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# MANDATORY ARBITRATION: HOW THE CURRENT SYSTEM PERPETUATES SEXUAL HARASSMENT CULTURES IN THE WORKPLACE

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**MANDATORY ARBITRATION: HOW THE CURRENT  
SYSTEM PERPETUATES SEXUAL HARASSMENT  
CULTURES IN THE WORKPLACE**

*Marsha Levinson\**

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## I. INTRODUCTION

In 2017, after social media exploded with outrage surrounding the sexual harassment and assault allegations against media mogul Harvey Weinstein, hundreds of women came forward revealing personal stories of harassment in the workplace.<sup>1</sup> The most prominent alleged culprits include NBC News anchor Matt Lauer, television host and journalist Charlie Rose, Senator Al Franken, comedian Louis C.K., and more.<sup>2</sup> This flood of accusations by so many women, many of whom remained silent for years, poses a grim question regarding the effectiveness of current anti-discrimination laws.

Quite conceivably, the failure to adequately protect employees stems from the lack of protection provided by mandatory arbitration agreements. Today, more than sixty million Americans have mandatory arbitration clauses in their employment contracts.<sup>3</sup> These clauses are generally required as a condition of employment and keep legal proceedings between the employer and employee out of the public eye, often allowing the accused to stay in their job while pushing victims out.<sup>4</sup>

Arbitration, generally, is less formal, less expensive, and less time consuming than a court proceeding, partially because it is run by an arbitrator, instead of a judge, who is not required to adhere strictly to the

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\* Marsha Levinson, B.A. University of California, Santa Barbara; J.D. Santa Clara University. The research that went into this writing has been nothing less than eye-opening. I would like to thank Professor Gary Spitko for his candid honesty and scrutiny in editing this Note, as well as all of the other wonderful individuals who helped edit this article—especially my partner Bradley Urso and my law review team here at Santa Clara Law. I am appreciative to have this opportunity to publish my first, but not last, writing piece.

1. Dan Corey, *Sexual Misconduct: A Growing List*, NBC NEWS (Jan. 10, 2018), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>.

2. *Id.*

3. ALEXANDER J.S. COLVIN, ECONOMIC POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION* (Sept. 27, 2017), <http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

4. *See infra* Section IV.A.

law.<sup>5</sup> It comes as no surprise then that throughout the last few decades, as the number of employment litigation suits increased, many employers have turned to mandatory arbitration agreements.<sup>6</sup>

Now, much attention is being paid to the expanded use of mandatory arbitration clauses in employment contracts as well as the attendant harms these clauses pose to employees.<sup>7</sup> Some critique mandatory arbitration agreements for stripping employees of their substantive rights and call for their invalidation.<sup>8</sup> In contrast, supporters of mandatory arbitration cite the expediency and simplicity of arbitration as outweighing the inadequacy of judicial review and discovery inherent in the process.<sup>9</sup>

On its face, mandatory arbitration seems to insult public policy. It deprives citizens of a judicial forum provided to them by law.<sup>10</sup> However, perhaps we should judge the validity of mandatory arbitration based on what is to be the best practice for a majority of people, rather than on facets of public policy. In light of the overworked, underfunded, Equal Employment Opportunity Commission (“EEOC”), and backlogged federal courts, both employers and employees may actually be better off with mandatory arbitration. This result, however, depends on whether the mandatory arbitration system can offer due process guarantees and fair resolutions.

This Note will argue for the continued use of arbitration agreements as long as certain safeguards are implemented to preserve individual civil rights. Currently, most employees have limited access to the court system.<sup>11</sup> Arbitration is a supplement to the court system that provides both employees and employers with a fast and

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5. See generally THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 49–51 (stating that arbitration should be more attractive to employers for dispute resolution because it is less costly and less formal than the courts), <http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DunlopCommissionFutureWorkerManagementFinalReport.pdf> (last visited Oct. 5, 2018).

6. Elizabeth A. Roma, Note, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL’Y & L. 519, 520 (2004).

7. See, e.g., Christine Hines, *Righting a Financial Wrong*, PUBLIC CITIZEN (Feb. 27, 2014), <http://www.citizen.org/documents/righting-a-financial-wrong-forced-arbitration-report.pdf>.

8. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 643 (1996).

9. See Kristen Decker & William Krizner, *The Fallacy of Duffield v. Robertson and Rosenberg v. Merrill Lynch: The Continuing Viability of Mandatory Pre-Dispute Title VII Arbitration Agreements in the Post-Civil Rights Act of 1991 Era*, J. DISP. RESOL. 141, 153 (1998).

10. See Roma, *supra* note 6, at 520 (arguing that arbitration circumvents the traditional judicial process).

11. See Decker & Krizner, *supra* note 9.

relatively inexpensive alternative method of dispute resolution.<sup>12</sup> If the entire mandatory arbitration system were to be abandoned, many claims would go unheard. In order to safeguard civil rights, however, the current arbitration system must be modified. Specifically, the procedures currently in place are ill-equipped to resolve disputes involving civil rights claims such as sexual harassment. Therefore, this Note proposes the retention of mandatory arbitration but with specific reforms that must be enacted by Congress in order to be effective.

Section II will provide a history of mandatory arbitration and summarize the common societal perceptions towards mandatory arbitration as well as recent efforts that attempt to address its perceived shortcomings. This section will also discuss recent legislation regarding mandatory arbitration and sexual harassment in the workplace, and the “knowing and voluntary standard”<sup>13</sup> for the fair enforcement of compulsory arbitration agreements.

Section III will identify the issues analyzed in this Note and Section IV will then delve into the legal and sociological literature on mandatory arbitration and sexual harassment in the workplace in order to analyze why existing laws against sexual harassment fail to be preventative. This analysis will also discuss the role of arbitration in perpetuating harassing work environments and will use Fox News as a case study, highlighting some approaches for rectifying the problem.

Finally, this Note will suggest that a more regulated system of arbitration is needed, reformed to serve the needs of employees. In order to resolve the uncertainty surrounding the use of mandatory arbitration, this Note proposes that Congress amend the Federal Arbitration Act to grant States some authority to regulate arbitration and discusses potential strategies for doing so.

## II. BACKGROUND

The emergence of mandatory arbitration over the last few decades has changed our legal system considerably.<sup>14</sup> While arbitration has historically been used as an alternative to litigation, in the past it was knowingly and voluntarily agreed upon, often by two or more businesses who had equal bargaining power.<sup>15</sup> With the encouragement of the

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12. See David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 100 (1999) [hereinafter Sherwyn et al., *Mandatory Arbitration*] (“For employers, the reduced cost, increased speed, private nature, and elimination of juries make arbitration an attractive option.”).

13. See *infra* Section II.F.

14. See *infra* Section II.C.

15. *Id.*

United States Supreme Court, businesses jumped at the opportunity to mandate arbitration of future employment disputes rather than allow those disputes to be brought in court.<sup>16</sup> Today, the involuntary imposition of arbitration in employment agreements has become a controversial topic.<sup>17</sup>

*A. What Are Mandatory Arbitration Agreements?*

Throughout the last few decades, mandatory arbitration clauses have become increasingly prevalent in employment contracts.<sup>18</sup> A mandatory arbitration agreement, generally referred to as a pre-dispute arbitration agreement, is an agreement between an employer and employee to resolve future employment disputes by binding arbitration.<sup>19</sup> Employers will include arbitration agreements as a condition of employment, tailoring agreements as they see fit.<sup>20</sup> Mandatory arbitration agreements can be inserted into employment contracts, employee handbooks, or stand-alone agreements.<sup>21</sup> Arbitration agreements can be broad, covering a variety of employment disputes, or can be more limited, covering only particular disputes.<sup>22</sup> Additionally, employers can either adopt rules for the arbitration proceeding from a neutral agency, such as the American Arbitration Association, or may formulate their own rules.<sup>23</sup> Arbitration places total control of a dispute into the hands of a third party by allowing the arbitrator to render a binding decision on behalf of the parties.<sup>24</sup>

*B. What are the Benefits and Drawbacks of Mandatory Arbitration Agreements in the Employment Context?*

Scholars, judges, and legislators are in hot debate over the fairness of mandatory arbitration of statutory claims.<sup>25</sup> Critics cite the “disparity of bargaining power between employers and employees, the involuntary

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16. *Id.*

17. *See infra* Section II.B.ii.

18. *See* Colvin, *supra* note 3.

19. Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 594 (1995).

20. *Id.*

21. *Id.*

22. *Id.* at 594–95.

23. *Id.* at 595.

24. Robert J. Landry & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL’Y 479, 483 (2008).

25. Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1892 (2000).

nature of the arbitral process, the lack of judicial guidance and oversight, and the submersion of important public law matters into a private process” to rationalize why compulsory arbitration of statutory claims should not be enforced.<sup>26</sup> In sum, critics fear that the process generates pro-employer outcomes at the expense of employees’ rights. On the other hand, proponents of mandatory arbitration argue that efficiency and accessibility to a legal forum are critical benefits of this system.<sup>27</sup> Others make the point that effective arbitration allows more claims to be resolved before the employment relationship suffers irreversible harm.<sup>28</sup> Generally, supporters feel as if mandatory arbitration actually provides employees with a *better* chance at resolving their dispute.<sup>29</sup>

### *1. Benefits of Mandatory Arbitration*

Advocates of mandatory arbitration see it as a protection against the “evils” of litigation.<sup>30</sup> The virtues of mandatory arbitration parallel that of arbitration, generally. In addition to being less expensive, arbitration offers a more informed, timely, and private resolution of the dispute than litigation.<sup>31</sup> Particularly in an employment context, the less formal resolution of arbitration may be useful in preserving a positive employment relationship that may otherwise be harmed by lengthy litigation.<sup>32</sup> Arguably, one of the greatest attributes of arbitration is the ability to select a decision maker with expertise in employment law matters.<sup>33</sup> This allows for a more informed and predictable decision on

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26. Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 350 (1997).

27. *Eljer Mfg. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (“[Arbitration] is a private system of justice offering benefits of reduced delay and expense.”).

28. Siderman, *supra* note 25, at 1893.

29. *See id.*

30. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 UNLV L. REV. 1631, 1638 (2005) (listing the “evils of litigation” as: publicity, jury awards, punitive damages, extensive discovery, and class actions) [hereinafter Sternlight, *Creeping Mandatory Arbitration*].

31. *See* Sherwyn et al., *Mandatory Arbitration*, *supra* note 12.

32. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001) (arguing that “unlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement”).

33. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 455 (1996).

the merits and, more importantly, a decision that both parties are likely to accept as legitimate.<sup>34</sup>

For the court system, mandatory arbitration increases judicial efficiency by reducing the courts' docket.<sup>35</sup> Without arbitration, court dockets would become severely overloaded with claims that could each take several years to even reach trial.<sup>36</sup>

Mandatory arbitration also presents benefits for employees. For example, arbitration can be less intimidating than the court system,<sup>37</sup> and arbitration of employment discrimination claims generally takes less than half the time it takes to litigate them.<sup>38</sup> Additionally, because it is difficult for employees to retain competent legal counsel for routine or marginal cases,<sup>39</sup> many employees may not be able to properly enforce their in court.<sup>40</sup> As any law student will tell you, the rules of evidence within the courtroom are no joke—and certainly not something a lay person can quickly learn. Arbitration, by contrast, provides a sure forum to have employees' problems addressed by an informed neutral.<sup>41</sup> Additionally, the lower monetary cost of arbitration, coupled with its informal nature, allows some employees to bring claims that they otherwise would not have been able to bring in court.<sup>42</sup>

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34. See Edward Brunet, *The Core Values of Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3, 13 (Edward Brunet et al. eds., 2006) (“Trust of the expert arbitrator is essential to support the concept of finality.”). Cf. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 866 (2008) (suggesting that “[u]nlike judges, arbitrators can be selected for their sensitivity to local context, which might plausibly make them superior to courts at tailoring public norms to specific workplaces, not to mention better able to identify or create workplace-specific norms in areas not governed by external law”).

35. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (citing the House report developed at the enactment of the FAA stating “[i]t is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable”).

36. *Id.*

37. Donna R. Milhouse, *Agreements to Arbitrate: Facilitating Employment Dispute Resolution of Statutory Claims*, 74 MICH. BUS. L.J. 1158, 1161 (1995).

38. See Richard A. Bales, *A Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 343 (2006).

39. See Siderman, *supra* note 25, at 1894.

40. *Id.* at 1894–95.

41. *Id.*

42. Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 8 (1998); Susan A. Fitzgibbon, *Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS U. L.J. 1401, 1412 (2000) (concluding that “[b]ased on experience in labor arbitration, *pro se* representation may also be used more effectively and with fewer risks than in court because of the more informal nature of arbitration”); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 651–52 (asserting that “the savings in time and expense that arbitration brings may allow an employee to pursue claims that he or she would otherwise be reluctant or unable to press”).



Finally, proponents weigh the drawback of not being able to bring a claim in court against the notion of not having the ability to arbitrate at all. For employees who lack a mandatory arbitration agreement, voluntary arbitration becomes unlikely.<sup>43</sup> It is unlikely that employers, knowing that an employee cannot bring a claim to court, will volunteer to arbitrate the same claim.<sup>44</sup> If, however, employers are bound to arbitrate, any claim will be heard.<sup>45</sup>

### 2. *Three Major Critiques of Mandatory Arbitration*

Critics' argument that mandatory arbitration is detrimental and unfair to individuals has many subparts; however, this Note will focus on three major critiques relating to the sexual-harassment-in-the-workplace predicament. The first concern regards the arguably nonconsensual nature of mandatory arbitration. The second concern is that employers enjoy informational and bargaining advantages over employees, and in using these advantages, may impose an arbitration process that favors the employer even more. And the final critique arises in the context of mandatory arbitration of statutory right claims such as Title VII discrimination.

#### *a. The Nonconsensual Nature of Pre-dispute Arbitration Agreements*

One major critique pertaining to mandatory arbitration is that the agreements are essentially nonconsensual because employees do not typically read or understand arbitration clauses, and even if they do, have no option but to sign them.<sup>46</sup> This critique stems from the broader concern that employers often use their disproportionate bargaining powers to make employees sign arbitration agreements that grossly favor the employer.<sup>47</sup>

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43. Siderman, *supra* note 25, at 1894.

44. *Id.*

45. *Id.* (citing RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 8 n.87 (1997)) (arguing that while compulsory arbitration prevents one percent of claimants who could get a lawyer to take their case from going to court, it opens up a forum for those claimants who would otherwise be shut out of the system because their claims are too small); *see also* Eric Schnapper, *Advocates Deterred by Fee Issues*, NAT'L L.J., Mar. 28, 1994, at C1.

46. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649 ("even to the extent that consumers might read and understand an arbitration clause imposed on a predispute basis, psychologists have shown that predictable irrationality biases will prevent them from properly evaluating the costs and benefits of accepting such a clause.").

47. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(3), (7) (2009) (asserting that "[m]ost consumers and employees have little or no meaningful option whether to submit their claims to arbitration . . ." and that "[m]any corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals . . .").

Empirical studies show that only a miniscule percentage of adults read form agreements, and of these, an even smaller number understand what they read.<sup>48</sup> Moreover, even if individuals read and understand mandatory arbitration clauses, employment contracts are offered on a “take it or leave it” basis.<sup>49</sup> As a result, individuals who are limited in employment options have little choice but to sign such agreements. In addition, people tend to be overly optimistic, and often under-predict the need they might have to bring a future claim and thus undervalue what they are losing by giving up the right to sue (i.e. the right to bring employment related claims to trial before a judge or jury).<sup>50</sup>

Courts view arbitration clauses as legitimate because they see the clauses as a bargained-for element of a contract.<sup>51</sup> Contracts are to be upheld when two parties voluntarily agree to be bound without undue influence or other unconscionable factors.<sup>52</sup> However, more often than not, parties to mandatory arbitration contracts are not on equal footing—for precisely the reasons described above. In short, the typical employee lacks the knowledge or ability to make an informed decision with respect to such an agreement.<sup>53</sup> The lack of understanding of what arbitration entails prohibits employees from properly consenting to the agreement. As a result of this nonconsensual nature of the contract, critics urge that mandatory arbitration is wrong as a matter of public policy.<sup>54</sup>

### *b. Structural and Procedural Concerns*

A second major critique of mandatory arbitration agreements is that they may often be slanted in favor of the business.<sup>55</sup> Instead of judges, arbitration cases are decided by arbitrators, hired by companies that routinely give them business.<sup>56</sup> Critics argue that a “repeat provider”

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48. See Alan M. White & Cathy L. Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233 (2002) (analyzing literacy research which shows that a surprisingly high percentage of literate adults are unable to extract pertinent information from form contracts); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1059–60 (1998).

49. See *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997) (finding that many employees are not able to negotiate the terms of their employment contract).

50. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW & ECONOMICS 13, 39 (2000); Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649.

51. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (noting that the legislative intent behind the FAA was to put arbitration agreements on the same level as other contracts).

52. See *id.* (expressing the importance of upholding contracts).

53. Haagen, *supra* note 48, at 1059.

54. See EEOC Notice Number 915.002, Section VII, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, (July 10, 1997), <https://www.eeoc.gov/policy/docs/mandarb.html> [hereinafter EEOC Notice].

55. See Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649–50.

56. *Id.*

problem arises when companies give this repeat business to arbitrators.<sup>57</sup> Essentially, they fear that arbitrators may become biased toward the employer if the employer frequently uses their services.<sup>58</sup> Although providers vehemently deny the charge that they are biased, critics maintain that, consciously or subconsciously, arbitrators may slant the result in companies' favor in order to retain business.<sup>59</sup>

Even if arbitrators are not biased, employers still have the advantage of being a "repeat player."<sup>60</sup> The idea here is that employees who participate in arbitration are hindered because (1) they lack information about arbitrators (such as experience and previous employment), and (2) they have less experience than employers who have likely participated in arbitration proceedings before.<sup>61</sup>

Of course, while there exists extensive empirical data supporting the "repeat player" effect, some scholars have pointed out that the data is ultimately misleading because it includes a large proportion of claims by lower-paid employees who may choose the arbitral process even for frivolous claims, because it is often free.<sup>62</sup> Other scholars argue that even if a repeat player effect does exist, litigation, too, provides such an effect for lawyers who represent employers and employees in court. However, because lawyers are more likely to take claims going to litigation (as opposed to arbitration) due to the potential for higher earnings,<sup>63</sup> the scale of fairness is more balanced in litigation.

### *c. Concerns Relating to Statutory Claims*

The final concern arises when mandatory arbitration is applied to Title VII and other statutory rights actions. Mainly, critics of employment arbitration argue that it does not serve the policy goals of

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57. See, e.g., Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 35–37 (1999).

58. Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 698–99 (2010).

59. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1650.

60. See generally Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 L. & SOC'Y REV. 95, 97–104 (1974) (explicating typology of parties that divides litigants into "repeat players" and "one-shotters" and discussing each type of party's incentives and advantages in legal system).

61. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 208–13 (1997) (reporting results of her study on employment arbitrations, in which employees win less frequently and win less of what they demanded when arbitrating against repeat-player employer as compared to when arbitrating against one-shot employer); Russell Evans, Note, *Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in Employment Contracts Survive a "Fairness" Analysis?*, 50 HASTINGS L.J. 635, 644 (1999).

62. See Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 495, 530 (2010).

63. Bingham, *supra* note 61, at 198–99.

anti-discrimination laws as well as a court proceeding would.<sup>64</sup> Opponents believe that arbitration proceedings evade public accountability, and that compared to public adjudication, arbitration is less effective at general deterrence and development of legal precedent.<sup>65</sup>

The argument pertaining to accountability is that the private nature of mandatory arbitration prevents employees from holding their employers accountable to the public. Employers are less likely to learn of an arbitration outcome that punishes another employer's discrimination.<sup>66</sup> When a matter is addressed by the court, however, other employers are exposed to the resulting consequences and are thus deterred from engaging in discrimination themselves.<sup>67</sup>

A confidential forum also denies the public access to knowledge of harmful business practices, such as sexual harassment and discrimination.<sup>68</sup> While arbitration often results in a private award, litigation of discrimination claims develops and refines legal precedent and educates the public about the legality of certain employment practices.<sup>69</sup> This developed law not only governs future disputes, but also provides employers with guidelines for appropriate conduct and reinforces cultural norms that disavow invidious discrimination.<sup>70</sup>

The lack of public accountability and transparency addressed here will be further explored in this Note, illuminating it as one factor that must be changed in order to make mandatory arbitration fairer for employees.<sup>71</sup>

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64. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999) (arguing that "arbitration is not an effective forum in which to satisfy the public goals of employment discrimination statutes, even when employees are accorded a fair hearing").

65. *Id.* at 400, 437–38.

66. *EEOC Policy Statement on Mandatory Arbitration*, reprinted in 133 Daily Lab. Rep. (BNA) at V-A-1 (July 11, 1997) (arguing that arbitration's private nature weakens general deterrence).

67. *Id.* at IV-C (July 11, 1997) ("By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination.").

68. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 197 (finding that cases outside of the public forum allow fewer people to engage in dialogue on the issue); see also *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358–59 (1995) (stating that litigation reveals incidents of discrimination that may impact the entire industry).

69. *EEOC Policy Statement*, *supra* note 66, at IV-A (noting that "[a]bsent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, . . . or sexual harassment . . ."); Moohr, *supra* note 64, at 432.

70. Moohr, *supra* note 64, at 400, 437–38 ("In articulating the standard of acceptable conduct, an adjudication reaffirms these values and forms community standards.").

71. See *infra* Section IV.B.iii.

### C. *The Evolution of Mandatory Arbitration in the United States*

Voluntary binding arbitration has a long and mostly honorable history in the United States.<sup>72</sup> Traditionally, businesses sought to resolve disputes through binding arbitration because of the expertise, speed, efficiency, privacy, and neutral decision makers that arbitration provided.<sup>73</sup> Internationally, arbitration is favored because it allows businesses to feel secure against potential biases from another country's courts and to obtain results that are more enforceable in another country than a court decree.<sup>74</sup> Courts themselves have traditionally supported voluntary binding arbitration, enforcing both arbitral awards and post-dispute agreements to arbitrate.<sup>75</sup> However, pre-dispute agreements to arbitrate, i.e. mandatory arbitration clauses, have a more complex history, with courts originally refusing to enforce them.<sup>76</sup> This of course changed with the passing of the Federal Arbitration Act. However, until recently, these pre-dispute agreements were not used by businesses to require employees to resolve disputes.<sup>77</sup>

#### 1. *The Federal Arbitration Act (FAA)*

In order to understand why mandatory arbitration became widely acceptable, one must understand how the Supreme Court interprets the Federal Arbitration Act (the "FAA").<sup>78</sup> When Congress passed the FAA in 1925 it required courts to grant motions to compel arbitration pursuant to arbitration agreements.<sup>79</sup> The FAA provides that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>80</sup> Therefore, under the FAA, parties entering into an

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72. William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, WASH. U. L.Q. 193, 194 (1956) (examining uses of arbitration in New York, beginning with the Dutch West India Company in the 1600s, and concluding that "arbitration has been an important means of deciding disputes since the earliest days of European settlement in New York in the seventeenth century").

73. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1635.

74. *Id.* (citing GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 7-11 (2d ed. 2001)). Arbitration agreements are typically more enforceable in foreign countries than are court decrees because over one hundred countries have adopted the New York Convention requiring them to enforce arbitral awards issued by other signatory countries.

75. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1636.

76. *See, e.g.,* *Tobey v. Bristol*, 23 F. Cas. 1313, 1319-23 (C.C.D. Mass. 1845) (No. 14,065) (refusing to use equitable powers to enforce pre-dispute agreement to arbitrate).

77. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1636.

78. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1-16 (2000)).

79. *Id.*

80. 9 U.S.C. § 2 (1994) (stressing that arbitration agreements entered into voluntarily will be upheld).

arbitration agreement are contractually bound to arbitrate any dispute that arises under said contract.<sup>81</sup>

A series of Supreme Court decisions then expanded the FAA's reach to cover almost all employment contracts, regardless of whether the parties actually had an opportunity to bargain or negotiate the terms.<sup>82</sup> Since then, the number of arbitration agreements has increased exponentially.

## 2. Supreme Court Jurisprudence Leading to the Emergence of Mandatory Arbitration

Section 2 of the FAA states that “a written provision in . . . a contract evidencing a transaction . . . arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>83</sup> In *Moses H. Cone Memorial Hospital v. Mercury Construction*,<sup>84</sup> the Court interpreted Section 2 of the FAA as Congress' way of promoting a liberal federal policy favoring arbitration.<sup>85</sup> The Court explained that because the FAA favors arbitration, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.<sup>86</sup> The practical impact of this decision is that whenever courts must decide whether a claim can be resolved through arbitration, the court's decision will be slanted towards arbitration.

The significant rise of mandatory arbitration agreements in employment contracts that followed *Moses H. Cone Memorial Hospital* can be attributed to a line of United States Supreme Court cases that permitted the use of arbitration in situations that businesses had never previously thought acceptable.<sup>87</sup> In the first significant case regarding mandatory arbitration in the employment context, *Alexander v. Gardner-Denver*,<sup>88</sup> the Supreme Court found that a compulsory arbitration clause in a collective bargaining agreement did not preclude a Title VII federal

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81. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (emphasizing that a party making an agreement to arbitrate should be held to that decision).

82. See *infra* Section II.C.ii.

83. 9 U.S.C. § 2 (1925).

84. 460 U.S. 1 (1983).

85. *Id.* at 24 (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”).

86. *Id.* at 24–25.

87. See Katherine V.W. Stone & Alexander J.S. Colvin, Report, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECONOMIC POLICY INST. (Dec. 7, 2015), <http://www.epi.org/publication/the-arbitration-epidemic/>.

88. 415 U.S. 36 (1974).

claim.<sup>89</sup> This meant that an employee had both a contractual right to submit a race discrimination grievance to arbitration and an independent statutory right to file a lawsuit under Title VII.<sup>90</sup> This decision weakened the influence of mandatory arbitration clauses in reference to employment contracts, but only temporarily.<sup>91</sup>

In 1991, the Court's attitude toward arbitration had changed, as evidenced by its holding in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>92</sup> In *Gilmer*, the Court held that individual statutory claims brought under the Age Discrimination in Employment Act ("AEDA") may be subject to valid pre-dispute arbitration agreements.<sup>93</sup> In rejecting the plaintiff's argument that arbitration of age discrimination was inconsistent with the ADEA's purpose, the Court explained that an agreement to arbitrate an ADEA claim is not a waiver of substantive rights, but merely an agreement to resolve claims arising from those rights "in an arbitral, rather than a judicial, forum."<sup>94</sup> The Court reasoned that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>95</sup> This idea was subsequently applied by lower courts to hold that claims arising under Title VII may also be the subject of pre-dispute arbitration agreements.<sup>96</sup>

*Gilmer* also held that the FAA manifests a "liberal federal policy favoring arbitration agreements," and preempts state statutes that conflict with this approach.<sup>97</sup> Thereby effectively making the FAA the

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89. *Id.* at 48–49 (inferring that Title VII supplements, rather than supplants, existing laws relating to employment discrimination).

90. *Id.* at 49–50 (the Court reasoned that although arbitration is efficient and inexpensive the informal proceedings were not the correct forum for deciding statutory claims); Title VII of the Civil Rights Act of 1964 is a federal law that prohibits sexual harassment. 29 U.S.C. § 2000e-2. Under Title VII, harassment based on race, color, sex, national origin, or religion constitutes discrimination. *Id.*

91. Although the Court today recognizes arbitration as an appropriate forum for adjudicating an individual's statutory claim, it has not expressly overruled *Gardner-Denver*; in later decisions the Court has found arbitration appropriate, as it provides a neutral forum for dispute resolution, so long as individual substantive rights are protected. *See Roma*, *supra* note 6, at 525.

92. 500 U.S. 20, 26 (1991).

93. *Id.* at 35. *Gilmer* argued that requiring arbitration of employment discrimination claims would be inconsistent with public policy and undermine the role of the EEOC, but the Court rejected both arguments. *Id.* at 26–29.

94. *Id.* at 26.

95. *Id.* at 28.

96. *See, e.g., EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749–50 (9th Cir. 2003) (en banc) (ADA and Title VII); *Rosenberg v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999) (Title VII); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (Title VII).

97. *Gilmer*, 500 U.S. at 24–25 (reasoning that the FAA's purpose was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common

law of all lands. However, because the agreement at issue in *Gilmer* was within a securities registration application, and not an employment contract, the Court ultimately failed to address whether Section 1 of the FAA applied to *all* employment contracts.<sup>98</sup> This question remained unsolved.<sup>99</sup>

Ten years later, the Court addressed *Gilmer*'s unsolved question in *Circuit City Stores v. Adams*.<sup>100</sup> There, the Court expressly ruled that the FAA applied to all employment contracts except for those specifically exempted.<sup>101</sup> This interpretation was extremely narrow because the FAA only exempts employment contracts of transportation workers.<sup>102</sup> *Circuit City Stores* reinforced case law from lower federal courts and further encouraged the use of mandatory arbitration contracts.<sup>103</sup>

After the Supreme Court issued these decisions, which asserted that arbitration is "favored" and permitted, businesses jumped at the opportunity to compel arbitration in contexts where they previously assumed such agreements would not be enforced.<sup>104</sup>

#### *D. Mandatory Arbitration Today*

Since *Gilmer*,<sup>105</sup> arbitration has become a preferred method of dispute resolution for many employers who view it as faster and more cost effective than litigation.<sup>106</sup> Today, more than fifty-five percent of

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law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

98. *Id.* at 26 (holding that arbitration may not be appropriate for all statutory claims and that in determining whether arbitration is suitable, courts should look to the text of the statute, its legislative history, and whether or not there is an "inherent conflict" between the statutory purpose and arbitration).

99. Although the majority in *Gilmer* did not address whether the FAA applied to employment contracts, the dissent discussed the issue and concluded that Congress did not intend for the FAA to apply to employment contracts at all. *See id.* at 39–41. Justice John Paul Stevens wrote "[T]he FAA specifically was intended to exclude arbitration agreements between employees and employers." *Id.* at 40 (Stevens, J., dissenting).

100. 532 U.S. 105 (2001).

101. *Id.* at 122–23.

102. *Id.* at 119.

103. Landry, *supra* note 24, at 488 ("The *Circuit City* decision clarified the broad scope of the FAA and seemed to affirm employers' use of mandatory arbitration provisions in employment contracts").

104. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1638.

105. 500 U.S. at 26.

106. Bales, *supra* note 19; *see also* Equal Employment Opportunity Commission Alternative Dispute Resolution Policy Statement, *reprinted in* 133 Daily Lab. Rep. (BNA) at E-4 (July 17, 1995) (recognizing that if the circumstances are appropriate that ADR techniques can provide "faster, less expensive, less contentious, and more productive results in eliminating workplace discrimination"); *see* Bingham, *supra* note 61, at 189 (citing to studies that provide evidence of increase between 1991 and 1995 in number of employers using predispute employment arbitration agreements); Lisa B. Bingham, *On Repeat Players*,



nonunion, private-sector employees are bound by arbitration clauses.<sup>107</sup> Of the employers who require mandatory arbitration, about thirty percent include class action waivers—meaning that employees also lose their right to pursue collective legal action to address widespread rights violations.<sup>108</sup>

Over this same period of time, however, state legislatures and courts have sought to regulate and invalidate various forms of arbitration agreements that they believed to be threatening to the interests of the state, its businesses, and its employers.<sup>109</sup> However, most of the attempts to pass legislation or implement case law contrary to mandatory arbitration have been preempted by the FAA.

It is unclear why states nevertheless attempt to pass legislation that is preempted. Professor Sarah Rudolph Cole, at the Moritz College of Law, speculated that states may attempt to pass preempted legislation as a “purely symbolic” gesture, with the hope that such legislation might spur Congress to amend the FAA to allow states greater leeway to regulate arbitration.<sup>110</sup> Professor Gary Spitko, at Santa Clara University School of Law, theorized that states might simply perceive the need for arbitration regulation to be so great that it is in their best interest to proceed with arguably preempted regulations until the Supreme Court rules on the preemption of the specific effort at issue.<sup>111</sup>

#### *E. Recent Legislation Regarding Mandatory Arbitration and Sexual Harassment in the Workplace*

While the general climate towards mandatory arbitration among courts and legislatures is positive, many have found mandatory arbitration agreements to be problematic in the context of statutory

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*Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225 (1998) (asserting that “[t]he use of employment arbitration began to accelerate dramatically after the United States Supreme Court decided *Gilmer*”); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 411 (2007) (reviewing empirical studies and concluding that “[a]lthough there are limitations to the existing studies, they do show a consistent pattern of significant expansion of employment arbitration in the decade and a half since the *Gilmer* decision” and hypothesizing that “employment arbitration is likely already a more widespread system for governing employment relations than collective bargaining and labor arbitration”).

107. Colvin, *supra* note 3.

108. *Id.*

109. See, e.g., Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL., 759, 785–87 (2001) (discussing various state statutes that purport to protect certain categories of disputants from compliance with predispute arbitration agreements).

110. *Id.* at 789.

