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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.”¹ The #MeToo movement, started by activist Tarana Burke over a decade ago² 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.³ #MeToo crusaders utilize social media, press coverage, and their celebrity status to provide a voice to previously silenced survivors⁴ across nearly every

1. Jodi Kantor & Megan Twohey, *News Analysis: A Year of Reckoning*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/sunday-review/me-too-weinstein-a-year-later.html> [https://perma.cc/7XZS-ACVS]. For the original report, see Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [https://perma.cc/2XP9-9TGU].

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.*

3. Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/7FKS-PLFZ].

4. This Article uses the word “survivor” rather than “victim,” 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/EDD9-5QPW]; *Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> [https://perma.cc/D4AD-HNHB]; Kate Harding, *I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong With*

industry.⁵ Feminist legal scholar and Michigan Law Professor Catharine MacKinnon believes that the #MeToo movement exposed “the disbelief and trivializing dehumanization of [sexual harassment] victims.”⁶ We cannot end sexual harassment without changing the norms of ignoring harassing behavior and minimizing the experiences of those who have survived sexual misconduct.⁷

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.”⁸ 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.”⁹ 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.¹⁰ As Professor MacKinnon notes, “[s]exual harassment law—the first to conceive sexual violation in inequality terms—created the preconditions for this moment.”¹¹ 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.¹² Although some states engaged in legislative reform, Kantor and Twohey

Being a Victim?, TIME (Feb. 27, 2020, 8:20 AM), <https://time.com/5789032/victim-survivor-sexual-assault/> [<https://perma.cc/G9C2-HZSM>].

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

6. Catharine A. MacKinnon, Opinion, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/5QAA-9QA7>].

7. See *id.*

8. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1683 n.6 (1998).

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."¹³ Perceptions of sexual harassment vary "widely along partisan lines,"¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ McConnell was the highest-profile Republican at the time to demand that Moore step down from the race.¹⁸ 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.¹⁹ 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."²⁰ 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.*

14. See Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), <https://www.pewresearch.org/social-trends/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/> [<https://perma.cc/WLT2-Y6MN>].

15. Julia Jacobs, *Anita Hill's Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html> [<https://perma.cc/2X4F-RKRX>].

16. Chris Casteel, 'Speaking Truth to Power', *Anita Hill Tells Why She Left OU*, OKLAHOMAN (Sept. 28, 1997), <https://www.oklahoman.com/article/4804079/speaking-truth-to-power-anita-hill-tells-why-she-left-ou> [<https://perma.cc/52GY-UPRM>].

17. David A. Graham, 'I Believe the Women, Yes', ATLANTIC (Nov. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/11/i-believe-the-women-yes/545750/> [<https://perma.cc/8EZC-BHP4>].

18. *Id.*

19. Martin Pengelly, *Christine Blasey Ford Makes Rare Public Remarks, a Year After Kavanaugh Ordeal*, GUARDIAN (Nov. 18, 2019), <https://www.theguardian.com/us-news/2019/nov/18/christine-blasey-ford-brett-kavanaugh> [<https://perma.cc/SP4N-QKUC>].

20. See Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, WIS. L. REV. 55, 63 (1979).

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.²¹ 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.²² 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.²³ With its support, the Equal Rights Amendment (ERA) was first introduced as a Congressional bill in December 1923.²⁴ The bill was unsuccessful in part because women were divided along socioeconomic lines.²⁵ Some opponents of the ERA, primarily working women, feared losing labor protections unique to women.²⁶ 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."²⁷

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 1972.²⁸ Representative Martha W. Griffiths and Senator Birch Bayh were the ERA's lead proponents in the House and Senate respectively.²⁹ 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-

21. Tara Law, *Virginia Just Became the 38th State to Pass the Equal Rights Amendment. Here's What to Know About the History of the ERA*, TIME (Jan. 15, 2020, 4:51 PM), <https://time.com/5657997/equal-rights-amendment-history/> [<https://perma.cc/56MV-ED3H>].

22. *Id.*

23. *Id.*

24. *Three Amendments Offered in Senate*, BALT. SUN, Dec. 11, 1923, at 2.

25. See Rebecca DeWolf, *Amending Nature: The Equal Rights Amendment and Gendered Citizenship in America, 1920–1963* (2014) (Ph.D dissertation, American University) (ProQuest).

26. *American Women: Topical Essays, The Long Road to Equality: What Women Won from the ERA Ratification Effort*, LIBR. CONG., <https://guides.loc.gov/american-women-essays/era-ratification-effort> [<https://perma.cc/URU6-3Y3Z>].

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).

28. Law, *supra* note 21.

29. Eileen Shanahan, *Equal Rights Amendment Is Approved by Congress*, N.Y. TIMES, Mar. 23, 1972, at 1.

eight states.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.³¹ Such optimism would prove unwarranted. Despite the deadline's extension to 1982, only thirty-five states ratified the ERA in time³²—five of which subsequently attempted to revoke their ratification.³³ Three additional states recently voted in favor of the ERA—Nevada (2017), Illinois (2018), and Virginia (2020).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.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.³⁶ *Coleman* also held that the validity of a state revocation is a nonjusticiable political question.³⁷ Thus, the legal effect of revocation is theoretically up to Congress unless *Coleman* is overruled.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.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.

30. U.S. CONST. art. V.

31. Shanahan, *supra* note 29.

32. Law, *supra* note 21.

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. POL'Y 233, 233 n.2 (1979). Idaho, Nebraska, and Tennessee ultimately rescinded ratification. *Id.*

34. Law, *supra* note 21.

35. See Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U. L. REV. 633, 642–50 (2019).

36. *Coleman v. Miller*, 307 U.S. 433, 456 (1939); Magliocca, *supra* note 35, at 647.

37. *Coleman*, 307 U.S. at 450.

38. See Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legal*, 3 WM. & MARY J. WOMEN & L. 113, 130–34 (1997).

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

40. See Susan Chira, *Do American Women Still Need an Equal Rights Amendment?*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/sunday-review/women-equal-rights-amendment.html> [https://perma.cc/NGF2-YFE5].

41. Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

42. Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1536 (1973).

43. Brown et al., *supra* note 41, at 872–74, 879–81.

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.

47. Paul A. Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV C.R.-C.L. L. REV. 234, 237–38 (1971) ("[E]qual protection of the laws shall not be denied or abridged . . . on account of sex.").

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.”⁵¹ Opponents of the ERA were also concerned that a broad amendment would generate litigation,⁵² and any unanticipated judicial results would be more difficult to rectify for an amendment than for a statute.⁵³

Emerson also doubted that Equal Protection jurisprudence would expand to protect against classifications based on sex.⁵⁴ Early Supreme Court cases indicated that sex-based classifications were permissible because women had a “separate place” in society.⁵⁵ In 1872, *Bradwell v. Illinois* upheld an exclusion of women from the legal profession.⁵⁶ 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.”⁵⁷ 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.⁵⁸ Due to differences in physical strength and a fear of exploitation by men,⁵⁹ 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 1905.⁶⁰ 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.”⁶¹ 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.⁶² The district court entered judgment for the defendants on the grounds that this sex

51. *Id.* at 235.

52. Henry J. Hyde, *Equal Rights Amendment: The Losses Can Outweigh the Gains*, CHI. TRIBUNE, June 9, 1972, at 16.

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 875–83.

55. *Id.* at 876.

56. *Bradwell v. State*, 83 U.S. 130, 139 (1872).

57. *Id.* at 141 (Bradley, J., concurring).

58. *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

59. *Id.* at 421–23.

