

## ARBITRATION IN THE WORKPLACE: THE NEED FOR LEGISLATIVE INTERVENTION

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**ABSTRACT**—Since passage of the Federal Arbitration Act in 1925, arbitral proceedings have played an important role in American dispute resolution processes. However, the frequent application of the FAA to employment contexts is a relatively new phenomenon. Over the past thirty years, the Supreme Court has heralded an explosion in the use of mandatory arbitration agreements in employee contracts, reshaping employment law and limiting workers’ access to courts. Vast swaths of American workers are now bound to agreements they know little about that provide them only precarious protections. Justifiable backlashes to this terraforming of the employment law landscape have begun to sprout up in various workplaces.

This Essay suggests that the uninhibited expansion of arbitration to employment contexts has been a net negative for American workers. While current arbitration procedures are suitable for the commercial business-to-business disputes the FAA originally envisioned, these procedures have not been appropriately modified for workplace contexts, making such cases ripe for abuse. Documenting the history of the FAA and modern Court decisions regarding it, this Essay contends that Congress will need to act boldly in order to develop a system of arbitration suitable for workers.

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INTRODUCTION

Twenty thousand Google employees staged a walkout in 2018, protesting the use of mandatory arbitration for sexual misconduct claims.<sup>1</sup> Responding quickly, Google and Facebook then ended their use of mandatory arbitration for sex discrimination cases.<sup>2</sup> Two years later, Google extended that policy shift to include a ban on the use of arbitration for harassment, discrimination, and retaliation-related disputes.<sup>3</sup> Elsewhere, major law firms have begun caving to pressure from law school lecturers to withdraw similar forced arbitration agreements.<sup>4</sup> Opposition to arbitration is on the rise.

Pushback on arbitration likely stems in part from the dramatic increase in the use of mandatory arbitration clauses in employment contracts over the past decades. In the early 1990s, few nonunion workplaces included arbitration agreements in their employment contracts.<sup>5</sup> Now, more than half

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<sup>1</sup> Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow*, WASH. POST: ON LEADERSHIP (Nov. 12, 2018), <https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/> [<https://perma.cc/5WCR-B8DS>].

<sup>2</sup> *Id.* (“Last week, two of Silicon Valley’s biggest tech heavyweights said they were ending their policy of forcing workers to settle sexual harassment claims through private arbitration, allowing employees to pursue those claims in court. Google’s announcement came Thursday . . . and Facebook’s came just a day later.”).

<sup>3</sup> Alaina Lancaster, *Google Ends Mandatory Arbitration in \$310M Sexual Harassment Settlement*, LAW.COM (Sept. 25, 2020, 1:50 PM), <https://www.law.com/therecorder/2020/09/25/google-ends-mandatory-arbitration-in-310m-sexual-harassment-settlement/> [<https://perma.cc/QJ2U-6JZA>].

<sup>4</sup> Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, A.B.A. J. (June 1, 2018, 12:15 AM), [https://www.abajournal.com/magazine/article/biglaw\\_mandatory\\_arbitration\\_clauses](https://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses) [<https://perma.cc/D6RH-24L7>].

<sup>5</sup> Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 7 (2019) (discussing academic studies in the early 1990s that showed significantly lower rates of arbitration clause use in nonunion workplaces).

of all nonunion workplaces require mandatory arbitration for employees.<sup>6</sup> As these agreements are forced upon newly hired employees without negotiation, workers often do not understand their effect, discovering that they are no longer entitled to sue their employers only after litigation is pursued.<sup>7</sup> Neither Congress nor the Supreme Court has intervened comprehensively to halt coercive or abusive uses of arbitration,<sup>8</sup> so perhaps pushback is unsurprising. In any case, arbitration reform is overdue.

This Essay proceeds in four parts. Part I briefly explores the history of American arbitration and explains the nature of arbitral proceedings, which began as an efficient conflict-resolution mechanism between businesses. Part II analyzes the development of arbitration in commercial and employment contexts and details the uniquely harmful effects of mandatory arbitration when wielded against employees. Part III then considers the Supreme Court's recent employment-related arbitration decisions and argues that those decisions show that the Court will not protect workers from the harm arbitration causes employees. Finally, Part IV explores ways in which arbitration can be improved through legislative reforms. This Essay ultimately argues that a fair and equitable system of arbitration for employment disputes can be achieved through a series of both legislative and professional reforms, such as removing class action waivers and requiring new ethical guidelines for arbitrators.

## I. A BRIEF HISTORY OF ARBITRATION

The evolution of the law of arbitration informs its impact. Prior to the 1920s, courts frequently refused to enforce arbitration agreements.<sup>9</sup> In order “to reverse the longstanding judicial hostility to arbitration agreements,”<sup>10</sup>

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<sup>6</sup> *Id.* at 9 (showing that survey results from a study exploring nonunion arbitration clause use found “50.4 percent of responding [nonunion] establishments” required arbitration as the exclusive dispute resolution method).

<sup>7</sup> See Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 432 (2020) (explaining that arbitration clauses ordinarily “have been offered as a take-it-or-leave-it condition of employment. Individual workers lack the power to resist the imposition of terms like these. Indeed, they are unlikely to read the fine print of arbitration contracts—or even necessarily know that they have agreed to them—in any event” (footnotes omitted)). For a discussion of the functional differences between arbitration and litigation, see *infra* Part II.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> Deepak Gupta & Lina M. Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 504 (2017) (noting that “[u]ntil the 1920s federal courts refused to enforce arbitration agreements”).

<sup>10</sup> Thomas J. Lilly, Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine After American Express v. Italian Colors Restaurant?*, 61 WAYNE L. REV. 301, 305 (2016) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)) (providing context for Congress’s passage of the Federal Arbitration Act of 1925).

Congress unanimously passed the Federal Arbitration Act (FAA) in 1925.<sup>11</sup> The FAA of 1925 broke with judicial antipathy to arbitration, requiring federal courts to enforce arbitration agreements in commercial contexts.<sup>12</sup> Leaders and activists—concerned that “the powerful people . . . [would] come in and take away the rights of the weaker ones”—were assured that arbitral proceedings would be confined to disputes between consenting merchants of roughly equal bargaining power.<sup>13</sup> Eventually, however, those assurances became emptier and emptier.<sup>14</sup>

Starting in the 1980s, the Supreme Court issued a series of increasingly sweeping proarbitration decisions. In 1983, the Supreme Court interpreted the FAA expansively when it held that the FAA created a “federal policy favoring arbitration” and that the Act established that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .”<sup>15</sup> In 1984, the Court delved into state law interactions with the FAA, holding that state laws limiting arbitration violated the Supremacy Clause.<sup>16</sup> In 1985, the Court held that arbitrators could also apply statutory laws, such as the Sherman Antitrust Act.<sup>17</sup> Soon after, the Court permitted

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<sup>11</sup> Gupta & Khan, *supra* note 9, at 505 (describing the intense lobbying Congress faced from various proarbitration business interests desperate for court arbitration enforcement); *see also* 9 U.S.C. §§ 1–14 (1925).

<sup>12</sup> *Id.* at § 2 (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

<sup>13</sup> Gupta & Khan, *supra* note 9, at 505 (quoting Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106–07 (2006)).

<sup>14</sup> *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 624 (1992) (“One result of industrial pluralist rhetoric is that the Supreme Court has elevated private arbitration to an exalted status within labor law doctrine. In a series of benchmark decisions in the late 1950s and early 1960s, the Supreme Court adopted the pluralist rationale of defending the mini-democracy from external, particularly judicial, intervention.” (footnote omitted)).

<sup>15</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (finding that questions of arbitrability require courts to favor arbitration regardless as to “whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”).

