The Times They Are A-Changin’: #MeToo and Our Movement

Forward

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THE TIMES THEY ARE A-CHANGIN’: 
#METOO AND OUR MOVEMENT FORWARD*

Terry Morehead Dworkin & Cindy A. Schipani**

ABSTRACT

Social movements like #MeToo have gained public traction like never before. In this Article, we place those developments within their historical context and chart a path forward. First, we provide a history of the prior unsuccessful attempts to ratify an Equal Rights Amendment, and we discuss that effort’s current legal status and prospects. Then, we briefly review the history of sexual harassment law. Having outlined this historical context, we move to contemporary developments. We describe actions that state legislatures and local municipalities have taken to address the concerns raised by the #MeToo movement. Finally, we discuss how inflection points can lead to change and we make concrete reform suggestions.

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* The Times, They Are A-Changin’ is the title of a song by Bob Dylan, originally released in 1964, Warner Brothers, Inc.
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INTRODUCTION

On the first anniversary of their report on Harvey Weinstein sexually abusing women, New York Times reporters Jodi Kantor and Megan Twohey reflected: “All of us have been told that the key to gender equality is looking to the future. . . . The past year has shown that this wisdom is incomplete. To move forward, we have to excavate the past.” The #MeToo movement, started by activist Tarana Burke over a decade ago and brought to headlines by the New York Times report, seems to have rocked our nation to its core—or at least grabbed its attention. By upending the careers of high-profile, abusive men, the movement has placed a spotlight on wrongs rampant in our society. #MeToo crusaders utilize social media, press coverage, and their celebrity status to provide a voice to previously silenced survivors across nearly every


2. Tarana Burke created Just Be Inc., an “organization that helps victims of sexual harassment and assault,” and she called her movement “#Me Too.” Sandra E. Garcia, The Woman Who Created #MeToo Long Before Hashtags, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/KE4S-4PTU]. After the New York Times report on October 5, 2017, actress Alyssa Milano used the hashtag #metoo to encourage others to share their experiences being sexually harassed or assaulted. Id. This helped set off the viral #MeToo movement. Id. Milano later publicly credited Burke for her work. Id.


4. This Article uses the word “survivor” rather than “victims,” while also recognizing that some may prefer the term “victim.” See generally The Language We Use, WOMEN AGAINST ABUSE, https://www.womenagainstabuse.org/education-resources/the-language-we-use [https://perma.cc/ED9D-3QPW]; Key Terms and Phrases, RAINN, https://www.rainn.org/articles/key-terms-and-phrases [https://perma.cc/DA-AD-HNHB]; Kate Harding, I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong With
industry. Feminist legal scholar and Michigan Law Professor Catharine MacKinnon believes that the #MeToo movement exposed “the disbelief and trivializing dehumanization of [sexual harassment] victims.”

We cannot end sexual harassment without changing the norms of ignoring harassing behavior and minimizing the experiences of those who have survived sexual misconduct.

The issue of pervasive sexual harassment has been the focus of legal, academic, and feminist scholars and activists for decades. For example, when Yale Law Professor Vicki Schultz first “reconceptualized” sexual harassment in 1998, she wrote that her work “ha[d] been a long time in the making.” And in 2003, Yale Law Professor Reva Siegel remarked that discussions of sexual harassment have “continue[d] without sign of diminishing, in the workplace and the popular press, as well as in . . . academic fora.”

This Article traces the history of that discussion through the stalled constitutional amendment to provide equal rights for women (the Equal Rights Amendment or ERA). In addition, it follows the decades-long movement to identify, define, sanction, and prevent sexual harassment in the workplace, as well as the courts’ role in these developments. The legal doctrine that reflects this story is the foundation upon which the #MeToo movement took force. As Professor MacKinnon notes, “[s]exual harassment law—the first to conceive sexual violation in inequality terms—created the preconditions for this moment.” In light of the #MeToo movement, it is time to evaluate the failures and successes of sexual harassment laws. By accounting for this history, we will see how far we have come, how much further we have yet to go, and what impact (if any) the #MeToo movement has had on American corporate culture.

In the wake of #MeToo, journalists have devoted significant efforts to investigating the influence of this movement on society’s perception of sexual harassment. Jodi Kantor and Megan Twohey documented the cultural shift brought about by the Harvey Weinstein investigations.

Although some states engaged in legislative reform, Kantor and Twohey


5. See Carlsen et al., supra note 3.


7. See id.


9. Reva B. Siegel, A Short History of Sexual Harassment, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

10. See MacKinnon, supra note 6.

11. Id.

12. Kantor & Twohey, supra note 1.
do not believe the law (as a whole) reflects society’s “shifts in social attitudes.”
Perceptions of sexual harassment vary “widely along partisan lines,” and these political views challenge the durability and significance of shifting social attitudes. In 1991, Anita Hill testified before the Senate Judiciary Committee that then-Supreme Court nominee Clarence Thomas sexually harassed her. She was subjected to an invasive inquisition and faced so much public opposition that she resigned from a tenured position at the University of Oklahoma. By contrast, in November 2017, Senate Majority Leader Mitch McConnell stood in defense of four women who came forward against then-Senatorial candidate Roy Moore with allegations of sexual misconduct. McConnell was the highest-profile Republican at the time to demand that Moore step down from the race. It appeared that change was on the horizon. Yet only one year later, then-Supreme Court nominee Brett Kavanaugh was confirmed despite testimony from Dr. Christine Blasey Ford that Kavanaugh sexually assaulted her. Are we back where we started?

Achieving sustainable reform in societal gender values may require further changes in sexual discrimination law because of the “intersubjective . . . and symbolic qualities of modern law.” This Article’s discussion of these issues proceeds in four parts. Part I provides background on the so-far unsuccessful attempts to amend the United States Constitution to grant equal rights to women. Part II follows with a brief history of sexual harassment law. Part III continues by discussing efforts by state legislatures and local municipalities to shed light on sexual discrimination by prohibiting nondisclosure agreements in settlements of claims for workplace sexual misconduct, among other laws. And in Part IV, the Article discusses historical

13. Id.
18. Id.
inflection points prompting societal change, finding that 2020–2021 may have been one of those points.

I. THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment is a proposed Constitutional amendment to uphold equal rights under the law regardless of sex. The first attempt to incorporate an Equal Rights Amendment into the United States Constitution followed naturally from the enactment of the Nineteenth Amendment. This effort was spearheaded by the National Women’s Party, which formed in June 1916 with the goal of securing a woman’s right to vote. After the Nineteenth Amendment became law on August 18, 1920, the National Women’s Party shifted its focus to the broader goal of women’s equality. With its support, the Equal Rights Amendment (ERA) was first introduced as a Congressional bill in December 1923. The bill was unsuccessful in part because women were divided along socioeconomic lines. Some opponents of the ERA, primarily working women, feared losing labor protections unique to women. Other opponents of the ERA feared losing the special status of women that allowed for the right of wives to be protected by their husbands and for the “traditional American family.”

With the rise of the women’s rights movement in the 1960s, there was enough Congressional support in the 1970s to pass the ERA: it was approved by the House in 1971 and the Senate followed suit in 1972. Representative Martha W. Griffiths and Senator Birch Bayh were the ERA’s lead proponents in the House and Senate respectively. For the ERA to become law, the proposed amendment next needed approval from the legislatures of at least three-quarters of the states, or thirty-

22. Id.
23. Id.
27. Law, supra note 21; see also Chats with Visitors, WASH. POST, Feb. 26, 1922, at 32 (citing similar concerns by Matthew Woll, Vice President of the American Federation of Labor at the time).
eight states.\textsuperscript{30} Supporters were initially optimistic that this threshold would be met: although the ERA had a seven-year ratification deadline (1979), Senator Bayh believed it would take only two years to obtain sufficient state ratification.\textsuperscript{31} Such optimism would prove unwarranted. Despite the deadline's extension to 1982, only thirty-five states ratified the ERA in time\textsuperscript{32}—five of which subsequently attempted to revoke their ratification.\textsuperscript{33} Three additional states recently voted in favor of the ERA—Nevada (2017), Illinois (2018), and Virginia (2020).\textsuperscript{34} Although thirty-eight states have now ratified the ERA, the expired deadline and five revocations make the legal effect of these recent state ratifications unclear.

Congress could likely act to change the ERA’s ratification deadline even now: unlike the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments, the ERA’s text does not include an express ratification deadline.\textsuperscript{35} And in Coleman v. Miller, the Supreme Court held that Congress, not the courts, had the final authority on whether a ratification deadline could be extended.\textsuperscript{36} Coleman also held that the validity of a state revocation is a nonjusticiiable political question.\textsuperscript{37} Thus, the legal effect of revocation is theoretically up to Congress unless Coleman is overruled.\textsuperscript{38} But as Professor Gerard Magliocca has pointed out, Congress would be adopting an inconsistent position if it simultaneously extended an expired deadline by four decades and maintained that States’ previous decisions are irrevocable.\textsuperscript{39} It is ultimately unlikely, therefore, that the three recent ratifications are sufficient to turn the ERA into law. The #MeToo movement’s revival of interest in the ERA, though likely without legal consequence, may symbolize the increased value placed on women in American society and give further power to female voices.

\textsuperscript{30} U.S. CONST. art. V.
\textsuperscript{31} Shanahan, supra note 29.
\textsuperscript{32} Law, supra note 21.
\textsuperscript{33} These states were Idaho, Kentucky, Nebraska, Tennessee, and South Dakota. Peter Michael Jung, Note, Validity of a State’s Rescission of Its Ratification of a Federal Constitutional Amendment, 2 HARV. J.L. & PUB. POLY 233, 233 n.2 (1979). Idaho, Nebraska, and Tennessee ultimately rescinded ratification. Id.
\textsuperscript{34} Law, supra note 21.
\textsuperscript{36} Coleman v. Miller, 307 U.S. 453, 456 (1939); Magliocca, supra note 35, at 647.
\textsuperscript{37} Coleman, 307 U.S. at 450.
\textsuperscript{39} Magliocca, supra note 35, at 654.
A. Judicial Action vs. Amendment

Legal academics dispute whether the judiciary or an amendment would better address the issue of women’s equality.40 A 1971 Yale Law Journal article, written by Yale Professor Thomas Emerson and three students, addressed this question, finding that the ERA would better address the issue.41 The Emerson article was praised by Representative Griffiths and Senator Bayh and “referred to with approval in the Congressional Reports.”42 The article weighed judicial versus legislative options for improving women’s rights, ultimately favoring the ERA because it would provide absolute equality, while the judiciary would rely on discriminatory precedent.43

Emerson believed that no meaningful change to women’s rights could occur absent an uncompromising amendment.44 Several proposed revisions which would have limited the ERA’s scope ultimately failed, including amendments with exceptions for “physiological or functional differences”45 or for the draft,46 and an amendment that would have the ERA’s anti-discrimination provision parallel the Fourteenth Amendment.47 Emerson argued that absolute language48 was necessary because: 1) many women do not fit the female stereotype assumed by law, 2) sex discrimination is interrelated across contexts (e.g., the benefits of equal access to public education are limited if there is discrimination in public employment), and 3) one group will dominate in a dual system of rights and responsibilities (as with race).49 Considering the ERA’s broad scope but limited Congressional analysis, opponents worried about the potential unintended consequences resulting from an absolute amendment.50 Harvard Law Professor Paul Freund compared the choice between the ERA and alternative legislative or judicial solutions to a

44. See id. at 888–89.
45. Equal Rights Amendment May Be a Mixed Blessing, CHI. DAILY DEFENDER, June 6, 1972, at 8.
46. Shanahan, supra note 29.
48. Section 1 of the ERA provides: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92nd Cong. (1972).
49. Brown et al., supra note 41, at 873–74.
50. See, e.g., Freund, supra note 47, at 234–35.
“choice . . . between a single broad-spectrum drug with uncertain and unwanted side-effects and a selection of specific pills for specific ills.”

Opponents of the ERA were also concerned that a broad amendment would generate litigation, and any unanticipated judicial results would be more difficult to rectify for an amendment than for a statute.