60. *Lochner v. New York*, 198 U.S. 45, 64–65 (1905), *overruled in part* by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and *overruled in part* by *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *abrogated* by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

61. *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961). 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, 951 (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 sexbased 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

63. *Williams v. McNair*, 316 F. Supp. 134, 137–38 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

64. See, e.g., Crystal N. Feimster, *The Impact of Racial and Sexual Politics on Women's History*, 99 J. AM. HIST. 822 (2012) (arguing for the inclusion of race in feminist histories).

65. See Juliet Eilperin, *New Drive Afoot to Pass Equal Rights Amendment*, WASH. POST (Mar. 28, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702357.html> [<https://perma.cc/ZE82-T58C>].

66. Shepard, *supra* note 53, at 1507–08.

67. *Id.* at 1505.

68. Freund, *supra* note 47, at 240.

69. See Robert Sherrill, *That Equal-Rights Amendment—What, Exactly, Does it Mean?*, N.Y. TIMES (Sept. 20, 1970), <https://www.nytimes.com/1970/09/20/archives/that-equalrights-amendmentwhat-exactly-does-it-mean-the-equalrights.html> [<https://perma.cc/V8P9-JDNT>].

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.⁷⁴

B. *The Debate over Process*

Opponents of the ERA attacked Congress's approval process, claiming that it failed to allow for sufficient deliberation.⁷⁵ The House had no committee hearings on the ERA and only one hour of floor debate preceded the vote.⁷⁶ Moreover, the House's Judiciary Committee, then headed by a known opponent of the ERA, was circumvented by a discharge petition.⁷⁷ 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.⁷⁸ The lack of deliberation was especially egregious, opponents argued, because the ERA's equality of rights language raised significant questions about its legal implications.⁷⁹ How would laws that classified based on sex be equalized (e.g., would pro-female labor protections be overturned or also provided to men)?⁸⁰ How would the ERA interact with other constitutional rights (e.g., the right to privacy)?⁸¹ In addition, the ERA's passage could affect broad swaths of existing state and federal law.⁸² A 1972 study by Maryland's Attorney General found that the ERA would impact 227 "clauses and concepts" in Maryland's legal codes,⁸³ and there was no reason to think Maryland was exceptional in this regard.⁸⁴ Such "farreaching and inflexible" changes, opponents argued, "ought surely not be brought about as the half-hidden implication of a constitutional motto."⁸⁵

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.

81. See Lisa Baldez, *The U.S. Might Ratify the ERA. What Would Change?*, WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/politics/2020/01/23/us-might-ratify-era-what-would-change/> [https://perma.cc/YYH2-8XAY].

82. See, e.g., *Says Husbands May Pay Wives Wages Under Proposed Law*, SUN, Feb. 10, 1926, at 26.

83. *Sexism in the Statutes*, WASH. POST, Oct. 30, 1972, at A20.

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.⁸⁶ 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.⁸⁷ In all states at the time, "husbands [were] primarily liable for the support of their wives and children."⁸⁸ Proponents of the ERA argued that the amendment would ease this financial burden on men and improve the enforcement of support laws.⁸⁹ 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.⁹⁰ By equating the rights of women and men, their legal responsibilities to one another in family law would become nonexistent.⁹¹ 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.⁹² 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."⁹³ 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.⁹⁴ Lastly, proponents of the ERA pointed to the difficulties women face in getting loans from financial institutions.⁹⁵ Despite being financially qualified, some single women alleged they were denied loans without a male co-signer.⁹⁶ 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.*

92. Eileen Shanahan, *Women's Rights: A Vote for Equal Status—And Equal Burdens*, N.Y. TIMES, Mar. 26, 1972, at E6.

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 Dullea, *Women Demanding Equal Treatment in Mortgage Loans*, N.Y. TIMES, Oct. 29, 1972, at R1.

96. *Id.*

eligibility.⁹⁷ Bankers argued this practice was necessary to protect against the risk of a married woman quitting work to have a baby.⁹⁸

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.⁹⁹ Although Congress could have required women to register for the draft before the ERA was proposed, the amendment would have made registration compulsory.¹⁰⁰ Senator Ervin suggested an amendment to the ERA excluding women from the draft, but this proposal was soundly defeated.¹⁰¹ 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."¹⁰² On the other hand, Representative Griffiths believed that the ERA would help eliminate the draft entirely.¹⁰³ Other proponents of the ERA emphasized the benefits of military service¹⁰⁴ and pointed out that women's exclusion from the draft hurt their social status.¹⁰⁵

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.¹⁰⁶ These labor laws preserve women's minimum wages,¹⁰⁷ enforce maximum hour requirements, and limit the physical strenuousness of women's work.¹⁰⁸ As child-bearers, women arguably needed legal protection from working too much or too hard.¹⁰⁹ 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.*

99. *See* Victoria Irwin, *The Equal Rights Amendment: The Case Against*, CHRISTIAN SCI. MONITOR (May 6, 1980), <https://www.csmonitor.com/1980/0506/050606.html> [<https://perma.cc/B2G3-PTQX>]; Sherill, *supra* note 69.

100. Hyde, *supra* note 52.

101. Shanahan, *supra* note 29.

102. Jean Murphy, *Crucial Test for Equal Rights Proposal*, L.A. TIMES, Apr. 17, 1972, at F1.

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.*

108. Russell Kirk, *Equal Rights Amendment Means Equal Misery*, BALT. SUN, May 10, 1972, at A15.

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.¹¹⁰

Lastly, state statutes banning same-sex marriage could have been invalidated under the ERA as a sex-based classification.¹¹¹ Senator Bayh rejected this interpretation as long as marriage licenses were denied to both male-male and female-female couples.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.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.¹¹⁴ Therefore, statutes banning same-sex marriage could have been defended on the grounds that only different-sex couples can procreate.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]."¹¹⁶ There are many different-sex couples who cannot procreate and others who do not want to have children.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.¹¹⁸

110. *Id.*

111. Charles C. Bridges, Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583 (1973).

112. *Id.* at 583–84.

113. *Loving v. Virginia*, 388 U.S. 1, 2, 12 (1967); Bridges, *supra* note 111, at 584.

114. Brown et al., *supra* note 41, at 892–93.

115. Bridges, *supra* note 111, at 586–87.

116. Brown et al., *supra* note 41, at 894.

117. Bridges, *supra* note 111, at 587–88.

118. *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. *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).

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.

126. See, e.g., *Williams v. McNair*, 316 F. Supp. 134, 138 (D.S.C. 1970) ("[T]his Court cannot declare as a matter of law that a legislative classification, premised as it is on respectable pedagogical opinion, is without any rational justification and violative of the Equal Protection Clause."), *aff'd*, 401 U.S. 951 (1971); see Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999).

127. See Sherrill, *supra* note 69.

workplace and undermine women's equality.¹²⁸ 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.¹²⁹ 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 1964.¹³⁰ 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."¹³¹ Activists transformed the public and judicial understanding of sexual harassment from a private matter outside of the workplace, to an illegal form of discrimination.¹³² To dismantle the judiciary's resistance to accepting harassment as a form of discrimination, activists emphasized that both men and women could be harassed.¹³³

In 1979, Professor MacKinnon observed that women were valued in the workplace based on "men's perceptions of their potential to be sexually harassed."¹³⁴ 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."¹³⁵ 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.

130. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *Facts About Sexual Harassment*, U.S. EEOC (Jan. 15, 1997), <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> [<https://perma.cc/VLA8-DYSM>] ("Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.").

131. MARTHA CHAMALLAS, *PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW* 116 (1st ed. 2019).

132. See *id.*

133. Siegel, *supra* note 9, at 11.

134. Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book 'Sexual Harassment of Working Women'*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/books/review/metoo-workplace-sexual-harassment-catharine-mackinnon.html> [<https://perma.cc/2VDV-CJN3>] (quoting CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 23 (1979)).