111. E. Gary Spitko, *Federal Arbitration Act Preemption of State Public Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEG. L. REV. 1, 4 (2015).

complaints such as sexual assault, harassment, and discrimination.<sup>112</sup> In recognition of the harms caused by forced arbitration of these types of complaints, some officials have taken steps to address the issue.<sup>113</sup> The actions taken reflect a general understanding that forced arbitration can be unfair to employees; however, the measures taken nonetheless fall short of fully protecting employees.<sup>114</sup>

In 2009, President Obama signed into law the first federal legislation that prevents employers from forcing binding arbitration on their employees.<sup>115</sup> The Franken Amendment to the 2010 Defense Appropriations Bill<sup>116</sup> was a small victory for opponents of arbitration, as it prevented the use of any funds made available under the Defense Appropriation Act if a contractor or subcontractor providing services or equipment under the Act requires its employees to arbitrate certain claims.<sup>117</sup> These claims included: those arising under Title VII, or any torts relating to (or arising out of) sexual assault, harassment, intentional infliction of emotional distress, and more.<sup>118</sup>

However, in the same year the Franken Amendment was passed, the Rape Victims Act of 2009<sup>119</sup> failed. If enacted, the act would have made any agreement to arbitrate a dispute unenforceable with respect to claims arising out of rape.<sup>120</sup> Unlike the Franken Amendment, the Rape Victims Act would have applied to all employers, not just to federal contractors receiving funds under the particular act.<sup>121</sup>

The approach taken by the Franken Amendment was subsequently extended to some federal contracts through the Fair Pay and Safe Workplaces Executive Order of 2014 (“FPSW”).<sup>122</sup> The FPSW order bars all federal contractors with contracts of greater than one million dollars from enforcing mandatory arbitration agreements in claims based on Title VII, or tort claims involving sexual assault or harassment.<sup>123</sup>

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112. See generally EEOC Notice, *supra* note 54; see Landry, *supra* note 24; see Katherine V.W. Stone & Alexander J.S. Colvin, Report, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*, ECONOMIC POLICY INST. (Dec. 7, 2015), <http://www.epi.org/publication/the-arbitration-epidemic/>.

113. See *infra* notes 116–29.

114. DAVID SELIGMAN, NAT’L CONSUMER LAW CTR., MODEL STATE CONSUMER & EMPLOYEE JUSTICE ENFORCEMENT ACT 3 (Nov. 2015), <https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf>.

115. See Dep’t of Defense Appropriations Act of 2010, Pub. L. No. 111-118 § 8116, 123 Stat. 3409, 3454 (2010) (Franken Amendment).

116. *Id.*

117. Pub. L. No. 111-118, § 8116, 123 Stat. 3409 (2009).

118. Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009).

119. Rape Victims Act of 2009, S. 2915, 111th Cong. § 3 (2009).

120. *Id.*

121. *Id.*; see Franken Amendment, *supra* note 115.

122. Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

123. *Id.*

The FPSW, although another win for opponents of mandatory arbitration, suffers from similar limitations as the Franken Amendment did as the Order only applies to a limited number of potential employment-related claims.

In February 2018, state attorney generals (“AGs”) in all fifty states, the District of Columbia, and U.S. territories wrote a letter to Congressional leadership seeking the elimination of arbitration clauses in employment agreements for sex harassment claims.<sup>124</sup> In the letter, the AGs objected to the “veil of secrecy” created by arbitration, which prevents similarly situated individuals from learning about the harassment claims, thereby precluding them from also seeking relief.<sup>125</sup> The letter also mentions the “Ending Forced Arbitration of Sexual Harassment Act of 2017”<sup>126</sup> that is pending in the U.S. Senate.<sup>127</sup> This legislation would prohibit the enforcement of an arbitration clause for claims based on sex under Title VII of the Civil Rights Act.<sup>128</sup>

Finally, and to this date, the most prominent effort to deal with mandatory arbitration at the federal level is the proposed Arbitration Fairness Act (“AFA”).<sup>129</sup> Although various versions of the AFA exist, the most recent version would amend the FAA to specify that “no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer or franchise dispute, or a dispute arising under any statute intended to protect civil rights.”<sup>130</sup> If enacted, the AFA would effectively eliminate all mandatory arbitration within employment and consumer realms, as well as in antitrust and civil rights cases.<sup>131</sup> The AFA has been repeatedly introduced in Congress, with versions proposed in 2009, 2011, 2013, and most recently 2015.<sup>132</sup> However, the AFA has not received a vote, and passage in the current Congress appears unlikely.<sup>133</sup>

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124. Letter from National Association of Attorneys General, to Congressional Leadership (Feb. 12, 2018), <https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Musell-NAAG%20Letter%20re%20mandatory%20arbitration.pdf> [hereinafter Letter from AGs].

125. *Id.*

126. S. 2203, 115th Cong. (2017–2018).

127. *See* Letter from AGs, *supra* note 124.

128. S. 2203, 115th Cong. (2017–2018).

129. Proposed Arbitration Fairness Act of 2017, H.R. 1374, S. 537, 115th Cong. § 402(a). The AFA was originally proposed in 2009 and the findings then suggested that the bill’s sponsors were primarily concerned with the inequality of bargaining power between employers and employees, the lack of meaningful choice, the potential for unfair arbitration procedures attendant to such inequality, and dissatisfaction with the lack of transparency in arbitration. H.R. 1020, S. 931, 111th Cong. § 2 (2009).

130. H.R. 1020, S. 931, 111th Cong. § 2 (2009).

131. Stone & Colvin, *supra* note 112.

132. *Id.*

133. *Id.*

*F. The “Knowing and Voluntary” Requirement*

Some have suggested that Congress impose a requirement that employees agree to arbitrate Title VII claims “knowingly and voluntarily.”<sup>134</sup> Generally, “knowing” means that an employee is aware of the arbitration agreement she is entering into, and “voluntary” means that she is willingly entering into it.<sup>135</sup> At one point, the Ninth Circuit implemented a knowing standard, which required that an employee knowingly enter into a mandatory arbitration agreement for Title VII claims.<sup>136</sup> In *Prudential Insurance Co. of America v. Lai*,<sup>137</sup> the Ninth Circuit held that employers are required to inform employees who sign pre-dispute agreements that any employment discrimination claims will be subject to mandatory, binding arbitration.<sup>138</sup> The Ninth Circuit’s standard has been questioned for its failure to define the parameters of a “knowing” requirement.<sup>139</sup> Without establishing these parameters, employers are left to guess whether their employee “knowingly” agreed to arbitrate an employment discrimination claim.

In *Nelson v. Cyprus Bagdad Copper Corp.*,<sup>140</sup> the Ninth Circuit clarified the knowing requirement when it rejected an argument that an agreement to arbitrate an ADA claim could be inferred from the employer giving an employee an Employee Handbook containing arbitration provisions.<sup>141</sup> The court held that “[a]ny bargain to waive the right to a judicial forum for civil rights claims . . . in exchange for employment or continued employment must at the least be *express*; the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.”<sup>142</sup> Unfortunately, this standard is quite simple to meet,<sup>143</sup> and it is unforeseeable that this standard would make a significant impact on peoples’ decisions of whether to take a job.

Moreover, as critics of this standard point out, the knowing requirement will have little effect if the agreement is not also voluntary.<sup>144</sup> Unlike the knowing requirement, no court currently

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134. See Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 28, 36 (1996).

135. Siderman, *supra* note 25, at 1907.

136. See *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

137. *Id.*

138. *Id.* at 1305.

139. Siderman, *supra* note 25, at 1908.

140. 119 F.3d 756 (9th Cir. 1997).

141. *Id.* at 762.

142. *Id.* (emphasis added).

143. Keeping in mind that many people either do not understand what mandatory arbitration entails or have limited job prospects.

144. See Grodin, *supra* note 134, at 37.

requires that a waiver of Title VII claims be voluntary.<sup>145</sup> To require courts to subjectively determine whether an arbitration clause was voluntarily entered into poses its own issues. This Note will discuss why the knowing and voluntary standard does not effectively address the issues posed by mandatory arbitration in section IV.<sup>146</sup>

### III. ISSUE

Employees are often required to sign arbitration agreements as conditions of employment.<sup>147</sup> In these agreements, employees sign away their right to litigate employment-related disputes in front of a court, and instead agree to resolve all future claims—including statutory civil rights protections found in Title VII—through binding arbitration.<sup>148</sup> While arbitration may be a faster and cheaper alternative to litigation, using the arbitral forum raises unique problems in the context of civil rights claims. The problems surrounding the arbitration of Title VII claims include the nonconsensual nature of mandatory arbitration clauses, the alleged propensity for arbitral proceedings to be slanted in favor of the business, and restricted public accountability particularly in regard to statutory rights such as those under Title VII.<sup>149</sup>

As a result of the lack of safeguards in place for employee's rights, mandatory arbitration may be propagating sexual harassment cultures in the workplace. Unfortunately, the combination of the FAA and a strong federal policy favoring mandatory arbitration compels courts to decide all disputes in favor of mandatory arbitration.<sup>150</sup> Thus, in order to effectively reform the mandatory arbitration system, Congress, and Congress alone, must take action to create stricter regulations to safeguard the rights of employees and make arbitration a fair forum for statutory claims.

### IV. ANALYSIS

In 2017, the floodgates sprung open when the media published sexual harassment allegations made against media mogul Harvey Weinstein.<sup>151</sup> The Weinstein scandal sparked a national conversation

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145. Sideman, *supra* note 25, at 1909.

146. *See infra* Section IV.D.

147. Eric Kolowitz, "I Didn't Agree to Arbitrate That!"—How Courts Determine if Employees' Sexual Assault and Sexual Harassment Claims Fall Within the Scope of Broad Mandatory Arbitration Clauses, 13 *CARDOZO J. CONFLICT RESOL.* 565, 570 (2012).

148. EEOC Notice, *supra* note 54, at Section I.

149. *See id.* at Section C.ii.

150. *See id.* at Section II.C.

151. Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, *TIME* (Jan. 26, 2018), <http://time.com/5015204/harvey-weinstein-scandal/>.

about sexual misconduct in the workplace as women from all over felt encouraged to come forward with allegations of their own against prominent male figures, ranging from sexual misconduct and harassment to rape.<sup>152</sup> Despite a number of the allegations leading to the men in question being dismissed or otherwise disciplined,<sup>153</sup> the dismissal of these men remains the exception, not the rule. While these particular dismissals culminated from the heavy publicity surrounding the allegations, not all harassment claims are visible to the public eye. Even some of the individuals hit publicly with harassment charges are sometimes able to carry on unharmed in their careers. The most prominent example being President Donald Trump, who was accused of sexual harassment by several women while in the running for President, and still succeeded in the 2016 Presidential election.<sup>154</sup>

In the past seven years, United States companies have paid out more than \$295 million in public penalties over sexual harassment claims.<sup>155</sup> Too often, sexual harassment in the workplace remains hidden and businesses fail to take disciplinary action until they feel threatened by bad publicity.<sup>156</sup> The fact that existing anti-discrimination and harassment laws, such as Title VII, fail to prevent such culpable actions tends to suggest that some form of legal reform is needed. The next section of this analysis seeks to understand the weaknesses in the current legislation based on a case analysis of Gretchen Carlson and the harassment scandal at Fox News.

#### *A. How Title VII Failed to Prevent Harassment at Fox News*

In the last few years, dozens of women at Fox News came forward with sexual harassment allegations against men at the Fox network.<sup>157</sup> After significant negative press coverage, Fox News was hard pressed to fire many of the accused, costing the network over eighty million dollars in pay-outs to the departing executives and settlements to the alleged

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152. *Id.*

153. Corynne Cirilli, *High Profile Men Accused of Sexual Harassment and Sexual Abuse*, COVETEUR: NEWS (Nov. 29, 2017), <http://coveteur.com/2017/11/29/harvey-weinstein-sexual-harassment-repercussions/>.