<sup>16</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.” (footnotes omitted)).

<sup>17</sup> *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638–40 (1985) (“Accordingly, we ‘require this representative of the American business community to honor its bargain,’ . . . by holding this agreement to arbitrate ‘enforce[able] . . . in accord with the explicit provisions of the Arbitration Act.’” (alteration in original and citation omitted)).

arbitration in routine consumer contracts<sup>18</sup> and in employment agreements where statutory language arguably conflicted with the use of arbitration.<sup>19</sup> In the landmark *AT&T Mobility LLC v. Concepcion* decision, the Court held that arbitration clauses can also be used to deny access to class action lawsuits.<sup>20</sup> The 2018 *Epic Systems Corp. v. Lewis* decision extended that precedent to employment contexts.<sup>21</sup> Despite recent language from the Court de-emphasizing a judicial preference for arbitration,<sup>22</sup> the aforementioned precedent governs employment arbitration contracts.

Because parties may draft highly unique arbitration agreements, arbitral proceedings lack much standardization beyond the existence of arbitrators and the lack of court involvement.<sup>23</sup> Arbitration agreements may vary as to: who chooses arbitrators, how many arbitrators are chosen, whether parties may join to form classes, what matters must be arbitrated, how expansive discovery may be, and whether the arbitrators are competent to determine their own competence.<sup>24</sup> In aggregate, the lack of FAA requirements creates a highly flexible, often faster, and frequently cheaper alternative to the court

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<sup>18</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (“What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”).

<sup>19</sup> See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 129 (2001) (Stevens, J., dissenting) (“Today, however, the Court fulfills the original—and originally unfounded—fears of organized labor by essentially rewriting the text of § 1 to exclude the employment contracts *solely* of ‘seamen, railroad employees, or any other class of [transportation] workers engaged in foreign or interstate commerce.’ . . . [I]t is clear that it was not intended to apply to employment contracts at all.” (alteration in original)). *But see id.* at 119 (“Section 1 exempts from the FAA only contracts of employment of transportation workers.”).

<sup>20</sup> 563 U.S. 333, 351–52 (2011) (holding that “California’s *Discover Bank* rule is pre-empted by the FAA” and that arbitration agreements can be used to prevent class formation).

<sup>21</sup> 138 S. Ct. 1612, 1632 (2018) (“The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested . . . . The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written.”).

<sup>22</sup> *Morgan v. Sundance, Inc.*, No. 21-328, 2022 WL 1611788, at \*4 (U.S. May 23, 2022) (“But the FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-prefering procedural rules”).

<sup>23</sup> Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 173–74 (2019).

<sup>24</sup> See Gene Commander, *SCOTUS Decision Applies FAA to Empower Businesses and Arbitrators*, 48 COLO. LAW. 30, 32 (2019) (“*Schein* confirms that businesses can agree in advance to delegate authority to an arbitrator . . . including the authority to decide threshold arbitrability issues.”); see also Andrew Myburgh & Jordi Paniagua, *Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 J.L. & ECON. 597, 600 (2016) (discussing how commercial arbitration allows parties to “determine the number of arbitrators on the tribunal, the procedure for selecting arbitrators, the place of arbitration, the applicable law, and the tribunal’s powers”).

system.<sup>25</sup> However, due to shifting court precedent, which has progressively expanded the reach of arbitration, the lack of FAA requirements for arbitral proceedings also creates a system that is potentially ripe for abuse.<sup>26</sup>

## II. ARBITRATION'S IMPACT

Although the FAA originally envisioned arbitration as a forum for commercial entities with broadly equal bargaining power, currently more than half of nonunion private sector workers are bound by mandatory arbitration agreements.<sup>27</sup> Many of those agreements have sprung up in the last five years.<sup>28</sup> However, while arbitration carries many benefits in commercial contexts,<sup>29</sup> its benefits do not neatly extend to the employment contexts in which arbitration has become increasingly common.<sup>30</sup> Despite the widespread use of arbitration agreements, individuals bound by them often do not know they are bound or wrongly believe that forced-arbitration clauses nevertheless allow them to take companies to court.<sup>31</sup> This Part begins by exploring the application of arbitration to commercial contexts—showing that arbitration is well suited for domestic and foreign disputes between commercial entities—before detailing how arbitration's use in the employment context is ripe for abuse and fails to protect American workers.

### A. Commercial Contexts

Congress first envisioned arbitration as a tool for disputes between businesses,<sup>32</sup> and in that context, well-drafted arbitration clauses provide entities with confidentiality, flexibility, efficiency, and predictability.<sup>33</sup> By arbitrating rather than litigating disputes, large commercial entities assist in

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<sup>25</sup> See Myburgh & Paniagua, *supra* note 24, at 600 (explaining the efficiency-related benefits to be found in commercial arbitration, including the ability to select arbitral proceedings and applicable law); Commander, *supra* note 24, at 33–34.

<sup>26</sup> See *infra* Section II.B.

<sup>27</sup> Colvin, *supra* note 5, at 9.

<sup>28</sup> See *id.* at 10 (“For employers who have adopted mandatory arbitration, I asked them how recently they adopted this policy. Among the employers with mandatory employment arbitration, 39.5% of them adopted their policy within the last five years, i.e. from 2012 to [2017] . . .”).

<sup>29</sup> Myburgh & Paniagua, *supra* note 24, at 600–01.

<sup>30</sup> See *infra* Section II.B.

<sup>31</sup> See Gupta & Khan, *supra* note 9, at 500 n.6 (“In a 2014 Consumer Financial Protection Bureau (CFPB) survey of credit-card holders, for example, half of all respondents said they did not know whether they had the right to sue their credit card issuer in court, and more than one-third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court.”) (citing *Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROT. BUREAU § 3, at 19 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/32Q2-86SJ>]).

<sup>32</sup> *Id.* at 505.

<sup>33</sup> Myburgh & Paniagua, *supra* note 24, at 600–01.

declogging the congested American court system.<sup>34</sup> In exchange, large commercial entities gain the ability to structure dispute resolution procedures as they desire.<sup>35</sup> Because entities in commercial transactions tend to have relatively equal bargaining power, the parties often fashion mutually beneficial arbitration clauses.<sup>36</sup>

Commercial entities also prefer arbitration for purposes of confidentiality. While the FAA does not ensure confidentiality in arbitral proceedings, parties usually include confidentiality as a standard express provision, and some states mandate confidentiality.<sup>37</sup> In international commercial arbitration, an implied duty of confidentiality binds parties.<sup>38</sup>

Arbitration also provides flexibility to contracting parties. For example, some commercial entities may prefer to have dispute resolution overseen by individuals with unique arbitral expertise.<sup>39</sup> Moreover, arbitration grants commercial entities the option to choose to use industry experts as arbitrators.<sup>40</sup> By moving more quickly than standard litigation, arbitration also increases overall efficiency.<sup>41</sup> Further, through choice of law provisions and forum selection clauses,<sup>42</sup> arbitration allows businesses to plan for future proceedings and thus provides businesses with predictability.<sup>43</sup>

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<sup>34</sup> See Commander, *supra* note 24, at 33–34.

<sup>35</sup> See Jane Flanagan & Terri Gerstein, “Sign on the Dotted Line”: How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It, 54 U.S.F. L. REV. 441, 451 (2020) (describing arbitration provisions used by employers to “stack the deck” in favor of the employer); see also Myburgh & Paniagua, *supra* note 24, at 600 (describing the flexibility of commercial arbitration).

<sup>36</sup> Flanagan & Gerstein, *supra* note 35, at 451.

