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#METOO, DUE PROCESS, AND MANDATORY ARBITRATION: THE PERFECT STORM FOR FUNCTIONAL STATE LEVEL ARBITRATION REFORM

By
Kaci Dupree*

I. INTRODUCTION

In December of 2017, a bipartisan group of senators including Democrat Kirsten Gillibrand and Republican Lindsey Graham introduced the Ending Forced Arbitration of Sexual Harassment Act (“the Act”). The Act would amend the Federal Arbitration Act (“FAA”) to make arbitration agreements in employment contracts regarding Title VII claims unenforceable.¹ On the same day, another bipartisan group introduced a version of the bill in the House of Representatives which, if enacted, would function in the same manner as the Senate bill.² Lawmakers introduced the Act in response to the MeToo movement and public outcry over the sexual harassment scandals involving Harvey Weinstein and other prominent figures in Hollywood, government, and business.³ The Act enjoys bipartisan support in Congress and the support of the Attorneys General of all fifty states, the US territories, and the District of Columbia as a result of the prominent position sexual harassment currently occupies in the public discourse.⁴

However, it is unlikely that major reform of the FAA will occur in any manner other than through legislation due to the Supreme Court’s recent decisions regarding adhesive arbitration agreements in the consumer and employment contexts, and its generally favorable view of arbitration.⁵ Passing the Act and other similar legislation is seen by groups like the National Association of Attorneys General as a key way to ensure that victims of sexual harassment receive the due process and access to justice that can be denied to claimants by mandatory arbitration.⁶

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¹ Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

² Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4570, 115th Cong. (2017).

³ See Susan Sholinsky, *#MeToo’s Impact on Sexual Harassment Law Just Beginning*, Law360, (July 11, 2018) (actress Alyssa Milano’s tweet asking any woman who had been sexually harassed to respond in a tweet and share her story launched the MeToo movement, prompting lawmakers nationwide to propose legislation, including the Act, designed to protect victims in a variety of contexts including the workplace).

⁴ Sarah Gruber and Salvatore G. Gangemi, *Attorneys General Support Ending Arbitration of Workplace Sexual Harassment Claims*, THE NATIONAL LAW REVIEW, (February 20, 2018), <https://www.natlawreview.com/article/attorneys-general-support-ending-arbitration-workplace-sexual-harassment-claims>.

⁵ Thomas E. Carbonneau, *ARBITRATION LAW IN A NUTSHELL*, 4th ed., 69 (“... they [lower courts] contested the legality and desirability of adhesive arbitration. The Court appeared to be convinced that, if any exceptions to arbitrability were to be made, arbitration would cease to resolve effectively the problems of civil litigation.”)

⁶ Letter from National Association of Attorneys General, to Paul Ryan, Speaker of the House, Mitch McConnell, Senate Majority Leader, Charles Schumer, Senate Minority Leader, Nancy Pelosi, House Minority Leader (February 12, 2018) (“victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.”)

Unfortunately, like other congressional attempts to reform the arbitration system such as the Arbitration Fairness Act,⁷ the Act is unlikely to advance out of committee in either house because Congress is generally unwilling to interfere with the Court's expansive arbitration regime.⁸

As the passage of federal legislation amending the FAA is unlikely, state legislators should pass legislation that would protect employees that bring sexual harassment claims and would provide the due process that every state attorney general has advocated for.⁹ Although the Supreme Court has established that the FAA preempts contradictory state law,¹⁰ states can and should enact legislation. States could provide a functional framework at the state level to take advantage of the perfect storm that encourages policies that protect sexual harassment victims that has developed as the result of the ongoing MeToo movement without taking away the ability to arbitrate if both of the parties so choose.

II. ADHESIVE ARBITRATION: THE GREAT DEBATE

A. *The Development of the Supreme Court's Arbitration Jurisprudence*

Prior to the FAA's passage, courts in the United States expressed disdain towards the practice of arbitration.¹¹ Courts were also far less likely than modern courts to uphold an agreement to arbitrate because judges at the time viewed arbitrators as unqualified decision-makers.¹² A dismissive attitude towards arbitration as an inadequate forum for redress of claims was fairly typical of the judiciary at the time and was a large part of the impetus for the passage of the FAA.¹³ However, Congress did not vote for the FAA in 1924 solely to correct the judicial bias against arbitration; legislators also sought to create a procedural framework that would enable primarily commercial parties to expediently resolve disputes between themselves without having to resort

⁷ See Carbonneau, *supra* note 5, 72-73 (describing the Fairness in Arbitration Act as one of many failed Congressional attempts to decrease the reach of the Court's arbitrability jurisprudence and reform the arbitration system).

⁸ *Id.*, at 72 ("There appears to be a tacit understanding between the Court and the U.S. Congress that arbitration falls within the Court's exclusive bailiwick.")