Emerson also doubted that Equal Protection jurisprudence would expand to protect against classifications based on sex. Early Supreme Court cases indicated that sex-based classifications were permissible because women had a “separate place” in society. In 1872, Bradwell v. Illinois upheld an exclusion of women from the legal profession. In his concurring opinion, Justice Bradley expressed that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” In 1908, the Court agreed in Muller v. Oregon that a woman “is properly placed in a class by herself” in upholding a state law setting a maximum number of hours that women could work. Due to differences in physical strength and a fear of exploitation by men, the Court was willing to depart from the general freedom from work hour limitations (based on the freedom of contract) which it had decided in Lochner v. New York in 1905. Later cases reinforced the notion of women’s separate place in society. In 1961, Hoyt v. Florida upheld a Florida statute giving women the option to opt into the jury pool as a reasonable classification because the “woman is still regarded as the center of home and family life.” And in 1971, the Court affirmed the district court’s judgment on a challenge against the single sex status of two South Carolina state universities. The district court entered judgment for the defendants on the grounds that this sex

51. Id. at 235.
53. Andrew Schepard, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1520 (1971).
54. See Brown, et al., supra note 41, at 875–85.
55. Id. at 876.
57. Id. at 141 (Bradley, J., concurring).
59. Id. at 421–23.
61. Hoyt v. Florida, 368 U.S. 57, 61–62 (1966). Opponents of the ERA also argued that it was reasonable for this Florida statute to presume, based on prior history, that most women would request excusal from jury service because of household duties. Freund, supra note 47, at 236.
62. Williams v. McNair, 401 U.S. 951, 957 (1971). The specific universities in question were the Citadel (only men) and Winthrop College (only women). Brown et al., supra note 41, 881. The Supreme Court affirmed the district court’s judgment without hearing argument and without opinion. Williams, 401 U.S. at 951.
classification had a rational justification under the Equal Protection Clause.63

More conceptually, both sides of the ERA debate contested the similarities and differences between sex- and race-based classifications.64 Proponents of the ERA pointed to the similarities, arguing that sex-based classifications, like race-based classifications, should be subject to strict scrutiny review under the Equal Protection Clause.65 Classifications based on both race and sex create large groups that are beyond an individual’s control, are highly visible, and are subject to stereotypes.66 A relevant difference cited by opponents was that, unlike racial minorities, women comprised a majority of the population and were thus capable of protecting their interests by voting.67 Additionally, Professor Freund distinguished classifications based on sex and race by using a sports analogy: “To hold separate Olympic competitions for whites and blacks would be deeply repugnant to our sensibilities. Do we—should we—feel the same repugnance, that same sense of degradation, at the separate competitions for men and women?”68

Although widespread support initially existed for a judicial solution, dissatisfaction with the Nixon administration increased support for an ERA.69 During the 1960s, the Presidential Commission on the Status of Women recommended working toward expanding the Fourteenth Amendment’s coverage.70 As opponents of the ERA argued, the scope of the Equal Protection Clause had already expanded to new classifications in recent years.71 This approach changed as the women’s rights movement grew frustrated with the Nixon administration’s failure to follow through on its promises.72 For example, the administration refused to support a bill to expand equal pay.73 Disappointment with President Nixon’s inactivity and perceived

66. Schepard, supra note 53, at 1507–08.
67. Id. at 1505.
68. Freund, supra note 47, at 240.
70. Id.
71. Freund, supra note 47, at 235 (including classifications based on “poverty, illegitimacy, [and] duration of residence”).
72. Sherrill, supra note 69.
73. Id. (“[T]hey wouldn’t even approve a bill to extend equal pay to executive and professional administrative women.”).
changes in the administration’s dedication to women’s rights resulted in a swell of support for the ERA among women’s rights advocates.  

B. The Debate over Process

Opponents of the ERA attacked Congress’s approval process, claiming that it failed to allow for sufficient deliberation. The House had no committee hearings on the ERA and only one hour of floor debate preceded the vote. Moreover, the House’s Judiciary Committee, then headed by a known opponent of the ERA, was circumvented by a discharge petition. Commenting on this rapid progress, Senator Ervin remarked that he “doubt[ed] if anybody [in the House] except the chief proponent of the bill gave more than 15 minutes’ study . . . before they voted” and noted feeling unprepared for the Senate’s deliberations. The lack of deliberation was especially egregious, opponents argued, because the ERA’s equality of rights language raised significant questions about its legal implications. How would laws that classified based on sex be equalized (e.g., would pro-female labor protections be overturned or also provided to men)?

How would the ERA interact with other constitutional rights (e.g., the right to privacy)? In addition, the ERA’s passage could affect broad swaths of existing state and federal law. A 1972 study by Maryland’s Attorney General found that the ERA would impact 227 “clauses and concepts” in Maryland’s legal codes, and there was no reason to think Maryland was exceptional in this regard. Such “farreaching and inflexible” changes, opponents argued, “ought surely not be brought about as the half-hidden implication of a constitutional motto.”

74. Id.
75. Id.; see also Freund, supra note 47, at 241 (“[W]hen basic, commonplace, recurring questions are raised and left unanswered by text or legislative history, one can only infer a want of candor or of comprehension.”).
76. Sherrill, supra note 69.
77. Id. (explaining how a discharge petition can help “free legislation from committee bottlenecks” through a procedural tactic that allows a bill to be brought to the floor of the House by a committee without a report from the committee).
78. Id.
79. Id.
80. See, e.g., Equal Rights Amendment May Be a Mixed Blessing, CHI. DAILY DEF., June 6, 1972, at 8.
84. Freund, supra note 47, at 238.
85. Id.
C. The Amendment in Action

Proponents and opponents of the ERA also debated its potential consequences. In particular, proponents focused on the economics of marriage, including a husband's support obligations, a wife's property rights, and a couple's ability to receive fair financing. Proponents of the ERA argued that the amendment would ease this financial burden on men and improve the enforcement of support laws. On the other hand, Senator Sam Ervin of North Carolina asserted that the ERA would destroy any right to support, because for every right, there must also be a duty. By equating the rights of women and men, their legal responsibilities to one another in family law would become nonexistent. Proponents of the ERA also contended that the amendment would overturn state laws requiring a married woman to obtain her husband's consent before selling property. Moreover, in community property states, married women may hold an equal share in the ownership of property acquired during marriage; yet in all these states, “except [for] Texas and Washington, the husband has the power of management and control over the community property.” The ERA ensures that laws vesting community property management “in the husband alone,” or those favoring husbands based on wage earning, would no longer be valid. Lastly, proponents of the ERA pointed to the difficulties women face in getting loans from financial institutions. Despite being financially qualified, some single women alleged they were denied loans without a male co-signer. Additionally, a married woman's income was often not counted, or even discounted, in calculating mortgage loan

86. See Baldez, supra note 81.
87. See Brown et al., supra note 41, at 937–38, 946–53.
88. Id. at 944.
89. Trude Forsher, The Blind Mice and the Equal Rights Amendment, L.A. TIMES, Nov. 17, 1972, at E7. According to a study by the Citizens’ Advisory Council on the Status of Women, support could “generally be enforced only through an action for separation or divorce,” and alimony was rarely awarded in these cases. Id.
90. Sherrill, supra note 69 (“For a person to have a right, it means somebody else must have a corresponding legal duty.”).
91. Id.
93. Brown et al., supra note 41, at 946–47. In every common law ownership state, Married Women’s Property Acts largely prevented this type of financial control by husbands over their wives. Id. at 948.
94. Brown et al., supra note 41, at 946–47.
95. See Georgia Dulleea, Women Demanding Equal Treatment in Mortgage Loans, N.Y. TIMES, Oct. 29, 1972, at R1.
96. Id.
eligibility. Bankers argued this practice was necessary to protect against the risk of a married woman quitting work to have a baby.

Consequences of the ERA that opponents hoped to avoid included women's inclusion in the draft, elimination of female-specific labor protections, and invalidation of statutes banning same-sex marriage. Although Congress could have required women to register for the draft before the ERA was proposed, the amendment would have made registration compulsory. Senator Ervin suggested an amendment to the ERA excluding women from the draft, but this proposal was soundly defeated. Resistance to this consequence of the ERA was expressed most simply by California Senate Leader James Mills, who said: “Anyone who tries to tell me to vote for a measure that would send my two small daughters off to war isn’t going to get anywhere.” On the other hand, Representative Griffiths believed that the ERA would help eliminate the draft entirely. Other proponents of the ERA emphasized the benefits of military service and pointed out that women’s exclusion from the draft hurt their social status.

Some labor unions, such as the American Federation of Labor and Congress of Industrial Organizations, fought against the ERA because they believed the amendment would invalidate labor laws benefitting women. These labor laws preserve women’s minimum wages, enforce maximum hour requirements, and limit the physical strenuousness of women’s work. As child-bearers, women arguably needed legal protection from working too much or too hard. Additionally, some individuals worried that by supporting women

97. Id. ("Bankers argue that working mothers are unrealistic to expect full credit for their paychecks.").
98. See id.
100. Hyde, supra note 52.
101. Shanahan, supra note 29.
103. See id.
104. Brown et al., supra note 41, at 968 ("Veterans receive educational scholarships ... loans, [and] preference in government employment.").
105. According to NYU Law Professor Norman Dorsen, “when women are excluded from the draft—the most serious and onerous duty of citizenship—their status is generally reduced.” Id.
106. Murphy, supra note 102. However, according to the Secretary-Treasurer of the California AFL-CIO, John Henning, they “wouldn’t object if the protection women [then] enjoy(ed) [was] extended to men.” Id.
107. Id.
109. Id. ("There exist very good reasons why women should be exempted from excessive hours of labor and exhausting duties.").
joining the workforce, the ERA would strain the relationship between mothers and their children.\textsuperscript{110}

Lastly, state statutes banning same-sex marriage could have been invalidated under the ERA as a sex-based classification.\textsuperscript{111} Senator Bayh rejected this interpretation as long as marriage licenses were denied to both male-male and female-female couples.\textsuperscript{112} But Professor Freund pointed out that Bayh’s reasoning ran counter to the invalidation of antimiscegenation statutes banning interracial marriages under the Fourteenth Amendment, as held in Loving v. Virginia, which impacted all races equally.\textsuperscript{113} Although Emerson’s article suggested that an ERA should require strict sex equality, it also mentions an exception for “particular attributes of individuals,” even if they are unique to one sex.\textsuperscript{114} Therefore, statutes banning same-sex marriage could have been defended on the grounds that only different-sex couples can procreate.\textsuperscript{115} However, supporters of same-sex marriage could have responded that Emerson intended for such exceptions to strict sex equality to be “closely, directly and narrowly confined to . . . unique physical characteristic[s].”\textsuperscript{116} There are many different-sex couples who cannot procreate and others who do not want to have children.\textsuperscript{117} Neither group was prevented from marrying by the statutes banning same-sex marriage at the time, thus these laws were not narrowly confined to procreation.\textsuperscript{118}

\begin{flushleft}
\textsuperscript{110} \textit{id.}
\textsuperscript{112} \textit{id.} at 583–84.
\textsuperscript{113} Loving v. Virginia, 388 U.S. 1, 2, 12 (1967); Bridges, supra note 111, at 584.
\textsuperscript{114} Brown et al., supra note 41, at 892–93.
\textsuperscript{115} Bridges, supra note 111, at 586–87.
\textsuperscript{116} Brown et al., supra note 41, at 894.
\textsuperscript{117} Bridges, supra note 111, at 587–88.
\textsuperscript{118} \textit{id.} In Lawrence v. Texas, the Supreme Court made significant strides toward LGBTQ equality by overruling a Texas statute making it a crime for two adult individuals of the same sex to engage in private sexual conduct, subsequently holding in a 6-3 decision that the Fourteenth Amendment provides constitutional protections to personal decisions about marriage, procreation, contraception, family relationships, the raising of children, and education. Lawrence v. Texas, 539 U.S. 558 (2003). Specifically, the Court found that because the statute applied to adult males engaging in consensual sex within the privacy of their home, this law impacted these individuals’ liberty-related interests protected by the Due Process Clause of the Fourteenth Amendment, which overruled the precedent previously set by the Supreme Court in Bowers v. Hardwick, an older case which held that there was no constitutional right to engage in “consensual sodomy” in the bedroom of an individual’s home. \textit{id.} at 578; see also Bowers v. Hardwick, 478 U.S. 186 (1986), overruled by Lawrence. Ultimately, Lawrence helped lay a foundation for subsequent Supreme Court decisions affirming LGBTQ+ rights, such as the granting of marriage rights under the Fourteenth Amendment’s Due Process Clause via Obergefell v. Hodges and the extension of employment protections for LGBTQ+ workers in Bostock v. Clayton County. See Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).\end{flushleft}
D. Prognosis