135. *Id.* (quoting MACKINNON, *supra* note 134, at 18).

and earn a decent living, or wish she looked good enough to invite the indignities.”¹³⁶ 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.¹³⁷

The Supreme Court identified sexual harassment as a Title VII violation in the 1986 case *Meritor Savings Bank v. Vinson*.¹³⁸ 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.”¹³⁹ In this case, a bank teller claimed that her company’s vice president had repeatedly touched her in public and raped her.¹⁴⁰ 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.¹⁴¹ 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.¹⁴²

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.¹⁴³ 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.”¹⁴⁴

Sexual harassment law is most powerful when it holds an employer vicariously liable for the unlawful acts of its employees.¹⁴⁵ 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-9592bde341af> [<https://perma.cc/XB5N-WNSP>] (explaining that attractiveness is not a necessary condition for someone to be subjected to sexual assault).

137. Bellafante, *supra* note 134 (quoting MACKINNON, *supra* note 134, at 215–21).

138. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 57–58 (1986).

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))).

143. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 237 (2018) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993)).

144. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

145. See Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. UNIV. L. REV. 133, 135–37 (2013).

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

146. *See id.*

147. *See* *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998) (“District Courts and Courts of Appeals . . . [have] uniformly judg[ed] co-worker harassment under a negligence standard.”).

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.

150. *See* Tippett, *supra* note 143, at 243; *see also* Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html> [<https://perma.cc/6j5j-SJHH>] (stating that what constitutes “severe or pervasive” harassment is an area of uncertainty for judges).

151. Tippett, *supra* note 143, at 290, 242 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

152. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see, e.g.*, Judith Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 85–86 (2003).

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

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 Tippet, *supra* note 143, at 243.

162. See Sherwyn et al., *supra* note 159.

163. MacKinnon, *supra* note 6.

164. *Id.*

165. *Id.*

166. *Cf. id.*

167. See Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS’N (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/> [https://perma.cc/E7E9-AXT7].

168. See MacKinnon, *supra* note 6.

tectonic plates.”¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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 2020.¹⁷²

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.¹⁷³ 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.¹⁷⁴ During the pandemic, employees were “asked to do so much more for so much less.”¹⁷⁵ Additionally, sexual harassment increased throughout the pandemic, especially in the food service industry, where tips and pay decreased.¹⁷⁶

169. *Id.* (alteration in original).

170. David A. Lieb, *Half of States Act as #MeToo Sexual Misconduct Claims Mount*, ASSOCIATED PRESS (Aug. 26, 2018), <https://apnews.com/article/83caf61841a84db3bbd85648bce8fec5> [<https://perma.cc/WS4U-2PAZ>].

171. *#20StatesBy2020 Letter*, NAT'L WOMEN'S L. CTR. (Mar. 5, 2020), <https://nwlc.org/resources/20-states-by-2020-letter/> [<https://perma.cc/AEZ3-M75J>].

172. *See id.*

173. *See, e.g.*, Keither Ridler, *Idaho Legislature Shuts Down Due to COVID-19 Outbreak*, ASSOCIATED PRESS (Mar. 19, 2021), <https://apnews.com/article/legislature-coronavirus-pandemic-idaho-9cc12cf52aecb26dd4f884e752317d8c> [<https://perma.cc/D4L9-GUSU>].

174. *See, e.g.*, *Sexual Harassment During the COVID-19 Pandemic: Health, Care, and Domestic Work*, U.N. WOMEN (July 7, 2020), <https://www.unwomen.org/en/news/events/2020/07/event-sexual-harassment-during-the-covid-19-pandemic> [<https://perma.cc/QFD9-K7HQ>].

175. Amanda Kludt, *Hostility, Harassment, and Low Wages Are Keeping Many Restaurant Workers Home*, EATER'S DIGEST (Apr. 27, 2021, 10:55 AM), <https://www.eater.com/2021/4/27/22404238/restaurant-labor-shortage-saru-jayamaran-one-fair-wage> [<https://perma.cc/E3RB-DUBZ>].

176. *Id.*; *see also* Natasha Dailey, *Hostility and Harassment Against Women and Minorities Increased with Remote Work During the Pandemic*, BUSINESS INSIDER (Apr. 1, 2021, 9:23 AM), <https://www.businessinsider.com/harassment-hostility-against-women-minorities-increased-while-working-remote-study-2021-3> [<https://perma.cc/V5HV-TNXG>].

The legacy of reforms enacted between 2017 and 2019, however, generated changes that proved influential in 2020; for example, California¹⁷⁷ and Illinois¹⁷⁸ 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 address¹⁸²—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] bubb[ed] 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

177. For an overview, see *Governor Newsom Signs Worker Protection Bills Addressing Sexual Harassment, Wages, and Health Protections*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 10, 2019), <https://www.gov.ca.gov/2019/10/10/governor-newsom-signs-worker-protection-bills-addressing-sexual-harassment-wages-and-health-protections/> [<https://perma.cc/M2P3-TMBA>].

178. 820 ILL. COMP. STAT. 96/1-1 (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-31079/> [<https://perma.cc/H9MV-H6QN>].

181. *Id.*

182. See Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, UNIV. MINN. GENDER POL’Y REP. (Nov. 14, 2017), <https://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/> [<https://perma.cc/4R8T-QS9A>].

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.”).

185. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 171 (2019) (quoting Michelle Chen, *How Forced Arbitration and Non-Disclosure Agreements Can Perpetuate Hostile Work Environments*, NATION (Nov. 30, 2017), <https://www.thenation.com/article/how-forced-arbitration-and-non-disclosure-agreements-can-perpetuate-hostile-work-environments/> [<https://perma.cc/75TT-TLLH>]).

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.J. 157, 193 (2019)

both parties, and they may be less emotionally taxing for the claimant than drawn-out litigation.¹⁸⁷ Moreover, some claimants may prefer NDAs to avoid the stigma associated with bringing a sexual assault claim.¹⁸⁸ NDAs also provide claimants with leverage against harassers in settlement negotiations;¹⁸⁹ alleged harassers are likely to pay more in a settlement if the claimant promises not to discuss the incident(s).¹⁹⁰

The #MeToo movement has highlighted the significant drawbacks of NDAs in the context of sexual misconduct.¹⁹¹ 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.¹⁹² Shielding this misconduct from the public eye may harm the public's faith in corporate governance (if sexual misconduct is later revealed, despite NDAs).¹⁹³ Similarly, investors deserve to know the legal risks faced by the companies in which they invest.¹⁹⁴ 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.¹⁹⁵ And although these risks are inherent to every NDA, they are particularly pernicious here, where they may shield repeat offenders from public accountability.¹⁹⁶

Additionally, sexual misconduct may harm public health and safety if the perpetrator is a serial offender (as is frequently the case).¹⁹⁷ Discussing misconduct can prevent future misconduct, encourage other survivors to discuss their own experiences,¹⁹⁸ 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.

196. See Symposium, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. 76 (2018).

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

198. See Prasad, *supra* note 187, at 2515–16 (explaining that perpetrators of sexual harassment seek NDAs so that they can continue misbehaving).

process the trauma they experienced.¹⁹⁹ Not discussing it, on the other hand, may normalize the misconduct.²⁰⁰ Survivors, especially those who are new to their jobs, may believe that this misconduct is inherent in the workplace.²⁰¹ They may even leave their chosen field of work to avoid future harassment.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.²⁰³ But #MeToo has demonstrated that NDAs' unregulated use in the context of sexual misconduct must be reined in.²⁰⁴

In the wake of the #MeToo movement, confidentiality and nondisclosure agreements have been viewed as “encourag[ing] further bad behavior on behalf of the sexual harassers, leading to more victims and more confidentiality agreements.”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,”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.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.²⁰⁸ Warren credited her questioning of Bloomberg to her intolerance “for the kind of behavior the ‘Me too’ movement has exposed” and the ways

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.”).