⁹ Letter from National Association of Attorneys General, *supra* note 6.

¹⁰ See generally *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

¹¹ See Thomas E. Carbonneau, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 51 (West, 7th ed., 2012), ("Arbitration, in their [the courts'] view, was makeshift justice. Courts were reluctant to compel parties to arbitrate.")

¹² See Carbonneau, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 51, (quoting Justice Story: "when courts are asked to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress... and to close against him the doors of justice...").

¹³ *Id.*, at 61 ("According to the Court, [in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001)] the FAA was enacted by Congress to eliminate the 'hostility of American courts to the enforcement of arbitration agreements.'")

to costly and time-consuming litigation.¹⁴ In reality, the FAA was special interest litigation brought to Congress by sophisticated commercial parties and was intended to make it easier for merchants and other commercial parties to arbitrate their disputes with minimal judicial interference.¹⁵ The FAA provides a procedural mechanism for selecting arbitrators, judicial enforcement of awards, and gives arbitrators the power to compel witnesses to testify.¹⁶

Nonetheless, the Supreme Court has expanded its jurisprudence since the inception of the FAA to protect a right to arbitrate in a diverse score of situations. A key factor in the development of arbitration jurisprudence was the establishment of the separability doctrine in the 1960s.¹⁷ The Court ordered the district courts to uphold arbitration agreements, so long as the arbitration clause was valid, even when the remainder of the contract would be invalid.¹⁸ Subsequently, the Court further expanded the applicability of the FAA by striking down a California law that exempted franchise disputes from arbitration and held that Congress created a substantive body of law when it enacted the FAA and intended to prevent state legislators from passing legislation designed to undercut the enforceability of arbitration agreements.¹⁹ In 1983, the court further solidified its position by holding that “...as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”²⁰ By the end of the 1980s, the Court’s position with respect to arbitration had become fairly clear: there was a strong, emphatic, liberal federal policy in favor of arbitration.²¹

¹⁴ Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers’ and Employees’ Contractual Rights? - Legal and Empirical Analyses of Courts’ Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act*, 25 B.U. Pub. Int. L.J. 143, 165 (2016) (“the congressional record clearly reveals that Congress enacted the FAA for other reasons: (1) to allow sophisticated merchants to fashion voluntary arbitration agreements; (2) to encourage courts to enforce arbitration agreements; (3) to increase merchants’ ability to resolve trade disputes efficiently by eliminating expensive litigation; and (4) to “preserve business friendships” within and between various trade associations.”)

¹⁵ Carbonneau, *supra* note 12 (stating that the FAA was originally drafted by the American Bar Association’s Committee on Commerce, Trade, and Commercial Law to encourage the enforcement of arbitration agreements in commercial contexts).

¹⁶ 9 U.S.C. §5, §7, §10.

¹⁷ *See Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (holding that the arbitration clause is “seperable” from the main contract. Therefore, even where the main contract could be challenged, the arbitration clause could still be valid).

¹⁸ *Id.* at 403 (“The federal court is instructed to order arbitration to proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.”)

¹⁹ *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1980) (“Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”)

²⁰ 460 U.S. 1, 24 (1983).

²¹ *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1980) (“in enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”)

B. *The States Fight Back: Resistance to Enforcing Arbitration Clauses*

After the Court solidified its stance in favor of arbitration, corporations began to take advantage of arbitration's strong position by inserting pre-dispute arbitration agreements into their consumer contracts.²² The increasing addition of mandatory arbitration clauses in the consumer context gave rise to a conflict between state and lower federal courts and the Supreme Court as to their validity.²³ Some courts regularly invalidated mandatory arbitration clauses on the grounds of unconscionability.²⁴ Similarly, states courts differed with the Supreme Court over whether or not employees and consumers could be required to arbitrate statutory rights (such as civil rights).²⁵ The FAA contains the so-called "savings clause," which appears to carve out an exception to arbitrability where at law or equity the contract would be considered invalid.²⁶ Many courts have traditionally relied on the savings clause exemption in order to invalidate arbitration agreements on unconscionability grounds.²⁷ However, in *AT&T Mobility v. Concepcion*,²⁸ the Court made it more difficult for states to invalidate arbitration agreements even when they were imposed unilaterally or could be invalidated on state law grounds.²⁹ The Court held that state laws which allowed invalidation for unconscionability directly opposed the federal policy favoring arbitration.³⁰

The majority of opposition to enforcing arbitration agreements has come from California and the Ninth Circuit.³¹ In the view of these courts, agreements to arbitrate were considered

²² See e.g. *Green Tree Fin Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000) (where an adhesive agreement to arbitrate between a consumer and a corporation was at issue).

²³ See Carbonneau, *supra* note 5 ("an ideological war developed between the U.S. Supreme Court and a number of lower federal and state courts in which the lower courts criticized the Court's support for arbitration- in particular, they contested the legality and desirability of adhesive arbitration.")