<sup>37</sup> Christopher M. Campbell, *U.S.A. vs. the World: Right to Public Access of Court Records and Confidentiality Concerns in Commercial Arbitration*, 15 S.C. J. INT’L L. & BUS. 99, 119–20 (2018); see Laura A. Kaster, *Confidentiality in U.S. Arbitration*, 5 N.Y. DISP. RESOL. LAW. 23 (2012).

<sup>38</sup> Avinash Poorooye & Ronán Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275, 286 (2017).

<sup>39</sup> Myburgh & Paniagua, *supra* note 24, at 600 (discussing how commercial arbitration allows parties to “determine the number of arbitrators on the tribunal, the procedure for selecting arbitrators, the place of arbitration, the applicable law, and the tribunal’s powers”).

<sup>40</sup> *Id.* (“There are likely to be substantial benefits from being able to use specialized adjudicators as opposed to relying on generalist domestic courts.”).

<sup>41</sup> See generally ROY WEINSTEIN, CULLEN EDES, JOE HALE & NELS PEARSALL, MICRONOMICS ECON. RSCH. & CONSULTING, EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDINGS (2017), [https://static1.squarespace.com/static/61b53e492ea58d13b806ccb3/t/61bb8320fa9ba06e1700a3bc/1639678753466/Efficiency\\_Economic\\_Benefits\\_Dispute\\_Resolution\\_through\\_Arbitration\\_Compared\\_with\\_US\\_District\\_Court\\_Proceedings.pdf](https://static1.squarespace.com/static/61b53e492ea58d13b806ccb3/t/61bb8320fa9ba06e1700a3bc/1639678753466/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf) [<https://perma.cc/XPR9-3GRY>] (providing a comparison of arbitration and federal courts for dispute resolution purposes and finding that district courts takes roughly a year longer than the AAA to resolve disputes).

<sup>42</sup> Myburgh & Paniagua, *supra* note 24, at 600.

<sup>43</sup> While businesses may expect to face litigation in obvious forum states, arbitration clauses can more easily limit the applied law and the sites of arbitral proceedings. See *id.*

Internationally, the high frequency of commercial arbitration has led to the development of arbitral norms, increasing business predictability in one of the key areas where arbitration can be unpredictable: the form and structure of the proceeding.<sup>44</sup> Arbitration proceedings traditionally apply the English system, where losing parties pay attorneys' fees.<sup>45</sup> Accordingly, nuisance suits are less common when arbitration is mandated, reducing unnecessary expenditures.<sup>46</sup> International arbitration in commercial contexts may even benefit forum countries, especially those that take care to enforce arbitration clauses. One study found that strengthening arbitration regimes may result in increased foreign direct investment: countries which provided greater assurances that arbitration awards would be enforced experienced more extensive foreign direct investment than countries with weaker arbitration regimes.<sup>47</sup> Thus, arbitration may not only reduce foreign courts' congestion but also increase prosperity abroad.

Significantly, businesses and their attorneys seem to prefer arbitration. In a study investigating corporate counsel's perceptions of arbitration in business-to-business disputes, 52% of respondents found arbitration to be better than traditional litigation for resolving disputes, and almost 60% of respondents believed that arbitration saved time.<sup>48</sup> Additionally, most respondents believed that arbitration reduced costs relative to litigation.<sup>49</sup> However, over 70% of respondents also thought that arbitration frequently "split the baby," dealing out less satisfactory rewards to winners but also less damaging results to losers.<sup>50</sup> While a lower reward may not be ideal for a commercial entity that is on the winning side of a dispute, businesses seeking to reduce risk would greatly benefit from the smaller rewards provided by arbitration. In fact, 75% of respondents indicated that the alternative risk of

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<sup>44</sup> See Tony Cole, Pietro Ortolani & Barbara Warwas, *Arbitration in Southern Europe: Insights from a Large-Scale Empirical Study*, 26 AM. REV. INT'L ARB. 187, 267 (2015) (concluding that there are standardized norms of arbitral practice developing at an elite level of transnational arbitral practice).

<sup>45</sup> Myburgh & Paniagua, *supra* note 24, at 601.

<sup>46</sup> See *id.* (explaining the increased likelihood of nuisance suits in courts using the American system due to the decreased cost burden on the losing party).

<sup>47</sup> *Id.* at 622.

<sup>48</sup> DOUGLAS SHONTZ, FRED KIPPERMAN & VANESSA SOMA, RAND INST. FOR CIV. JUST., BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL 8–9 (2011), [https://www.rand.org/pubs/technical\\_reports/TR781.html](https://www.rand.org/pubs/technical_reports/TR781.html) [<https://perma.cc/Y89G-3X77>] (showing that 17% and 35% of respondents believed that arbitration was better or somewhat better than litigation for resolving business-to-business disputes).

<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.* at 11 ("When asked whether they agreed or disagreed that arbitrators tend to 'split the baby'—i.e., are less likely than a judge or jury to decide strongly in favor of one side or the other—over 70 percent of respondents agreed, and only 14 percent disagreed . . .").



excessive and emotionally driven jury awards encouraged the use of arbitration in commercial contracts.<sup>51</sup>

When employed in commercial disputes, arbitration provides lasting benefits to commercial entities. Those benefits include flexibility, predictability, and arbitral expertise when desired. Because commercial entities in business-to-business transactions are usually of relatively equal bargaining power, arbitration in commercial contexts matches with its original legislative intent: it reduces caseloads in the courts without stealing away the “rights of the weaker ones.”<sup>52</sup>

### *B. The Uniqueness of Employment Contexts: Bargaining Power*

In contrast to business-to-business agreements, arbitration agreements between employers and employees tend to benefit employers at the expense of workers.<sup>53</sup> Nevertheless, dramatic growth in workplace arbitration continues. In 1992, mandatory arbitration clauses bound only 2% of nonunionized private sector employees.<sup>54</sup> By 2018, that percentage had jumped to over 56%.<sup>55</sup> The frequency of arbitration clauses in employment contracts is expected to continue to grow unabated, with arbitration clauses projected to govern more than 80% of nonunionized private sector employees by 2024.<sup>56</sup>

In theory, arbitration could provide workers with many of the benefits it provides large entities in commercial contexts: namely, flexibility, efficiency, predictability, and confidentiality when desired. Court cases expanding the use of arbitration in employment contexts have highlighted these potential benefits.<sup>57</sup> In practice, however, arbitration in its current incarnation does not offer workers the benefits it provides commercial entities in business-to-business transactions. Arbitration instead uses the unequal bargaining power of workers against them, and lack of awareness

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<sup>51</sup> *Id.* at 15 (“For 75 percent of respondents, the risk of excessive or emotionally driven jury awards encourages including arbitration clauses in B2B [business-to-business] contracts . . . Only 7 percent of respondents disagreed, and only 15 percent had neutral opinions.”).

<sup>52</sup> Gupta & Khan, *supra* note 9, at 505 (quoting Moses, *supra* note 13, at 106–07).

<sup>53</sup> See Flanagan & Gerstein, *supra* note 35, at 451 (“[S]ome arbitration provisions are explicitly structured to dissuade claims or ‘stack the deck’ in favor of the employer.”).

<sup>54</sup> *Id.* at 447.

<sup>55</sup> *Id.* The massive shift in arbitration utilization rates likely results from both a general business consensus that arbitration saves businesses money and new, expansive proarbitration court precedent, which is discussed at length in Part III.