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.”).

201. Williams et al., *supra* note 184, at 213.

202. *Id.*

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.

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.”).

205. Tammy Binford, *Era of #MeToo and Tell-All Books Triggering New Thinking About NDAs*, HP DAILY ADVISOR (Sep. 10, 2018), <https://hrdailyadvisor.blr.com/2018/09/10/era-of-metoo-and-tell-all-books-triggering-new-thinking-about-ndas/> [https://perma.cc/P89S-8CB].

206. Rachael L. Jones & Virginia Hamrick, *Reporting on NDAs and #MeToo: How the Press May Obtain Standing to Challenge NDAs*, 35 COMM'NS LAW., J. MEDIA, INFO. & COMM'NS L. 7, 10 (2019), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/fall2019/cl_35_n1.pdf [https://perma.cc/8T5P-WZC3].

207. Hanna Trudo, *Warren Torches Bloomberg on #MeToo and Secret Settlements*, DAILY BEAST (Feb. 20, 2020, 3:52 AM), <https://www.thedailybeast.com/elizabeth-warren-torches-michael-bloomberg-on-metoo-and-secret-settlements> [https://perma.cc/943F-WKWL].

208. *Id.*

that NDAs silence women's hostile workplace experiences.²⁰⁹ 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.²¹⁰ 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."²¹¹ 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."²¹²

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.²¹³ A bill in New York to restrict NDAs in the context of sexual misconduct was proposed on the heels of the #MeToo movement.²¹⁴ Illinois passed the Workplace Transparency Act in 2019, which included a prohibition of NDAs covering instances of sexual harassment.²¹⁵ In the debates leading up to the passage of the Workplace Transparency Act, Illinois House Representative Anne Stava-Murray remarked: "[T]he difference between the last time this came forward and now is the #MeToo movement."²¹⁶

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

209. *Id.*; see also Natalie Gontcharova, *This Is the One Way Elizabeth Warren Has Already Won*, REFINERY29 (Feb. 28, 2020, 3:20 PM), <https://www.refinery29.com/en-us/2020/02/9486888/elizabeth-warren-election-win-bloomberg-me-too-women> [<https://perma.cc/25L4-YYUZ>].

210. Tom Lutz, *Judge Orders Donald Trump to Pay Stormy Daniels \$44,000 in Legal Fees*, GUARDIAN (Aug. 22, 2020, 4:59 PM), <https://www.theguardian.com/us-news/2020/aug/22/donald-trump-stormy-daniels-legal-fees-non-disclosure-agreement> [<https://perma.cc/Z37N-ZVT4>].

211. Nina Burleigh, *Stormy Daniels Defies Trump to Join Chorus of Women Violating Nondisclosure Agreements About Sex, Abuse and Harassment*, NEWSWEEK (Mar. 8, 2018, 10:30 AM), <https://www.newsweek.com/stormy-trump-2016-election-sex-hush-money-835646> [<https://perma.cc/G88C-55X8>].

212. *Id.*

213. See ASSEMB. COMM. ON JUDICIARY, SB820 SETTLEMENT AGREEMENTS: CONFIDENTIALITY 1 (2018), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB820 [<https://perma.cc/H9FF-5CTV>] (select "06/30/18- Assembly Judiciary" under "Bill Analysis").

214. ASSEMB. B. A8421, 2019 Leg., Reg. Sess. (N.Y. 2019), <https://legislation.nysenate.gov/pdf/bills/2019/A8421> [<https://perma.cc/34UN-6E4B>].

215. 820 ILL. COMP. STAT. 96/1-1, 96/1-25, 96/1-30 (2021).

216. *House of Representatives, Transcription Debate*, 40th Legislative Day, 101st Gen. Assemb., 40th Sess., at 118 (Ill. 2019).

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 § 12964.5(a)(2) (West 2021); NEV. REV. STAT. § 10.195(1) (West 2021); N.Y. C.P.L.R. 5003-B (McKinney 2021).

218. Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure*, 41 L.A. LAW. 12, 12 (May 2018), <https://www.lacba.org/docs/default-source/lal-back-issues/2018-issues/may-2018.pdf> [<https://perma.cc/HMX9-PALK>].

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. S6577, 2019 Leg., Reg. Sess. (N.Y. 2021).

223. N.M. STAT. ANN. § 50-4-36 (LexisNexis 2021); TENN. CODE ANN. § 50-1-108 (2021); VT. STAT. ANN. tit. 21, § 495h(g) (2021); VA. CODE ANN. § 40.1-28.01 (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.370(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* § 10:5-12.8.

228. § 659A.370(1)(a)(A).

229. LA. STAT. ANN. § 13:5109.1 (2020).

230. CAL. CIV. PROC. CODE § 1001(c) (West 2021).

231. TENN. CODE ANN. § 49-2-131 (2021); TENN. CODE ANN. § 49-1-103(2) (2021).

232. *Legislation on Sexual Harassment in the Legislature*, NAT’L CONF. STATE LEGISLATURE (Feb. 11, 2019), <https://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx> [<https://perma.cc/W66R-32HZ>].

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.²³⁴ 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.²³⁵

Other states allow confidentiality provisions when claimants request or agree to them.²³⁶ For example, New Mexico law contains a clause which protects the claimant's identity when the claimant requests confidentiality.²³⁷ Both Nevada²³⁸ and California²³⁹ 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.²⁴⁰ 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).²⁴¹ Additionally, Nevada, New Mexico, and New York allow the monetary terms of a settlement to remain confidential.²⁴²

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.²⁴³ Similarly, Oregon provides an exception for when the claimant requests confidentiality and is given seven days following the agreement to revoke the confidentiality clause.²⁴⁴ 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.

237. N.M. STAT. ANN. § 50-4-36(B)(2) (LexisNexis 2021).

238. NEV. REV. STAT. § 10.195(4)-(5) (2021).

239. CAL. CIV. PROC. CODE § 1001(c) (West 2021).

240. *See* LA. STAT. ANN. § 13:5109.1 (2020).

241. § 50-4-36(C).

242. NEV. REV. STAT. § 10.195(6)(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).

243. 820 ILL. COMP. STAT. 96/1-30(a)(5)-(6) (2021).

244. OR. REV. STAT. § 659A.370(2)-(3) (2021).

discrimination.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷

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.²⁴⁸ 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."²⁴⁹ Not all states that restrict confidentiality provisions also restrict the waiver of a claimant's rights and remedies.²⁵⁰ 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.²⁵¹

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.²⁵² 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(1), (4) (2020).

247. 5003-B.

248. See Lisa Nagele-Piazza, *Can an Employee Waive the Right to Bring a Sexual Harassment Claim?*, SHRM (Oct. 26, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nondisclosure-agreements-sexual-harassment-claims.aspx> [<https://perma.cc/SM5X-7FJ3>].

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: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation*, 53 COLUM. J.L. & SOC. PROBS. 247, 256–57 (2020), <http://blogs2.law.columbia.edu/jlsp/wp-content/uploads/sites/8/2020/01/Vol53-Dugan.pdf> [<https://perma.cc/MKJ2-8UP5>]. 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.

250. See Amanda Gomez, *New Mexico Prohibits Non-Disclosure Provisions in Settlement Agreements Involving Harassment and Discrimination Claims*, NAT'L L. REV. (June 7, 2021), <https://www.natlawreview.com/article/new-mexico-prohibits-non-disclosure-provisions-settlement-agreements-involving> [<https://perma.cc/RX3X-55GM>].