²⁴ See e.g. *Nino v. Jewelry Exchange, Inc.* 609 F.3d 191, 204 (3d Cir. 2010) (which states that "arbitration provisions that confer an unfair advantage upon the party with greater bargaining power are substantively unconscionable.") (quoting *Alexander v. Anthony Int'l, L.P.*, 341 F. 3d 256 269 (3d 2003)).

²⁵ See e.g. *Litle v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064 (Cal. Sup. Ct. 2003) (discussing the validity of mandatory arbitration of federal and state statutory claims.)

²⁶ See 9 U.S.C. §2 ("An agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

²⁷ For a discussion of the traditional unconscionability defense to arbitration agreements, see *Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. 93 (N.C. Sup. Ct. 2008).

²⁸ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

²⁹ *Id.*

³⁰ See Carbonneau, *supra* note 5, at 151 ("although these agreements [at issue in AT&T] prevented consumers with modest ends from pursuing their right of recovery, the court held that state law policies about unconscionability were in direct opposition to the 'strong emphatic public policy in favor of arbitration'.")

³¹ See e.g. *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778 (9th Cir 2002) and see e.g. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)(superseded by statute) (holding that the FAA did not preempt the

fundamentally unfair when they were imposed unilaterally, and arbitration itself represented a compromise of the courts' fundamental role in American law as protectors of the public's rights.³² In terms of employment arbitration, the California Supreme Court has argued that in order to be valid, arbitration agreements which would mandate that employees arbitrate statutory claims are subject to requirements of minimum fairness.³³

The FAA also provides an exclusion in section one for certain classes of workers.³⁴ Some courts based their rulings on the FAA's employment exclusion in order to exclude workers' contracts from mandatory arbitration clauses.³⁵ However, the Supreme Court has held that this clause only implicates certain workers in interstate commerce, such as transportation workers, but does not exclude arbitration agreements in employment contracts for any other workers involved in interstate commerce, causing the employment exclusion's significance to decrease over time.³⁶ As a result of this interpretation, very few workers' contracts are actually excluded from the FAA, and pre-dispute agreements signed by employees are likely to be upheld.³⁷

California courts from refusing to enforce an arbitration clause that was unconscionable under California law, and that unconscionability had both procedural and substantive elements which could be implicated in class action waivers in arbitration agreements).

³² Carbonneau, *supra* note 5, at 68 (“[the view in California is that] private parties should not be empowered to alter the creation and attribution of judicial jurisdiction and private arbitrators should not be substituted for judges in the performance of judicial tasks.”)

³³ *See* Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83 (Cal. 2000) ((quoting Cole v. Burns Intern. Security Services, 105 F.3d 1465,1482 (D.C. Cir. 1997) (“Such an arbitration agreement is lawful if it ‘(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment 'effectively may vindicate [his or her] statutory cause of action in the arbitral forum.’”)

³⁴ *See* 9 U.S.C. §1 (“... but nothing herein shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”)

³⁵ *See e.g.* Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1998) (holding that where the FAA did not apply to an employment contract, the court could not compel arbitration pursuant to the arbitration clause in a collective bargaining agreement.)

³⁶ Matthew Finkin, “Workers’ Contracts” Under The United States Arbitration Act: An Essay in Historical Clarification, 17 Berkeley J. Emp. & Lab. L. 282, at 294 (“... the United States Supreme Court has more recently interpreted the word "involving" to be as broad as the word "affecting" commerce, *i.e.*, as expressing the full reach of the Commerce power. Thus, the argument is that employees referred to as "*engaged*" in commerce had a well-developed meaning limited to those who either transported goods or were so closely connected to such transport so as to be practically part of it. Employees who "*affected*" commerce included not only transport workers "but also all workers involved in the manufacture or production of interstate goods." Consequently, the argument runs, when Congress chose to exempt only the former, it left the latter covered by the Act.”)

³⁷ *Id.* at 298. (explaining that “The U.S.A.A. exempts contracts of employment, all contracts of employment, over which Congress had constitutional authority. The scope of the commerce power when the U.S.A.A. was enacted was quite narrow; in the employment setting, it was limited largely to transportation workers. Thus in 1925, the U.S.A.A. could not have applied to an arbitration provision in the employment contract of a neo-natal physician, a manufacturing manager, or a secretary in a law firm, because these employees would not have been considered as being in interstate commerce. As the commerce power has been expanded by the United States Supreme Court, the