Having reviewed this historical background, we can return to the question with which we began this Part: what is the significance of the revived interest in the ERA? On the one hand, because of the expired deadline and revocations of ratification by state legislatures, the recent approval of the ERA by multiple states may not have any legal consequence.119 On the other, these ratifications are highly symbolic of a renewed interest in women’s rights120 as evidenced by the #MeToo movement. Similarly, the first introduction of an ERA bill in Congress followed the Nineteenth Amendment becoming law, and the women’s rights movement of the 1960s preceded Congressional approval of the ERA in 1972.121 As with these historical legal shifts, renewed interest in the ERA and the #MeToo movement may signify that we are on the precipice of social change that may provide opportunity for corresponding legal transformations. Furthermore, although Emerson doubted that Equal Protection jurisprudence would expand to protect against sex-based classifications,122 the Court began to apply intermediate scrutiny review to these classifications in 1976.123 Intermediate scrutiny asks whether a law is “substantially related” to an “important” government interest.124 Although this standard may fall short of the absolute equality envisioned by Emerson,125 it provides greater protection than the deferential rational basis standard that applied when Emerson wrote his article. The rational basis standard asks merely whether a law is “rationally related” to a “legitimate” state interest, and it nearly always results in government victory.126 Lastly, even if the ERA had become law, some were concerned about how great an effect it would exert on sex discrimination in practice.127 Bias by decision-makers within organizations could continue to permeate the

119. See Law, supra note 21 (“[T]he Constitution does not set deadlines for amendment ratification. In fact, the Constitution sets a requirement that one Congress can’t bind a future Congress, so modern legislators could alter the [deadline].”).
120. Brown et al., supra note 41, at 901.
121. Law, supra note 21.
122. Brown et al., supra note 41, at 875.
123. The Supreme Court first applied the intermediate scrutiny standard to sex-based classifications under the Equal Protection Clause in 1976. Craig v. Boren, 429 U.S. 190 (1976). This standard requires the government to prove that the policy being challenged is substantially related to an important government interest. Id. at 197.
124. Id. at 190.
125. Brown et al., supra note 41, at 875.
127. See Sherrill, supra note 69.
workplace and undermine women’s equality. Although the ERA becoming law would be a powerful symbol, ratification may not directly influence the hearts and minds of our leaders in the public and private sectors. This reality reveals the limitations of legal solutions to sex-based discrimination. The next Part addresses a brief history of the developing jurisprudence in sexual harassment law.

II. A BRIEF HISTORY OF SEXUAL HARASSMENT LAW

Sexual harassment is legally actionable under Title VII of the Civil Rights Act of 1964. But when the Civil Rights Act was enacted, “the term ‘sexual harassment’ had not yet been coined and there was no secure legal remedy for . . . sexual propositioning, gender baiting, and other forms of sexualized behaviors.” Activists transformed the public and judicial understanding of sexual harassment from a private matter outside of the workplace, to an illegal form of discrimination. To dismantle the judiciary’s resistance to accepting harassment as a form of discrimination, activists emphasized that both men and women could be harassed.

In 1979, Professor MacKinnon observed that women were valued in the workplace based on “men’s perceptions of their potential to be sexually harassed.” In her work, Professor MacKinnon referred to the sociological scholarship of Talcott Parsons, who focused on the stereotypes of working women as office housekeepers, “ego-build[ers],” and “sex objects.” Professor MacKinnon reflected on one woman’s observation that the best jobs went to the most attractive women: “It was a woman’s fate to either endure the migratory hands of a male boss

128. See Shanahan, supra note 92 (“There are, for example, the feelings of many people who just don’t feel women are capable of being engineers, crane operators, elective officials, business executives or judges and who are in a position to deny women the training and experience that would permit them to achieve these and many other positions.”); see also Sherrill, supra note 69 (“But the statistics clearly indicate that, even with a new constitutional amendment for leverage, women would have trouble dislodging official deadweight resistance.”).

129. See Shanahan, supra note 92.


131. MARTHA CHAMALLAS, PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW 116 (1ST ED. 2019).

132. See id.

133. Siegel, supra note 9, at 11.


135. Id. (quoting MACKINNON, supra note 134, at 18).
and earn a decent living, or wish she looked good enough to invite the indignities.” Based on these observations, Professor MacKinnon theorized that sexual harassment perpetuated women’s inequality and that without change, women would continue to be prevented from professionally advancing.337

The Supreme Court identified sexual harassment as a Title VII violation in the 1986 case Meritor Savings Bank v. Vinson.338 In a unanimous decision, the Court held that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”339 In this case, a bank teller claimed that her company’s vice president had repeatedly touched her in public and raped her.340 The Court drew on Title VII’s “terms, conditions, or privileges” of employment language to hold that unwelcomed sexual advances that create a hostile or offensive work environment constitute illegal discrimination.341 In its analysis, the Supreme Court compared sexual harassment with racial harassment (which was already illegal) and found both practices to be equally arbitrary barriers to workplace equality.342

More specifically, the Court declared that harassment “must be both subjectively and objectively offensive” for it to be illegal, requiring the plaintiff to prove that they were actually offended and that a reasonable person would also be offended by the conduct.343 The Court refined this test further in Oncale v. Sundowner Offshore Services, Inc., where it stated: “In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which the particular behavior occurs and is experienced by its target.”344

Sexual harassment law is most powerful when it holds an employer vicariously liable for the unlawful acts of its employees.345 Courts are

136.  Id. (citing MacKINNON, supra note 134, at 22). But see Laura Fox, Unattractive Women Are Victims of Sexual Assault Too, MEDIUM (Jan. 29, 2021), https://medium.com/fearless-she-wrote/unattractive-women-are-victims-of-sexual-assault-too-9992bde54af [https://perma.cc/XB9N-WNSP] (explaining that attractiveness is not a necessary condition for someone to be subjected to sexual assault).


139.  Id. at 64.

140.  Id. at 60.

141.  Id. at 66–67.

142.  Id. at 67 (“Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.” (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982))]


hesitant, however, to hold the employer liable. \(^{146}\) If the harasser is a coworker of the survivor, their employer is held liable only when negligence can be proven (i.e., when the employer knew or should have known of the harassment and failed to act). \(^{147}\) If the harasser supervises the survivor, the employer is strictly liable if the supervisor made a “tangible employment action” against the survivor, such as a demotion, firing, or pay-cut. \(^{148}\) In the absence of a “tangible employment action,” the employer is presumed liable unless they are able to prove an affirmative defense. Based on *Faragher v. City of Boca Raton*, courts consider whether the employer took reasonable measures to prevent or redress the harassment and whether the plaintiff “unreasonably failed to take advantage” of these measures. \(^{149}\)

The seemingly subjective and unpredictable results of sexual harassment cases are a product of the ineffectual nature of the laws addressing sexual harassment as well as the many avenues by which employers can avoid liability. \(^{150}\) The Supreme Court has distinguished *civility code*, where employers outline “wide swaths” of unacceptable conduct, from *harassment law*; unlike civility code, harassment law should not apply to “usual workplace interactions.” \(^{151}\) Beyond the distinction between harassment law and civility code, scholars have remarked that the Court’s requirement that actionable hostile environment harassment be “severe or pervasive” has excused egregious conduct. \(^{152}\) Judith Johnson believes that lower court judges overemphasize this requirement; instead they should focus on whether the work environment in a sexual harassment case is “objectively hostile or abusive.” \(^{153}\) Elizabeth Tippett suggests that the stories voiced through the #MeToo movement may provide the context necessary to properly evaluate the severity or pervasiveness of the alleged conduct in harassment cases, as expressed from the survivor’s perspective. \(^{154}\) This

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146. See id.
148. *Id.* at 808 (“No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” (citation omitted)).
149. *Id.* at 807.
153. *Johnson*, supra note 152, at 85 (citation omitted).
154. Tippett, supra note 143, at 242.
additional context may push judges “toward a more lenient standard” for identifying harassment, focusing on “whether the conduct is objectively hostile or abusive,” and increasing survivors’ compensation.155

Jurisprudence regarding vicarious liability is also unclear.156 Employers evade liability by reacting to complaints with very little meaningful action.157 Survivors are deemed to have declined an employer’s intervention if they fail to report a complaint until months after misconduct occurred.158 Thus, unsurprisingly, application of the Faragher defense has produced favorable results for employers.159 For an employer to succeed, they must simply maintain a policy that “constitutes ‘reasonable care,’” “regardless of whether plaintiffs reported harassment.”160

Courts often dismiss sexual harassment claims due to the broad judicial discretion afforded in these cases,161 reporting requirements,162 and doubts surrounding women’s credibility.163 For these reasons, the effectiveness of legally prohibiting sexual harassment is limited, resulting in pervasive inequality between men and women.164 Sexual harassment is “built into [our] structural social hierarchies.”165 It cannot be eradicated without removing broad cultural inequalities embedded elsewhere in the law.166

The #MeToo movement inspired legislatures to fill the wide gaps left in sexual harassment law which have allowed discrimination to occur across all levels of all industries.167 Professor MacKinnon notes that #MeToo refuted the assumption that the person who reports sexual abuse is lying.168 Although “[s]exual harassment law prepared the ground, . . . it is today’s movement that is shifting gender hierarchy’s

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155. See id. at 243.
156. See Chamallas, supra note 145, at 177.
157. See id.
158. Id. at 178.
159. See David Sherwyn, Michale Heise & Zev J. Eigen, Don’t Train Your Employees and Cancel Your 1-800 Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges, 69 FORDHAM L. REV. 1265, 1289 (2001) (“[O]ur analyses reveal that courts are prepared to conclude that a good policy constitutes ‘reasonable care’ and that employers can prevail regardless of whether plaintiffs reported harassment.”).
160. Id.
161. See Tippett, supra note 143, at 243.
162. See Sherwyn et al., supra note 159.
164. Id.
165. Id.
166. Cf. id.
168. See MacKinnon, supra note 6.
tectonic plates.” The next Part outlines actions taken by state legislatures regarding sexual harassment in response to the #MeToo movement.

III. STATE LAW INITIATIVES: SETTLEMENT AGREEMENTS FOR CLAIMS OF SEXUAL MISCONDUCT

The #MeToo movement has not left state legislatures unmoved. Before the COVID-19 pandemic caused widespread governmental shutdowns and delays in 2020, state legislatures reviewed over 200 bills to strengthen protections against workplace harassment. Nearly 400 state legislators from 42 states and the District of Columbia took the #20StatesBy2020 Pledge to affirm their commitment to supporting and working with survivors to strengthen protections against sexual harassment in 20 states by 2020.

Initiatives from state legislatures propelled changes to state law until approximately March 2020, when the global COVID-19 pandemic caused many governmental bodies to shut down operations or redistribute resources to emergency relief efforts. This sudden shift delayed legislation connected with #MeToo efforts in the midst of an economic recession that caused high levels of job loss among women and pushed others out of the workplace due to school shutdowns. During the pandemic, employees were “asked to do so much more for so much less.” Additionally, sexual harassment increased throughout the pandemic, especially in the food service industry, where tips and pay decreased.

169. Id. (alteration in original).
172. See id.
The legacy of reforms enacted between 2017 and 2019, however, generated changes that proved influential in 2020; for example, California\(^{177}\) and Illinois\(^{178}\) instituted changes, such as new laws extending deadlines for filing sexual harassment claims, aiming to prevent sexual harassment, and voiding “no rehire” provisions in settlement agreements. These laws include California’s SHARE Act,\(^{179}\) which extends the deadline for filing workplace harassment-related retaliation claims from one year to up to three years.\(^{180}\) California’s deadline is six times longer than the federal standard, and this extension may influence other states and federal regulations.\(^{181}\)

One of the most pernicious gaps left in sexual harassment law—a gap these recent regulations have begun to address\(^{182}\)—is harassers’ ability to coerce survivors into silence through the use of confidentiality provisions in settlements.\(^{183}\) Also known as non-disclosure agreements (NDAs), these provisions ensure that claimants promise secrecy in return for a settlement payment.\(^{184}\) These agreements initially silenced survivors in the “sexual-abuse scandals [that have] bubbled out of Hollywood, Capitol Hill, and corporate boardrooms” in recent years.\(^{185}\) That is not to say that legal settlements of sexual harassment claims are always malicious. Settlements are generally quicker, less expensive, and less burdensome on the judicial system;\(^{186}\) they provide certainty for


\(^{178}\) 820 ILL. COMP. STAT. 95/1-1 (2021).

\(^{179}\) CAL. GOV’T CODE § 12960 (West 2019).

\(^{180}\) See Adam Abrahms & Story Cunningham-White, AB 9 Extends Employee’s Statute of Limitations to File Discrimination Charges in California to Three Years—Employers, This Affects You!, JD SUPRA (Oct. 16, 2019), https://www.jdsupra.com/legalnews/ab-9-extends-employees-statute-of-limitations/31079/ [https://perma.cc/H9MV-H6QN].

\(^{181}\) Id.


