH2-BFM6].

[187] One should also note that companies are advised to include additional confidentiality clauses alongside arbitration provisions that wind up barring victims from speaking out about the process as well. *E.g.*, Henn, *supra* note 120, at 11-12.

[188] Steven C. Bennett, *Who Is Responsible for Ethical Behavior by Counsel in Arbitration?* , *in* HANDBOOK ON ARBITRATION PRACTICE, *supra* note 120, at 523, 534.

[189] *Id.*

[190] Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, *in* HANDBOOK ON ARBITRATION PRACTICE, *supra* note 120, at 41, 51-52.

[191] *Id.* at 53.

[192] *See id.* at 52.

[193] *See id.* at 52-53.

[194] *See id.* at 51-52.

[195] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 192.

[196] *See id.*

are powerful for individuals and the community.[197] No matter the outcome, they inspire and comfort survivors.[198]

One could also argue that arbitration agreements are more efficient and could award a plaintiff compensation in months as opposed to years.[199] However, other factors offset this advantage.[200] When individuals go before arbitration courts they win less frequently, and when employees do win, they are awarded significantly less money than their counterparts in court.[201] Additionally, how does one measure efficiency? If a company must go to arbitration three times for the same person — as opposed to having a public trial where the public is put on notice about their sexually harassing CEO — one might say duplicative arbitrations are less efficient.[202]

III. UNCONSCIONABILITY AND PUBLIC POLICY CONTRACT DEFENSES: CLOSED AVENUES FOR SEXUAL HARASSMENT VICTIMS IN ARBITRATION AGREEMENTS

Considering the national outcry inspired by the #metoo movement, one might argue that the text of the FAA savings clause provides a mechanism to nullify arbitration agreements in sexual harassment cases.[203] Specifically, the defenses of "unconscionability"[204] or "public policy"[205] should protect victims of sexual harassment and assault. However, as Professor David Horton discusses, the Supreme Court has interpreted the FAA to immunize arbitration agreements from the defense of public policy.[206] Additionally, as recent Supreme Court cases

197 *See* Emma Hinchliffe, *Trailblazer: 11 Women on What Ellen Pao's Fight Meant to Them*, MASHABLE (Sept. 19, 2017), https://mashable.com/2017/09/19/ellen-pao-women-in-tech/ [https://perma.cc/L3CK-J5Y8].

198 *Id.*

199 *See, e.g.*, Henn, *supra* note 120, at 4; Gershman, *supra* note 136.

200 *See supra* notes 133–148 and accompanying text.

201 *See supra* notes 140–149 and accompanying text.

202 *See, e.g.*, Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html [https://perma.cc/UUT2-Z2SP].

203 *See supra* Part I.

204 *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

205 *Id.* § 178 (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable . . . .").

206 *See* Horton, *Preemption*, *supra* note 83, at 1220. Professor Horton discusses the "total preemption theory" which rests on two pillars. *Id.* First, the FAA preempts state law as "state lawmakers virtually never pass statutes that are inclusive enough to regulate 'any contract.' Rather, they attempt to shield the rights of vulnerable parties through laws that invariably apply to some contracts: those involving consumers,

have confirmed, the Court views the FAA as similarly protected from arguments regarding unconscionability.[207]

This Part traces the arc of FAA expansion through four seminal Supreme Court cases. This Part explains why these two crucial contract defenses are not viable for sexual harassment victims. Additionally, this Part discusses preemption and the severability doctrine and how both of these legal concepts further foreclose the availability of unconscionability or public policy as a defense to mandatory arbitration clauses in sexual harassment cases.