C. “The law is clear”: The Supreme Court Reaffirms its Arbitration Jurisprudence

The Supreme Court has made it abundantly clear in recent years that there are very few limitations regarding what types of contracts may include arbitration agreements despite the historical disagreement in the lower courts over the legitimacy of adhesive arbitration agreements. The Supreme Court has reinforced this view by making it nearly impossible to challenge this type of arbitration agreement in recent decisions.³⁸ The Court has held that the FAA applies in state courts and that states must place arbitration clauses on equal footing with other contracts, greatly decreasing the options available to states to regulate the enforcement of arbitration clauses specifically.³⁹ For example, in response to a California decision not to allow class action waivers in pre-dispute arbitration agreements, the Supreme Court held that allowing class arbitration would serve to impede arbitration proceedings, a result which would be in opposition to the federal policy favoring arbitration.⁴⁰ The Court also held that arbitration agreements are enforceable against employees who wish to bring statutory claims against employers as long as the statute does not indicate that Congress intended to exclude arbitration as an adjudicatory mechanism for claims that arise under it.⁴¹ Even when a federal agency might bring a court case on behalf of an employee seeking to address civil rights claims, the court has upheld an adhesive agreement for that employee to arbitrate the same claims.⁴² Most recently, in *Epic Systems Corp. v. Lewis*,⁴³ the Supreme Court upheld class action waivers in adhesive employment contracts because there is a clear Congressional directive to uphold arbitration agreements as written.⁴⁴ The *Epic Systems* decision only reinforces the position that as a matter of federal law, arbitration agreements are likely to be enforced no matter the circumstances under which they were agreed to.

In the wake of these decisions, it is clearer than ever that the Supreme Court is likely to uphold agreements to arbitrate even when, as in the *Epic Systems* decision, “the policy may be

exemption has expanded along with it... the judicial policy toward arbitration has rendered the courts amenable to giving the Act a more sweeping application.”)

³⁸ Carbonneau, *supra* note 5 at 230.

³⁹ *Allied- Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (“what states may not do is decide that a contract is fair enough in to enforce in all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful....”)

⁴⁰ *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 347-48 (2011) (explaining that the very nature of class arbitrations, which would involve numerous parties and formal procedures to protect them necessarily violates the policy favoring arbitration because it reduces the informal process to the equivalent of a civil trial.)

⁴¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴² *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that the EEOC, as a third party, is not subject to the arbitration agreement and may bring a court case on the employee’s behalf but the arbitration agreement between the employer and employee is not invalidated).

⁴³ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018).

⁴⁴ *Id.* at 1632 (“the policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us be enforced as written.”)

debatable.”⁴⁵ The Supreme Court’s reinforcement of arbitration as a preferred dispute resolution system has brought arbitration into favor as a mechanism by which companies may settle disputes with their employees. Ultimately, the debate between the courts as to whether adhesive arbitration agreements should be enforced is essentially settled by the Court’s strict enforcement of arbitration agreements. Further, any limitations on adhesive consumer or employment arbitration agreements in the near future must come in the form of legislative reform.

III. ARBITRATION PROVIDES INSUFFICIENT DUE PROCESS TO VICTIMS OF WORKPLACE SEXUAL HARASSMENT

While arbitration is a valuable tool for the resolution of disputes in general because of its private nature and flexible procedures, these very aspects make arbitration an insufficient forum for the resolution of sexual harassment claims. While resolving these claims in court allows victims to come forward in the public eye or to file a class action, arbitration allows employers to prevent a class action suit and to receive a binding judgment that they do not have to disclose publicly. As a result, victims may never know that other victims exist, and the public may never know that a corporation’s employees have a history of making sexual harassment claims. Similarly, the flexibility of the arbitration procedure further allows large corporations to have an advantage over individual employees in preventing the disclosure of sexual harassment claims.

A. *The Antithesis of #MeToo: Silence and Arbitration of Workplace Sexual Harassment Claims*

The private nature of arbitral adjudication in comparison to the public’s access to court proceedings is one of the most significant problems identified by those who oppose arbitration’s use in the sexual harassment context.⁴⁶ Since the inception of the United States and even when the states were colonies, the courts have played an important role in society.⁴⁷ Public accountability is an important aspect of the courts’ role because when brought to court, the accused was at least theoretically brought before the whole community.⁴⁸ Another important aspect of the judicial system is the ability of aggrieved employees to file class actions against their employers. In a sexual harassment case this can play a major role because an open court class action gives employees access to knowledge about the claims, which can encourage others to join the action,

⁴⁵ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1632.

⁴⁶ See e.g. letter from National Association of Attorneys General, *supra* note 9 (“additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both harassment complaints and any settlements confidential.”)

⁴⁷ See Carbonneau, *supra* note 5 at 4 (“even if it is merely a perception, adjudication is indispensable to the integrity and efficacy of the social, economic, and political order.”)