<sup>56</sup> *Id.*

<sup>57</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011) (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

surrounding the contents of arbitration clauses means that many employees will not understand the agreements that bind them.<sup>58</sup>

Unlike in commercial contexts, arbitration agreements that bind employees are not usually negotiated. While courts have at times classified arbitration agreements as a freely chosen bargain between workers and their employers,<sup>59</sup> an employee usually has no real choice because their employer sets the terms of the agreement.<sup>60</sup> These terms include the ability to select potentially biased arbitrators<sup>61</sup> and to limit discovery in ways that would make finding employer liability more difficult.<sup>62</sup> Further, employees—who are already at a bargaining disadvantage relative to employers—typically sign their arbitration agreements as part of the onboarding process provided to new hires.<sup>63</sup> Newly hired employees may be especially unlikely to resist coercive contracts.<sup>64</sup>

Once bound to an arbitration agreement, employees “almost never file arbitration claims.”<sup>65</sup> In one estimate, somewhere between 9,600 and 28,400 fewer federal employment arbitration claims were filed in 2016 than would have been expected, given the rate of federal employment litigation claims that year.<sup>66</sup> Although more than half of all nonunion private sector employees are subject to arbitration clauses, only about 5,100 employment arbitration

<sup>58</sup> Bagenstos, *supra* note 7, at 432 (explaining that arbitration clauses in employment contracts are rarely understood by bound individuals and that workers lack any real ability to refuse signing them regardless); Colvin, *supra* note 5, at 8 n.27 (“The study found that a majority of Circuit City employees he interviewed were unaware that they had signed arbitration agreements or of the import of such agreements . . .”).

<sup>59</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”).

<sup>60</sup> Sternlight, *supra* note 23, at 171.

<sup>61</sup> See Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2385 (2012) (discussing how changes to arbitration could reduce arbitrator bias).

<sup>62</sup> See Sternlight, *supra* note 23, at 174 n.127 (explaining that arbitration provides the drafting party with immense flexibility, such as the ability to “disallow particular types of discovery and particular kinds of motions”).

<sup>63</sup> Colvin, *supra* note 5, at 8–9.

<sup>64</sup> See Bagenstos, *supra* note 7, at 432 (arguing that because arbitration agreements act as “take-it-or-leave-it condition[s] of employment,” workers are unable to “resist the imposition” of their terms).

<sup>65</sup> Gupta & Khan, *supra* note 9, at 512 (quoting Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1312 (2015)).

<sup>66</sup> Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 692 (2018) (discussing “an estimate of between 9600 and 28,400 ‘missing’ arbitrations”). Although it is unclear why employees are dropping so many claims under arbitration, it may be the case that the opaque nature of arbitral proceedings combined with a sense that success is less likely disincentivizes employees from pursuing their rights.

claims were filed in 2016, even as 31,000 federal employment lawsuits were filed by nonunion private sector employees without arbitration agreements.<sup>67</sup> The number of missing arbitration claims grows when accounting for missing state and collective action claims.<sup>68</sup>

Even for the employment arbitration claims that are filed, the win rate and award amounts for employees are lower than in employment litigation.<sup>69</sup> A 2011 study found that the win rate for employees in arbitral proceedings was roughly fifteen percentage points lower than the win rate of employment discrimination cases in federal courts and approximately thirty-five percentage points lower than the win rate of employees in state courts.<sup>70</sup> While the study noted that the reduced win rate could have resulted from differences in the types of claims, it also found that the median arbitration award for successful cases was over \$100,000 lower than in federal court.<sup>71</sup> Perhaps some of these differences result from the fact that arbitrators deciding employment disputes shy away from punitive damage rewards and rarely grant interest on back pay, even when their decisions are issued years after an unjust dismissal.<sup>72</sup> But the fact remains that employees win fewer cases under arbitration regimes and receive smaller awards when they do.

Employees' diminished outcomes may result in part from repeat player bias, which can occur when one party uses a dispute resolution system repeatedly and the other party does not.<sup>73</sup> In arbitration, this bias results from a natural dichotomy between employers and employees: unlike in arbitration between opposing commercial entities, which involves multiple repeat players thus eliminating or reducing consistent bias towards one side or the other, employees are significantly less likely than employers to enlist an arbitrator's services more than once.<sup>74</sup> Studies have raised concerns about

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<sup>67</sup> *Id.* at 691.

<sup>68</sup> *See id.* at 693–94 (Professor Mark Gough has found that an “estimate of 195,000 state cases is likely to yield a more realistic estimate of total employment lawsuits, and a more realistic estimate of ‘missing’ arbitration cases.”).

<sup>69</sup> Gupta & Khan, *supra* note 9, at 512.

<sup>70</sup> Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 (2011).

<sup>71</sup> *Id.* (finding that whereas the median employment arbitration award is approximately \$36,500, successful employment discrimination cases in federal court yielded median awards of approximately \$150,500).

<sup>72</sup> Stone, *supra* note 14, at 629–30 (“[R]emedies in arbitration are not as effective or as generous as remedies in a judicial forum. For example, most arbitrators believe that they do not have the power to award damages for intangible harms, or to award punitive or consequential damages. In addition, arbitrators almost never grant interest on back pay awards, even when they are issued months or years after an unjust dismissal. It is common practice for an arbitrator to award reinstatement but no back pay at all to a worker fired without just cause.” (footnotes omitted)).

<sup>73</sup> Colvin, *supra* note 5, at 22.

<sup>74</sup> *Id.*

biased arbitrators since the 1990s.<sup>75</sup> Moreover, anecdotes from arbitral proceedings indicate that impropriety in arbitrator–employer relationships may be common and potentially far in excess of what ethics guidelines would allow for similarly positioned judges. For example, arbitrators have been known to attend sporting events and casual lunches with employers’ in-house counsel in the midst of ongoing arbitral proceedings.<sup>76</sup> Given that empirical studies have found significant variances in arbitral outcomes depending on whether the employer had previously enlisted an arbitrator’s services,<sup>77</sup> such improper relationships may disadvantage employees pursuing arbitration.

In addition to facing potential bias from arbitrators, employees are likely disadvantaged by reduced access to effective representation. Whereas employer-side attorneys may gain a consistent client by defending an employer in an arbitral proceeding, an employee-side attorney’s client relationship likely ends after a one-off engagement.<sup>78</sup> Additionally, because mandatory arbitration reduces the likelihood of an employee’s success, results in reduced damages, and eliminates class actions, employee-side attorneys may be unwilling to take on employee arbitration claims.<sup>79</sup> Pro se representation, with only a 7% success rate in arbitration, is not a viable alternative either, even with the relaxed discovery procedures available in arbitration.<sup>80</sup> Thus, employees are simply not well positioned to enjoy the benefits of mandatory arbitration.

### *C. The Uniqueness of Employment Contexts: Employment Discrimination*

Looking only to the success of individual employee claims and bargaining power differences, however, may underestimate arbitration’s damage to employees. Diverting so much of employment law to binding,

<sup>75</sup> Colvin, *supra* note 70, at 11.

<sup>76</sup> Estlund, *supra* note 66, at 686 (“Among the ‘subtler’ forms of partiality was ‘the case of the arbitrator who went to a basketball game with the company’s lawyers the night before the proceedings began. (The company won.)’ In another case, ‘a dismayed [plaintiff] watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)’” (alteration in original and footnotes omitted) (quoting Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a Privatization of the Justice System*, N.Y. TIMES (Nov. 1, 2015)), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/979P-K9BD>])).

<sup>77</sup> See Colvin, *supra* note 70, at 13 (“Despite the conservative nature of the test, there is strong evidence of a repeat employer effect, with employees winning 31.6 percent of cases involving one-shot employers, whereas they won only 16.9 percent of cases involving repeat employers, which was a statistically significant difference ( $p < 0.01$ ).”).