The first case to broaden the scope of the FAA was *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*[208] Two key themes gird *Prima Paint*. First, the Supreme Court recognized the severability rule.[209] The severability rule treats arbitration clauses as separate from the underlying agreements in which they are contained.[210] This means that every agreement that includes an arbitration clause is seen as containing two separate agreements: "(1) the agreement to arbitrate and (2) the overarching container contract."[211] This legal fiction enables arbitrators to nullify the container "contract without simultaneously foreclosing their own ability to make such a ruling."[212]

Consider an example where a party alleges that a contract with an arbitration provision is invalid under the defense of duress. If the party seeks to overturn the contract, the arbitration provision is seen as free-standing and kicks in.[213] Thus, the arbitrator (not the judge) must resolve the matter.[214] The severability principle means that even if there are clear signs that the container contract is invalid, the case still goes to arbitration.[215] A party must therefore argue the arbitration clause *itself* is unenforceable or a court cannot decide the issue.[216]

employees, franchisees, construction, or 'contracts of adhesion.'" *Id.* Second, the FAA's purpose was to protect the nullification of arbitration clauses under public policy. *Id.* "Arguably, giving states authority over the validity of arbitration clauses would create a loophole the size of the statute itself. Under the guise of the public policy defense, state lawmakers could pass regulations that resurrect the very hostility to arbitration that the FAA eradicated." *Id.*

207 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622-23 (2018).

208 388 U.S. 395 (1967).

209 *See* Horton, *Arbitration About Arbitration*, *supra* note 10, at 380-81.

210 *Id.*

211 *Id.* at 381.

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 Horton, *Testamentary*, *supra* note 68, at 1040.

The second important theme in *Prima Paint* is the Court's characterization of the FAA. Prior to 1967, federal courts were interpreting the FAA to be a source of federal procedural law only.[217] However, in *Prima Paint*, the Court held that the FAA is a source of federal substantive law under the Commerce Clause of the Constitution.[218] Thus the Court ruled that the FAA (not state law) controlled federal courts and could not be displaced by state law.[219] This characterization planted a seed that blossomed two decades later in *Southland Corp. v. Keating*.[220]

In 1984, the Supreme Court greatly expanded the power and purview of the FAA. [221] In *Southland*, a group of 7-Eleven franchisees in California sued Southland, their franchisor in California State court.[222] They sued for fraud, misrepresentation, breach of contract, and violation of California's Franchise Investment Law ("CFIL").[223] Southland attempted to compel arbitration due to the arbitration provision in the franchise agreement.[224]

The Court held that the FAA was not only substantive federal law but that it also applied in state court and preempted contrary state law.[225] The preempted California law at issue was the CFIL.[226] In relevant part, the CFIL provided: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."[227] The California Supreme Court interpreted this provision to negate arbitration provisions in franchisee contracts.[228]

But the U.S. Supreme Court reversed,[229] holding that the California Supreme Court's interpretation of the CFIL violated the Supremacy

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217 *See* Brunino, *supra* note 112, at 575.

218 *Id.*

219 *Id.* "*Prima Paint* thus established that the FAA would henceforth be interpreted and applied as substantive law, albeit only in federal courts. However, despite *Prima Paint*, lower courts were reluctant to hold that the FAA preempted state law for almost two decades longer." *Id.*

220 Southland Corp. v. Keating, 465 U.S. 1 (1984).

221 *See id.*; Horton, *Preemption*, *supra* note 83, at 1219.

222 *Southland*, 465 U.S. at 4-5.

223 *Id.* at 4.

224 *Id.*

225 *See id.* at 15-16.

226 *Id.* at 10.

227 *Id.*

228 *See id.* at 5.

229 *Id.* at 17 (noting that the Court reversed in part and remanded in part).

Clause.[230] The Court stated that in enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration."[231] Additionally, the court confirmed the *Prima Paint* view that Congress's ability to pass the FAA was through the commerce power.[232] Thus, the FAA was a substantive law and not a procedural law.[233] This ruling foreclosed any opportunity for a future state law which conflicted with the FAA.

Southland ultimately launched the Court into the beginnings of its aggressive pro-arbitration stance.[234] Prior to the Court's decision in *Southland,* many believed the FAA only applied in federal courts.[235] However, in 1984, the Supreme Court ruled that limiting the enforcement of arbitration to federal courts would "frustrate" Congress's intent "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[236] This was a radical shift in the understanding and scope of the FAA.[237] After *Southland* and until 2015, there were more than two dozen Supreme Court decisions in arbitration cases, almost all of them greatly expanding the scope of the FAA.[238]

In a contemporary case, *AT&T Mobility LLC v. Concepcion*,[239] the Supreme Court held that the FAA preempted a California rule of contract law.[240] The preempted ruling involved a finding that class arbitration waivers in consumer contracts were unconscionable.[241] In *Concepcion*, the class action waiver at issue was one where AT&T required its customers to relinquish their class action rights.[242] However, in exchange for that relinquishment, AT&T promised to pay customers $7,500 and double their attorney's fees if they recovered more in individual arbitration than AT&T's last written settlement

230 *Id.* at 16-17.