⁴⁸ Judith Resnik, *Access to Justice, Access to Knowledge and Economic Inequalities in Courts and Arbitrations*, 96 N.C.L rev. 605, (2018) (early colonial and state constitutions have always contained provisions stating that the courts should be open so that all might attend).

and at the settlement stage, knowledge about the reasoning the court employed.⁴⁹ The class-action feature of civil litigation is an example of a functional way in which the public is able to gain knowledge about and participate in litigation against sophisticated players like large corporations.⁵⁰ The traditional openness of the courts in the United States functions as “sunshine” in litigations, shedding light on the proceedings by allowing the public to access them. When victims are able to air their claims publicly, others are able to learn of their claims, and this availability of knowledge to the public encourages those who have been harmed to bring their claims and keeps justice in the public eye.⁵¹

By contrast, arbitration is private adjudication by its very definition⁵² because the parties to the contract in question set the terms. Parties get to choose the manner of adjudication, who will adjudicate the claims, and the degree of publicity when an award is rendered.⁵³ Where the contract is adhesive, often the terms include anonymity.⁵⁴ Victims are often barred from publicly discussing their claims because they are asked to sign non-disclosure agreements as part of the arbitration of sexual harassment claims.⁵⁵ Further, even where the contract is adhesive, the court has held that it is constitutional for corporations to insert class action waivers into the employment agreement, denying claimants the ability to recover as a class.⁵⁶ Similarly, arbitrators do not have to publish opinions and are not subject to the judgment of the community in the same way as the judiciary; even when awards are published, such as by the American Arbitration Association (“AAA”), the awards omit the name of the accuser and the accused in order to protect their identities.⁵⁷ Although this privacy ostensibly protects the claimant, it protects the accused and the employer as well. If no one ever knows that an employee has been accused of sexual harassment, then the corporation may not have to fire the accused employee (unless it is part of the arbitral award) and further, the

⁴⁹ *Id.*, at 613- 615 (resorting to open courts can provide knowledge to the public about the case and about the reasoning for the result. The increased knowledge decreases the disparity between sophisticated repeat players and individuals in the court system).

⁵⁰ *Id.*

⁵¹ *Id.* at 613, and 626-627 (discussing various state and federal court practices that give the public access to information about court proceedings and the public’s role in adjudication within the court system).

⁵² See Carbonneau, *supra* note 5 at (“Arbitration is a private process that independently markets its services and pays its own overhead. There is no political entitlement to, and consequentially no rigorous social or legal regulation of, arbitration.”)

⁵³ See Carbonneau, *supra* note 12, Ch.1 §3 at 16-23.

⁵⁴ See Resnik, *supra* note 43, at 644 (describing the current case law as encouraging an attitude of secrecy and the common use of impositions of secrecy when agreements to arbitrate are entered into adhesively, such as one which was under review by the 9th circuit in 2012).

⁵⁵ Letter from National Association of Attorneys General *supra* note 6 (“this veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, may pursue relief.”)

⁵⁶ See *Epic Systems Corp. vs. Lewis*, *supra* note 38.

⁵⁷ See e.g. 2007 AAA Lexis 37 (an arbitration award where, although published, identities of the corporation, accused, and accuser have all been omitted).

corporation does not get a public reputation as a business that employees those who victimize others.⁵⁸ Under the current process, it is possible for the accused employee to retain his position while the employee who brought a claim of sexual harassment to arbitration must remain silent. The privacy of the arbitral process is a valid tool for commercial disputes, but the value of the silence encouraged by this private system in the context of sexual harassment claims is certainly debatable in light of the plethora of victims who have come forward in response to the MeToo movement in the past year.⁵⁹

B. Arbitration's utility as a flexible process can make it an unsuitable forum for the resolution of workplace sexual harassment claims

Due process -both substantive and procedural- are cornerstones of the American judicial system. Due process in the court system has arisen out of a set of judicial and statutory rules that proscribes the rights of those involved in a court proceeding; these apply to both the accused and the accuser, the plaintiff, and the defendant.⁶⁰ Unfortunately, these rules that are designed to give due process to all involved in the judicial process often slow down the pace of adjudication and create an inflexible and expensive system for dispute resolution.⁶¹ The value of arbitration is that it is not necessarily fettered by any of the rules of procedure which constrain courts.⁶² Arbitration is a uniquely flexible process because the terms of the parties' contract determine the process and scope of the arbitration. By the same token, arbitration's very value as a flexible system prevents it from providing an adequate resolution system in some contexts. For example, it can be inadequate where both parties did not have equal bargaining power when creating the terms- as in mandatory arbitration under an employment contract -because the use of arbitration without oversight can deprive weaker parties of access to the benefits of the judicial system.⁶³ Employers

⁵⁸ Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a model*, 128 Yale L.J. F. 121, 134-135 (2018) (stating that employers benefit from the privacy of arbitration and arbitration settlements and are often unlikely to remove high level employees accused of harassment unless there is public pressure to do so).

⁵⁹ See Audrey Carlsen, Maya Salam, Claire Cain Miller, et. al. "#MeToo Brought Down 201 Powerful Men. Nearly Half Their Replacements are Women." *The New York Times*, (October 29, 2018) <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> (outlining 201 different cases of #MeToo sexual harassment victims coming forward).