\(^{183}\) See Jeffrey Steven Gordon, Silence for Sale, 71 ALA. L. REV. 1109, 1111 (2020) (arguing that some NDAs that restrict harassment survivors from speaking out should be voided because they violate the public policy of free expression).

\(^{184}\) See Joan C. Williams, Jodi L. Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, What’s Reasonable Now? Sexual Harassment Law After the Norm Cascade, 2019 MICH. STATE L. REV. 139, 197 (“NDAs (or confidentiality agreements) are contractual agreements to keep certain specified information secret.”).


\(^{186}\) See Alexandria Murphy, Better Late than Never: Why the USOC Took so Long to Fix a Failing System for Protecting Olympic Athletes from Abuse, 26 JEFFREY S. MOORAD SPORTS L. 157, 193 (2019).
both parties, and they may be less emotionally taxing for the claimant than drawn-out litigation. Moreover, some claimants may prefer NDAs to avoid the stigma associated with bringing a sexual assault claim. NDAs also provide claimants with leverage against harassers in settlement negotiations; alleged harassers are likely to pay more in a settlement if the claimant promises not to discuss the incident(s).

The #MeToo movement has highlighted the significant drawbacks of NDAs in the context of sexual misconduct. When it comes to sexual misconduct, the public is entitled to know about illegal activities occurring in the workplace, particularly if that behavior is repeated. Shielding this misconduct from the public eye may harm the public’s faith in corporate governance (if sexual misconduct is later revealed, despite NDAs). Similarly, investors deserve to know the legal risks faced by the companies in which they invest. NDAs prevent “the free flow of information in markets” and can thus harm investors if the underlying issues are not addressed, ultimately impacting the value of a firm. And although these risks are inherent to every NDA, they are particularly pernicious here, where they may shield repeat offenders from public accountability.

Additionally, sexual misconduct may harm public health and safety if the perpetrator is a serial offender (as is frequently the case). Discussing misconduct can prevent future misconduct, encourage other survivors to discuss their own experiences, or help claimants

(noting that without enforceable NDAs sexual assault and harassment cases may clog up the court systems; see also Williams et al., supra note 184, at 204 (“Sexual harassment lawsuits are costly [and] lengthy.”).)

187. See Vasundhara Prasad, If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements, 59 B.C. L. REV. 2507, 2516 (2018) (stating that litigating sexual harassment claims is difficult and that NDA agreements can be designed to protect both the plaintiff and defendant).

188. See id. (observing that sexual harassment claimants worry that a prospective future employer would label them litigious if they knew of a settlement).

189. See Williams et al., supra note 184, at 220–21 (arguing that making sexual harassment NDAs unenforceable would cause defendants to either refuse to settle the case or reduce their willingness to pay in a settlement).

190. See Murphy, supra note 186 (“Many victims prefer to sign an NDA because an NDA . . . gives financial restitution, a large monetary sum.”).

191. See Hill, supra note 182.

192. See Williams et al., supra note 184, at 213–14.

193. See id. (noting that some courts have found “integrity in corporate governance” as a public policy exception to NDAs).

194. Id. at 215.

195. Id. at 213–15.


197. Williams et al., supra note 184, at 215–16.

198. See Prasad, supra note 187, at 2513–16 (explaining that perpetrators of sexual harassment seek NDAs so that they can continue misbehaving).
process the trauma they experienced.\textsuperscript{199} Not discussing it, on the other hand, may normalize the misconduct.\textsuperscript{200} Survivors, especially those who are new to their jobs, may believe that this misconduct is inherent in the workplace.\textsuperscript{201} They may even leave their chosen field of work to avoid future harassment.\textsuperscript{202} To be clear, we must avoid reforms that place the burden of rectifying the sexist workplace on the survivor—one risk of banning the NDA altogether.\textsuperscript{203} But #MeToo has demonstrated that NDAs’ unregulated use in the context of sexual misconduct must be reined in.\textsuperscript{204}

In the wake of the #MeToo movement, confidentiality and nondisclosure agreements have been viewed as “encouraging further bad behavior on behalf of the sexual harassers, leading to more victims and more confidentiality agreements.”\textsuperscript{205} Public discourse surrounding sexual harassment and NDAs has increased as journalists are “eager to amplify the voices of those who have suffered in silence,”\textsuperscript{206} including in the political sphere. During a 2020 Presidential Debate, Senator Elizabeth Warren questioned fellow Democratic candidate, former New York City Mayor, Michael Bloomberg, about his treatment of women.\textsuperscript{207} Warren asked if Bloomberg would release women at Bloomberg’s company and foundation from their NDAs regarding sexual harassment and gender discrimination in their workplace.\textsuperscript{208} Warren credited her questioning of Bloomberg to her intolerance “for the kind of behavior the ‘Me too’ movement has exposed” and the ways

\textsuperscript{199} See Williams et al., supra note 184, at 217–18 ("[D]iscussion about incidents of harassment with co-workers, friends, and family can help individuals recognize their own experiences as harassment and seek help.").

\textsuperscript{200} See Prasad, supra note 187, at 2517 ("[A] widespread use of [NDAs] creates a culture of impunity."); see also Murphy, supra note 186, at 194 ("Part of the grooming process for sexual abusers is silencing the victim through threats, persuasion, and tools such as NDAs.").

\textsuperscript{201} Williams et al., supra note 184, at 213.

\textsuperscript{202} Id.

\textsuperscript{203} To avoid that problem, some scholars have proposed conditional reforms to NDAs in this context, banning only certain clauses and placing particular requirements on sexual misconduct settlements. For instance, see Symposium, supra note 196.

\textsuperscript{204} See Prasad, supra note 187, at 2508 ("There are many beneficial purposes of NDAs, but in the context of sexual assault and sexual harassment, they are incredibly pernicious contracts.").


\textsuperscript{208} Id.
that NDAs silence women’s hostile workplace experiences. In 2018, President Donald Trump’s NDA with Stephanie Clifford, also known as Stormy Daniels, was abandoned when Clifford chose to publicly disclose details of her sexual relations with Trump. Clifford joined a growing number of women breaking their NDAs to warn other women of the harassment and hostile workplaces they endured; as the #MeToo movement has grown “we have seen more women willing to tell their stories in the face of possibly being sued for breaking their NDAs.” As more women continue to challenge NDAs, “public policy, agencies and the judiciary are more open to not enforcing these contracts when there is a public interest to know.”

State legislatures have considered the #MeToo movement as they debate whether to prohibit the use of NDAs in settlements of sexual assault or harassment claims. For example, the Assembly Judiciary Committee in California specifically noted the sexual misconduct occurring in Hollywood in its analysis of proposed NDA legislation. A bill in New York to restrict NDAs in the context of sexual misconduct was proposed on the heels of the #MeToo movement. Illinois passed the Workplace Transparency Act in 2019, which included a prohibition of NDAs covering instances of sexual harassment. In the debates leading up to the passage of the Workplace Transparency Act, Illinois House Representative Anne Stava-Murray remarked: “The difference between the last time this came forward and now is the #MeToo movement.”

Below, we discuss the different legal solutions adopted by state legislatures to address the problem posed by NDAs in the sexual harassment context.


212. Id.


A. Confidentiality Prohibitions Applying to Claimants Generally

California, New York, and Nevada have the broadest prohibitions on NDAs involving claims of sexual misconduct, banning many confidentiality clauses. 217 Confidentiality provisions are commonplace in “nearly every settlement agreement resolving a legal dispute.”218 In settlement agreements concerning sexual harassment of an employee, confidentiality clauses bar the employee from communicating details of the settlement, or the facts that led to the agreement, to anyone.219 When confidentiality agreements are included in NDAs, they traditionally prohibit employees from sharing trade and company secrets, however, they have been extended in some contracts to also prohibit complaints and disclosures of workplace sexual harassment.220 California bans the use of NDAs for all claims of sexual misconduct in civil or administrative actions.221 Similarly, Nevada prohibits confidentiality clauses in settlements of criminal sexual misconduct claims, while New York prohibits them in settlements of all discrimination claims (e.g., race, gender, and age).222

B. Confidentiality Prohibitions in Employer-Employee Agreements

Most states that regulate confidentiality provisions covering claims of sexual misconduct ban these provisions in the employer-employee context. But there are differences in the statutes. New Mexico, Tennessee, Vermont, and Virginia prohibit employers from requiring confidentiality agreements in sexual harassment settlements as a condition of employment.223 Illinois, New Jersey, and Oregon, on the other hand, provide general restrictions preventing employers from enforcing confidentiality provisions in certain cases.224 Illinois’ general restriction prohibits confidentiality provisions if they are unilaterally

217. CAL. GOV’T CODE § 12964.525(2) (West 2021); NEV. REV. STAT. § 10.195(6) (West 2021); N.Y. C.P.L.R. 5003-B (McKinney 2021).
219. Id.
220. See id. at 13.
221. CAL. CIV. PROC. CODE § 1001 (West 2021).
222. § 10.195; N.Y. C.P.L.R. 5003-B. When New York’s law was originally passed in 2018, it referred only to “sexual harassment.” 5003-B. However, the law was later amended to cover all forms of discrimination. S.B. S6777, 2019 Leg., Reg. Sess. (N.Y. 2021).
224. 820 ILL. COMP. STAT. 96/1-30(b) (2021); N.J. STAT. ANN. § 10:5-12.8 (West 2021); OR. REV. STAT. § 659A.372(1) (West 2021).
decided by the employer.225 This prohibition applies to all “unlawful employment practices,” not only claims of sexual misconduct.226 New Jersey narrows its prohibition to employer-employee settlements of alleged discriminatory misconduct.227 Oregon’s general prohibition is even more precise, specifying that “sexual assault” is a type of discrimination that cannot be included in confidentiality provisions.228

C. Confidentiality Prohibitions for Public Officials

In addition to employment relationships, some states prohibit the confidential settlement of claims against various public agents. For example, Louisiana prohibits public agents from including confidentiality clauses in sexual harassment or assault settlements if public funds were spent to reach the agreement.229 Similarly, California prohibits government agents from entering into confidentiality agreements, even if the provision would otherwise be allowed under the state’s exception (which is discussed in the next Section).230 Tennessee has a more specific prohibition against confidentiality clauses in the public sector; it restricts public school districts and other educational agencies (“local education agencies”) from using confidentiality provisions in sexual misconduct settlements.231 These are not the only states to recognize the issue of sexual misconduct by public agents. The National Conference of State Legislatures has compiled a list of states who have recently considered passing a law regarding sexual harassment in their state legislature.232 For example, Louisiana Senate Bill 182 “[p]rovides for reimbursement of taxpayer dollars used to pay sexual harassment judgments or settlements” and North Carolina House Bill 817 “[c]reates a confidential process for reporting and resolving incidents of sexual harassment... requires training to prevent workplace harassment [and]... adopts clear sanctions.”233

225. 96/1-30(b).
226. Id.
227. See § 105-12.8.
228. § 659A.370(1)(a)(A).
230. CAL. CIV. PROC. CODE § 1001(c) (West 2021).
233. Id.
D. State Law Exceptions to Confidentiality Prohibitions

Although the above states limit the reach of confidentiality provisions, they also recognize circumstances where confidentiality may be permissible and carve out exceptions to accommodate such instances. Of the states that have banned confidentiality clauses in settlements of sexual harassment claims, only Arizona, New Jersey, Tennessee, Vermont, and Virginia do not provide any exceptions to their prohibitions.

Other states allow confidentiality provisions when claimants request or agree to them. For example, New Mexico law contains a clause which protects the claimant’s identity when the claimant requests confidentiality. Both Nevada and California have a similar exception, but those exceptions do not apply when a government agency is a party to the agreement. Louisiana permits public agents to agree to confidentiality clauses provided no public funds are used to further the settlement. New Mexico has an exception for when the claimant requests the clause but is later legally required to disclose the confidential information (e.g., via subpoena). Additionally, Nevada, New Mexico, and New York allow the monetary terms of a settlement to remain confidential.