231 *Id.* at 10.

232 *Id.* at 11-12.

233 Justice O'Connor contested this view in her dissent. *Id.* at 25-26 (O'Connor, J., dissenting).

234 Horton, *Preemption*, *supra* note 83, at 1227.

235 *See* Horton, *Arbitration About Arbitration*, *supra* note 10, at 387.

236 *Southland*, 465 U.S. at 15-16.

237 Blankley, *supra* note 91, at 713.

238 Stone & Colvin, *supra* note 15, at 7.

239 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

240 *Id.*

241 Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. 333.

242 Horton, *Preemption*, *supra* note 8383, at 1239.

offer.[243] The Ninth Circuit struck down the class action waivers as unconscionable.[244]

The Ninth Circuit based their reasoning on a prior California Supreme Court decision, *Discover Bank v. Superior Court*.[245] In *Discover Bank*, the California Supreme Court held that at least some class action waivers (which resulted in mandated individual arbitration proceedings) were unconscionable under California law.[246] In an adhesion contract[247] involving "small amounts of damages" and unequal bargaining power, arbitration provisions that act as class action waivers were unconscionable.[248] Additionally, the California Supreme Court held that this legal interpretation was not preempted by the FAA.[249]

However, in *Concepcion*, the Supreme Court abrogated *Discover Bank* and reversed the holding from the Ninth Circuit.[250] The majority, led by Justice Scalia, looked to the text, congressional intent, and the purpose of the FAA to determine their holding.[251] Justice Scalia stated that Congress intended to facilitate "streamlined proceedings" and thus state law may not "require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[252] Justice Scalia wrote that if "state law prohibits outright the arbitration of a particular type of claim . . . the conflicting rule is displaced by the FAA."[253]

This decision is significant for two primary reasons. One, it effectively obliterated attorney representation for individuals with class action waivers in their adhesion contracts.[254] As the damages of each contract

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[243] *Concepcion*, 563 U.S. at 337.

[244] *Id.* at 338.

[245] *Discover Bank*, 113 P.3d, *abrogated by Concepcion*, 563 U.S. 333.

[246] *See id.* at 1108.

[247] An adhesion contract is one that is drafted by one party (usually a corporation or business) and signed by a second party (usually an individual or one with a weaker bargaining power). The second party usually is unable to modify the terms of the contract. *Adhesion Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29 (last visited Nov. 20, 2018) [https://perma.cc/337L-L353].

[248] *Discover Bank*, 113 P.3d at 1108-10.

[249] *Id.* at 1110.

[250] *Concepcion*, 563 U.S. at 352.

[251] *See id.* at 339, 344, 349, 352.

[252] *Id.* at 344, 351.

[253] *Id.* at 341.

[254] *Id.* at 365 (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

is nominal, attorneys only take these cases if they can amalgamate the damages for the whole class.[255] Second, and more importantly for this Note, *Concepcion* held that the defense of unconscionability does not pierce the armor of an arbitration provision if unconscionability is being alleged "in a fashion that disfavors arbitration."[256] Thus, despite the language of the savings clause in Section 2, courts may not apply the defense of unconscionability if the reason the provision is unconscionable is simply due to the fact that there is an arbitration provision in the contract.[257] While California courts or any state court might want to strike down mandatory arbitration provisions in sexual harassment suits as unconscionable, they are unable to do so.[258] The FAA both preempts state law, and is interpreted to exclude defenses of unconscionability.[259]

The most recent case to uphold this interpretation of the FAA was *Epic Systems Corp. v. Lewis*.[260] In a five to four decision written by Justice Gorsuch, the Court held that the FAA savings clause did not provide a defense to arbitration agreements.[261] Specifically, the court rejected the idea that the savings clause was designed to protect individuals from the unconscionable nature of mandatory arbitration.[262] The majority stated that the employee's argument failed because the employee did not argue that his arbitration agreement was extracted by "an act of fraud or duress or in some other unconscionable way."[263] Instead, the employee argued that his agreement was unconscionable "precisely because they require individualized arbitration proceedings instead of class or collective ones."[264]

In a scorching dissent, Justice Ginsburg reflected that "the inevitable result of today's decision will be the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[265] In painting that grim picture, Justice Ginsburg points to

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255 *Id.*

256 *See id.* at 341 (majority opinion).