⁶⁰ Due process, both procedural and substantive, is an essential consideration in a variety of legal challenges brought to the Supreme Court. See e.g. *Fuentes v. Shevin*, 407 U.S. 67 (1972) for a discussion of due process in the civil context; See also *McDonald v. City of Chicago*, 561 U.S. 742 (2010) for a discussion of fundamental rights implicated in the Due Process Clause; and see *Chavez v. Martinez*, 538 U.S. 760, (2003) for a discussion of due process in a criminal context.

⁶¹ See Thomas Carbonneau, *Arbitration and The U.S. Supreme Court: A Plea for Statutory Reform* 5 J. Disp. Resol. 231, 238 (1990) (describing the failure of American courts to resolve disputes as a result of procedural processes designed to protect legal rights).

⁶² Carbonneau, *supra* note 5 at 2 (stating that arbitration is valuable to business people because it provides an effective and efficient and reasonably fair form of justice).

⁶³ See Carbonneau, *supra* note 59 ("Advancing arbitral relief as the exclusive remedial standard in the area of commercial regulation not only divest society of basic governance over such matters, but it could also result in the

gain an advantage in arbitration proceedings by deciding rules when employees unknowingly agree to terms in adhesive contracts.⁶⁴ Unlike in the courts, where everyone is held to the same terms or the established law, the flexibility of arbitration allows arbitrators to render justice differently in different situations. Arbitrators do not have to consider the law, unless the contract says so, or can additionally consider industrial factors when making their decisions.⁶⁵ Arbitrators under a collective bargaining agreement, for example, first decide culpability and then a remedy appropriate for the action while courts are asked to strictly determine guilt or non-guilt.⁶⁶

However, it is true that arbitrators can use a variety of methods to try and ensure fairness in arbitral proceedings.⁶⁷ Therefore, arguments are made that the employer's superior bargaining power does not necessarily decrease the availability of justice to the employee since after all, standards and procedures exist to protect the interest of parties under adhesive arbitration agreements.⁶⁸ Ultimately, the flexibility of arbitration procedures is exactly what makes arbitration problematic as a way to adjudicate claims of sexual harassment.

Arbitration's flexibility ideally allows parties who agree to arbitration to resolve their disputes in a manner that they choose. However, because employees can agree to arbitration in situations where they had little or no understanding of the consequences that can stem from agreeing to arbitrate, employees are effectively deprived of access to the courts for redress of their claims.⁶⁹ The current decisional law, though, supports enforcing these agreements, necessitating functional legislation to give employees a meaningful choice as to whether to arbitrate or go to a court of law for resolution of these disputes.⁷⁰

loss of the adjudicatory safeguards that proceed from a procedural process built upon public scrutiny, fairness, and a basic right of appeal- one which entrusts socially divisive issues to an impartial and principled judiciary.”)

⁶⁴ See Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 Widener L. Rev. 101, 103 (2010) (describing studies finding that arbitration favors sophisticated corporate players and can be tilted against individuals).

⁶⁵ Mollie H. Bowers, E. Patrick McDermott, *Sexual Harassment in the Workplace: How Arbitrators Decide*” 48 Clev. St. L. Rev. 439, 440 (“Regardless of whether an arbitrator elects to apply external law, he considers broader concepts of industrial jurisprudence in determining what the remedy shall be. This seems to create a chasm between arbitral treatment of sexual harassment allegations and that of Federal courts under Title VII.”)

⁶⁶ *Id.* (stating that an arbitrator's mandate is to not to consider whether the complainant's legal rights are violated (like a court would) but rather whether, in the particular case, the employer proved the conduct and the remedy was sufficient for that conduct. This implies arbitrators do not consider outside law when rendering their decisions, at least in the same manner as courts).

⁶⁷ See Hickox, *supra* note 62 at 108 (describing programs employers can use to create more fair arbitral proceedings when they seek to compel arbitration; for example, employers can ensure the employee was a participant in meaningful communications about the arbitration clause in their employment agreement).

⁶⁸ See e.g. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399 (2000).

⁶⁹ See e.g. Hickox, *supra* note 62, at 108 (describing case law as accepting the mere presentation of the arbitral clause in an employee handbook as sufficient to demonstrate an employee's consent).

⁷⁰ Carbonneau, *supra* note 59 (“the tenor of the current decisional law makes it unlikely that the Court will fashion for itself and other federal courts an authority sufficient to make the necessary corrections... an intelligent reordering of arbitration, therefore, can only proceed from a legislative reformation of the enabling statute.”)