251. *Id.*

252. *Id.*

statutes.²⁵³ 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.²⁵⁴ Vermont's law is very similar to New Jersey's.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."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.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).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.²⁵⁹ The California legislature attempted to broaden these prohibitions in a bill signed into law by Governor Newsom in October 2019.²⁶⁰ Although the proposed law, Assembly Bill 51 (AB 51), does not explicitly ban mandatory arbitration in employment disputes,²⁶¹ it does prohibit employees from waiving their rights to any forum or procedure as a condition of their employment.²⁶² Thus, AB 51 effectively bans mandatory arbitration clauses in employment contracts.²⁶³

AB 51 was scheduled to take effect on January 1, 2020.²⁶⁴ In December 2019, however, the California Chamber of Commerce and other trade organizations sought to enjoin AB 51's enforcement on the

253. Chamber of Com. v. Becerra, 438 F. Supp. 3d 1078, 1087–89, 1090 (E.D. Cal. 2020), *aff'd in part, vacated in part, rev'd in part sub nom.* Chamber of Com. v. Bonta, 13 F.4th 766 (9th Cir. 2021); Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=2019202000AB51 [<https://perma.cc/Lz5M-RYYM>] ("Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act.").

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(1)(c).

255. VT. STAT. ANN. tit. 21, § 495h(g)(1)(B) (2021).

256. WASH. REV. CODE § 49.44.085 (2020).

257. MD. CODE ANN., LAB. & EMPL. § 3-715(a) (West 2018).

258. CAL. CIV. CODE § 1670.11 (West 2020).

259. CAL. GOV'T CODE § 12964.5(a)(2) (West 2021).

260. Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=2019202000AB51 [<https://perma.cc/Lz5M-RYYM>].

261. *Id.*

262. *See id.*

263. *See* Thomas H. Petrides & Harrison Thorne, *Federal Court Preliminary Enjoins Enforcement of New California Arbitration Law AB 51*, NAT'L L. REV. (Feb. 4, 2020), <https://www.natlawreview.com/article/federal-court-preliminary-enjoins-enforcement-new-california-arbitration-law-ab-51> [<https://perma.cc/3N9J-288Q>].

264. Chamber of Com. v. Becerra, 438 F. Supp. 3d 1078, 1085 (E.D. Cal. 2020), *aff'd in part, vacated in part, rev'd in part sub nom.* Chamber of Com. v. Bonta, 13 F.4th 766 (9th Cir. 2021).

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).

273. S.B. S6382A, 2017 Leg., Reg. Sess., § 1 (N.Y. 2017).

274. N.Y. C.P.L.R. 7515 (MCKINNEY 2019).

275. See Petrides & Thorne, *supra* note 263.

276. *Washington State Takes on the Arbitration of Harassment and Discrimination Claims*, OGLETREE DEAKINS (Aug. 7, 2009), <https://ogletree.com/insights/washington-state-takes-on-the-arbitration-of-harassment-and-discrimination-claims/> [<https://perma.cc/WQN6-65BU>].

employment-related claims.²⁷⁷ The employment contract specifically referred to the FAA.²⁷⁸ Following his employment, the employee sued Lithia Motors for discrimination.²⁷⁹ Lithia Motors argued that the dispute should be submitted to mandatory arbitration, claiming the FAA preempted Washington's statute.²⁸⁰ The court agreed with Lithia Motors' argument because "[f]ederal policy favors arbitration" under the FAA.²⁸¹ Thus, Lithia succeeded in moving the dispute to arbitration because the FAA preempted Washington's ban of mandatory arbitration clauses.²⁸²

Similarly, a federal court recently ruled that New York's ban on mandatory arbitration is preempted by the FAA.²⁸³ In *Latif v. Morgan Stanley & Co.*, an employee sued his former employer for discrimination and sexual misconduct.²⁸⁴ The employer sought to compel mandatory arbitration because the employee had signed an arbitration agreement.²⁸⁵ The agreement stated that it should be interpreted in accordance with the FAA.²⁸⁶ The court granted the employer's motion to compel arbitration,²⁸⁷ stating that "[t]he FAA . . . is not easily displaced by state law."²⁸⁸ The court reasoned that the ordinary meaning of the FAA's wording and Supreme Court decisions interpreting it demonstrate a preference for arbitration agreements.²⁸⁹ Because the court found that New York's law discriminated against arbitration agreements, the court held it preempted by the FAA.²⁹⁰

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.²⁹¹ The issue of

277. Order: Findings of Fact and Conclusions of Law on Motion to Compel Arb., *Logan v. Lithia of Seattle, Inc.*, No. 18-2-19068-1 SEA (Wash. King Cnty. Super. Ct. July 12, 2019).

278. *Id.* at 2–3.

279. *Id.* at 3.

280. *See id.*

281. *See id.* at 7 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

282. *Id.* at 9.

283. *Latif v. Morgan Stanley & Co.*, No. 18-cv-11528, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019).

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.

291. *See Jaime Cole, Washington State Takes on the Arbitration of Harassment and Discrimination Claims*, NAT'L L. REV. (Aug. 7, 2019), <https://www.natlawreview.com/article/washington-state-takes-arbitration-harassment-and-discrimination-claims> [<https://perma.cc/H6GQ-DKJE>] (arguing that employers should review their arbitration agreements to make sure they mention the Federal Arbitration Act).

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, LLC*²⁹⁵ 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

292. See Triston O'Savio, *Does FAA Prevent States from Barring Mandatory Arbitration?*, CORP. COUNS. BUS. J. (Mar. 17, 2020), <https://cbjournal.com/articles/does-faa-prevent-states-from-barring-mandatory-arbitration> [<https://perma.cc/6467-WY9W>].

293. *Manhattan Cryobank, Inc. v. Hensley*, No. 19 Civ. 3370, 2020 WL 4605236 (S.D.N.Y. Aug. 11, 2020).

294. *Id.* at *3–6.

295. *Tantaros v. Fox News Network, LLC*, 465 F. Supp. 3d 385 (S.D.N.Y. 2020).

296. N.Y. C.P.L.R. 7515 (MCKINNEY 2019).

297. *Tantaros*, F. Supp. 3d at 392 n.6.

298. See Keith J. Frank, *State Legislation Precluding Compelled Arbitration in Sexual Harassment Claims and the FAA*, AM. BAR ASS'N (Feb. 24, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/03/compelled-arbitration/ [<https://perma.cc/7ZJC-CDB5>].

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

299. FAIR Act, H.R. 963, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/963/text> [<https://perma.cc/FH89-FSXC>]; Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/842> [<https://perma.cc/H4PE-JP2P>]; Robert S. Whitman & John R. Phillips, Seyfarth Shaw LLP, *Turning of the Tide: Could Congress Ban Mandatory Employment Arbitration?*, LEXOLOGY: WAGE & HOUR LITIG. BLOG (Feb. 25, 2021), <https://www.lexology.com/library/detail.aspx?g=9644173a-dac6-4a72-887a-a82e1a4994a4> [<https://perma.cc/3JBG-YDYR>].

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/10-opinion/470422-380576-our-opinion-society-is-poised-to-change-for-the-better-%C3%A2%E2%82%AC%E2%80%9C-if-we-let-it-> [<https://perma.cc/9D9A-X7K6>].

303. N.Y.C., ADMIN. CODE §§ 8-107(29)–(30) (2020).

304. *Id.*; *Stop Sexual Harassment Act*, N.Y.C. HUMAN RIGHTS, <https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page> [<https://perma.cc/4V8N-Q3MX>].

305. See S.F. ADMIN. CODE art. 2, § 67.12(b)(3) (2020), https://sfgov.org/sunshine/article-ii-public-access-meetings#67_12 [<https://perma.cc/M3VM-QHH9>] (“[A] policy body shall neither solicit nor agree to any term in a settlement which would preclude the release of the text of the settlement itself and any related documentation.”).