257 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1645-46 (2018).

258 *See* Kate S. Gold & Jaime D. Walter, *California Considers Ban on Forced Arbitration By Employers*, NAT'L L. REV. (June 13, 2018), https://www.natlawreview.com/article/california-considers-ban-forced-arbitration-employers [https://perma.cc/X3KP-3DFD].

259 *Id.*

260 *Lewis*, 138 S. Ct. 1612.

261 *See id.* at 1616.

262 *See id.* at 1622.

263 *Id.*

264 *Id.*

265 *Id.* at 1646-47 (Ginsburg, J., dissenting).

the inevitable decline of private representation which is crucial to the enforcement of federal statutes.[266] Additionally, she underlines that individuals may fear retaliation without the backing of their fellow employees, and thus not pursue redress by themselves.[267] Lastly, she underlines a concern with arbitration process: anomalous resorts.[268] Since arbitration agreements are often confidential, and arbitrators are barred from giving prior proceedings precedential effect, arbitrators may render conflicting awards in cases involving similarly situated employees.[269]

In sum, these four decisions paint the picture of why standard contract defenses are inaccessible as a vehicle to defeat arbitration clauses in sexual harassment cases.[270] *Prima Paint* established the supremacy of the FAA over state law.[271] *Southland* extended *Prima Paint* and invalidated an actual state law that prevented arbitration.[272] *Concepcion* struck down a California law that curbed the use of mandatory arbitration in specific consumer contracts.[273] Lastly, *Epic Systems* upheld an arbitration clause in an employment contract.[274] *Epic Systems* also foreclosed challenges to mandatory arbitration clauses in court if the only basis for the challenge was the mandatory aspect of the arbitration proceeding itself. [275] Thus, while lawyers, activists, and legislators may have hoped to use the contract defense of unconscionability or public policy to strike down mandatory arbitration clauses in sexual harassment suits, the Supreme Court has clearly foreclosed this as an option.[276]

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[266] *See id.* at 1647.

[267] *Id.* at 1647-48.

[268] *Id.* at 1648.

[269] *Id.*

[270] *See supra* Part III.

[271] *See supra* notes 208–219 and accompanying text.

[272] *See supra* notes 220–238 and accompanying text.

[273] *See supra* notes 239–259 and accompanying text.

[274] *See supra* notes 260–269 and accompanying text.

[275] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018); Katherine Stone, *Symposium: Majority Gives Short Shrift to Worker Rights*, SCOTUS BLOG (May 23, 2018, 2:43 PM), http://www.scotusblog.com/2018/05/symposium-majority-gives-short-shrift-to-worker-rights [https://perma.cc/2WPR-RR7Z].

[276] *See Lewis*, 138 S. Ct. at 1622.

IV. THE COURT HAS IMPROPERLY DISTORTED THE ORIGINAL INTENT AND SCOPE OF THE FAA

The expansion of the FAA stings on two fronts: (1) it prevents state legislators from enacting legislation to curb mandatory arbitration in sexual harassment cases and (2) it distorts the original intent of the FAA. While the FAA's initial influence was marginal, as the Court expanded the reach of the FAA, companies caught on and greatly increased their utilization of arbitration provisions in adhesion contracts.[277] The FAA no longer merely stands for the right of commercial parties engaging in interstate commerce to manage their disputes out of the court system.[278] Instead, the FAA extends to cover almost every contract including credit-card agreements, pay-day loans, employee handbooks, union employees, and computer purchases.[279]

This expansive reading of the FAA flies in the face of the drafters' original intent. Numerous articles, cases, and books have been written about the history surrounding the FAA and Congress's intent in passing the legislation.[280] Most commentators conclude that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power.[281] The corporate environment of 1925 and legislative history of the FAA both lead to that conclusion.[282]

During the period from 1890 to 1920, America underwent a period of rapid economic growth and industrialization.[283] Industries became consolidated, production increased to cater to a national market, and businesses began to engage in mass production and mass distribution of products.[284] In the throes of urbanization, there were still substantially few commercial transactions between large merchants and individual consumers.[285] Primarily, transactions occurred between businesses attempting to meet new national needs.[286]

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277 Horton, *Testamentary*, *supra* note 68, at 1039-43.