154. Danielle Kurtzleben, *Here's the List of Women Who Accused Donald Trump of Sexual Misconduct*, NPR, Oct. 20, 2016, <https://www.npr.org/2016/10/13/497799354/a-list-of-donald-trumps-accusers-of-inappropriate-sexual-conduct>.

155. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGES ALLEGING SEXUAL HARASSMENT FY 2010-FY 2018, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (Jan. 14, 2018).

156. *See infra* Section IV.A.

157. Kate W. Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, PENN. STATE. L. REV. 463, 465 (Aug. 1, 2017).

victims.<sup>158</sup> Despite these charges, the legal prohibitions against sexual harassment in the workplace failed to deter Fox News from ignoring the rampant harassment for years. For example, in January of 2016, after settling multiple cases regarding Bill O'Reilly's misconduct with female employees, Fox News nevertheless renewed O'Reilly's employment contract.<sup>159</sup> Fox News was, at the time, fully aware of the harassment allegations made against O'Reilly.<sup>160</sup> It is likely that the reason Fox News was able to retain O'Reilly for so long, despite the recurring allegations, was because the network circumvented anti-harassment laws through the use of mandatory arbitration clauses.

Title VII of the Civil Rights Act of 1964<sup>161</sup> is a federal law that prohibits sexual harassment. Under Title VII, harassment based on race, color, sex, national origin, or religion constitutes discrimination.<sup>162</sup> However, Title VII is often critiqued for its failure to deter sexual harassment in the workplace.<sup>163</sup>

One established critique of Title VII, regarded as the "standards and defenses critique," may partially explain why Title VII fails to have the deterrent effect desired.<sup>164</sup> According to this critique, Title VII encourages only superficial compliance without actually preventing or punishing harassment, makes it too difficult for employees to prove their claims, and fails to adequately protect employees who choose to report harassment.<sup>165</sup> However, the "standards and defenses critique" fails to fully explain the events that occurred at Fox News because Title VII was not the only law in play. Fox News is located in New York City, which is governed by a stricter law prohibiting harassment in the workplace—the New York City Human Rights Law ("NYCHRL").<sup>166</sup> The NYCHRL has a lower standard for proving harassment and provides greater protections against retaliation.<sup>167</sup> Nevertheless, even the existence of this stricter anti-discrimination law failed to deter the widespread

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158. Emily Steel & Michael Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES, Apr. 2, 2017.

159. Doug Stanglin, *Report: Fox kept Bill O'Reilly despite \$32M sexual harassment settlement*, USA TODAY, Oct. 21, 2017, <https://www.usatoday.com/story/news/2017/10/21/report-bill-oreilly-struck-sexual-harassment-deal-january-former-fox-analyst/787360001/>.

160. John Bacon, *Bill O'Reilly dismisses NYT report as 'lies and smears,'* USA TODAY, Oct. 22, 2017, <https://www.usatoday.com/story/news/nation/2017/10/22/bill-oreilly-dismissed-nyt-report-lies-and-smears/788461001/>.

161. 42 U.S.C.A. § 2000e-2 (West).

162. *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–65 (1986).

163. *See supra* note 157.

164. *See* Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 700–06 (2000).

165. *Id.*

166. N.Y.C. Admin. Code §§ 8-107(1)(a).

167. *Id.*; *see* Nuñez, *supra* note 157, at 49–96.

harassment at Fox News. These facts suggest that an effective reform of discrimination law will take more than merely strengthening a plaintiff's individual claims through additional legislation.

### *1. The Fox News Scandal*

Gretchen Carlson joined Fox News in 2005.<sup>168</sup> From 2006 to 2013, Carlson was the co-host of the “Fox & Friends” morning show.<sup>169</sup> Carlson alleges that during her time on the Fox program she experienced sexist and condescending behavior by her co-host, Steve Doocy.<sup>170</sup> Carlson first complained to her supervisor about Doocy's behavior in September 2009.<sup>171</sup> Shortly after Carlson filed this complaint, her work environment began to change. Carlson alleges that in response to her complaint, Roger Ailes called her a “man hater” and “killer” who “needed to learn to ‘get along with the boys.’”<sup>172</sup> Carlson further alleges that Ailes retaliated against her by assigning her fewer interviews, ending her regular appearances on “The O'Reilly Factor,” failing to showcase her to the public, and more.<sup>173</sup> According to Carlson, this retaliatory conduct eventually led to her removal from the “Fox & Friends” program altogether, her reassignment to a less desirable afternoon slot, and a reduction in pay.<sup>174</sup>

Carlson's complaint also listed a variety of harassment claims against Ailes.<sup>175</sup> Some of the alleged actions include: (a) claiming that Carlson saw everything as if it “only rains on women” and admonishing her to stop worrying about being treated equally and getting “offended so God damn easy about everything;” (b) ogling Carlson in his office and asking her to turn around so he could view her posterior; (c) commenting that certain outfits enhanced Carlson's figure and urging her to wear them every day; (d) commenting repeatedly about Carlson's legs; (e) lamenting that marriage was “boring,” “hard,” and “not much fun;” (f) wondering aloud how anyone could be married to Carlson, while making sexual advances by various means, including by stating that if he could choose one person to be stranded with on a desert island, she would be that person; (g) asking Carlson how she felt about him, followed by: “Do you understand what I'm saying to you?;” (h) boasting to other attendees at an event where Carlson walked over to greet him

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168. Complaint and Jury Demand ¶ 8, *Carlson v. Ailes*, No. BEL-L-005016-16 (N.J. Super. Ct. Law Div. July 6, 2016) [hereinafter Carlson Complaint].

169. *Id.* at ¶ 10; GRETCHEN CARLSON, <https://www.gretchencarlson.com/about>.

170. Carlson Complaint, *supra* note 168, at ¶ 11.

171. *Id.*

172. *Id.* at ¶ 13.

173. *Id.* at ¶ 14.

174. *Id.* at ¶¶ 16–17.

175. *See generally id.* ¶¶ 20–22.



that he always stays seated when a woman walks over to him so she has to “bend over” to say hello; and (i) telling Carlson that she was “sexy,” but “too much hard work.”<sup>176</sup>

On June 23, 2016, Fox News refused to renew Carlson’s contract.<sup>177</sup> The next month Carlson filed a lawsuit against Ailes individually, asserting claims of harassment and retaliation under the NYCHRL.<sup>178</sup> Instead of suing Fox News under Title VII, Carlson strategically chose to sue Ailes *individually* under the NYCHRL because her employment contract with Fox News required mandatory confidential arbitration of any claims against the network.<sup>179</sup> Ailes attempted to compel arbitration, but the case reached settlement before the court was able to decide on the issue.<sup>180</sup> While Fox News paid Carlson twenty million dollars to settle the case,<sup>181</sup> they negotiated a price twice as high—forty million dollars—as a payout to Ailes for his departure.<sup>182</sup>

Shortly after Carlson filed her suit, another former Fox News host, Andrea Tantaros, filed a complaint bringing similar sexual harassment and retaliation allegations against Ailes.<sup>183</sup> In her complaint, Tantaros alleged that Ailes frequently made sexual remarks directed at her and other Fox News employees about their relationships and sexuality.<sup>184</sup> The alleged retaliation against Tantaros for complaining about the harassment included actions by Fox News media relations personnel such as: failing to provide media support, denying interview requests of Tantaros, crafting and placing false and negative stories about Tantaros,

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176. *Id.* ¶ 20.

177. *Id.* ¶ 25.

178. *Id.* ¶ 4.

179. The employment agreement between Carlson and Fox News states in relevant part: “Any controversy, claim or dispute arising out of or relating to this Agreement or Performer’s employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association then in effect . . . Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence.” Certification of Barry Asen in Support of Defendant Roger Ailes’s Motion to Compel Arbitration, Exhibit A, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016).

180. See Notice of Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016); Order of Voluntarily Dismissal, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. Sept. 6, 2016); Petition to Compel Arbitration, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. July 15, 2016); Notice of Voluntary Dismissal, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. Sept. 9, 2016).

181. Bill Chappel, *Fox Will Pay Gretchen Carlson \$20 Million to Settle Sexual Harassment Suit*, NPR: AMERICA (Sept. 6, 2016), <https://www.npr.org/sections/thetwo-way/2016/09/06/492797695/fox-news-will-pay-gretchen-carlson-20-million-to-settle-sexual-harassment-suit>.

182. Nuñez, *supra* note 157, at 470.

183. Complaint, Tantaros v. Fox News Network, et al., No. 157054/2016 (N.Y. Sup. Ct. Aug. 22, 2016) [hereinafter Tantaros Complaint].

184. *Id.* at ¶ 5(a)-(e).

and posting negative social media comments about her using fake accounts.<sup>185</sup> When Tantaros complained of the harassment and retaliation to senior Fox News executive, William Shine, he allegedly warned her that Ailes was a “very powerful man” and Tantaros “need[ed] to let this one go.”<sup>186</sup>

Turning down a settlement offer in excess of one million dollars to keep her claims quiet,<sup>187</sup> Tantaros instead filed her complaint in New York State court alleging claims against Fox News and a number of executives including Ailes.<sup>188</sup> This time the defendants were successful in compelling confidential arbitration,<sup>189</sup> and as a result the outcome of this proceeding remains private. Since the Carlson and Tantaros suits, many others have come forward and Fox News has reportedly reached settlements with at least six women who accused Ailes of sexual harassment.<sup>190</sup>

One query that arises when reviewing these complaints is whether, without the high profiles of the victims and defendants involved, there would have been enough press and media coverage to pressure Fox News into taking action against the alleged offender? Here, non-legal forces ultimately led Fox News to fire the perpetrators, but both federal and state law failed to do so despite years of allegations. This unfortunate reality begs the question of why it took this long-winded series of events for Fox to rectify and take action against conduct that is already prohibited by the law.

## 2. *How Mandatory Arbitration Undermines Laws such as Title VII*

While there are laws in existence which protect employees from sexual harassment, such as Title VII, these laws do a poor job of deterring such behavior, as evidenced by the happenings at Fox News<sup>191</sup> and the exponentially growing number of sexual harassment claims filed.<sup>192</sup> One explanation for why these laws are so easily circumvented is that mandatory arbitration clauses undermine the law by allowing employers to secretly pay out victims and brush harassment claims under the rug. For example, Fox News paid millions of dollars over the years

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185. *Id.* at ¶ 6).

186. *Id.* at ¶ 7.

187. Nuñez, *supra* note 157, at 471.

188. Tantaros Complaint, *supra* note 183, ¶¶ 75-98.

189. Nuñez, *supra* note 157, at 472. (citing Order on Motion to Compel Arbitration, *Tantaros v. Fox News Network LLC*, No. 157054/2016 (N.Y. Sup. Ct. Feb. 2, 2017).