<sup>78</sup> See Sternlight, *supra* note 23, at 179 (discussing how “mandatory arbitration also suppresses claims by making it even harder for employees to retain attorneys than it otherwise would be”).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 179–80. Theoretically, pro se plaintiffs can benefit from the less formalistic discovery procedures of arbitration. *Id.*

confidential arbitration puts workers at risk of being left out of legal advances that would otherwise protect the most vulnerable. Further, recent cases have revealed serious issues with applications of arbitration in employment discrimination contexts.

Arbitration seems to reduce employment discrimination cases both directly and indirectly. Despite national population growth, employment discrimination cases declined by more than 25% between 1998 and 2012.<sup>81</sup> The rise of arbitration clauses in employment contracts may thus be rerouting such claims to confidential arbitral tribunals that do not expand the law through precedent, thereby stymieing progress.<sup>82</sup> Vulnerable employees may have claims that exist in a legal gray area<sup>83</sup>—claims that are best resolved by the disclosed decision-making of the appellate system.<sup>84</sup> Arbitration, which at times lacks written-out reasoning in its decisions,<sup>85</sup> fails to sufficiently replace this mechanism.

Due to its confidential and individualized nature, arbitration also fails to provide crucial notice to wronged employees that similar suits are being pursued. Arbitral proceedings are traditionally confidential,<sup>86</sup> and arbitration agreements are often paired with expansive and sometimes illegal nondisclosure agreements (NDAs) that prohibit disclosures related to one's employment.<sup>87</sup> Additionally, due to the Supreme Court's *Epic Systems Corp. v. Lewis* holding that class action waivers in employment contracts are not

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<sup>81</sup> Colvin, *supra* note 5, at 21 (“It is only when we get to the later 2000s and 2010s when the growth of mandatory arbitration had expanded further do we start getting to the point where a sufficient proportion of employees were covered by the practice to potentially make a dent in litigation rates. Interestingly, employment discrimination litigation rates levelled off and declined during this period, despite the overall growth in the population. In 2012, only 16,789 employment discrimination lawsuits were filed in the federal court, a decline of over 6,000 from the 1998 total.”).

<sup>82</sup> See Sternlight, *supra* note 23, at 191–92 (explaining how the rise of arbitration removes cases on the penumbra of legal issues, preventing precedent from developing at the rate it would otherwise likely develop).

<sup>83</sup> See *id.* at 184 (“Imagine that an employee goes to an attorney because she believes she has been discriminated against on the basis of a status that is not explicitly addressed under federal or state law.”).

<sup>84</sup> See *id.* at 192 (“An appellate court may be asked to review the jury’s verdict or the jury instructions. Through these kinds of decisions, judges spell out the meaning of our employment law, and these kinds of decisions will disappear to the extent employment disputes are sent to arbitration.” (footnotes omitted)).

<sup>85</sup> But see *id.* at 182 (“Still, some scholars have challenged the idea that arbitration is inherently ‘lawless.’ As Christopher Drahozal notes, few have taken the time to try to explain what this supposed lawlessness really means . . . . Is arbitration lawless because arbitration decisions do not contain legal reasoning, or because those decisions are not appealed or published? It is important to remember that arbitration varies substantially from context to context.” (footnote omitted)).

<sup>86</sup> Poorooye & Feehily, *supra* note 38, at 277–78.

<sup>87</sup> Flanagan & Gerstein, *supra* note 35, at 453–54 (explaining that such broadly written NDAs hurt employees’ chances of speaking up for themselves as well as their exit options, as the NDA can also “prohibit one employee from recommending a former co-worker”).

per se invalid, arbitration clauses now often prevent class action lawsuits on the part of employees.<sup>88</sup>

In the #MeToo era, this combination of traits has shown mandatory arbitration to be exceptionally ill suited to dealing with certain forms of widespread employment discrimination.<sup>89</sup> By denying notice to wronged employees that other employees were pursuing similar claims, mandatory arbitration has uniquely harmed employee victims of sexual harassment and made clear that mandatory arbitration is an ineffective forum for employment discrimination cases. In 2016, for example, former Fox News anchor Gretchen Carlson successfully sued former Fox News CEO Roger Ailes for sexual harassment.<sup>90</sup> Unusually, she did not sue the party with the biggest pockets, Fox News.<sup>91</sup> Carlson was constrained to targeting Ailes because suing Fox News would have led to enforcement of a mandatory arbitration agreement, thus preventing Carlson's suit and silencing the allegations.<sup>92</sup> Carlson's unique tactic worked: she received a significant settlement, and the suit's publicity led over twenty other women to come forward with claims and witness statements, corroborating Ailes's harassment over many years.<sup>93</sup> Those stories had previously been suppressed by NDAs and mandatory confidential arbitration.<sup>94</sup> Had mandatory arbitration not been required of Fox News employees, Ailes's years of abuse might have been uncovered much earlier due to the public nature of lawsuits.<sup>95</sup>

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<sup>88</sup> See 138 S. Ct. 1612, 1632 (2018) (“[I]t’s altogether unclear . . . why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead.”).

<sup>89</sup> Sternlight, *supra* note 23, at 201.

<sup>90</sup> *Id.* at 201–02.

<sup>91</sup> *Id.* at 202.

<sup>92</sup> *Id.*

<sup>93</sup> Emily Crockett, *Here Are the Women Who Have Publicly Accused Roger Ailes of Sexual Harassment*, VOX (Aug. 15, 2016, 1:00 PM), <https://www.vox.com/2016/8/15/12416662/roger-ailes-fox-sexual-harassment-women-list> [<https://perma.cc/7LPM-MG47>] (detailing how Roger Ailes's resignation in July 2016 preceded a flood of “at least 20 other women” contacting Gretchen Carlson's attorneys to report a pattern of abuse obscured by Fox News arbitration agreements).

<sup>94</sup> See Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, VOX (May 21, 2018, 11:44 AM), <https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court> [<https://perma.cc/R6UG-BKC3>] (“Let’s say you’re being harassed. You go to complain to HR. The company wipes their forehead with their hand and goes, ‘Phew, nobody will ever know about this,’ because of these clauses. Then you get thrown into forced arbitration . . .”).

<sup>95</sup> See *id.* Carlson's experience has led her to fight against mandatory arbitration in employment contracts. *Id.* (“Now Carlson is focusing her efforts on ending forced arbitration, which she signed in her own contract with Fox News, and helping women speak publicly about harassment.”).

In sum, unnegotiated, mandatory arbitration provides employees with fewer protections and worse outcomes while depriving our legal system of new precedent. Moreover, employees face bargaining power deficits during the agreement phase, as well as potentially biased proceedings and outcomes. Mandatory arbitration might also lead employers to continue harboring bad actors for years without recourse. Unlike in commercial contexts, where mandatory arbitration still serves the useful purpose that Congress envisioned in 1925,<sup>96</sup> mandatory arbitration in employment contexts needs reforms in order to safeguard workers.

### III. THE COURT'S TREATMENT OF ARBITRATION

Given that much of arbitration law derives from shifting court precedent,<sup>97</sup> courts may initially appear to be a viable route for reenvisioning employment applications of the FAA. The recent *Morgan v. Sundance* precedent, limiting access to arbitration after a party has commenced litigation in federal courts, lends credence to this position.<sup>98</sup> However, examined in its totality, the Court has taken a decidedly antiworker course when applying the FAA to employment contexts; thus, courts will likely not be a forum where employees can expect to receive protection from mandatory arbitration. This Part shows how the Court's decisions vis-à-vis the FAA have progressively worsened applications of the FAA to employment contexts and made clear that worker protections will not derive from the judiciary.