306. Dennis J. Herrera, GOOD GOVERNMENT GUIDE: AN OVERVIEW OF THE LAWS GOVERNING THE CONDUCT OF PUBLIC OFFICIALS 11 (2018) (citing CAL. GOV'T CODE §§ 12950.1, 53235 (West 2021)),

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.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹ Prior inflection points include 1933, the year that the Great Depression reached its peak, and the beginning of the Civil War in 1861.³¹⁰ 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.³¹¹ 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

<https://www.sfcityattorney.org/wp-content/uploads/2015/07/Good-Gvt-Guide-3.20.2018.pdf> [<https://perma.cc/MZ9D-EB9N>].

307. See Blythe E. Lovinger & Jonathan A. Wexler, *New York State and City Pass Sweeping Anti-Sexual Harassment Laws Amid #MeToo*, NAT'L L. REV. (Apr. 23, 2018), <https://www.natlawreview.com/article/new-york-state-and-city-pass-sweeping-anti-sexual-harassment-laws-amid-metoo> [<https://perma.cc/PL9B-MQWV>].

308. See *Sexual Harassment in the Workplace*, N.Y.C. HUM. RTS., <https://www1.nyc.gov/site/cchr/media/sexual-harassment-campaign.page> [<https://perma.cc/53V3-6RVK>]; Yuki Noguchi & Shane McKeon, *Amid #MeToo, New York Employers Face Strict New Sexual Harassment Laws*, NPR (Oct. 9, 2018, 4:38 PM), <https://www.npr.org/2018/10/09/654537942/amid-metoo-new-york-employers-face-strict-new-sexual-harassment-laws> [<https://perma.cc/7SVN-LFSY>].

309. 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.

310. See History.com Editors, *Great Depression History*, HIST., <https://www.history.com/topics/great-depression/great-depression-history> [<https://perma.cc/TU6P-K5RZ>]; History.com Editors, *Civil War*, HIST., <https://www.history.com/topics/american-civil-war/american-civil-war-history> [<https://perma.cc/YR7W-HNJS>].

311. See Tom Rosentiel, *How a Different America Responded to the Great Depression*, PEW RSCH. CTR. (Dec. 14, 2010), <https://www.pewresearch.org/2010/12/14/how-a-different-america-responded-to-the-great-depression/> [<https://perma.cc/D7NX-XSEY>].

subsequent election of Ronald Reagan.³¹² Another inflection period occurred in 1968,³¹³ 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.³¹⁴ The assassination of presidential candidate Robert F. Kennedy further shocked the country, which was already deeply divided over the Vietnam War.³¹⁵ This generational and class rift was amplified by the chaos at the Democratic political convention in Chicago.³¹⁶

We appear to be suffering from a similarly divisive time in 2020 and 2021.³¹⁷ 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.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.³¹⁹ This, in turn, has led to shifts in the way people work,³²⁰ are schooled,³²¹ and interact.³²² The pandemic also brought to

312. Anna Bauman & Jane Clayson, *Tracing the Path of the Modern GOP, from Reagan to Trump*, WBUR (Aug. 28, 2020), <https://www.wbur.org/onpoint/2020/08/28/gerald-seib-tracing-modern-gop> [<https://perma.cc/D35M-WYPZ>].

313. See Kenneth T. Walsh, *1968: The Year That Changed America Forever*, U.S. NEWS (Dec. 31, 2017, 11:00 PM), <https://www.usnews.com/news/national-news/articles/2017-12-31/1968-the-year-that-changed-america-forever> [<https://perma.cc/33XX-XKMA>].

314. See *id.*

315. See *id.*

316. William A. Galston, *I've Never Been so Afraid for America*, WALL ST. J., June 3, 2020, at A17.

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); Elliot 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/TGE8-3MU9>] (explaining that the Roaring 20s 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).

318. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [<https://perma.cc/64PS-K47E>]; *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/5YFW-AUDC>].

319. Heather Gillers & Gunjan Banerji, *U.S. States Face Biggest Cash Crisis Since the Great Depression*, WALL ST. J., Oct. 29, 2020, at A1; Victoria Udalova, *Pandemic Impact on Mortality and Economy Varies Across Age Groups and Geographies*, U.S. CENSUS BUREAU (Mar. 8, 2021), <https://www.census.gov/library/stories/2021/03/initial-impact-covid-19-on-united-states-economy-more-widespread-than-on-mortality.html> [<https://perma.cc/5LL3-AAXF>].

320. See, e.g., Noam Scheiber, *Upsides for Some Remote Workers; Lost Pay and Security for Others*, N.Y. TIMES (July 26, 2020), <https://www.nytimes.com/2020/07/26/business/economy/labor-remote-work-coronavirus.html> [<https://perma.cc/F8XD-BTZY>].

light the inequities in our healthcare system³²³ and disparities in wages.³²⁴ The killings of George Floyd³²⁵ and Breonna Taylor³²⁶ 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.³²⁷ Political divisions have deepened, furthered by an impeachment trial³²⁸ and an unusually bitter political campaign, followed by violent insurrection at the United States Capitol.³²⁹ At the same time, unprecedented fires, floods, and storms have caused even further harm,³³⁰ with devastating effects.³³¹

321. See, e.g., Erin Richards, *Students Are Falling Behind in Online School. Where's the COVID-19 'Disaster Plan' to Catch Them up?*, USA TODAY (Dec. 17, 2020, 1:33 PM), <https://www.usatoday.com/indepth/news/education/2020/12/13/covid-online-school-tutoring-plan/6334907002/> [https://perma.cc/NQ43-EGG3].

322. See, e.g., Joe Pinsker, *The Art of Socializing During a Quarantine*, ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/family/archive/2020/03/coronavirus-quarantine-socializing/608020/> [https://perma.cc/SH6Y-KEX9].

323. See Meera Jagannathan, *Telemedicine Provides People with a Lifeline During the Pandemic—for Wealthier Americans*, MARKETWATCH (Jan. 6, 2021), <https://www.marketwatch.com/amp/story/these-vulnerable-populations-had-trouble-accessing-telemedicine-during-the-pandemic-and-that-could-worsen-existing-inequities-11609884738> [https://perma.cc/QK79-8PAD]; Isaac Stanley-Becker & Lena H. Sun, *Covid-19 is Devastating Communities of Color. Can Vaccines Counter Racial Inequity?*, WASH. POST (Dec. 18, 2020, 1:00 PM), <https://www.washingtonpost.com/health/2020/12/18/covid-vaccine-racial-equity/> [https://perma.cc/X2XX-9PE8].

324. See, e.g., Katy O'Donnell & Janaki Chadha, *The Most Lopsided Economic Event Imaginable: Wave of Evictions Threatens Black, Latino Tenants*, POLITICO (Dec. 15, 2020, 11:05 AM), <https://www.politico.com/states/new-york/albany/story/2020/12/14/the-most-lopsided-economic-event-imaginable-wave-of-evictions-threatens-black-latino-tenants-1346648> [https://perma.cc/NT7F-SRLZ]; Alicia Adamczyk, *Inequity Has Been Building for Decades in the U.S., but Experts Say the Pandemic 'Ripped It Open,'* CNBC (Oct. 23, 2020 2:07 PM), <https://www.cnbc.com/2020/10/23/coronavirus-is-exacerbating-economic-inequality-in-the-us.html> [https://perma.cc/B3C7-T9UT].

325. N.Y. Times Staff, *What We Know About the Death of George Floyd in Minneapolis*, SEATTLE TIMES (Sept. 8, 2020, 3:31 PM), <https://www.seattletimes.com/nation-world/what-we-know-about-the-death-of-george-floyd-in-minneapolis/> [https://perma.cc/ZDE5-ZPCW].