190. Emily Steel & Michael Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES, Apr. 2, 2017, at A1.

191. See *supra* Section IV.A.i.

192. 12,860 claims were filed at the EEOC in 2016 alone. EEOC, *supra* note 157. This does not include charges filed at state or local Fair Employment Practice Agencies. *Id.*

to settle harassment claims against Bill O'Reilly.<sup>193</sup> Since most of these claims never reached the courtroom, the full extent of O'Reilly's abuse was hidden from the public eye.<sup>194</sup> Only when Carlson took extraordinary steps to avoid arbitration did the harassment at Fox News become a big enough news story to pressure Fox News into dismissing O'Reilly.<sup>195</sup>

As a term of employment, Fox News requires many of its employees to agree to confidential binding arbitration.<sup>196</sup> Gretchen Carlson, for example, was a party to such an agreement.<sup>197</sup> Because of the arbitration clause in her employment contract, Carlson's only option for filing a public suit and bringing to light the harassment was suing Ailes individually.<sup>198</sup> However, even her ability to individually sue Ailes was zealously disputed and remained unresolved before settlement.<sup>199</sup> In fact, her individual cause of action against Ailes would have been unavailable in most jurisdictions; the NYCHRL allowed Carlson to sue Ailes individually, an action not permitted under federal law.<sup>200</sup> In addition, while the particular language in Carlson's contract left some wiggle room for excluding individual claims against executives from arbitration, most contracts do not permit this.<sup>201</sup> Overall, it was the culmination of these uncommon circumstances that brought Carlson's case into the public eye.

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193. Steel & Schmidt, *supra* note 190.

194. *See id.*

195. *See* Carlson Complaint, *supra* note 168.

196. *See* Arbitration Agreement Between Gretchen Carlson and Fox News, Exhibit A, Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016) (containing an Exhibit A of "Standard Terms and Conditions" which includes the mandatory arbitration clause).

197. *Id.*

198. *See* Carlson Complaint, *supra* note 168; Plaintiff's Brief in Opposition to Defendant's Motion to Compel Arbitration and Stay Judicial Proceedings, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 15, 2016).

199. Notice of Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016); Order of Voluntarily Dismissal, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. Sept. 6, 2016); Petition to Compel Arbitration, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. July 15, 2016); Notice of Voluntary Dismissal, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. Sept. 9, 2016).

200. N.Y.C. Admin. Code §§ 8-107(1)(a) ("It shall be an unlawful discriminatory practice: (a) For an *employer or an employee or agent thereof*") (emphasis added); 42 U.S.C. § 2000e-2(a) (2015) ("It shall be an unlawful employment practice for an *employer . . .*") (emphasis added).

201. *See* Eric Wemple, *Roger Ailes Opts for Secrecy, Cowardice, in Face of Gretchen Carlson Suit*, WASHINGTON POST, July 9, 2016 ("Ailes is not named in [the arbitration agreement]. Their argument is that FOX means Ailes. They should have written more broadly, most arbitration clauses name others who work for or with, are associated with, etc. I consider him a non-party under this language. Poor drafting." (quoting Paul Bland, executive director of Public Justice)).

Considering the foregoing, Title VII alone cannot be blamed for its failure to deter the sexual harassment culture at Fox News. The private, confidential nature of mandatory arbitration not only keeps sexual harassment allegations out of court, but also out of the public domain. If confidential arbitration contributes to the lack of deterrent effect imposed by existing discrimination laws, then one solution may be to pursue legislation and encourage activism to make arbitration decisions more public and subject to greater judicial review. This idea will be further addressed below.<sup>202</sup>

*B. Inadequacies of the Current Arbitration System in Addressing Title VII Claims*

*1. Mandatory Arbitration Clauses are Nonconsensual and Inherently Unfair*

Under even the most reasonable definitions, many would argue that mandatory arbitration clauses are nonconsensual given that most employees fail to read, let alone understand, the clauses.<sup>203</sup> Even if employees understand arbitration provisions, the majority lack any meaningful choice when entering into these agreements because employers have exclusive control over the terms of the employment relationship.<sup>204</sup> Employees often have no power to bargain for better terms. This power imbalance results in contracts that are not bargained-for exchanges.<sup>205</sup> Economic climate further exacerbates the divide in bargaining power as applicants who are limited in employment options have little choice but to sign the agreement.<sup>206</sup> Despite this lack of bargained-for exchange, courts continue to uphold arbitration agreements as a matter of contract.<sup>207</sup>

When posed with this concern, proponents of mandatory arbitration will respond by questioning why employment contracts should be treated or enforced any differently than other contracts. To be enforceable, a contract requires mutual assent and consideration.<sup>208</sup> People sign contracts every day that they fail to read or understand.

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202. See *infra* Sections IV.B.iii & V.

203. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649; see also *infra* Section II.B.i.

204. Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 PACE L. REV. 114, 128 (2012).

205. *Id.* at 125.

206. See Walter J. Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 HOFSTRA LAB. & EMP. L.J. 245 (1996). Even in 1996, many individuals who found the job market difficult signed pre-employment agreements because it allowed them to obtain work: they believed “no alternative [was] available.” *Id.* at 263.

207. *Id.* at 246.

208. 17 Am. Jur. 2d Contracts § 29 (1964).

These contracts are nevertheless enforced. If courts began to treat employment contracts differently based on the notion that employees fail to understand the terms or have unequal bargaining power, and therefore agree involuntarily, where would the line be drawn?<sup>209</sup>

However, critics also argue that mandatory arbitration is wrong as a matter of public policy because it eliminates individuals' rights to have a trial before a judge or jury.<sup>210</sup> Even in *Gilmer*, the case that originally confirmed the use of mandatory arbitration, the Court recognized that subjecting Title VII claims to mandatory arbitration was inconsistent with Congress' goal because Congress had empowered the federal courts to litigate Title VII claims.<sup>211</sup>

Title VII was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment.<sup>212</sup> "Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the federal government."<sup>213</sup> It did so in three ways. First, Congress created the Commission, initially giving it authority to investigate claims of discrimination and to interpret the law,<sup>214</sup> and subsequently giving it litigation authority to bring cases to court that it could not resolve administratively.<sup>215</sup> Second, Congress granted certain enforcement authority to the Department of Justice.<sup>216</sup> Third, Congress established a private right of action to enable aggrieved individuals to bring their claims directly in federal court, after initially bringing their claims to the Commission for administrative purposes.<sup>217</sup> Mandatory arbitration effectively does away with this third avenue of enforcement.

This private right of access to courts is an essential part of the statutory enforcement scheme,<sup>218</sup> but mandatory arbitration essentially "privatizes" the enforcement of federal discrimination laws.<sup>219</sup> The imposition of mandatory arbitration substitutes a private dispute

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209. The justification for the "strict judicial respect" for arbitration agreements is based on a belief that if parties agree to resolve their dispute through arbitration, a court should not interfere with the parties' original intent. Evans, *supra* note 61, at 652-53.

210. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649.

211. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 56 (1991) (expressing that the goals of arbitration are distinct from the goals of the courts).

212. See EEOC Notice, *supra* note 54, at Section V.

213. *Id.* at Section III.

214. See §§ 706(b), 713 of Title VII, 42 U.S.C. §§ 2000e-5(b), 2000e-12.

215. See § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).

216. See §§ 706(f)(1), 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6.

217. See § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).

218. See, e.g., *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA).

219. EEOC Notice, *supra* note 54, at Section V.

resolution system for the public justice system intended by Congress.<sup>220</sup> This private arbitral system is different in many ways from the judicial forum. When issues do arise, such as sexual harassment claims like those brought by Andrea Tantaros, employees have no avenue to resolve the dispute except through arbitration.<sup>221</sup> In arbitration, employees may then be pressured into settling their complaints in private, out of sight from public speculation, and without the chance to hold the offender publicly accountable.<sup>222</sup>

## 2. Mandatory Arbitration Can Be Biased Towards Employees

Critics contend that arbitration proceedings have a tendency to be biased against the employee.<sup>223</sup> Employers imposing mandatory arbitration through clauses in employment contracts have the ability to manipulate the arbitral mechanism to their benefit.<sup>224</sup>

Mandatory arbitration clauses are drafted by employers and imposed on employees *particularly* because employers believe them to be in their own best interest.<sup>225</sup> It should thus come as no surprise that the system may often fall short of being fair. The ability of businesses to draft agreements in their own favor is made possible by their superior bargaining power,<sup>226</sup> and these agreements consequentially reinforce this bargaining power. Proponents of arbitration, however, suggest that this argument applies to litigation just the same, and that employers always have superior bargaining power and that is the way of business.<sup>227</sup>

Another argument relevant to biases found in arbitration is that the employer is at an advantage as the “repeat player.”<sup>228</sup> While it is likely the employer has participated in many arbitration proceedings, the employee has not.<sup>229</sup> As a result, the employee is generally less adept in making an informed selection of arbitrators than the employer who knows more about arbitrators’ records.<sup>230</sup> However, this same point could arguably be made about litigation. It is unlikely that an employee, who is unable to afford representation, will bode well in court against an experienced attorney representing the employer.

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220. *Id.*

221. *Supra* Section IV.A.i.

222. EEOC Notice, *supra* note 54, at Section V(A)(1).

223. *See* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649–50.

224. *See supra* notes 51–54.

225. EEOC Notice, *supra* note 54, at Section V(A)(3)(B).

226. Referring to the idea that many employees who apply for a job may take an offered position without reading the contract, understanding the contract, or simply because they need the job. *See supra* Section IV.B.i.

227. Gary E. Spitko, interview (Oct. 3, 2018).

228. EEOC Notice, *supra* note 54, at Section V(A)(3)(B).

229. *Id.*

230. *Id.*

Finally, opponents argue that arbitrators could be influenced by the fact that the employer, not the employee, provides them with future business.<sup>231</sup> A recent study of employment law cases revealed this bias, finding that the more frequently an employer uses arbitration, the better the employer fared in arbitration.<sup>232</sup>

### 3. Confidential Nature of Mandatory Arbitration Leads to a Lack of Public Accountability

The limited judicial review of arbitration awards results in a general failure to control and discipline errant arbitrators, to expose employers to public scrutiny, and to develop new law through precedent.<sup>233</sup>

For one, arbitrators are hired by private parties and do not have to answer to public scrutiny.<sup>234</sup> “While the courts are charged with giving force to the public values reflected in the anti-discrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute.”<sup>235</sup> Title VII, for example, was created to enforce the public interest in combating employment discrimination.<sup>236</sup> Plaintiffs’ awards in Title VII lawsuits, especially the larger and more well-known ones, often serve as a notice to the public of the extreme costs of permitting discrimination in the workplace.<sup>237</sup>

While published decisions by courts expose the identities of the accused, private arbitration awards keep these identities hidden.<sup>238</sup> “The risks of negative publicity and blemished business reputation can be powerful influences on behavior.”<sup>239</sup> Without a public trial, there may be less negative publicity, which translates into less incentive for employers to act fairly toward employees.<sup>240</sup> As a result, arbitration

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231. See, e.g., Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 936 (1979) (“an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process”).

232. See CLIFF PALEFSKY, MANDATORY BINDING ARBITRATION: IS IT FAIR AND VOLUNTARY?, H.R. REP. at 6 (2009); Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, Cornell University ILR School Site (2011), <http://digitalcommons.ilr.cornell.edu/articles/577>.

233. Siderman, *supra* note 25, at 1911–12.

234. *Id.*

235. EEOC Notice, *supra* note 54, at Section V(A)(1).

236. See Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 777 (1990) (“[T]here is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest ensuring that the law is correctly and consistently applied . . .”).

237. Siderman, *supra* note 25, at 1912 (“Publicity can clarify contested issues, and deter future behavior by publicizing the high damages awarded for egregious conduct.”).