The modern expansion of mandatory arbitration into employment contexts results largely from the Court's ongoing interpretation of two sections of the FAA: § 1, which grants a unique employment exception to application of the FAA, and § 2, which is known as the "saving clause" and generally makes mandatory arbitration enforceable under the FAA outside of certain contract defenses.<sup>99</sup> The Court has taken an expansive view of § 2, broadly enforcing arbitration in the employment context, and a limited view of § 1, finding few employment-based exceptions.<sup>100</sup> Thus, this combination has calcified the use of mandatory arbitration in employment contexts even in the most unfair cases.

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<sup>96</sup> See *supra* Section II.A; Gupta & Khan, *supra* note 9, at 505.

<sup>97</sup> See *supra* Part I.

<sup>98</sup> *Morgan v. Sundance, Inc.*, No. 21-328, 2022 WL 1611788, at \*3–4 (U.S. May 23, 2022).

<sup>99</sup> 9 U.S.C. §§ 1–2 (1925).

<sup>100</sup> See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 124 (2001) (Stevens, J., dissenting) (“[T]he Court’s parsimonious construction of § 1 of the Federal Arbitration Act (FAA or Act) is not consistent with its expansive reading of § 2.”).

Mandatory arbitration first burrowed its way into employment contexts in *Circuit City Stores, Inc. v. Adams*, when the Court adopted a new, broad interpretation of § 1 of the FAA.<sup>101</sup> Section 1 states that the FAA does not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>102</sup> The phrase “any other class of workers engaged in foreign or interstate commerce” may have reasonably been interpreted to exempt all interstate employment contracts.<sup>103</sup> However, applying the *ejusdem generis*<sup>104</sup> canon in *Circuit City*,<sup>105</sup> the Court instead held that the residual exclusion of “any other class of workers” in “Section 1 exempts from the FAA only contracts of employment of transportation workers.”<sup>106</sup> In so holding, the Court eliminated the first barrier preventing application of mandatory arbitration to nonunionized private sector workers, and mandatory arbitration in employment contexts became generally binding.

A decade later in *Concepcion*, the Court began to breach the second floodwall protecting workers by interpreting § 2 of the FAA narrowly.<sup>107</sup> Section 2 of the FAA states that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>108</sup> Such grounds include “generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>109</sup> California law had forbidden class action waivers in any contract, deeming such waivers unconscionable.<sup>110</sup> The plaintiffs in *Concepcion* had signed a mandatory arbitration agreement that disallowed claims brought “as a plaintiff or class member in any purported class or representative proceeding.”<sup>111</sup> Thus, under California law, the arbitration

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<sup>101</sup> *Id.* at 120–21 (majority opinion).

<sup>102</sup> 9 U.S.C. § 1.

<sup>103</sup> *See Cir. City Stores, Inc.*, 532 U.S. at 138–39 (Stevens, J., dissenting) (arguing that proper interpretation of § 1 of the FAA should consider that “Congress took care to bar application of the Act to the class of employment contracts it most obviously had authority to legislate about in 1925,” and that contemporaneous figures such as then-Secretary Hoover had made clear that “the exemption language would respond to any ‘objection . . . to the inclusion of workers’ contracts”).

<sup>104</sup> *Ejusdem Generis*, BLACK’S LAW DICTIONARY (11th ed. 2019). (“[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

<sup>105</sup> 532 U.S. at 114–15.

<sup>106</sup> *Id.* at 118–19.

<sup>107</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

<sup>108</sup> 9 U.S.C. § 2.

<sup>109</sup> *Dr.’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>110</sup> *Concepcion*, 563 U.S. at 357–58 (Breyer, J., dissenting) (“California law sets forth certain circumstances in which ‘class action waivers’ in any contract are unenforceable. In my view, this rule of state law is consistent with the federal Act’s language and primary objective.”).

<sup>111</sup> *Id.* at 336 (majority opinion).



agreement included unconscionable terms—which are ordinarily unenforceable under the FAA.<sup>112</sup> However, other Court precedent barred courts from “invalidat[ing] arbitration agreements under state laws applicable *only* to arbitration provisions.”<sup>113</sup> Leaning on this exception, the Supreme Court in *Concepcion* held that because the state law’s prohibition on *all* class action waivers would fall mostly on arbitral proceedings, the state law impermissibly interfered with the FAA and thus was preempted by the FAA.<sup>114</sup> State unconscionability defenses involving class action waivers were suddenly no longer a basis for revoking an arbitration agreement.

While *Concepcion* involved a consumer arbitration agreement and state law interactions, the Court extended the *Concepcion* reasoning to employment contexts involving potential federal law conflicts in the landmark 2018 case *Epic Systems Corp. v. Lewis*.<sup>115</sup> Despite federal statutory language that implied a right to class action lawsuits,<sup>116</sup> the Court in *Epic Systems* held that without unambiguous federal statutory language, class action waivers in employment contracts do not make arbitration agreements unenforceable.<sup>117</sup> Thus, employers may now evade class action lawsuits from employees entirely through arbitration.

The Court’s expansion of class action waivers to employment contexts in *Epic Systems* is best considered in tandem with its earlier decision in *American Express Co. v. Italian Colors Restaurant*. In *American Express Co. v. Italian Colors Restaurant*, the Court held that class action waivers in mandatory arbitration agreements were permissible even when the waiver denied an individual any real opportunity to bring a claim.<sup>118</sup> The plaintiffs had submitted a declaration from an expert economist, which showed that proving the underlying antitrust claim would cost several hundred thousand

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<sup>112</sup> Compare 9 U.S.C. § 2 (indicating that arbitration clauses are deemed to be “valid, irrevocable, and enforceable” unless there exists grounds “at law or in equity for the revocation of any contract”), with *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (“Like other contracts, however, they may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (quoting *Casarotto*, 517 U.S. at 687)).

<sup>113</sup> *Casarotto*, 517 U.S. at 687.

<sup>114</sup> *Concepcion*, 563 U.S. at 352 (reversing the judgment of the Ninth Circuit and holding that a ban on all class action waivers would impermissibly interfere with the Federal Arbitration Act’s elevation of arbitration).

<sup>115</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018).

<sup>116</sup> See *id.* at 1640 (Ginsburg, J., dissenting) (admonishing the Court for its failure to consider “the reality that sparked the NLRA’s passage,” which was namely that “employees ordinarily are no match for the enterprise that hires them” and that the NLRA thus protects “employees’ right to act in concert for their ‘mutual aid or protection’” (quoting 29 U.S.C. §§ 151, 157, 158)).

<sup>117</sup> *Id.* at 1631–32 (majority opinion).

<sup>118</sup> 570 U.S. 228, 231–32, 236–38 (2013) (holding that the class action waiver in the arbitration agreement prevented collectivized claims despite the paltry value of any such claim without a potential class action remedy).

dollars at minimum, even though the maximum recovery available to an individual was \$38,549 when trebled.<sup>119</sup> Thus, even facially unconscionable uses of mandatory arbitration are permissible under this line of precedent.

In conclusion, the Court's decisions show that it will generally enforce mandatory arbitration even in situations where plaintiffs have no way to effectively vindicate their rights. By broadly interpreting the enforceability of arbitration under § 2 of the FAA and severely limiting the employment exemptions provided under § 1 of the FAA, the Court has solidified judicial enforcement of mandatory arbitration clauses in employment contracts, regardless of how coercive those contracts are. While § 2 still provides opportunities to invalidate unfair mandatory arbitration clauses through standard contract defenses, it seems that few, if any, defenses will be deemed acceptable by the Court in practice.<sup>120</sup> Further, recent changes in the Court's composition will likely reinforce these trends.<sup>121</sup> Thus, workers looking for relief from unfair mandatory arbitration clauses will need to pursue reform outside of the courts.