326. Richard Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [https://perma.cc/384F-G64J].

327. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/GM2S-QWKL].

328. Seung Min Kim, *In Historic Vote, Trump Acquitted of Impeachment Charges*, WASH. POST (Feb. 5, 2020), https://www.washingtonpost.com/politics/in-historic-vote-trump-acquitted-of-impeachment-charges/2020/02/05/8b7ea90e-4832-11ea-ab15-b5df3261b710_story.html [https://perma.cc/5YUF-E4V4].

329. See Bill Duryea, *An Unprecedented Election—and Its Bitter Aftermath—Seen from Across the Country*, POLITICO MAG. (Nov. 15, 2020, 11:45 AM), <https://www.politico.com/news/magazine/2020/11/15/american-voices-roundup-435702> [https://perma.cc/G4QP-HQGJ].

330. See e.g., Bob Henson, *Iowa Derecho Was Likely Costliest U.S. Thunderstorm*, SEATTLE TIMES (Oct. 17, 2020, 12:26 PM), <https://www.seattletimes.com/nation-world/iowa-derecho-in-august-was-most-costly-thunderstorm-disaster-in-u-s-history/> [https://perma.cc/U7XF-VHRN] (“No single thunderstorm event in modern times—not even a tornado—has wrought as much economic

Inflection points may lead to shifts in societal thinking and calls for reform in the government and its laws.³³² Indeed, according to one influential scholar of constitutional theory, inflection points can be direct causes of constitutional change.³³³ Major societal-paradigm shifts can, according to Bruce Ackerman, themselves become an instance of “higher lawmaking,” through which “We the People” can effect constitutional change without undergoing the formal amendment process.³³⁴ According to Ackerman, major inflection points have caused three constitutional paradigm shifts: from the Founding paradigm, through Reconstruction, to the current New Deal Constitutionalism.³³⁵ Inflection points can cause radical changes in our constitutional thought—even without formal amendments—that can respond to and even exacerbate interbranch conflict.³³⁶ 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.³³⁷ 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.³³⁸

But even if we reject Ackerman’s views, it is clear that social crises often serve as catalysts for legal change.³³⁹ 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-11603891153> [<https://perma.cc/R8ND-4PRN>] (reporting that Hurricane Zeta is the twenty-seventh of the season, almost reaching the record of twenty-eight in 2005).

331. See Umair Irfan, *Fires, Floods, Hurricanes, and Locusts: 2020 Was an Epic Year for Disasters*, VOX (Dec. 30, 2020, 1:10 PM), <https://www.vox.com/22202889/disasters-2020-flood-hurricane-wildfire-australia-california-covid-pandemic> [<https://perma.cc/C7JM-SR6T>].

332. See e.g., Heather E. McGowan, *The Coronavirus Is Creating an Inflection Point in the Future of Work*, FORBES (Apr. 16, 2020, 7:46 PM), <https://www.forbes.com/sites/heathermcgowan/2020/04/16/the-coronavirus-is-creating-an-inflection-point-in-the-future-of-work/?sh=79e5e0183b2d> [<https://perma.cc/5KWD-6A79>].

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).

338. See We the People Podcast, *2020: A Constitutional Year in Review*, NAT’L CONST. CTR. (Dec. 24, 2020), <https://constitutioncenter.org/interactive-constitution/podcast/a-constitutional-year-in-review> [<https://perma.cc/X5US-K666>].

339. See Annegret Haase, *Covid-19 as a Social Crisis and Justice Challenge for Cities*, FRONTIERS IN SOCIO. (Nov. 12, 2020), <https://www.frontiersin.org/articles/10.3389/fsoc.2020.583638/full> [<https://perma.cc/Y4GL-VHJB>].

widespread in the 1960s, leading to the passage of the Equal Pay Act of 1963³⁴⁰ and the Civil Rights Act of 1964 which includes Title VII.³⁴¹ 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.³⁴² Moreover, the #MeToo movement has prompted greater awareness of injustices in the corporate world.³⁴³ Academics have acknowledged that the #MeToo movement “has strong support in Congress, in state legislatures, and in the business community.”³⁴⁴ In light of the movement, companies and shareholders are rethinking their approach to diversity, equal treatment, and leadership.³⁴⁵ 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.³⁴⁶ Liberals have been a driving force behind the #MeToo movement, making them more likely to respond to sexual harassment with political change.³⁴⁷ 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.³⁴⁸ He cited the need to address inequities so that

340. 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).

341. 42 U.S.C. § 2000e-2.

342. 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-seek-legislative-office-in-record-numbers-in-2020> [<https://perma.cc/89AQ-JNVT>].

343. 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).

344. 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 Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements*, #TimesUp on Workers' Rights, 15 STAN. J. C.R. & C.L. 41, 81 (2019)).

345. See *id.* at 1089.

346. See Alex Clark, Dominic Gilbert, Richard Moynihan & Bruno Ridy, *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/ps/i.do?p=STND&u=umuser&id=GALE%7CA641398065&v=2.1&it=r&sid=summon> [<https://perma.cc/L55D-7JFE>].

347. See Claire Gothreau, 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://cawp.rutgers.edu/election-analysis/2020-first-presidential-election-metoo-era-why-do-political-parties-see-it-so> [<https://perma.cc/NR8A-E89A>].

348. Camila Domonoske & 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/live-updates-2020-election-results/2020/11/07/932104693/biden-to-make-victory-speech-as-president-elect-at-8-p-m-et> [<https://perma.cc/JN5H-9MKP>].

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.*

350. See *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIB. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html> [<https://perma.cc/VDF4-TGL2>].

351. See Lisa Bowleg, *We’re Not All in This Together: On COVID-19, Intersectionality, and Structural Inequality*, 110 AM. J. PUB. HEALTH 917 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7287552/> [<https://perma.cc/7L3A-HAHF>].

352. Tim Smart, *COVID-19 Job Market Wreaks Havoc on Black Women*, U.S. NEWS & WORLD REP. (Apr. 15, 2021, 1:40 PM), <https://www.usnews.com/news/economy/articles/2021-04-15/black-women-suffering-the-most-from-covid-19-job-market-disruption> [<https://perma.cc/F4AY-SMMJ>].

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-F3S3>].

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.

356. See *The Biden Emergency Action Plan to Save the Economy*, BIDEN HARRIS DEMOCRATS, <https://joebiden.com/the-biden-emergency-action-plan-to-save-the-economy/> [<https://perma.cc/94GU-32VT>].

357. *Seven Charts That Show COVID-19’s Impact on Women’s Employment*, MCKINSEY & CO. (Mar. 8, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/seven-charts-that-show-covid-19s-impact-on-womens-employment> [<https://perma.cc/4GB2-A28V>].

358. *Id.*

359. *Id.*

360. See Lucia Mutikani, *U.S. Labor Market Roars Back; Full Recovery Still Years Away*, REUTERS (Mar. 5, 2021, 12:03 AM), <https://www.reuters.com/article/us-usa-economy/u-s-labor-market-roars-back-full-recovery-still-years-away-idUSKBN2AXoCY> [<https://perma.cc/6SZE-SS3B>].

361. See Michel Martin, *Getting Women back to Work Is Key to a Strong Recovery*, *Labor Secretary Says*, NPR (May 8, 2021, 8:37 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/05/08/995065486/getting-women-back-to-work-is-key-to-a-strong-recovery-labor-secretary-says> [<https://perma.cc/UK69-CJSY>].