278 *See* SZALAI, *supra* note 68, at 9-10; Comsti, *supra* note 10, at 13-14.

279 *See* Brunino, *supra* note 112, at 570; Resnik, *supra* note 112, at 2907.

280 *See, e.g.*, SZALAI, *supra* note 68, at viii-x; Christopher R. Drahozal, *In Defense of* Southland: *Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Horton, *Preemption*, *supra* note 83; Sternlight, *Panacea*, *supra* note 73, at 647.

281 Sternlight, *Panacea*, *supra* note 73, at 647.

282 *See id.* at 647-48.

283 SZALAI, *supra* note 68, at 98.

284 *Id.*

285 *See* Sternlight, *Panacea*, *supra* note 73, at 647-48.

286 *See* SZALAI, *supra* note 68, at 98.

In response to this wave of industrialization, businesses needed a dispute resolution method that was less costly and more efficient than the court system.[287] Reformers turned to arbitration, in order to avoid the costly backlog of the court system. As mentioned in the background, business lobbyists ensured the passage of the FAA.[288]

Congressional hearings during this time demonstrate that Senators wanted to ensure that arbitration only covered businesses of equal bargaining power.[289] For example, one senator elevated a concern that arbitration contracts might be "offered on a take-it-or-leave-it basis to captive customers or employees."[290] He added that arbitration contracts in those cases "are really not voluntar[y] things at all" because "there is nothing for [employees] to do except to sign it."[291] However, the bill's supporters emphatically assured the Senator that they did not intend to cover such unequal situations.[292]

Additionally, the FAA did not originally intend to cover arbitration provisions in employment contracts.[293] When the legislation was originally introduced, organized labor voiced concern.[294] In response, then-Secretary of Commerce Herbert Hoover suggested that Congress amend the legislation to explicitly exclude employment contracts.[295] His almost exact language was ultimately included in section 1 of the FAA.[296]

While the FAA was not originally intended to cover employment agreements,[297] today 53.9% of nonunion private-sector employers have mandatory arbitration procedures.[298] Among companies with 1,000 or more employees, 65.1% have mandatory arbitration procedures.[299] Among all types of contracts, employment agreements are the most likely to include an arbitration provision.[300]

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287 *See supra* Part I.A.

288 *Id.*

289 *See* Sternlight, *Panacea, supra* note 73, at 647.

290 *Id.*; *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018).

291 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967).

292 *Id.*; *see also Lewis*, 138 S. Ct. at 1643.

293 *Lewis*, 138 S. Ct. at 1643.

294 *Id.*

295 *Id.*

296 *Id.*

297 Horton, *Arbitration About Arbitration*, *supra* note 10, at 378.

298 Colvin, *Growing*, *supra* note 16, at 5.

299 *See id.* at 6.

300 *See* Sarath Sanga, *A New Strategy for Regulation Arbitration*, 113 NW. U. L. REV. 1121, 1126-27 (2019) (utilizing "filings with the Securities and Exchange Commission

Lower federal courts have even enforced arbitration clauses signed by employees in non-contracts.[301] In *Patterson v. Tenet Healthcare, Inc.*, the Eighth Circuit enforced an arbitration clause found in an employee handbook.[302] The court did so even though an employee handbook is not a contract under state law.[303] Additionally, this specific handbook even provided that it was "not intended to constitute a legal contract" and that "no written statement or agreement in this handbook concerning employment is binding."[304] This case reflects that there may be an even greater number of employees impacted by arbitration clauses that are not reflected in the aforementioned statistics.[305]