238. Siderman, *supra* note 25, at 1915.

239. EEOC Notice, *supra* note 54, at Section IV(C).

240. Siderman, *supra* note 25, at 1915.

permits the immediate resolution of disputes, but fails to uphold the public values behind the law.<sup>241</sup>

Furthermore, arbitration affords very little opportunity for the development of new legal precedent due to the limited judicial review of arbitrators' decisions.<sup>242</sup> This too deters public accountability because the absence of new legal standards permits offenders to get away with such acts. Not only is development of the law stifled, but individual decisions by arbitrators are virtually free from scrutiny.<sup>243</sup> Higher courts and Congress are therefore unable to correct the potential errors of statutory interpretation made by arbitrators.<sup>244</sup>

Finally, the unavailability of judicial review or private arbitration undermines existing antidiscrimination laws.<sup>245</sup> Because arbiters may apply Title VII law in conflicting manners, employers and employees may become confused, or may lack a uniform understanding or definition of discrimination.<sup>246</sup> This issue is also explored in Section IV(A)(ii) above and a proposal identifying one way to address it is introduced in Section V below.

### *C. Working Around the FAA's Preemption of State Legislation*

More recently, federal agencies, legislators, and commentators alike have expressed their concerns pertaining to mandatory arbitration of statutory civil rights claims.<sup>247</sup> Some actors have taken steps to try to mitigate the negative effects of such agreements.<sup>248</sup> Currently, the most prominent effort to deal with mandatory arbitration at a federal level is

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241. "A common critique of arbitration is that without a jury there is no opportunity for an exercise of local judgement in evaluating whether the conduct at issue is acceptable to the community." *Id.*

242. Review is limited because the standard for judicial review is difficult to meet. *See Wilko v. Swan*, 346 U.S. 427, 436 (1953) (holding a court will only vacate an arbitration decision for substantive reasons if the opposing party can show a "manifest disregard" of the law), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *see also* *Bell Aerospace Co. v. Int'l Union 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973) (explaining that the FAA set the standard that "manifest disregard" of the law entails that the arbitrator "understood and correctly stated the law but proceeded to ignore it.").

243. EEOC Notice, *supra* note 54, at V(A)(2).

244. *Id.*

245. *See* Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. ON DISP. RESOL. 387, 428 (1997).

246. *Id.* ("The danger is great that individual private employment arbitrators will apply a law such as Title VII in a conflicting manner; such danger largely goes unchecked because of the unavailability of judicial review.").

247. *See* Section II.E.

248. David Seligman, *Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 59 (2016) (describing several federal efforts to limit the use of forced arbitration).



the proposed Arbitration Fairness Act (“AFA”).<sup>249</sup> Various versions of this statute have been proposed,<sup>250</sup> but the most recent version seeks to amend the FAA to specify that “no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”<sup>251</sup> Although the AFA has drawn the support of many scholars,<sup>252</sup> it is unlikely to pass in the current political climate.<sup>253</sup> However, without some other form of federal action, it is likely that the FAA will continue to preempt most state laws that attempt to limit forced arbitration.<sup>254</sup>

Despite these attempts to address the issues that stem from mandatory arbitration, the system today remains inadequate in protecting employees’ rights. In light of this reality, the National Consumer Law Center (“NCLC”) proposed a Model State Consumer and Employee Justice Enforcement Act (the “Model Act”)<sup>255</sup> to provide model language for alternative state solutions.<sup>256</sup> The Model Act was designed to mitigate the harms of arbitration while still operating within the confines of state action available under the FAA.<sup>257</sup> While there are many arguments that such regulations would nevertheless be preempted by the FAA, states can still look to the Model Act for examples of potential solutions.

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249. See Arbitration Fairness Act of 2017, H.R. 1374, S. 537, 115th Cong.

250. Stone & Colvin, *supra* note 112 (different version of the AFA were proposed in 2009, 2011, and 2013).

251. *Id.*

252. See, e.g., Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 468 (2011); Sternlight, *Panacea or Corporate Tool?*, *supra* note 8, at 726; Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKLEY J. EMP. & LAB. L. 31, 55–56 (2014).

253. For example, the AFA has no Republican co-sponsors in either the House or Senate. See H.R. 1374, S. 537. Critics argue that the AFA is too broad and that a “blanket prohibition on the enforcement of arbitration clauses” is unwarranted. Erin O’Hara O’Connor, Kenneth J. Martin, & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 182 (2012).

254. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); Seligman, *supra* note 248, at 62.

255. See Seligman, *supra* note 248.

256. See generally *id.*

257. Seligman, *supra* note 248, at 62. Although, the FAA preempts any state law that limits forced arbitration, the proponents of the Model Act see room for state action in: (a) using state’s public enforcement and procurement powers to protect its own financial and enforcement interests; (b) regulating the formation of arbitration agreements rather than their enforcement; (c) unconscionability challenges to arbitration agreements “as long as what renders such clauses unfair is not a ‘fundamental’ attribute of arbitration;” (d) limiting enforcement of arbitration agreements in insurance contracts, contracts regarding transportation workers, and contracts that do not involve interstate commerce or when the parties agree state law applies, areas exempted from FAA preemption; (e) regulating private companies that administer arbitrations; (f) drafting procedures for litigating questions about arbitration in state court. *Id.* at 62–63.

Title I of the Model Act allows private attorneys generals to bring actions on behalf of the state and its interests.<sup>258</sup> Under many state employment statutes, private actions are supplementary to an underlying state right to bring its own enforcement proceedings.<sup>259</sup> However, because States generally lack the budget to play a substantial enforcement role, Title I proposes to delegate the state enforcement power to private attorneys.<sup>260</sup> This could encourage private attorneys to take on more of these cases.<sup>261</sup>

Title II of the Model Act prohibits the state from contracting with any companies that use forced arbitration in their contracts with either consumers or employees.<sup>262</sup> This utilizes a State's marketplace power to discourage businesses from using mandatory arbitration clauses in their employment contracts.<sup>263</sup> Title III of the Model Act aims to protect employees at the formation of an agreement by requiring arbitration contracts to "adequately disclose terms and condition[s]."<sup>264</sup> Title IV of the Model Act creates rebuttable presumptions that certain mandatory arbitration provisions are unconscionable, such as: inconvenient venues, waiver of rights to seek remedies provided by statute, waiver of right to seek punitive damages, and a requirement that the individual pay costs of arbitration that exceed the court cost of bringing a state or federal claim.<sup>265</sup> In addition to these provisions, the Model Act offers four other sections aimed at the areas of arbitration law not preempted by federal law.<sup>266</sup>

The Model Act was drafted as an idea for states to pass non-preempted laws directed at mandatory arbitration. However, due to a

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258. *Id.* at 61.

259. *Id.* at 60–61.

260. Seligman, *supra* note 248, at 65. ("A person may initiate on behalf of the State an action alleging violations of [*designated State consumer and worker protection statutes*] to recover civil penalties on behalf of the State and to seek injunctive, declaratory, or other equitable relief that the State would itself be entitled to seek.")

261. For an argument as to why this type of "Iskanian" doctrine would be preempted by the FAA, see Spitko, *supra* note 111.

262. Seligman, *supra* note 248, at 31. ("The State shall not do business with any person or any of its parent entities or subsidiaries if that person includes forced arbitration clauses in any of its contracts with consumers or employees . . .").

263. *See id.* at 33.

264. *Id.* at 39 ("This title applies to contracts [the categories of which are to be determined by each state] formed after this Title's effective date that meet any one of the following three criteria: (a) An employment or consumer contract not written in plain language that an average consumer or employee would understand; (b) An employment or consumer contract not written in the language in which the transaction was conducted, unless it can be proven that fewer than ten percent (10%) of the entity's transactions are conducted in that language; or (c) if a consumer contract, all of the material terms are not found in a single document."). For an argument as to why this would be preempted by the FAA, see Spitko, *supra* note 111.

265. *Id.* at 43.

266. *Id.* at 48–55.

concern that their efforts will be preempted by federal law, many states do not even attempt to draft such legislation.<sup>267</sup> Similar regulations, adopted by Congress, would allow employees and employers alike to reap the benefits of mandatory arbitration while avoiding the negative aspects employees often face. Whereas state-level legislative action always runs the risk of being challenged under the FAA, legislation passed by Congress would encounter no such issue.

*D. Why the “Knowing and Voluntary” Standard Would Fail to Address the Inadequacies of Mandatory Arbitration*

In Part II(F)<sup>268</sup> this Note discussed the idea of implementing a “knowing and voluntary” standard for arbitration agreements. This type of standard aims to address the concern that employees sign away their rights to litigate future complaints involuntarily due to a lack of understanding of the agreement.<sup>269</sup> In making the dispute resolution process fairer, some believe that a higher standard of consent would ensure that employees are fully aware of their decision when they accept an arbitration agreement.<sup>270</sup> The “knowing and voluntary” standard has been suggested as a mechanism for doing so.<sup>271</sup> Generally, “knowing” means that an employee is aware of the arbitration agreement she is entering into, and “voluntary” means that she is willingly entering into it.<sup>272</sup>

Some circuits, such as the Ninth Circuit, have attempted to implement a variation of this standard. In *Prudential*, the Ninth Circuit required that an employee knowingly enter into mandatory arbitration for any Title VII claims.<sup>273</sup> However, this standard only mandated that an arbitration agreement be express, which can be objectively measured by examining the language of the agreement.<sup>274</sup> Requiring an express statement acknowledging mandatory arbitration in an employment

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267. Seligman, *supra* note 248 at 63.

268. See *infra* Section F.

269. See Siderman, *supra* note 25, at 1889–90.

270. *Id.*

271. The knowing and voluntary language originated in a footnote in *Gardner-Denver* and was used in floor debates preceding the passage of the CRA. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (“In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee’s consent... was voluntary and knowing.”). During floor debates over the CRA, Senator Robert Dole stated that Section 118 encouraged arbitration only when “parties knowingly and voluntarily elect to use these methods.” 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

272. Siderman, *supra* note 25, at 1907.

273. See *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

274. *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104, 1108 (9th Cir. 1997).

contract may be helpful to employees who read and understand the clause, but does little to ensure that the agreement is also “voluntary.”

No court has attempted to implement a requirement that waivers of Title VII claims be voluntary.<sup>275</sup> Simply having a “knowing” requirement without the “voluntary” counterpart will have little effect in balancing the scales for employees. Unfortunately, requiring a “voluntary” requirement may unintentionally cause more issues than it prevents because a true voluntary waiver of statutory rights can only apply after a dispute has arisen.<sup>276</sup> Proponents of the voluntary requirement argue that an employee’s consent to a nonnegotiable term of employment cannot be voluntary, and thus neither can mandatory arbitration agreements.<sup>277</sup> Based on this interpretation, imposing a voluntary requirement on arbitration would effectively eliminate mandatory arbitration agreements altogether.<sup>278</sup> This may be the reason courts have yet to insist on such a standard.

Another reason courts may dislike the voluntary standard is because of its potential to increase timely and costly litigation. Whether or not an arbitration clause is voluntarily entered into requires a subjective determination.<sup>279</sup> This necessitates a close evaluation of an employee’s state of mind.<sup>280</sup> Such a heightened standard would open every mandatory arbitration agreement to debate, as employees and employers would argue over whether the agreement was actually entered into knowingly and voluntarily.<sup>281</sup> Instead of fixing the arbitration system, a “knowing and voluntary” standard might derail it.<sup>282</sup> If litigation was an expected side effect, it would no longer be worthwhile to use the arbitration system, which was designed to be efficient and cost effective.<sup>283</sup> Regardless, any such voluntary standard is likely preempted by the FAA.<sup>284</sup> While some courts and legislatures nevertheless permit

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275. Siderman, *supra* note 25, at 1909 (“The EEOC and most commentators agree that a voluntary waiver of statutory rights can only apply after a dispute has arisen.”).