Another common exception applies when the claimant either requests or agrees to the confidentiality agreement and has time to contemplate their decision. In addition to other exception requirements, Illinois requires that an employee have twenty-one days to consider the confidentiality agreement, and seven days to revoke the agreement after it has been signed. Similarly, Oregon provides an exception for when the claimant requests confidentiality and is given seven days following the agreement to revoke the confidentiality clause. Oregon also has an exception for when the employer determines, in good faith, that an employee engaged in illegal

234. See id.
235. ARIZ. REV. STAT. § 12-720 (LexisNexis 2021); N.J. STAT. ANN. § 10:5-12.8 (2021); TENN. CODE ANN. § 50-1-108 (2021); VT. STAT. ANN. tit. 21, § 495h(g) (2021); VA. CODE ANN. § 40.1-28.01 (2021).
236. See Prasad, supra note 187, at 2522.
239. CAL. CIV. PROC. CODE § 1001(c) (West 2021).
241. § 50-4-36(C).
242. NEV. REV. STAT. § 10.195(4)(b) (2021); N.M. STAT. ANN. § 50-4-36(B)(1) (2021); see N.Y. C.P.L.R. 5003-B (MCKINNEY 2021) (prohibiting restrictions on the disclosure of the “underlying facts and circumstances to the claim” only).
244. OR. REV. STAT. § 659A.370(4)–(5) (2021).
discrimination. Like Oregon, Washington has an exception to its general restriction on employers enforcing confidentiality clauses when the confidentiality was agreed to after the sexual harassment occurred. Lastly, New York's more stringent exception allows for confidentiality when the claimant prefers it, which is presumably a higher standard than if they request it, as long as they have twenty-one days to revoke the clause.

E. State Law Prohibitions on Waivers of Rights and Remedies

In addition to confidentiality provisions, states have also restricted waivers of a sexual harassment claimant's rights and remedies. A rights and remedies clause outlines which legal rights and remedies the signer can maintain while remaining in compliance with the agreement, as well as which legal rights the signer waives. In theory, a waiver of rights could result in employees "waiv[ing] future claims based upon illegal activity that occurred after they signed the NDA." Not all states that restrict confidentiality provisions also restrict the waiver of a claimant's rights and remedies. For example, Arizona, Nevada, New Mexico, Oregon, Tennessee, and Virginia all remain silent on a sexual harassment claimant's ability to contractually waive their rights.

The states that have addressed this issue fall into two categories. The first category of states void provisions waiving a claimant's rights and remedies. Although a ban in this category has been interpreted to also ban arbitration, arbitration is not specifically addressed in these

245. Id. § 659A.370(4).
246. WASH. REV. CODE § 49.44.210(4) (2020).
247. 5029-B.
249. Id. Some states have gone even further than restricting a claimant's ability to waive their rights and remedies and specifically banned mandatory arbitration for sexual misconduct claims. Natalie Dugan, #TimesUp on Individual Litigation Reform: Combating Sexual Harassment Through Employee-Driven Action and Private Regulation, 53 COLUM. J.L. & SOC. PROBS. 247, 256–57 (2020), http://blogz2.law.columbia.edu/jsp/wp-content/uploads/sites/8/2020/01/V0Gy-Dugan.pdf [https://perma.cc/MKH2-RUP5]. However, one could also interpret a prohibition against the waiver of rights and remedies to include a ban on mandatory arbitration. See Dugan, supra, at 252–53.
251. Id.
252. Id.
statutes.\textsuperscript{255} New Jersey, for example, prohibits employment contract clauses that waive substantive or procedural rights and remedies when a sexual discrimination or harassment claim is involved.\textsuperscript{254} Vermont’s law is very similar to New Jersey’s.\textsuperscript{255} Washington’s law is also similar, but it covers all forms of discrimination and focuses more specifically on an “employee’s right to publicly pursue a cause of action.”\textsuperscript{256} Although Maryland does not explicitly prohibit confidentiality provisions, it bans the waiver of rights or remedies in employment contracts when an employee makes a sexual harassment claim.\textsuperscript{257}

Similarly, California bans contractual provisions that waive a claimant’s right to testify about sexual harassment if they are later legally required to disclose the confidential information (e.g. by a subpoena).\textsuperscript{258} California also prohibits employers from asking employees not to disclose “unlawful acts in the workplace,” including sexual harassment, in return for a raise or bonus.\textsuperscript{259} The California legislature attempted to broaden these prohibitions in a bill signed into law by Governor Newsom in October 2019.\textsuperscript{260} Although the proposed law, Assembly Bill 51 (AB 51), does not explicitly ban mandatory arbitration in employment disputes,\textsuperscript{261} it does prohibit employees from waiving their rights to any forum or procedure as a condition of their employment.\textsuperscript{262} Thus, AB 51 effectively bans mandatory arbitration clauses in employment contracts.\textsuperscript{263}

AB 51 was scheduled to take effect on January 1, 2020.\textsuperscript{264} In December 2019, however, the California Chamber of Commerce and other trade organizations sought to enjoin AB 51’s enforcement on the


\textsuperscript{254} N.J. STAT. ANN. § 10:5-12.7 (West 2021). However, this public policy exception does not apply to collective bargaining agreements. Id. § 10:5-12.7(6).


\textsuperscript{256} Wash. Rev. Code § 49.44.085 (2020).

\textsuperscript{257} Md. Code Ann., Lab. & Empl. § 3-715(a) (West 2018).


\textsuperscript{259} Cal. Gov’t Code § 12964.5(a)(2) (West 2021).


\textsuperscript{261} Id.

\textsuperscript{262} See id.


grounds that it is preempted by the Federal Arbitration Act (FAA). 265 On December 30, the federal district court granted a temporary restraining order, preventing AB 51 from coming into operation as planned. 266 In February 2020, the court released an order granting a preliminary injunction. 267 The court held that AB 51 will likely be preempted by the FAA because it treats agreements to arbitrate differently than other agreements and conflicts with the FAA’s objectives. 268

The second category of states legislate against mandatory arbitration agreements. 269 For example, Illinois not only prohibits employers from requiring a waiver of substantive or procedural rights as a term of employment, 270 but also goes a step further and voids any clause that, as a term of employment, requires employees to arbitrate. 271 Illinois includes an exception to this prohibition when both parties provide “knowing . . . and bargained-for consideration,” however, the employee may still report discrimination or seek legal advice. 272 In New York a bill was proposed which would void contractual clauses that waive rights and remedies relating to discrimination claims (including harassment). 273 Although that bill has not passed, New York already specifically prohibits the enforcement of mandatory arbitration clauses for discrimination claims. 274

F. Preemption of State Laws Under the Federal Arbitration Act

Hope is on the horizon over the arbitration landscape, as discussed below, but under existing law, it may not matter whether state laws explicitly or implicitly prohibit mandatory arbitration. These laws may, like California’s AB 51, be preempted under the FAA. 275 In fact, a Washington court has already ruled that the state’s mandatory arbitration ban is unenforceable due to preemption. 276 In Logan v. Lithia Motors, an employee and Lithia Motors agreed to arbitrate all

265. Id.
266. Id.
267. Id.
268. Id. at 1100. The preliminary injunction will remain in force until a final judgment is issued or an appeal is filed with the Ninth Circuit Court of Appeals. Petrides & Thorne, supra note 263.
269. See Gomez, supra note 250.
270. 820 ILL. COMP. STAT. 96/1-25(b) (2020).
271. Id.
272. Id. 96/1-25(c).
275. See Petrides & Thorne, supra note 263.
employment-related claims. Following his employment, the employee sued Lithia Motors for discrimination. Lithia Motors argued that the dispute should be submitted to mandatory arbitration, claiming the FAA preempted Washington's statute. The court agreed with Lithia Motors' argument because “[f]ederal policy favors arbitration” under the FAA. Thus, Lithia succeeded in moving the dispute to arbitration because the FAA preempted Washington's ban of mandatory arbitration clauses.

Similarly, a federal court recently ruled that New York's ban on mandatory arbitration is preempted by the FAA. In Latif v. Morgan Stanley & Co., an employee sued his former employer for discrimination and sexual misconduct. The employer sought to compel mandatory arbitration because the employee had signed an arbitration agreement. The agreement stated that it should be interpreted in accordance with the FAA. The court granted the employer's motion to compel arbitration, stating that “[t]he FAA . . . is not easily displaced by state law.” The court reasoned that the ordinary meaning of the FAA's wording and Supreme Court decisions interpreting it demonstrate a preference for arbitration agreements. Because the court found that New York's law discriminated against arbitration agreements, the court held it preempted by the FAA.

These recent cases, as well as the preliminary injunction against California's AB 51, demonstrate a trend toward FAA preemption of state laws. Based on the facts of the above cases, however, one could argue that state law could strike down an employment contract mandating arbitration if the contract lacks a reference to the FAA. The issue of

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278. Id. at 2–3.
279. Id. at 3.
280. See id.
282. Id. at 9.
284. Id. at *3.
285. Id. at *1–2.
286. Id. at *2.
287. Id. at *11.
288. Id. at *6.
289. Id. at *10–11.
290. Id. at *9.
whether a contract needs to include a reference to federal law to preempt state law has not yet been litigated. Regardless, the FAA continues to cast a long shadow over attempts to limit enforcement of mandatory arbitration clauses. 292

Furthermore, recent cases such as Manhattan Cryobank, Inc. v. Hensley do not challenge Latif’s holding that the FAA preempts state law bans on mandatory arbitration in sexual harassment cases.293 Manhattan Cryobank distinguished Latif by contrasting minors’ arbitration claims with those of adults; it noted contractual differences between the arbitration of adults’ workplace discrimination claims and the arbitration of cases where children inherited genetic diseases from dishonest sperm donors.294 In contrast, Tantaros v. Fox News Network, LLC295 casts some doubt on Latif, first by acknowledging the lack of analysis from other federal courts regarding New York’s local statute specifying prohibited types of mandatory arbitration clauses,296 and then by emphasizing the importance of federal jurisdiction in Latif:

The only other federal court case interpreting § 7515 is . . . Latif v. Morgan Stanley & Co . . . in which Judge Cote held that § 7515 was preempted by the Federal Arbitration Act. In that case, however, federal jurisdiction was clearly present given Plaintiff’s Title VII and § 1981 federal claims. The Court and Parties agreed that the issue of preemption was to be resolved by the District Court in that case.297

But neither case offers robust criticism of Latif or the FAA, and instead indicate that the FAA continues to offer a viable means of preventing state laws from restricting the use of mandatory arbitration provisions in sexual harassment claims.298

Fortunately, further judicial scrutiny of Latif or the FAA may be less urgently needed now that the tangible effects of the #MeToo movement have begun to materialize. In the wake of the movement, discussions in Congress to amend the FAA led to proposals including the Forced Arbitration Injustice Repeal (FAIR) Act (R.963), which would invalidate

294. Id. at *3–6.
forced arbitration requirements in an employment, consumer, antitrust or civil rights dispute, as well as the Protecting the Right to Organize Act (PRO Act) (R.842, which could empower women to collectively bargain against their employers and enforce their rights.\(^{299}\) As of this Article’s publication, Congress recently passed legislation, which President Biden is expected to sign, banning forced arbitration provisions in contracts involving sexual harassment and sexual assault cases brought by workers and customers.\(^{300}\) The law will apply to employment contracts retroactively,\(^{301}\) further bolstering protections offered by the state laws discussed above.

**G. Local Laws Regulating Sexual Misconduct**

States are not the only entities attempting to address sexual misconduct in the wake of the #MeToo movement—local governments are attempting to do so as well.\(^{302}\) For example, the “Stop Sexual Harassment in NYC Act” became effective in 2018.\(^{303}\) Aimed at fighting workplace sexual harassment, this Act is a series of laws that expand New York City’s sexual harassment protections, including mandatory employee trainings and required notification of employees of their rights.\(^{304}\) Additionally, in San Francisco, local officials are prohibited from entering into confidential settlement arrangements,\(^{305}\) and every city commissioner must complete yearly ethics and sexual harassment training.\(^{306}\)


\(^{300}\) Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, S. 2342, 117th Cong. (2021).

\(^{301}\) Id.

\(^{302}\) See, e.g., Our Opinion: Society Is Poised to Change for the Better—If We Let It, PORTLAND TRIB. (June 16, 2020), https://pamplinmedia.com/pt/opinion/470422-316576-our-opinion-society-is-poised-to-change-for-the-better-%C3%A2%C2%A7%AC%E2%80%9C-if-we-let-it- [https://perma.cc/9D9A-X7K6].


These local laws strive to remedy the insufficient legal protections, brought to light by the #MeToo movement, which have left employees vulnerable to workplace sexual harassment.\(^3\) By implementing legislation targeted at preventing sexual harassment as well as providing measures to support the legal rights of claimants, these localities seek to transform workplace culture, expand protections to all employees, and increase employer accountability.\(^4\) Whether New York City and San Francisco inspire other local governments to pass similar laws remains to be seen. The next Part highlights how attitudes and advocacy around women’s rights have shifted as a result of greater societal turmoil and transformation.