#### IV. REFORMING THE FAA

The broadly proarbitration posture of the Supreme Court does not eliminate the possibility of employee-friendly changes to arbitration. Because the FAA is merely federal statutory law,<sup>122</sup> Congress may alter the language of the FAA to eliminate abusive uses of mandatory arbitration. Due to recent changes in American leadership<sup>123</sup> and changes in people's perceptions of arbitration,<sup>124</sup> legislation is a newly viable route to broadly

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<sup>119</sup> *Id.* at 231.

<sup>120</sup> See *Epic Sys. Corp.*, 138 S. Ct. at 1619; *Am. Express Co.*, 570 U.S. at 233; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011); *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 110 (2001).

<sup>121</sup> Justice Amy Coney Barrett, appointed to the Court in 2020, has written opinions previously indicating she approves of a broad interpretation of the FAA. See *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802–03 (7th Cir. 2020) (declining to extend the FAA's saving's clause to Grubhub food delivery drivers); *Weil v. Metal Techs. Inc.*, 925 F.3d 352, 357–58 (7th Cir. 2019) (finding against employees on several wage and hour points).

<sup>122</sup> 9 U.S.C. §§ 1–16, 201–08, 301–07.

<sup>123</sup> See Roberta Rampton, *Inauguration Day, from Home: Biden Team Plans Celebration amid COVID-19*, NPR (Dec. 15, 2020, 11:51 AM), <https://www.npr.org/sections/biden-transition-updates/2020/12/15/946721063/inauguration-day-from-home-biden-team-plans-celebration-amid-covid-19> [<https://perma.cc/2ZGK-J27N>] (discussing inaugural planning for a new administration during the COVID-19 pandemic). This new administration may be especially open to changes to arbitration. See Paige Smith, *Federal Contractors Wary of Push for Biden Ban on Arbitration*, BLOOMBERG L. (June 23, 2021, 11:02 AM), <https://news.bloomberglaw.com/daily-labor-report/federal-contractors-wary-of-push-for-biden-ban-on-arbitration> [<https://perma.cc/64LB-Y994>] (noting that President Biden is being asked to ban mandatory arbitration clauses by executive order).

<sup>124</sup> See McGregor, *supra* note 1 (pressure at Google and Facebook may be indicative of a broader pushback against mandatory arbitration clauses amongst white collar workers in America).

reforming mandatory workplace arbitration. This Part explores potential and developing legislative and professional changes to arbitration in employment contexts and offers a solution to help protect American workers from its coercive uses.

Support for arbitration reform is rising,<sup>125</sup> but what should arbitration reform look like? So far, several different reform models have been considered and a law limiting applications of mandatory arbitration has been passed.<sup>126</sup> These proposals show promise, but a flexible model of employment arbitration that provides holistic benefits to workers has yet to be proffered.

The bubbling up of potential arbitration reform proposals for workers has spanned more than a decade. In 2009, Senator Russ Feingold proposed the Arbitration Fairness Act, which would have eliminated arbitration in all employment and consumer contexts and in any situation involving civil rights issues.<sup>127</sup> Eight years later, Senators Kirsten Gillibrand and Lindsey Graham offered the Ending Forced Arbitration of Sexual Harassment Act of 2017, making mandatory arbitration unenforceable if it requires arbitration of a sex discrimination dispute.<sup>128</sup> Cheri Bustos's H.R. 4445 bill, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which became law in March 2022, is the clear progeny of the Gillibrand–Graham proposal.<sup>129</sup> A major but incomplete step towards fully reforming workplace arbitration contexts, the new law invalidates predispute mandatory arbitration agreements when applied to sexual assault and sexual harassment cases.<sup>130</sup> Outside of Congress, alternative reform ideas have included banning mandatory arbitration in any context in which unequal bargaining power between parties exists<sup>131</sup> and the creation of a government

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<sup>125</sup> Alexia Fernández Campbell, *Democrats Want to Ban Mandatory Arbitration at Work. Senate Republicans are Listening*, VOX (April 3, 2019, 5:00 PM) <https://www.vox.com/2019/4/3/18292168/forced-arbitration-senate-bill-hearing> [<https://perma.cc/A6M9-7GCC>] (discussing the bipartisan shifts towards reforming arbitration: “To understand how significant it is that Senate Republicans held a hearing on mandatory arbitration, all you really need to know is this: The last time the Senate Judiciary Committee discussed the legislation to regulate arbitration was in 2013, when Democrats controlled the Senate.”).

<sup>126</sup> Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C §§ 401–02 (2022).

<sup>127</sup> Farmer, *supra* note 61, at 2361 (“Many have argued that mandatory arbitration should be eliminated entirely in cases where the parties have unequal bargaining power. Most prominently, former Senator Russ Feingold put forth the Arbitration Fairness Act of 2009, which declares that ‘no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute.’” (footnotes omitted)).

<sup>128</sup> Sternlight, *supra* note 23, at 206.

<sup>129</sup> *See* 9 U.S.C §§ 401–02.

<sup>130</sup> *Id.* at § 402.

<sup>131</sup> *See* Farmer, *supra* note 61, at 2363 (considering the efficacy of banning mandatory arbitration in cases of unequal bargaining power and declining to endorse it).

middleman to police arbitration providers.<sup>132</sup> Disclosure changes, such as requiring tracking of which employers arbitrators have worked for and corresponding arbitration outcomes, as well as ethical advances, have also gained attention.<sup>133</sup>

The most effective solution would likely blend some of these ideas while also considering the positive role fair arbitrations could play in the employment context. After all, arbitration reduces congestion in the court system, provides increased flexibility to parties, and allows for more efficient dispute resolution.<sup>134</sup> By changing the timing of arbitration agreements, removing class action bans, and developing a new ethical regime for arbitrators, these benefits can flow to workers in fairly structured arbitral proceedings.

First, federal statutes should specify that arbitration be offered to employees as an alternative to litigation only at the time a dispute arises and that arbitration agreements should be truly negotiated. Most employees bound to mandatory arbitration agreements signed their agreements when newly hired and did not negotiate terms.<sup>135</sup> Because new employees may underestimate the risks of future disputes and prioritize impressing their new employers, this is a particularly poor time to offer mandatory arbitration agreements. By forcing employers to wait to offer arbitration until a dispute arises and circumscribing that agreement to only the dispute at hand, it may be possible to create a mutually beneficial system of arbitration for the employment context. Such a system would create natural competition between arbitration and litigation, potentially improving each and would likely reduce the effects of the repeat-player bias currently found in employment arbitration as arbitrators would suddenly need to win over the trust of employees too.

Some may worry that providing a choice between arbitration and traditional litigation would reduce the inherent benefits of arbitration.<sup>136</sup> Others may think this proposal does not go far enough.<sup>137</sup> However, because arbitration's beneficial aspects do not currently flow to employees, a less

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<sup>132</sup> *Id.* at 2364–65 (considering the effectiveness of adding a central regulator).

<sup>133</sup> *Id.* at 2366–67, 2372–73 (considering how arbitrators could be subject to new ethical requirements in order to rein in abusive uses of arbitration in contracts of unequal bargaining power).

<sup>134</sup> Commander, *supra* note 24, at 33–34.

<sup>135</sup> See Colvin, *supra* note 5, at 8–9.

<sup>136</sup> See Farmer, *supra* note 61, at 2362 (“[I]f litigation costs were higher than arbitration costs, then a claimant likely to prevail in a case where winning parties may recover attorney’s fees could refuse arbitration and compel a large settlement by threatening his opponent with costly litigation.”).