276. *Id.*

277. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 107 (1996).

278. *See id.*

279. Siderman, *supra* note 25, at 1909.

280. *Id.*

281. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1358 (1997) (explaining that the determination of whether a contract was voluntarily entered into “will be subject to the vagaries of after-the-fact litigation” and will “inject an additional element of uncertainty” into determining whether the agreements are binding).

282. Which is why this type of regulation would also be likely pre-empted by the FAA.

283. See Estreicher, *supra* note 281, at 1358–59.

284. A state law may not “stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives” of the FAA. *Volt Info. Scis., Inc. v. Leland Stanford Univ.*, 489 U.S. 468, 477–78 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

and enforce such standards, they are likely to be overturned by the Supreme Court.<sup>285</sup>

Finally, if pre-dispute arbitration clauses were completely voluntary, they would be optional. If mandatory arbitration became optional, most employers would not voluntarily choose to arbitrate their claims.<sup>286</sup> Employees would not have the resources to pursue lesser claims and would have a hard time finding lawyers to represent them.<sup>287</sup> Thus, employers, knowing that most employees lack the resources to bring smaller claims to court, would have no incentive to voluntarily arbitrate the same claim.<sup>288</sup> “If, however, employers are bound to arbitrate by a compulsory arbitration agreement, minor as well as more formidable claims will be heard.”<sup>289</sup>

Oftentimes when critics of mandatory arbitration suggest that it should be rid of altogether, they overlook its potential benefits. Mandatory arbitration is not an inherently negative facet of the legal world. Instead of implementing a “knowing and voluntary” standard, or trying to forbid mandatory arbitration altogether, the arbitration system needs to be improved. By providing a controlled system of arbitration, reformed to accommodate the needs of employees, the goals of the “knowing and voluntary” standard can be met without deterring from the usefulness and effectiveness of arbitration.

#### V. PROPOSAL

Although mandatory arbitration is not a characteristically malicious alternative to dispute resolution, there are many aspects of mandatory arbitration that must be safeguarded in order to prevent large businesses from taking advantage of employees’ lack of bargaining power. Specifically, Congress must account for the shortcomings of arbitration to ensure that employees receive the rights Congress intended when drafting Title VII. After identifying the problems in the current arbitration system, Congress must take the lead in implementing change, because most state actions regarding mandatory arbitration will be subjected to scrutiny or preempted without some sort of amendment to the FAA.

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285. See Spitko, *supra* note 111 at 8.

286. “There was credible testimony by management representatives before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate.” U.S. DEPT’S OF COMM. & LABOR, FACT FINDING REPORT: COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS 118 (May 1994).

287. St. Antoine, *supra* note 42, at 8.

288. See Siderman, *supra* note 25, at 1894.

289. *Id.*

The most direct way to address the issues mandatory arbitration poses to statutory rights, such as Title VII, is for Congress to amend the FAA to exempt all arbitration of such claims. However, the current political climate towards eradicating mandatory arbitration altogether is not friendly,<sup>290</sup> and completely eliminating mandatory arbitration is not the best solution.<sup>291</sup> Another alternative is exempting from the FAA arbitration of discrimination claims under Title VII.<sup>292</sup> An apparent issue with this is that if Congress exempted only discrimination claims, employees bringing several claims against employers would be forced to split their claims between arbitration and litigation. This would be extremely costly for both sides and would defeat the efficiency rationale behind mandatory arbitration.

While many critics of arbitration propose drastic changes and amendments to the FAA, the reality is that Congress is unlikely to alter the FAA in such an extreme manner.<sup>293</sup> Instead, this author proposes that we take the middle ground and push for Congress to amend the FAA in a manner that gives States more regulation power over employment arbitration as to protect the interests of workers related to state and federal statutory schemes such as Title VII. This approach would allow each state to tailor their arbitration laws to address the concerns and needs specific to its employees.

Accordingly, this author proposes that Congress amend the FAA to limit its preemptive scope by granting States the authority to establish various procedural regulations on arbitral proceedings. Specifically, the procedures States should regulate are: (1) greater judicial review of arbitration decisions,<sup>294</sup> (2) written, non-confidential opinions with

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290. *Supra* note 253.

291. *See supra* Section IV.D (arguing that as contrasted with litigation, employment arbitration offers a more knowledgeable, cost-effective, and expeditious adjudication of a dispute. A complete ban on mandatory arbitration would not serve these interests well).

292. On December 6, 2017, after this note was drafted, Representative Cheri Bustos and Senator Kirsten Gillibrand introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017. S. 2203, 115th Cong. (2017-2018). Senate Bill 2203 states that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute,” defined as “a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under Title VII.” *Id.* The bill is pending before the Senate Health, Education, Labor, and Pensions Committee. *Id.*

293. In recent years, a number of bills have been introduced in Congress proposing to invalidate mandatory arbitration agreements to various extents - the most extreme blankly invalidating all mandatory arbitration clauses. Spitko, *supra* note 111, at 50, n.223. None of these bills has been politically viable. *Id.* at 50.

294. Currently, the grounds for judicial review of an arbitration award under the FAA are extremely limited. *See* 9 U.S.C. § 10 (1994) (permitting judicial review of any award procured by “corruption, fraud, or undue means,” arbitrator misconduct, or exceeded authority). Because arbitral proceedings are often slanted in favor of employers, judicial review is necessary to even out the imbalance for employees. *See supra* Section III.B.iii. In order for

reasons,<sup>295</sup> (3) increased discovery, (4) access to information in choosing an arbitrator,<sup>296</sup> (5) jointly and neutrally selected arbitrators who are trained and qualified,<sup>297</sup> (6) cost of arbitration,<sup>298</sup> and (7) non-waivable remedies.<sup>299</sup> These procedural protections will address many of the concerns discussed in this comment while serving the best interests of all parties. While organizations such as the AAA and JAMS already require many of these rules, not every employment contract is governed by these organizations and these rules are not binding law.

Of course, the concern with such an amendment would be the power it gives States to regulate arbitration in favor of employees while ignoring the interests of employers.<sup>300</sup> However, considering employers generally have the upper hand in employment disputes, this concern seems to pale in comparison to the current need for mandatory arbitration reform.

With the ongoing #MeToo movement<sup>301</sup> and media attention surrounding mandatory arbitration, now is the perfect time to lobby for change. There is no quick fix. This requires a cultural shift—it will take work in every industry, on all rungs of employment, everywhere.

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judicial review to exist, there must also be written records. *See id.* Increasing judicial review will also permit development of the law. *See id.*

295. This would allow arbitration participants, the EEOC, and Congress to study past decisions when choosing arbitrator, deciding to settle a case, and determining whether the law was correctly applied. *See Sherwyn et al., Mandatory Arbitration, supra* note 12, at 120.

296. The ability to choose an arbitrator is already part of most systems, but giving employees more information about arbitrators, particularly costs, histories, and past decisions (which would also require access to written decisions) would give employees the opportunity to choose an arbitral that is fairer. A roster of qualified arbitrators should be provided for employees to select from.

297. I suggest that arbitrators need knowledge of the statutory issues in the dispute. Some sort of formal training program should be implemented to ensure that arbitrators are qualified for their important role.

298. Placing the arbitral fee on the employer would make arbitral proceedings fairer as employees would not be required to pay for a judge in court. Lessening the financial burden for employees may increase the likelihood that an employee who has suffered from discrimination will bring a claim. An alternative to this would be cost-splitting, which would actually deal with the “repeat player” issue more effectively.

299. In *Martens v. Smith Barney*, the court held that arbitration agreements waiving the remedies of Title VII to be unenforceable, including attorney’s fees, monetary relief, and equitable remedies. 181 F.R.D. 243 (S.D.N.Y. 1998). While employers may not be as eager to enter arbitration if these remedies are available, the expediency of arbitration over litigation will nevertheless reduce employers’ overall costs and maintain arbitration as a desirable forum for employers. *Id.*

300. For a thorough discussion of this concern and another approach that deals with such concern, see Spitko, *supra* note 111, at 52.

301. The #MeToo movement has gained nationwide notoriety, building a community of survivors and bringing vital conversations about sexual violence into mainstream society. The movement seeks to de-stigmatize survivors by highlighting the breadth and impact sexual violence has on thousands of women. ME TOO, <https://metoomvmt.org/> (last visited Dec. 20, 2017).

Individuals should continue to contact their state and federal representatives, initiate petitions, contact people running for elected positions, and voice their grievances. The current movement has not gone unnoticed by political power figures.<sup>302</sup>

While some states may be encouraged to change their arbitration proceedings, there will not be widespread reform of the arbitration system until a broad regulatory scheme is enacted for arbitration of Title VII (or other statutory) claims. Congress or the Supreme Court must clarify the scope of the FAA, and then Congress must amend the FAA to set specific guidelines on how mandatory arbitration clauses may be written and how arbitration proceedings must be regulated. A formal arbitral system controlled by law will increase the viability of arbitral forums for Title VII disputes and thereby reduce the risk of unfair arbitral proceedings.

## VI. CONCLUSION

Employers across the country utilize the arbitration system to resolve civil rights disputes. Supreme Court jurisprudence in favor of mandatory arbitration enables large employers to force their employees into arbitration to resolve practically all types of claims. Arbitration provides employees with a sure forum and an experienced decision maker. Arbitration is also quicker and less expensive than litigation. These benefits, however, are currently outweighed by the need to provide substantive relief of statutory claims. Mandatory arbitration clauses allow corporations to both write the rules that govern their contracts with workers and design the procedures used to interpret and apply these rules when disputes arise. Without stricter regulation, mandatory arbitration leads to a greater imbalance in power between employers and employees, and its confidential nature deters from the preventative efforts of anti-harassment laws such as Title VII.

The current mandatory arbitration system is ill-equipped to fairly settle civil rights claims and requires reform. This is demonstrated by the failure of existing anti-discrimination laws to prevent rampant harassment in the workplace, such as in the Fox News example discussed above. If employees are required to arbitrate Title VII claims, the procedures should include specific protections of their interests, preventing employers from taking advantage of the system. To ensure

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302. After Senate Bill 2203 was introduced all fifty state attorneys general threw their support behind the bill by writing a letter to both Senate and House Representatives asking, “for your support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace.” Letter from Nat’l Ass’n of Attorneys General, to Congressional Leadership (Feb. 12, 2018), <https://www.manatt.com/Manatt/media/Documents/Articles/AGs-letter.pdf>.



protection of employees' substantive rights the system requires additional safeguards such as written public opinions, training programs for arbitrators, non-waivable remedies, and increased judicial review to ensure that the law is correctly interpreted and applied. Congress must amend the FAA to give States more discretion to make these reforms in order to establish arbitration as a fair option for both employees and employers.

Even if Congress were to implement these changes, arbitration would still serve its intended function of providing faster and less expensive relief. If such protections existed and were enforced, perhaps harassment in the workplace would not run rampant and well-known men such as Harvey Weinstein would not get away with over thirty years of misconduct. Adopting clear procedural protections and measures will lead to a fair arbitration system for the arbitration of Title VII disputes.