IV. INFLECTION POINTS AND CHANGE

A. Inflection Points

2020–2021 has been a time of inflection.\(^5\) Prior inflection points include 1933, the year that the Great Depression reached its peak, and the beginning of the Civil War in 1861.\(^6\) These times usually result from a confluence of events causing a significant societal shift that leads to changes not only in attitudes, but also in laws and in people holding positions of power.\(^7\) A more recent confluence occurred in 1979 when an energy crisis, the seizure of the American embassy in Tehran, stagflation, and economic turmoil prompted the conservative shift and

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5. In the United States, turning points in national life tend to be defined by the year. Gerald F. Seib, Turning-Point Year Heads to Parts Unknown, WALL ST. J., Oct. 6, 2020, at A4.


subsequent election of Ronald Reagan.\textsuperscript{312} Another inflection period occurred in 1968,\textsuperscript{313} when protests followed the assassination of Dr. Martin Luther King, Jr. and a racial divide was intensified by the campaign of George Wallace, a racist and populist presidential candidate.\textsuperscript{314} The assassination of presidential candidate Robert F. Kennedy further shocked the country, which was already deeply divided over the Vietnam War.\textsuperscript{315} This generational and class rift was amplified by the chaos at the Democratic political convention in Chicago.\textsuperscript{316}

We appear to be suffering from a similarly divisive time in 2020 and 2021.\textsuperscript{317} At the time of this Article’s publication, the COVID-19 pandemic has resulted in the deaths of over 950,000 Americans, where people of color are disproportionately represented in this statistic.\textsuperscript{318} As a consequence of the pandemic and the resulting shutdowns, the country plunged into an economic crisis characterized by widespread unemployment and an unexpectedly steep decline in the employment-to-population ratio.\textsuperscript{319} This, in turn, has led to shifts in the way people work,\textsuperscript{320} are schooled,\textsuperscript{321} and interact.\textsuperscript{322} The pandemic also brought to


\textsuperscript{314} See id.

\textsuperscript{315} See id.

\textsuperscript{316} William A. Galston, I’ve Never Been so Afraid for America, WALL ST. J., June 3, 2020, at A17.

\textsuperscript{317} One might think that an appropriate historical comparison would be the influenza outbreak of 1918. Although that pandemic caused worldwide death and disruption, it was also followed by the end of WWI and an economic upturn. Elizabeth Yuko, How World War I’s Legacy Eclipsed the 1918 Pandemic, HISTORY (Mar. 11, 2021), https://www.history.com/news/world-war-i-1918-pandemic-memorials [https://perma.cc/HH8W-JMZC] (noting that WWI concluded nine months following the start of the pandemic); Elliott Smith, ‘Roaring 20s’ After the Pandemic? Big Banks Warn Be Careful What You Wish For, CNBC (Jan. 27, 2021, 1:44 PM), https://www.cnbc.com/2021/01/27/roaring-20s-after-the-pandemic-big-banks-warn-be-careful-what-you-wish-for.html [https://perma.cc/TG8S-JMU9] (explaining that the Roaring 2os followed the pandemic). Some lessons were learned about how to deal with such an outbreak, and it caused a change in thinking in the medical profession, but it is hard to separate the pandemic and the war. See JOHN M. BARRY, THE GREAT INFLUENZA (2005).


light the inequities in our healthcare system and disparities in wages. The killings of George Floyd and Breonna Taylor by police spurred nationwide protests against the pervasive discriminatory policing suffered by Black Americans. The Black Lives Matter movement continues to call for change, highlighting racial inequities not only in policing, but also in all facets of American life. Political divisions have deepened, furthered by an impeachment trial and an unusually bitter political campaign, followed by violent insurrection at the United States Capitol. At the same time, unprecedented fires, floods, and storms have caused even further harm, with devastating effects.


Inflection points may lead to shifts in societal thinking and calls for reform in the government and its laws. Indeed, according to one influential scholar of constitutional theory, inflection points can be direct causes of constitutional change. Major societal-paradigm shifts can, according to Bruce Ackerman, themselves become an instance of “higher lawmaker,” through which “We the People” can effect constitutional change without undergoing the formal amendment process. According to Ackerman, major inflection points have caused three constitutional paradigm shifts: from the Founding paradigm, through Reconstruction, to the current New Deal Constitutionalism. Inflection points can cause radical changes in our constitutional thought—even without formal amendments—that can respond to and even exacerbate interbranch conflict. National crises cause interbranch conflict (as, e.g., between the Supreme Court and the Executive) that is eventually resolved by a series of decisive elections. As the nation is faced with a confluence of social crises, a pandemic, and sharp division between an ultra-conservative judiciary and an increasingly liberal population (and, with President Biden’s election, a liberal Executive), we may well be heading toward another constitutional paradigm shift, particularly given the Democrats’ expressed willingness to consider court reform.

But even if we reject Ackerman’s views, it is clear that social crises often serve as catalysts for legal change. Consider, for example, when recognition of entrenched gender and racial inequities became devastation as the derecho that slammed the nation’s Corn Belt.”; Arian Campo-Flores, Hurricane Zeta Makes Landfall in Southeastern Louisiana as 27th Named Storm of Season, WALL ST. J. (Oct. 29, 2020, 6:38 AM), https://www.wsj.com/articles/hurricane-zeta-strengthens-as-it-churns-toward-louisiana-11609891913 [https://perma.cc/R8ND-4PRN] (reporting that Hurricane Zeta is the twenty-seventh of the season, almost reaching the record of twenty-eight in 2020).


333. Bruce Ackerman, We the People: Foundations (1993).

334. Id. at 6–7.

335. Id.

336. Id.

337. For a more detailed description of Ackerman’s view of this process, see id.; see also Bruce Ackerman, We the People: Transformations (2000).


widespread in the 1960s, leading to the passage of the Equal Pay Act of 1963\footnote{29 U.S.C. § 206(d)(1). At the time, women earning less than men for the same job was viewed as the primary inequality facing women, and the Equal Pay Act was designed to fix that. See Bettina C.K. Binder, Terry Morehead Dworkin, Niculina Nae, Cindy A. Schipani & Irina Averianova, The Plight of Women in Positions of Corporate Leadership in the United States, the European Union, and Japan: Differing Laws and Cultures, Similar Issues, 26 Mich. J. Gender & L. 279, 302 (2020).} and the Civil Rights Act of 1964 which includes Title VII.\footnote{42 U.S.C. § 2000e-2.} Today, in response to growing acknowledgement of racial, gender, and economic inequalities stemming from the events of 2020, women have gained significant power in Congress and state legislatures.\footnote{See Rachel Zohn, Nevada Continues to Lead State Legislatures on Women’s Equality Day, U.S. News (Aug. 26, 2020, 4:56 PM), https://www.usnews.com/news/best-states/articles/2020-08-26/women-serve-legislative-office-in-record-numbers-in-2020 [https://perma.cc/8aAQ-JNVT].} Moreover, the #MeToo movement has prompted greater awareness of injustices in the corporate world.\footnote{See Cindy A. Schipani & Terry Morehead Dworkin, The Need for Mentors in Promoting Diverse Leadership in the #MeToo Era, 87 GEO. WASH. L. REV. 1272, 1280–81 (2019).} Academics have acknowledged that the #MeToo movement “has strong support in Congress, in state legislatures, and in the business community.”\footnote{Joan MacLeod Heminway, Me, Too and #MeToo: Women in Congress and the Boardroom, 87 GEO. WASH. L. REV. 1079, 1088 (2019) (quoting Stephanie Greene & Christine Neylon O’Brien, Epic Rachollapse: The Supreme Court Endorses Mandatory Individual Arbitration Agreements, #TimesUp on Workers’ Rights, 15 STAN. J. C.R. & C.L. 41, 81 (2019)).} In light of the movement, companies and shareholders are rethinking their approach to diversity, equal treatment, and leadership.\footnote{See id. at 1089.} These factors suggest that new legislation and regulations designed to level the playing field and end sexual harassment in the workplace are likely.

This societal shift coincides with the election of President Biden, Vice President Kamala Harris, and a more balanced Congress.\footnote{See Alex Clark, Dominic Gilbert, Richard Moynihan & Bruno Riddy, US Election Results and Maps 2020: Joe Biden Wins US Election After Victory in Pennsylvania; Win in the State of Pennsylvania Cements Victory for Biden—See the US Election 2020 Results in Full, TELEGRAPH ONLINE (Nov. 13, 2020), https://go.gale.com/p/s?u=umuser&sid=GALE%7CA641398065&v=2.1&it=r&sid=summary [https://perma.cc/L5S5-D7FE].} Liberals have been a driving force behind the #MeToo movement, making them more likely to respond to sexual harassment with political change.\footnote{See Claire Guthreau, 2020 Is the First Presidential Election of the #MeToo Era. Why Do the Political Parties See It so Differently?, CTR. FOR AM. WOMEN & POL., (Jan. 8, 2020), https://cwp.rutgers.edu/election-analysis/2020-first-presidential-election-metoo-era-why-do-political-parties-see-it-so [https://perma.cc/NRA-AE8A].} In his first speech as President-Elect, while laying out his goals for the coming four years, Biden noted that we were at an inflection point.\footnote{Camila Domoneskes & Barbara Sprunt, Hope, Healing, and ‘Better Angels’: Biden Declares Victory and Vows Unity, NPR (Nov. 7, 2020, 3:15 PM), https://www.npr.org/sections/politics/2020-election-results/2020/11/07/932104693/biden-to-make-victory-speech-as-president-elect-at-8-p-m-et [https://perma.cc/JNSH-9MKP].} He cited the need to address inequities so that
people would have a “fair chance” to achieve what they wanted and needed in our society. 349

President Biden’s “fair chance” resembles the goals of the civil rights movement and resultant Civil Rights Act of 1964: to provide an equal playing field. 350 The country is likely ready for a new civil rights push. If a new Civil Rights Act were to be enacted, the next question becomes: what should be its focus? At its heart, it must address racial, gender, and economic inequality. Especially considering the disproportionate effect of COVID-19 on people of color and women, the need for intersectional change is clear. 351 The pandemic again exposed that Americans were not truly all in this together. Black women lost their jobs at the highest rate of all other groups during the pandemic while also facing more severe threats to their health from COVID-19 given the disproportionate incidence of chronic health conditions among the Black female population. 352 Because both COVID-19 and the Black Lives Matter movement are intersectional issues uniquely impacting women, lifting up women—such as in the workplace—will aid in the progress of these and other movements addressing this country’s entrenched inequities. 353 Many of today’s circumstances are different from those existing when the Civil Rights Act of 1964 was passed, thus the solutions will be different. But the goal is the same: a fairer society for the benefit of all.

B. Congressional Action

This better society can be achieved through several possible approaches. Earlier in this Article, we cite Professor Paul Freund of Harvard University for his commentary on the debate over passage of the ERA. 354 He analogized the two approaches to the issue of equal rights for women—the ERA versus other solutions—as a “single broad-spectrum drug with uncertain and unwanted side-effects and a

349. Id.
353. See Bowleg, supra note 351; Smart, supra note 352; Marcia Chatelain & Kaavya Asoka, Women and Black Lives Matter: An Interview with Marcia Chatelain, DISSENT MAG. (Summer 2015), https://www.dissentmagazine.org/article/women-black-lives-matter-interview-marcia-chatelain [http://perma.cc/B3SN-F5S8].
354. See Freund, supra note 47, at 234–35.
selection of specific pills for specific ills.”355 Because of today’s political climate, this Article urges for specific pills in the short term while considering the ERA as a “broad spectrum,” longer-term goal.