<sup>137</sup> See *id.* at 2361 (“Some criticize the Arbitration Fairness Act for not going far enough, arguing that it still allows companies to take advantage of consumers, including by tricking them into arbitration when it is not actually favorable to them.” (footnote omitted)).

efficient arbitration system would still be preferable to the existing structure. On the other hand, proposals such as Senator Feingold's,<sup>138</sup> which seek to eliminate arbitration wholesale, are likely misguided: many employee cases may be low value.<sup>139</sup> Employees with low-value cases would likely prefer to avoid the drawn-out, costly system of litigation. Real choice, which the Court has emphasized in its proarbitration decisions,<sup>140</sup> should be offered to employees.

Second, arbitration clauses that eliminate the opportunity to form class action lawsuits must be classified as inherently unconscionable and thus unenforceable.<sup>141</sup> Commercial entities must not be allowed to evade entire areas of law through dispute resolution trickery.<sup>142</sup> Because it is clear that the Court will deem virtually no mandatory arbitration clause eliminating a class action remedy unconscionable, Congress must respond boldly, enacting unambiguous statutory language that explicitly prohibits such clauses as *ipso facto* unconscionable. Eliminating class action bans and delaying the signing of arbitration agreements may remedy the weaknesses of arbitration in employment discrimination cases.

In this vein, Cheri Bustos's Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021<sup>143</sup> and its forebearer, Senator Kirsten Gillibrand's Ending Forced Arbitration of Sexual Harassment Act of 2017,<sup>144</sup> each represent bold—albeit underinclusive—visions for arbitration reform. The recently passed law laudably allows victims of sexual assault and harassment to choose arbitration or formal litigation after the arising of a dispute.<sup>145</sup> Some victims of workplace sexual harassment may crucially

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<sup>138</sup> *Id.*

<sup>139</sup> See Colvin, *supra* note 70, at 6 (“This employee win rate [in arbitration cases] is . . . lower than employee win rates in litigation. However, it should be noted that we may be comparing apples and oranges here in that the characteristics of cases in arbitration may differ systematically from those in litigation. For example, it could be that arbitration contains more *low-value* cases than litigation.” (emphasis added)).

<sup>140</sup> See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?”).

<sup>141</sup> Such legislation should, for instance, articulate that arbitration agreements do not in any way limit the availability of class action lawsuits.

<sup>142</sup> See Sternlight, *supra* note 23, at 177 (arguing that mandatory arbitration can allow employers to “use arbitration clauses to insulate themselves from liability under federal and state employment laws”).

<sup>143</sup> Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C §§ 401–02 (2022).

<sup>144</sup> Sternlight, *supra* note 23, at 206.

<sup>145</sup> See 9 U.S.C § 402.

prefer the confidential forum of an arbitral proceeding,<sup>146</sup> so outright banning workplace arbitration may harm these victims. However, the law exclusively covers disputes involving sex discrimination, whereas evidence suggests that arbitration in its current form is ineffective for a wide range of employment discrimination cases.<sup>147</sup> By responding to arbitration's ineffectiveness in employment discrimination cases with a one-off legislative fix, Congress may be positioning itself for an undesirable whack-a-mole cycle of legislating, forcing itself to counter discriminatory uses of ill-suited arbitral proceedings one-by-one as they arise. Broadly available, delayed choice mixed with the availability of class action remedies would likely obviate the need for one-off legislative fixes to discriminatory applications of arbitration.

Third, arbitrators need greater oversight and enforced ethical standards. While rules exist that require arbitrators to engage in neutral decision-making and avoid conflicts of interest, these rules are often voluntary.<sup>148</sup> High ethical standards for arbitrators must be mandatory and enforced. Almost all other arbitration reforms will require unambiguous federal legislation due to the ever-increasing proarbitration stance of the Supreme Court,<sup>149</sup> but states can enforce ethical standards without federal involvement. States should mandate registration of arbitrators and require adherence to codes of professional conduct for arbitrators. Ethical standards, after all, do not ban arbitration but rather improve it.<sup>150</sup> To facilitate the implementation of these standards, states may choose to adopt data disclosure systems and to develop regulatory bodies to track the incoming data and ensure ethical compliance.<sup>151</sup>

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<sup>146</sup> See David L. Ryan, *With Confidentiality Rule, Mass. Lawmakers Have Sexual Harassment Victims' Concerns in Mind*, BOS. GLOBE (Feb. 9, 2019, 12:00 AM), <https://www.bostonglobe.com/opinion/letters/2019/02/09/upholding-confidentiality-rule-mass-lawmakers-have-sexual-harassment-victims-concerns-mind/b4BwMOMcUWXRW6zCgXpwtN/story.html>[<https://perma.cc/BH3J-S2TX>] (discussing some victims' desire to have access to confidential forums through the use of NDAs).

<sup>147</sup> See Sternlight, *supra* note 23, at 178–80 (exploring the discriminatory impact of arbitration on vulnerable employee-plaintiffs).

<sup>148</sup> Farmer, *supra* note 61, at 2372.

<sup>149</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626–27 (2018) (“Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.’” (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001))).

<sup>150</sup> Farmer, *supra* note 61, at 2372–74.

<sup>151</sup> Data disclosure systems can allow for state aggregation of arbitrators' performance to detect biased arbitrators quickly. See Farmer, *supra* note 61, at 2364–66 (discussing potential regulatory bodies for overseeing arbitrations and how one potential data disclosure regime may be administered such that arbitrators would be dissuaded from exhibiting pro-employer biases). While the AAA and JAMS currently provide some ethical guidelines for arbitrators, anecdotal reports of unethical arbitrators indicate that they are likely insufficiently policing arbitrators' conduct. See Estlund, *supra* note 66, at 686.

By delaying the signing of arbitration agreements in employment contexts, preserving class action lawsuits, and enforcing new ethical standards for arbitrators, it is possible to envision a system of arbitration that can work for workers. For most of those improvements to take root, though, Congress needs to legislate.

#### CONCLUSION

Arbitration's uses have expanded dramatically over the past forty years. No longer do arbitrators solely review commercial contract issues between parties of relatively equal bargaining power.<sup>152</sup> Arbitration's applications now include employment, labor, and consumer disputes, each of which regularly appear before arbitral tribunals.<sup>153</sup> The drafters of the FAA likely never anticipated that arbitration would yield such extensive outgrowths.<sup>154</sup>

Developments in the uses of arbitration necessitate developments in the practice of arbitration. In employment contexts, the current model of arbitration harms workers without providing similar benefits to those provided to parties in business-to-business transactions.<sup>155</sup> Therefore, protecting American workers requires reform. Congressional action remains the best route for achieving equitable arbitration reform. By both delaying when employees sign arbitration agreements and providing employees with a real choice between arbitration and litigation, legislators can ensure that employee arbitration clauses are properly negotiated and fair. By eliminating the use of arbitration to silence class action lawsuits, legislators can prevent employers from choosing which laws they intend to follow. Finally, by strengthening and enforcing ethical standards for arbitrators, state and federal legislators can prevent avoidable abuses of arbitral powers. As Justice Gorsuch pointed out in *Epic Systems*, "it's the job of Congress by legislation . . . both to write the laws and to repeal them."<sup>156</sup>

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<sup>152</sup> See Colvin, *supra* note 5, at 5.

<sup>153</sup> Gupta & Khan, *supra* note 9, at 510–13.

<sup>154</sup> See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 138–39 (2001) (Souter, J., dissenting) (arguing that the FAA's drafters did not think arbitrators had authority over nontransportation employees).

<sup>155</sup> See *supra* Section II.B.

<sup>156</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).