IV. THE ENDING FORCED ARBITRATION OF SEXUAL HARASSMENT ACT

The Ending Forced Arbitration of Sexual Harassment Act would serve as an attempt to remedy arbitration's failure to give victims of sexual harassment sufficient due process by preventing employers from forcing employees who bring claims of sexual harassment into arbitration proceedings. Under the Act, claims that are considered "sex disputes" would be excluded from arbitrability.⁷¹ The Act defines "sex disputes" as "any dispute between an employee and employer which would form the basis of a claim based on sex under Title VII of the Civil Rights Act."⁷² The Act would amend the FAA to render any pre-dispute arbitration clauses which purport to govern these areas unenforceable as a matter of federal law.⁷³ The Act also provides that any questions as to its applicability should be referred to the courts rather than an arbitrator.⁷⁴ Given the Supreme Court's stance on the strength of the FAA and its supremacy in the field of arbitration, this bill would be an effective way to change the nearly limitless bounds of arbitrability. In doing so, it would give those bringing sexual harassment claims fair access to due process, and provide meaningful reform as one way to destabilize the culture of silence surrounding sexual harassment that allows those who commit these actions to remain in power. A caveat to the Act's protections can be found in § 402(b)(2), which provides that nothing in the chapter applies to contacts between an employer and a labor organization,⁷⁵ except that no arbitration agreement waives the employees' right to judicial enforcement of statutory claims.⁷⁶ Although the legislative history provides no guidance as to why the drafters chose to exempt agreements with labor unions, the probable reason is that these organizations have developed their own alternative dispute resolution processes.⁷⁷ Similarly, the bargaining power between unions and employers is theoretically more balanced, eliminating some of the fundamental concerns that the Ending Forced Arbitration of Sexual Harassment Act seeks to eliminate for individual employees.

⁷¹ See Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017) ("Except as provided in subsection (b)(2), and notwithstanding any other provision of this title, no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.")

⁷² *Id.*, §401.

⁷³ *Id.*

⁷⁴ See *id.*, §402(b)(1) ("The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.")

⁷⁵ *Id.*, §402(b)(2) .

⁷⁶ *Id.*, ("...except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.")

⁷⁷ See *id.* at legislative history; and see Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 ABA Journal Lab. & Emp. Law 411 (2010) (for a thorough discussion of the evolution of labor ADR processes).

Unfortunately, Congress has shown very little willingness to actually pass this essential legislation. For example, Congress has rejected other arbitration reform legislation, such as the Arbitration Fairness Act, which would prevent the inclusion of pre-dispute arbitration agreements in contracts.⁷⁸ Congress has not acted despite continuing public discourse about the problems surrounding sexual harassment and abuse and the silence that their victims are encouraged to maintain.⁷⁹ As the MeToo movement approaches its one year anniversary of existence, some powerful figures such as Gretchen Carlson, who came forward about the sexual harassment she endured under Roger Ailes for years, have called for the passage of the Act.⁸⁰ Similarly, some corporations, such as Microsoft, have acted on their own to remove adhesive arbitration clauses from their employment contracts.⁸¹ Congress has not acted despite powerful market statements like these. While federal legislation is the best way to achieve meaningful reform, it is not the only solution.

V. STATES SHOULD FOLLOW THE EXAMPLE OF AND LEARN LESSONS FROM STATES THAT HAVE ALREADY ENACTED REFORM MEASURES

The states should act to protect their citizens in light of Congress's unwillingness to pass meaningful reform legislation. States should act to rectify the due process concerns expressed by the State Attorneys General when they argued for the passage of the Ending Forced Arbitration of Sexual Harassment Act⁸² because arbitration deprives claimants of due process. The largest difficulty for state legislators in this area is the Supreme Court's jurisprudence about arbitration; the Supreme Court has held a multitude of times that the FAA preempts state law.⁸³ Thus, state legislators must enact legislation that does not directly contradict the FAA in order to withstand judicial scrutiny.

⁷⁸ See Morgan Stanley, *Sixth Time's the Charm: Rethinking the Arbitration Fairness Act to Achieve Practical Reform*, 10 Arb. L. Rev. 199 (2019) (for a discussion of the proposed Arbitration Fairness Act and Congressional reluctance to pass arbitration reform).

⁷⁹ See e.g. Ellen Bravo, *Are we at a tipping point on sexual misconduct?*, Quartz at Work, (Oct. 2, 2018) (discussing recent current events involving sexual misconduct) <https://qz.com/work/1410390/are-we-at-a-tipping-point-on-sexual-misconduct/>.

⁸⁰ See e.g. Gretchen Carlson, *To Succeed, MeToo Must Target America's Laws, not just a few powerful men*, azcentral, USAtoday, (Sep. 25, 2018), <https://www.azcentral.com/story/opinion/voices/2018/09/25/me-too-anniversary-women-sexual-harassment-gretchen-carlson-column/1381126002/>.