Since the Court foreclosed state legislators from passing state legislation that curbs mandatory arbitration, and the Court distorted the scope and intent of the FAA, the only way to rectify this statutory misinterpretation is federal legislation.[306]

V. A LEGISLATIVE CALL TO ACTION

Since the rise of the #metoo movement, there has been a renewed call for legislative reform to address how mandatory arbitration curbs the rights of sexual harassment survivors.[307] Numerous bills have been introduced by both state and federal legislators.[308] None have been successful.[309] Federal legislation has failed to pass, but numerous states have attempted to take matters into their own hands and pass state-wide legislation.[310] However, due to the Supreme Court's expansive reading of the FAA, state laws curbing arbitration are likely preempted by the FAA.[311]

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and create a database of nearly 800,000 contracts" and then parsing them out by type to uncover this trend).

301 *See* Horton, *Testamentary*, *supra* note 68, at 1056-57.

302 *See* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997).

303 *Id.* at 835.

304 *Id.*

305 *See id.*

306 *See infra* Part V.

307 *E.g.*, Gerstein, *supra* note 45.

308 *See supra* INTRODUCTION.

309 *See* Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

310 *See, e.g.*, S7848A, 2018 Leg., 241st Sess. (N.Y. 2018) https://www.nysenate.gov/legislation/bills/2017/s7848 [https://perma.cc/6WKJ-QX4X].

311 Ann-Elizabeth Ostrager & Jacob Singer, *The Limitations of NY's Anti-Sexual Harassment Law*, LAW360 (Sept. 12, 2018, 4:14 PM), https://www.law360.com/

In 2018, California legislators passed a bill barring employers from implementing arbitration or non-disclosure agreements "as a condition of employment."[312] However, on October 3, 2018, the California Governor, Jerry Brown, vetoed the bill citing preemption concerns.[313] In a letter to the California State Assembly, Governor Brown wrote that "the direction from the Supreme Court . . . [is] clear — states must follow the Federal Arbitration Act and the Supreme Court's interpretation of the Act."[314] Recently, Governor Newsom signed AB 51.[315] The bill prohibits "a person from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit."[316] In simpler terms, an employer may not ask an employee to waive their right to file a civil complaint in court.[317] Lawmakers clearly expected this to be challenged in court, and attempted to circumvent any illegality by including the language: "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)."[318] However, within three months the California Chamber of Commerce, with two other plaintiffs, challenged the bill and a court in the Eastern District of California granted a preliminary injunction blocking its enforcement.[319] Interestingly, the

articles/1082204/the-limitations-of-ny-s-anti-sexual-harassment-law [https://perma.cc/5Q3A-L7VD].

312 Assemb. B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

313 *Status, AB-3080 Employment Discrimination: Enforcement*, CAL. LEG. INFO, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080 (last visited Jan. 21, 2019) [https://perma.cc/N5DD-LJ8U].

314 *Id.*

315 Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 (last visited Nov. 21, 2019) [https://perma.cc/7VG9-GK58].

316 *Id.*

317 Alana Thorbourne Carlyle, *Third Time's A Charm: Governor Signs Legislation Prohibiting Mandatory Arbitration Agreements*, NAT'L L. REV. (Oct. 30, 2019), https://www.natlawreview.com/article/third-time-s-charm-governor-signs-legislation-prohibiting-mandatory-arbitration [https://perma.cc/7RPH-2Q63].

318 *See* Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 (last visited Nov. 21, 2019) [https://perma.cc/7VG9-GK58].

319 *See* Chamber of Commerce of the U.S. v. Becerra, No. 2:19-cv-02456-KJM-DB, 2019 U.S. Dist. LEXIS 222561, at *2-4 (E.D. Cal. 2019).

plaintiffs did not raise concerns regarding preemption but focused instead on its potential disruption of employment contracts.[320]

On March 12, 2018, the New York Senate Legislature passed a comprehensive sexual harassment law "to help prevent sexual harassment in the workplace, ensure accountability, and combat the culture of silence that victims face."[321] A provision included in the bill banned mandatory arbitration in sexual harassment suits.[322] However, commentators suggest that the mandatory arbitration ban is without teeth, as it is likely preempted by the FAA.[323]