President Biden faced many challenges upon entering office, but his overarching objectives have been reviving the economy and controlling COVID-19, which in turn would also help rebuild the economy.356 Before COVID-19, slow progress was made in expanding the representation of women in the workplace, from entry level jobs to C-suite positions. But COVID-19 brought with it major setbacks.357 Before the pandemic, women did not opt out of the workforce at a higher rate than men, yet during the pandemic women were pushed out of the workplace at a far higher rate.358 If the “negative impact of COVID-19 on women remains unaddressed—global GDP in 2030 would be $1 trillion below where it would have been if COVID-19 had affected men and women equally.”359 To make economic gains, the jobs market must be revitalized.360 And for this to occur, women must be brought back into the workforce.361 As of this Article’s publication, one of President Biden’s proposed domestic policy initiatives is a $1.9 trillion relief plan to support families with childcare and necessary costs.362 Childcare aid will allow parents, especially mothers, to return to the workforce.363

The pandemic has imposed a far greater toll on women’s employment than on men’s.364 For example, in September 2020, 865,000 women were laid off or had left the workforce compared to

355. Id. at 235.


358. Id.

359. Id.


363. See id.

216,000 men.\textsuperscript{365} In December 2020, all jobs lost were those held by women.\textsuperscript{366} As of May 2021, only 56% of women were working for pay, the lowest number since 1986.\textsuperscript{367} Women of color have been particularly impacted. Total employment for Black women in February 2021 was down 9.7% from February 2020; that figure was 8.6% for Hispanic women.\textsuperscript{368} For white women, total employment was down 5.4%.\textsuperscript{369} The difference is stark in employment-to-population ratios as well. In February 2020, before the pandemic, Black women’s employment-to-population ratio was 60.8%; as of April 2021, it stands at 54.8%, a six-percentage point drop.\textsuperscript{370} By contrast, white women’s rate dropped by only about three percentage points.\textsuperscript{371} These differences stem in part from the pandemic’s disproportionate impact on sectors like retail, tourism, and state and local governments, all of which employ large numbers of Black women and all of which were negatively impacted by COVID.\textsuperscript{372}

The pandemic may also drive many women to quit their jobs. The Sixth Annual Women in the Workplace Study by McKinsey & Co. and LeanIn.org found that more than a quarter of women said they may resign due to pandemic pressures, and more than thirty percent at the management level felt similarly.\textsuperscript{373} Women are feeling pushed to a point that is unsustainable.\textsuperscript{374} Inequality long predates the pandemic, especially in access to leadership positions, and the onset of the pandemic has only intensified the divide.\textsuperscript{375} Moreover, women who feel

\textsuperscript{365} Katie Surma, Recession Disproportionately Affects Women as More Moms Are Forced to Quit Jobs, SEATTLE TIMES (Nov. 4, 2020, 2:03 PM), https://www.seattletimes.com/business/pandemic-recession-disproportionately-affects-women-as-more-working-moms-are-forced-to-quit-jobs/ [https://perma.cc/CF72-AP8T]. Some have called this a “shecession.” Id.


\textsuperscript{369} Id.

\textsuperscript{370} Smart, supra note 352.

\textsuperscript{371} Id.

\textsuperscript{372} See id.


\textsuperscript{374} Id.

forced to leave work, even temporarily, can lose job skills, opportunities for advancement, wages, and benefits.\textsuperscript{376} This outflow of female workers may reverse the last five years of progress that women have made toward increasing their representation across all segments of the workforce.\textsuperscript{377} Companies attempting to diversify are also losing out.\textsuperscript{378} Two actions can help women reenter the workforce: improved childcare and higher wages.\textsuperscript{379}

In the post-election political climate, concrete steps seem feasible. Vice President Kamala Harris has long fought for civil rights and women’s rights.\textsuperscript{380} And there are more women in positions of power in Washington, D.C. than ever before.\textsuperscript{381} Women gained valuable seats in the House, the number of female Republican House members doubling from nine to eighteen.\textsuperscript{382} Women who held several top posts in the Biden campaign have filled important positions in his administration, and Biden has picked eleven women to serve on his cabinet.\textsuperscript{383}

Biden tapped two women—his campaign manager and his campaign’s general counsel—to be his deputy chief of staff and counsel


376. See Dworkin & Schipani, supra note 375, at 122.


378. Even in the midst of the pandemic, Nasdaq, Inc. filed a proposal with the Securities and Exchange Commission that would require the almost 3,000 companies listed on its exchange to have at least one female on their board or else disclose why they are not meeting the requirement. Jack Kelly, New Policy Requires Diversity on Corporate Boards for Nasdaq-Listed Companies, FORBES (Aug. 11, 2021, 8:02 AM), https://www.forbes.com/sites/jackkelly/2021/08/11/new-policy-requires-diversity-on-corporate-boards-for-nasdaq-listed-companies/?sh=3642b01abe. Additionally, they must have one racial minority or LGBTQ+ board member. Id. The New York Stock Exchange has taken a less aggressive approach, by establishing an advisory council to assist companies on its exchange in identifying diverse candidates for boards. Alexander Osipovich & Akane Orani, Stocks: Nasdaq Pushes Diversity Rule, WALL ST. J., Dec. 2, 2020, at A1.


to the president, respectively. 384 Biden’s appointments of women in the economic realm point to a “focus on workers and income equality.” 385 Moreover, women tend to perform at higher levels within agencies and organizations that actively support women. 386 President Biden has placed numerous women in positions of leadership, and this decision could contribute to more effective and proactive governance when it comes to issues that disproportionately affect women. 387

Access to childcare might be seen as a new form of civil right to the extent that it gives children safety and consistency while allowing parents equal access to work and a fair chance at success. 388 It will be crucial not only to revitalizing the economy, but also to creating an economy where every individual has “a fair shot and an equal chance to get ahead.” 389 A major concern with respect to childcare access is that “women’s waning labor force participation during the pandemic . . . [is] the burden borne by mothers forced to choose between work and the supervision and education of their young children.” 390 Government action prioritizing and supporting childcare providers and parents may allow parents, disproportionately mothers, to return to work. 391

President Biden already cited increased tax breaks for childcare expenses in his first economic plan upon being sworn in. 392

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384. Sean Sullivan, Biden Chooses More Key Members of White House Team, SEATTLE TIMES, Nov. 18, 2020, at A4. Biden’s former deputy campaign manager will become director of the White House Office of Intergovernmental Affairs. Id.


389. Id.


391. See id.

Additionally, the President has supported a “$15 billion allocation for child development block grants, a $1 billion allocation for the Head Start early education program, and a $24 billion stabilization fund for child care providers” in order to support the infrastructure allowing parents to return to work.393 Many other developed countries provide childcare;394 Scandinavian countries and France are prime examples.395 Considering these examples, much could be achieved in the United States through a combination of early preschool and supplements for childcare.396

A program supporting parents through additional access and affordability of childcare could be funded similarly to Medicaid, with joint federal and state contributions. The program could even be expanded to include the private sector, such as by providing increased tax breaks for companies that offer childcare. But a program like this may be viewed by some as approaching the path of social welfare, and with Congress so closely split, such a reform would likely be difficult to achieve despite the obvious benefits for economic recovery.

Higher wages will also aid in women’s reentry into the workforce. Lower wages perpetuate gender inequality and decrease women’s independence.397 Alleviating the wage gap will not only benefit the economy, but also allow women to more easily return to work. Additionally, closing the wage gap “benefits women’s families, especially their children, by increasing investment in education, health, nutrition, and housing.”398

President Biden has already taken steps in this direction, including through a minimum wage of $15 per hour proposed in his economic relief package.399 Although the $15 minimum wage ultimately did not

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393. White, supra note 390.
396. See Mead, supra note 394.
398. Id.
make it into the economic relief package, this proposal is a valuable jumping-off point for future lawmakers. This legislation would benefit women and minorities, who have been pushed out of the workforce and tend to have lower paying jobs than their white male counterparts. Correcting the wage gap would help women quickly reenter the workforce and alleviate some of the burdens imposed by childcare and eldercare expenses. Numerous states have already committed to increasing the minimum wage, with several raising it to $15 per hour. Even a lower increase would still constitute a step in the right direction.

Additionally, other congressional measures may be used to further address women’s inequality in the workplace. Congress has already passed legislation barring employers from requiring employees to agree to arbitration in most sexual harassment and sexual assault cases, legislation which President Biden is expected to sign. The ability to pursue discrimination claims furthers the public policy of rooting out discrimination by allowing these claims to become public knowledge. By contrast, there is no public reporting of arbitration claims, permitting workplace discrimination to persist unnoticed.

As discussed above, another possible path is to ratify the 1970s Equal Rights Amendment. But given its current makeup, the Supreme Court is unlikely to address the issue. The addition of Amy Coney Barrett to the Court in October 2020 means that a majority of the Court are strict constructionists. Strict constructionists generally share the view that the Court’s role is to enforce statutes strictly as

401. See Tankersley & Shear, supra note 399.
written, as opposed to engaging in more holistic interpretation that takes into account legislative aims, historical context, and policy consequences.408 Because Congress articulated two dates for the adoption of the ERA as a constitutional amendment, and those dates are long past, a majority of the Court will likely view that legislation as dead.409 The ERA, however, could be reintroduced in Congress at a later date. This approach may stand a better chance, considering that Democrats have a very slim majority in the Senate and consequently control of the bills that are introduced.410 Still, state ratification of an entirely new ERA, if successful, would likely take years, making this reform a remote possibility.

C. Specific Measures

Each proposed change discussed thus far requires congressional action, and the close congressional party split will require careful prioritizing of which actions to tackle first. In addition, Biden and Congress must grapple with the lasting impacts of the Trump administration and the pandemic. There are, however, many specific measures that Biden’s administration can implement quickly to effectuate his “fair chance” society, specifically with respect to women’s equality in the workforce.

On his first day in office, President Biden signed fifteen executive orders and took two executive actions.411 He issued many more in subsequent days, most of which undo some of the nearly 200 executive orders issued by President Trump.412 In issuing such orders, President Trump, like President Obama before him, was often reacting to Congress’s failure to pass legislation.413 Throughout history, significant actions, such as the first nondiscrimination order, were achieved

408. Strict constructionism contrasts with the philosophy of other justices such as Ruth Bader Ginsburg who take the non-textualist view that courts should look at the purpose of the statute and its policy consequences, placing more value on those considerations than on strict adherence to the language. See, e.g., Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1640 (2018) (Ginsburg, J., dissenting).
410. The Senate is evenly split between Democrats and Republicans, but in tie votes, the Vice President can cast the deciding vote. U.S. CONST. art. I, § 3.
411. Alex Leary, Executive Orders Lay out Broad Agenda, WALL ST. J., Jan. 21, 2021, at A1. Biden’s predecessors signed no more than one. Id.
412. Jeff Green & Paige Smith, Biden’s Diversity Policies May Line up with Corporate America’s, BLOOMBERG, Nov. 19, 2020, at A11. President Obama issued 295 executive orders during his two terms. Id.
through executive orders, illustrating the importance of executive orders as a tool in a closely divided Congress. 414

President Biden can also implement change through agencies and federal contracts under his control. 415 For instance, federal contractors can be more closely monitored to determine whether they actually achieve diversity rather than just treating stated diversity goals as required paperwork. 416 Another day-one Biden action was an order directing federal agencies to deliver plans addressing the removal of barriers to the advancement of minorities. 417 He also ordered the Office of Management and Budget to more equitably allocate federal funds to minority communities. 418 Importantly, Biden’s executive decisions were enacted immediately, remedying issues more swiftly than could ever be achieved via lengthy legislative changes aimed at growing gender disparities.

The power of the purse is yet another way to swiftly achieve reform. Federal contractors employ approximately a quarter of U.S. workers. 419 Biden has already issued an order directing agencies to begin planning for a $15 minimum wage for federal workers, and he is expected to issue an order requiring federal contractors to pay a $15-per-hour minimum wage in the near future. 420 The $15 pay would in turn put pressure on private employers to meet that minimum if there is competition for employees. Requiring contractors to meet diversity goals would also help establish norms throughout the United States. A stated goal of the new administration is to fight racism. 421 President Biden’s plan targeting lower-income jobs—including hospitality, retail, food service, and some health care jobs—disproportionately impacts women of color where “total employment for Black women is 9.7% lower than it was in February 2020” before the pandemic, with “Hispanic women close behind at 8.6% lower,” and compared to 5.4% for white women. 422 Additionally, women of color have been excluded by parts of the #MeToo movement that have focused on white, affluent, educated women instead of the “industries in which women of color workers are

418. Id.
422. Rattner & Franck, supra note 368.
strongly represented [which] are also particular hotbeds of sexual harassment and assault." 423 Increasing diversity training could also counteract workplace discrimination. The history of the 1964 Civil Rights Act shows that many advances for women followed from rights first granted on the basis of race. 424 For example, the Supreme Court authorized affirmative action on the basis of race in 1978; it allowed it for women in 1987. 425 Though many large employers had attempted to improve diversity through training programs, former President Trump issued an executive order on September 22, 2020, halting much of that training. 426 A reversal of this order is expected to be one of President Biden’s first employment moves while in office. 427

Biden could also swiftly work to address women’s equality by banning nondisclosure agreements with respect to discrimination claims and settlements in federal contracts. As discussed earlier, there are still immense gaps in sexual harassment law. 428 The #MeToo and similar movements, though undoubtedly important in their own right, do not protect an individual’s job when that person comes forward. About one-third of the states have decided that the freedom of contract is subordinate to the need for transparency regarding harassment. 429 Given that many states have already addressed this issue, such a ban would not be surprising to many, nor be too far a shift from the norm. 430 The Biden administration could create uniform language and rules, giving businesses a clearer idea of their obligations regardless of their state of operation.