⁸¹ See Nick Wingfield and Jessica Silver-Green, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, The New York Times, (Dec. 19, 2017) <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> (“Microsoft, one of the world’s biggest software makers, said on Tuesday that it had eliminated forced arbitration agreements with employees who make sexual harassment claims and was also supporting a proposed federal law that would widely ban such agreements.”)

⁸² See Letter from National Association of Attorneys General, *supra* note 6 (“ending mandatory arbitration of sexual harassment claims would help put a stop to the culture of silence that protects perpetrators at the cost of their victims.”)

⁸³ See e.g. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

Several states, including New York and Vermont, have already taken action in this area and can be used as examples of possible types of legislation that would help provide due process to employees bringing sexual harassment claims.⁸⁴ New York has taken radical action and simply made pre-dispute agreements to arbitrate sexual harassment claims illegal and unenforceable.⁸⁵ It appears that New York’s legislators attempted to circumvent federal preemption by including the language “except where inconsistent with federal law,” into the provision,⁸⁶ but the New York approach still has its limitations as a reform measure. New York’s legislation attempts to achieve what Congress has not, preventing the inclusion of “mandatory arbitration” of “sexual harassment”⁸⁷ clauses in employment contracts but similarly retains an exception for collective bargaining agreements.⁸⁸ However, if New York’s law is challenged in federal court, it is unlikely that even the exclusion of inconsistent federal law provision would be sufficient to prevent the Court from enforcing mandatory arbitration agreements,⁸⁹ even if the parties specifically invoke New York law.⁹⁰

Vermont’s legislators took a slightly more nuanced approach when they enacted legislation in May of 2018 that would not invalidate agreements to arbitrate sexual harassment claims per se, (in fact, the legislation does not even refer to arbitration by name) but amend Vermont’s employment regulations to set limitations on what employers could ask employees to agree to in their employment contracts related to sexual harassment claims in general.⁹¹ The legislation prohibits employers from requiring any employee to sign agreements which would prevent the employee’s participation in an investigation relating to or disclosure of sexual harassment,⁹² and requires that “an agreement to settle a claim of sexual harassment” must expressly state that it does not restrict the employee’s rights to pursue relief in any other forum.⁹³ Vermont’s approach is more functional

⁸⁴ Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, Bloomberg Law (Oct. 3, 2018) <https://www.bna.com/states-metoo-mantle-n73014482949/> (thirty-two states introduced MeToo related legislation, but only four, Maryland, New York, Vermont, and Washington, have enacted legislation to limit mandatory arbitration specifically).

⁸⁵ See N.Y. C.P.L.R. Art. 75 §7515 (2018).

⁸⁶ *Id.*, at §7515(b)(i).

⁸⁷ *Id.* at §7515(a), §7514(b).

⁸⁸ *Id.*, §7515(c) (“where there is a conflict between any collective bargaining agreement and this section, such agreement shall be controlling.”)

⁹⁰ *But see* Volt Info. Scis. V. Bd. of Trs., 489 U.S. 468, 479 (1989) (“... it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the act itself.”)

⁹¹ 21 Vt. Stat. Ann. §495h (2018) *amended by* Vt. H.B. 707 (May 28, 2018).

⁹² See *id.* at §(G)(1)(A).

⁹³ *Id.* at §G(1)(B) (prohibiting employers from requiring employees to sign agreements which (except as otherwise permitted by state and federal law) waive procedural rights and remedies available to the employee making the claim) *also see Id.* at §H (listing various forums and actions employees may not be prevented by agreement from utilizing to redress the sexual harassment claim).

than New York's, which expressly bans a type of arbitration agreement, but could still be invalidated by the Court if challenged along the same general reasoning the court employed in *Southland Corp. v. Keating*.⁹⁴ However, overall Vermont has taken an approach that provides choice for employees while not depriving parties of the ability to arbitrate.

VI. CONCLUSION

While no state has passed perfect legislation to address mandatory arbitration's shortcomings as the adjudicatory method for employment sexual harassment claims, the growing trend of states acting to provide increased protections for these employees is a sign that state governments, at least, understand the importance of legislation to make meaningful reform in the employment arbitration arena. Although each state reform measure must confront the Supreme Court's sweeping jurisprudence regarding the emphatic public policy favoring arbitration, the efforts made in states like New York, and Vermont to create laws that will provide protection as well as honor the judicial policy should serve as examples that other states can follow. States should continue to experiment with policies that will address the concerns raised by the public and their own Attorneys General. Finally, and perhaps most importantly, the pressures of the MeToo Movement and the efforts of the states to regulate arbitration may, (and should) serve as the political impetus needed to persuade Congress to pass the Act, which would provide reform, address due process concerns, and is the most likely avenue for arbitration reform that would withstand judicial scrutiny.

⁹⁴ See *Southland Corp. v. Keating*, 465 U.S. 1 (1980) (holding that Congress intended to foreclose the ability of state legislators to create laws that directly opposed the enforceability of arbitration agreements under the FAA).