Due to preemption concerns, the only viable solution is federal legislation.[324] There has been limited success in passing extremely narrow laws constricting mandatory arbitration in special circumstances.[325] For example, the Military Lending Act prohibited lenders from including arbitration clauses in credit contracts with military personnel and their dependents.[326] Another example is the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") which bars lenders from using mandatory arbitration clauses in mortgage agreements.[327]

In 2017, parallel bills were introduced in both the U.S. House of Representatives and the U.S. Senate entitled, "Ending Forced Arbitration of Sexual Harassment Act of 2017."[328] Both bills received bipartisan support.[329] Both bills were under one thousand words, and contained a provision that made any "pre-dispute arbitration agreement"[330] invalid and unenforceable.[331] The bills addressed the

320 Plaintiffs' Notice of Motion and Motion for a Temporary Restraining Order, Chamber of Commerce v. Becerra, No. 2:19-cv-02456-KJM-DB, 2019 U.S. Dist. LEXIS 222561, at *2 (E.D. Cal. Dec. 29, 2019).

321 S7848A, 2018 Leg., 241st Sess. (N.Y. 2018) https://www.nysenate.gov/legislation/bills/2017/s7848 [https://perma.cc/6WKJ-QX4X].

322 *Id.*

323 Even a senator who had a hand in passing a similar state bill had concerns, stating that she doubted "whether the legislation 'actually . . . provide[d] any new protections' given that the . . . FAA, 'generally preempts state law that treats arbitration less favorably than other arrangements.'" Ostrager & Singer, *supra* note 311.

324 Sternlight, *Mandatory Arbitration*, *supra* note 5, at 205-08.

325 *See, e.g.*, Brunino, *supra* note 112, at 588-89.

326 *Id.*

327 *Id.*

328 *See* Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

329 *See* H.R. 4570; S. 2203.

330 *See* H.R. 4570; S. 2203.

331 *See* H.R. 4570; S. 2203.

severability doctrine by stating that "the applicability of this chapter . . . and the validity and enforceability of an agreement to [arbitrate] . . . [shall] be determined by a court, rather than an arbitrator."[332] Attorneys general from all fifty states encouraged signing this bill into law.[333] Despite this momentum, the bill did not progress past the congressional floor.[334]

The parallel bills garnered national attention, but there is little evidence as to why the bill did not survive.[335] The Senate bill was read twice, and then referred to the Committee on Health, Education, Labor, and Pensions.[336] The House bill was referred to the Subcommittee on Regulatory Reform, Commercial And Antitrust Law.[337] It is possible one reason that bill did not move forward is due to private lobbying by business groups.[338] However, there is no clear evidence of why the bill did not survive.[339]

In September 2019, the U.S. House attempted again with the "Forced Arbitration Injustice Repeal Act."[340] The bill proposes to prohibit all "predispute arbitration agreements" in the "employment, consumer, antitrust, or civil rights" arena. The bill is the broadest yet in its attempt to curtail use of forced arbitration. However, after passing the House, the bill met its fate once again on the Senate floor. It was read twice, and then referred to the Committee on the Judiciary.

With the current rancor in Washington, it is difficult to imagine bipartisan support on legislation curbed at ending sexual harassment.[341]

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[332] *See* H.R. 4570; S. 2203.

[333] Jacqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, HILL (Feb. 13, 2018, 6:33 PM), https://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual [https://perma.cc/TDQ6-XV4D].

[334] There is no clear evidence as to why the bill did not progress despite its bipartisan support. One might conjecture that the current divide in Washington was simply insurmountable. And while there was bipartisan support, Democrats supported the bill significantly more than Republicans. *See* Marina Fang, *Business Groups Might Be Quietly Killing A Bill That Would Bring Sexual Abuse Claims to Light*, HUFFPOST (May 17, 2018, 4:02 PM), https://www.huffingtonpost.com/entry/forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019e0a [https://perma.cc/6LJB-VL9N].

[335] *See, e.g.*, Fang, *supra* note 334; Thomsen, *supra* note 333.

[336] S. 2203.

[337] *See* H.R. 4570.

[338] *See* Fang, *supra* note 334.