Under the right leadership, the Equal Employment Opportunity Commission (EEOC), could also swiftly fight for equality in the workplace. The EEOC is a bipartisan federal agency with five

425. Binder et al., supra note 340, at 305.
429. See infra Appendix (listing state laws restricting various aspects of nondisclosure agreements).
commissioners appointed by the President. In January 2021, Biden named a new chair and vice chair. It is the Commission’s responsibility to “provide[] leadership and guidance” on the federal government’s equal employment opportunity program. In its rules, regulations, and enforcement actions, the Commission has considerable power in the employment arena by enforcing federal laws that make it illegal to discriminate against a job applicant or employee on the basis of race, color, religion, sex, national origin, age, or disability. At a minimum, a reconfigured EEOC could halt some Republican attempts to undermine the Commission’s efforts to secure equality in the workplace. For example, by delegating some of its authority to the Departments of Justice and Labor, the EEOC could prevent the dilution of the agency’s power across partisan lines.

A reconfigured EEOC could also push for change in the workplace by promoting salary transparency—one of Biden’s stated goals during his campaign. Studies have shown that knowledge of pay in an organization and region enables women to bargain more effectively and helps narrow the wage gap between men and women. Women made progress toward equal pay before the pandemic, especially among younger workers, but the gap widens as women move up the


432. Id. The EEOC has announced the appointment of Commissioner Charlotte A. Burrows as Chair of the Commission and Commissioner Jocelyn Samuels as Vice Chair. Press Release, U.S. Equal Emp. Opportunity Comm’n, President Appoints Charlotte A. Burrows EEOC Chair (Jan. 21, 2021), https://www.eeoc.gov/newsroom/president-appoints-charlotte-burrows-eeoc-chair [https://perma.cc/AYF2-GAER].


435. But see Anne Cullen, EEOC Approves New Pact with Agencies Along Party Lines, LAW360 (Nov. 2, 2020), https://www.law360.com/articles/1324982/eeoc-approves-new-pact-with-agencies-along-party-lines [https://perma.cc/PtG4-XNQR]; but see also Mark Neuberger, Biden Puts Thumbprint on NLRB and Begins to Unwind Trump Board Policies, JD SUPRA (Feb. 9, 2021), https://www.jdsupra.com/legalnews/biden-puts-thumbprint-on-nlrb-and-965503/ [https://perma.cc/Q4LE-WXAF]. Neuberger explains that Biden can also have a major impact on the National Labor Relations Board through appointment of its general counsel. Neuberger, supra. The NLRB is led by a five-person board, and a Trump appointee’s term expires in August 2021. Id. This gives Biden a chance to create a Democratic majority. Id.


437. Green & Smith, supra note 412.

organizational hierarchy. One step toward transparency would be prohibiting employers from banning employees’ discussion of salaries. This prohibition should certainly apply to federal contractors given the power of the presidency. At least a quarter of the states already have such legislation, thus this kind of rule should not prove too controversial. Another change the EEOC could implement is publishing salary ranges for classes of jobs in various regions. Moreover, the government could require federal contractors to make salary information publicly available. Increasing salary transparency among both public and private employers would be a huge step forward for women’s equality, as equality increases alongside transparency.

The EEOC could also more aggressively promote salary equity by closing a loophole in the Equal Pay Act that essentially guts the legislation. The Act requires women be paid the same as men for equal work in the same establishment. However, an employer can justify different pay simply by showing that the difference was based on “any factor other than sex.” Courts have interpreted this phrase generously in favor of employers. Many efforts have sought to correct this loophole, with the proposed Paycheck Fairness Act (PFA) perhaps having the potential to be the most effective. This proposed legislation would require the EEOC to “collect data on compensation, hiring, termination, and promotion sorted by sex” and prevent employers from retaliating against employees for disclosing and discussing wage information. By mandating the collection of hiring and promotion data sorted by sex, the PFA may provide evidence of a company trend of gender based discrimination and dispel arguments that pay discrepancies were based on factors other than sex. Despite the


440. Dworkin et al., supra note 438, at 761–62, app. B.


443. Id.

444. Id.


447. Id.
Act’s failure to be enacted by Congress over many years, several states have adopted most or parts of the PFA. In this period of inflection, enacting such an act may even be possible in Congress.

CONCLUSION

The inflection period of 2020–2021 has already caused significant change. Democrats control both houses of Congress as well as the Executive branch, and social movements including Black Lives Matter and #MeToo have gained unprecedented traction. Although there is a greater understanding of our societal inequities, there is still a pressing need for women workers—especially women of color—to be supported economically, by promoting reentry into the workforce and fair pay, and to be equipped with stronger protections from workplace sexual harassment. Many of these reforms stand on the shoulders of previous movements, such as those preceding the passage of the Equal Rights Amendment and 1964 Civil Rights Act, which also sought to address inequality. The time is again ripe for change. It remains to be seen whether the post-inflection period will result in the necessary reforms for women in the workplace. Some potential changes, such as a reinterpretation of the Equal Pay Act and a new ERA will require great expenditures of political capital and unanimity of purpose. A unified purpose provides opportunities and hope for significant reform during a time of such uncertainty. The recent passage of federal legislation banning forced arbitration for claims of sexual harassment and sexual assault in employment contracts bolsters hope for future reform.

New York Times reporters Kantor and Twohey may have said it best when, reflecting upon the #MeToo movement, they wrote: “Progress requires a correct accounting of what women have really faced.” The legal changes motivated by the #MeToo movement will impact young, female professionals the most. These individuals are navigating, for the first time, the difficulties of being women in the workplace, as survivors, and as individuals whose professional advancement has been historically limited. Traditional legal avenues have thus far failed to bridge the gender gap in the workplace. Nevertheless, one can hope

449. Dworkin et al., supra note 438, at 759–60, app. A.
that after the fall from grace of prominent businessmen and the rise of the #MeToo movement that “the times, they are a-changin’.” 452

APPENDIX. STATE REGULATION OF HARASSMENT CLAIMS
<table>
<thead>
<tr>
<th>State</th>
<th>Does the state...</th>
<th>provide any exceptions to such confidentiality prohibition?</th>
<th>prohibit waiving one's rights or remedies generally?</th>
<th>explicitly prohibit mandatory arbitration?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td></td>
<td>Prohibited in settlements for claims of: (1) sexual assault, (2) sexual harassment, (3) workplace discrimination based on sex, (4) failure to prevent harassment, and (5) retaliation.</td>
<td>(1) it is requested by the claimant and (2) shields the claimant's identity. This exception does not apply if a government agency or agent is a party to the agreement.</td>
<td>An agreement may require that the settlement amount remain confidential. Cal. Civ. Proc. Code § 1001 (West 2020).</td>
<td><strong>This prohibition applies only to claims filed in civil or administrative actions. It does not apply to pre-litigation settlements.</strong></td>
</tr>
<tr>
<td>State</td>
<td>For Employers:</td>
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<tr>
<td>Illinois</td>
<td>Cannot unilaterally include a confidentiality provision in any settlement or termination agreement. For settlement agreements, see 820 ILL. COMP. STAT. 96/1-30(b) (2020). A confidentiality provision is allowed if: (1) it is documented that the employee wants it and the provision benefits both parties; (2) the employee is notified in writing of their right to have an attorney review the agreement; (3) there is consideration in exchange for confidentiality; (4) the confidentiality provision covers only events that have already occurred; (5) the employee has 21 days to consider the agreement; and (6) the employee has 7 days to revoke the agreement after it has been signed. 820 ILL. COMP. STAT. 96/1-30(a) (2020).</td>
<td>Voids any clause that, as a condition of employment, requires employees to waive substantive or procedural rights related to &quot;unlawful employment practice[s].&quot; 820 ILL. COMP. STAT. 96/1-25(b) (2020). EXCEPTION: such clause is allowed if: (1) it is in writing, (2) both parties provide bargained-for consideration, and (3) the employee can still report &quot;good faith&quot; allegations to government officials and seek legal advice. 820 ILL. COMP. STAT. 96/1-25(c) (2020).</td>
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<td>Louisiana</td>
<td>For Public Agents: No settlement agreement with a public entity or agent can include a confidentiality provision if: (1) the claim is based on sexual harassment or assault and (2) public funds were spent to reach the agreement. See LA. STAT. ANN. § 13:5109.1 (2020).</td>
<td>Settlement agreements not involving a public entity or agent, or where public funds are not used. See LA. STAT. ANN. § 13:5109.1 (2020). N/A</td>
<td></td>
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<tr>
<td>Maryland</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td>Nevada</td>
<td>A settlement agreement cannot contain a confidentiality clause if the claim relates to sexual misconduct. Nev. Rev. Stat. § 10.195(1) (2020). If the claimant requests it, the settlement must keep confidential: (1) the claimant’s identity and (2) any facts that could disclose the claimant’s identity. This exception does not apply if a public agent is a party to the agreement. The settlement amount may remain confidential in any case. Nev. Rev. Stat. § 10.195(4)–(6) (2020).</td>
<td>N/A</td>
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</tbody>
</table>

Notes:
- The provision voiding waiver of rights or remedies also voids mandatory arbitration of sexual harassment claims. See MD. CODE ANN., LAB. & EMP. § 3-715(a) (West 2020).
### New Jersey

**For Employers:** Confidentiality prohibited in settlements or contracts with a current or former employee if it relates to: (1) discrimination, (2) retaliation, or (3) harassment.

Any settlement agreement resolving one of the three types of claims listed above must include a notice that even if the parties agree to keep the facts confidential, the clause "is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable."

Employers who attempt to enforce a prohibited confidentiality provision are liable for the employee’s litigation costs.


**For Employers:** Prohibits clauses that waive "any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment." This does not apply to collective bargaining agreements.


### New Mexico

**For Employers:** Private employers cannot, as a term of employment, require employees to sign confidentiality provisions in settlements of sexual harassment claims.


Settlement agreements with an employee may include a confidentiality provision if it: (1) applies to the settlement’s monetary terms, (2) protects the employee’s identity (if the employee requests this), or (3) is at the employee’s request and still allows information to be disclosed when legally required.


The provision prohibiting a waiver of rights or remedies could be interpreted to also prohibit mandatory arbitration clauses. This has yet to be litigated. See N.J. Stat. Ann. § 10:5-12.7 (West 2020).
**New York**

**For Employers:**
Prohibited in settlements or other means of resolving discrimination claims outside of litigation.


The confidentiality provision is allowed if the claimant:
(1) prefers confidentiality,
(2) has 21 days to consider the agreement, and
(3) has 7 days to revoke the agreement after it has been signed.

Parties may agree to keep the settlement amount confidential.


A proposed bill, would void contractual provisions that:
(1) waive procedural rights and remedies or
(2) conceal details (other than a monetary term) related to sexual discrimination, retaliation, or harassment claims.


Mandatory arbitration clauses for discrimination claims are prohibited if an employer has four or more employees.


**Oregon**

**For Employers:**
Prohibited from using confidentiality provisions with employees that cover claims of sexual discrimination or assault.


Employers may enter into a “settlement, separation or severance agreement” that includes a confidentiality provision if the employee requests it and has seven days following the agreement to revoke it.

If the employer “makes a good faith determination” that an employee engaged in discrimination or sexual assault, the employer can include a confidentiality clause in a settlement, separation, or severance agreement with that employee.


**Tennessee**

**For Local Education Agencies:**
Public school districts and other educational agencies cannot enter into or require an NDA in any settlement of a sexual misconduct claim.


**For Employers:**
An employer cannot impose a term of employment requiring an employee to sign an NDA regarding sexual harassment.

For Employers: Prohibited from requiring someone, as a term of employment, to sign a contract that prevents them from reporting, disclosing, or participating in an investigation of sexual harassment.
VT. STAT. ANN. tit. 21, § 495h(g) (2020).

Any sexual harassment settlement must state that it does not prohibit the claimant from:
(1) bringing a sexual harassment complaint to a state or federal agency (such as the Attorney General’s Office or the EEOC);
(2) testifying or assisting with a sexual harassment investigation conducted by a state or federal agency; or
(3) complying with a discovery request in civil litigation, or testifying at a trial for a sexual harassment claim in court or at arbitration proceedings.
VT. STAT. ANN. tit. 21, § 495h(b)(2) (2020).

For Employers: May not require employees to sign an employment contract agreeing to keep details relating to a sexual assault claim confidential.

For Employers: Prohibited from forcing employees to sign a preemptive document containing a confidentiality provision regarding sexual assault or harassment in the workplace.
WASH. REV. CODE § 49.44.210(1) (2020).

A settlement agreement can include a confidentiality provision if the provision was written after actual litigation began or was threatened.
WASH. REV. CODE § 49.44.210(4) (2020).

A provision requiring an employee to waive their right to “publicly pursue a cause of action” for discrimination is unenforceable.
WASH. REV. CODE § 49.44.085 (2020).