[339] *See id.*

[340] Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

[341] *See* Ramesh Ponnuru, *Election Shows That U.S. Divisions Are Only Growing Wider*, BLOOMBERG (Nov. 7, 2018, 5:25 AM), https://www.bloomberg.com/opinion/articles/

However, with public outcry and pressure from constituents, it is not an impossibility.[342] For a narrower law — that is more likely to garner bipartisan support and therefore pass the legislature quickly — this Note recommends utilizing the 2017 bill.[343] As this bill had bipartisan support, it has the highest likelihood of survival in today's political climate.[344]

While this Note might prefer a more strongly worded bill or a more inclusive bill (banning mandatory arbitration in all employment discrimination cases, not just sexual harassment), a more inclusive bill will likely not gain bipartisan traction.[345] For example, in October 2018, Democrats in the House introduced the "Restore Justice for Workers Act" and attempted to ban mandatory arbitration in all employment contracts.[346] This expansive bill was rejected by every Republican in Congress.[347] In order to ensure protection for survivors as quickly as possible, Congress must act and unite to pass legislation that returns the FAA to its original scope.[348]

Some argue that extrajudicial activism is an effective way to counter mandatory arbitration. Instead of relying on the legislature, activists and organizers should turn their attention to available means of protest. Due to the consistent logjam on the congressional floor, this tactic may be an important complementary action to a legislative solution. Unfortunately, there are two layers of difficulty with this request. First, it requires that employees are aware that mandatory arbitration clauses exist in their contract.[349] Note that Google employees only resisted the

2018-11-07/congress-will-reflect-a-u-s-more-divided-than-ever [https://perma.cc/5PAT-NEHW].

342 *See* Brittany Shoot, *Congress Passes Bipartisan Bill Making Lawmakers Personally Liable for Paying Sexual Harassment Settlements*, FORTUNE (Dec. 13, 2018, 3:45 PM), http://fortune.com/2018/12/13/congress-sexual-harassment-policies-accountability-act-update-2018 [https://perma.cc/L3D5-4GMH].

343 *See* Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

344 *See* Alexia Fernández Campbell, *House Democrats Have a Sweeping Plan to Protect Millions of Workers' Legal Rights*, VOX (NOV. 14, 2018, 1:40 PM), https://www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats [https://perma.cc/2NED-7YQE].

345 *See id.*

346 Restoring Justice for Workers Act, H.R. 7109, 115th Cong. (2018).

347 Fernández Campbell, *supra* note 344.

348 *See supra* Part IV.

349 *See* Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html [https://perma.cc/45WT-5EPP].

existence of arbitration clauses in their employee contracts *after* it was leaked that a top Google executive walked away with a $90 million severance package after facing credible allegations of sexual misconduct.[350] Second, it requires that employees organize on an extremely large scale adding additional strain on a potentially disadvantaged workforce.

CONCLUSION

The arbitration agreements deemed protected by the FAA are unrecognizable to the ones envisioned by the Congress of 1925.[351] The Supreme Court has vastly expanded the power and purview of the FAA while striking down contract defenses that were potential vehicles for advocates.[352] Mandatory arbitration reduces an employee's opportunities to win against their employers,[353] reduces the awards they can receive from their arbitrators,[354] reduces public awareness of corporate abuse,[355] and reduces the likelihood that an employee brings a claim at all.[356] These negative consequences are particularly detrimental to sexual harassment victims.[357] Sexual harassment survivors need to know that they are not alone, especially if victims are enduring similar behavior at the same company. If the nation is serious about listening to the rising tide of voices from the #metoo movement, mandatory arbitration must be addressed through federal legislation.[358]

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350 *Id.*

351 *See supra* Part I.

352 *See supra* Part III.

353 Comsti, *supra* note 10, at 9-10 ("A recent social science study found that employees are almost twice as likely to prevail in federal court than in forced arbitration.").

354 *Id.* ("In addition, judges and juries awarded employees damages that were 150 percent greater than those received in arbitration.").

355 *Id.*

356 Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J. (Jan. 25, 2018, 5:30 AM), https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201 [https://perma.cc/D4VF-Y523].

357 *See, e.g.*, Gerstein, *supra* note 45.

358 *See supra* Part IV.