362. Jeff Stein, *Child Cash Benefit Will Begin Hitting Millions of Parents’ Bank Accounts July 15*, WASH. POST (May 17, 2021, 1:56 PM), <https://www.washingtonpost.com/us-policy/2021/05/17/biden-child-tax-benefit/> [<https://perma.cc/2SFG-6KHR>].

363. See *id.*

364. See Pallavi Gogoi, *Stuck-at-Home Moms: The Pandemic’s Devastating Toll on Women*, NPR (Oct. 28, 2020, 7:01 AM), <https://www.npr.org/2020/10/28/928253674/stuck-at-home-moms-the-pandemics-devastating-toll-on-women> [<https://perma.cc/4HQL-43GJ>].

216,000 men.³⁶⁵ In December 2020, all jobs lost were those held by women.³⁶⁶ As of May 2021, only 56% of women were working for pay, the lowest number since 1986.³⁶⁷ 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.³⁶⁸ For white women, total employment was down 5.4%.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.³⁷⁰ By contrast, white women's rate dropped by only about three percentage points.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.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.³⁷³ Women are feeling pushed to a point that is unsustainable.³⁷⁴ Inequality long predates the pandemic, especially in access to leadership positions, and the onset of the pandemic has only intensified the divide.³⁷⁵ Moreover, women who feel

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-AF8T>]. Some have called this a “shecession.” *Id.*

366. Annalyn Kurtz, *The US Economy Lost 140,000 Jobs in December. All of Them Were Held by Women*, CNN (Jan. 8, 2021, 9:25 PM), <http://cnn.com/2021/01/08/economy/women-job-losses-pandemic/index.html> [<https://perma.cc/EJY5-CZU4>]. At the same time, men gained 16,000 jobs. *Id.*

367. Claire Cain Miller, *The Pandemic Created a Child-Care Crisis. Mothers Bore the Burden*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/interactive/2021/05/17/upshot/women-workforce-employment-covid.html> [<https://perma.cc/572R-D8UM>].

368. Nate Rattner & Thomas Franck, *Black and Hispanic Women Aren't Sharing in the Job Market Recovery*, CNBC (Mar. 5, 2021, 2:09 PM), <https://www.cnbc.com/2021/03/05/black-and-hispanic-women-arent-sharing-in-the-job-market-recovery.html> [<https://perma.cc/M5AK-FMYR>].

369. *Id.*

370. Smart, *supra* note 352.

371. *Id.*

372. *See id.*

373. See Sarah Coury, Jess Huang, Ankur Kumar, Sara Prince, Alexis Krivkovich & Lareina Yee, *Women in the Workplace 2020*, MCKINSEY & CO. (Sept. 30, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> [<https://perma.cc/RK76-7PRX>].

374. *Id.*

375. See Terry Morehead Dworkin & Cindy A. Schipani, *The Role of Gender Diversity in Corporate Governance*, 21 U. PA. J. BUS. L. 105, 140 (2018); Maria Minor, *COVID-19's Impact on Gender Inequality in the Workforce Doesn't Have to Be a Step Backwards. Here's Why*, FORBES (Nov. 2, 2020, 6:50 AM), <https://www.forbes.com/sites/mariamminor/2020/11/02/covid-19s-impact-on-gender-inequality-in-the->

forced to leave work, even temporarily, can lose job skills, opportunities for advancement, wages, and benefits.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.³⁷⁷ Companies attempting to diversify are also losing out.³⁷⁸ Two actions can help women reenter the workforce: improved childcare and higher wages.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.³⁸⁰ And there are more women in positions of power in Washington, D.C. than ever before.³⁸¹ Women gained valuable seats in the House, the number of female Republican House members doubling from nine to eighteen.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.³⁸³

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

workforce-doesnt-have-to-be-a-step-backwards-heres-why/?sh=38fc4c7943c8 [https://perma.cc/YLT7-9L8P].

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

377. See Kevin Sneader & Laureina Yee, *As Women Fight to Maintain Progress, Companies Must Reimagine How They Operate*, WALL ST. J. (Sept. 30, 2020, 12:01 AM), <https://www.wsj.com/articles/as-women-fight-to-maintain-progress-companies-need-to-reimagine-how-they-operate-11601434152> [https://perma.cc/74ZB-AAWQ]; Lauren Weber & Vanessa Fuhrmans, *How the Coronavirus Crisis Threatens to Set Back Women's Careers*, WALL ST. J. (Sept. 30, 2020, 12:01 AM), <https://www.wsj.com/articles/how-the-coronavirus-crisis-threatens-to-set-back-womens-careers-11601438460> [https://perma.cc/PYW2-3UMK].

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=3640b011abe>. 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 Otani, *Stocks: Nasdaq Pushes Diversity Rule*, WALL ST. J., Dec. 2, 2020, at A1.

379. See, e.g., Kweilin Ellingrud & Liz Hilton Segel, *COVID-19 Has Driven Millions of Women out of the Workforce. Here's How to Help Them Come Back*, FORTUNE (Feb. 13, 2021, 10:00 AM), <https://fortune.com/2021/02/13/covid-19-women-workforce-unemployment-gender-gap-recovery/> [https://perma.cc/B6TV-4P99].

380. See Lisa Lerer & Sydney Ember, *Historic Milestone for Woman Steeped in Civil Rights Battles*, N.Y. TIMES, Nov. 8, 2020, at A1.

381. Gabriel T. Rubin, *Black, Female Candidates for Federal Office Reach Record High*, WALL ST. J. (Oct. 23, 2020, 5:30 AM), <https://www.wsj.com/articles/black-female-candidates-for-federal-office-reach-record-high-11603445402> [https://perma.cc/7JEL-65KX].

382. See Gerald F. Seib, *The Year of the Women Really, Finally Did Arrive in 2020*, WALL ST. J. (Nov. 16, 2020, 10:20 AM), <https://www.wsj.com/articles/the-year-of-the-woman-really-finally-did-arrive-in-2020-11605539331> [https://perma.cc/3ZSG-4572].

383. *Who Are Joe Biden's Cabinet Picks? The Full List*, WALL ST. J., Jan. 21, 2021, at A6.

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

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.*

385. Jim Tankersly, Jeanna Smialek & Alan Rappeport, *Biden's Economic Picks Suggest Focus on Workers, Income Equality*, BOSTON GLOBE (Nov. 30, 2020, 10:53 PM), <https://www.bostonglobe.com/2020/11/30/nation/bidens-economic-picks-suggest-focus-workers-income-equality/> [https://perma.cc/PLX8-ZLFB].

386. See INT'L LAB. ORG., EMPOWERING WOMEN AT WORK: COMPANY POLICIES AND PRACTICES FOR GENDER EQUALITY 18 tbl.2 (2020); see also Shelley Zalis, *Power of the Pack: Women Who Support Women Are More Successful*, FORBES (Mar. 6, 2016, 10:43 AM), <https://www.forbes.com/sites/shelleyzalis/2019/03/06/power-of-the-pack-women-who-support-women-are-more-successful/?sh=23c1973e1771> [https://perma.cc/MX3R-E426].

387. See Rachel Augustine Potter & Craig Volden, *How Women Leaders Can Enhance Rulemaking in the Biden Administration*, BROOKINGS INST. (Dec. 14, 2020), <https://www.brookings.edu/research/how-women-leaders-can-enhance-rulemaking-in-the-biden-administration/> [https://perma.cc/94UJ-GKYB]; see also Tankersly, et al., *supra* note 385.

388. See Sarah Jane Glynn, Jane Farrell & Nancy Wu, *The Importance of Preschool and Child Care for Working Mothers*, CTR. FOR AM. PROGRESS (May 8, 2013, 8:59 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2013/05/08/62519/the-importance-of-preschool-and-child-care-for-working-mothers/> [https://perma.cc/89FU-64QE] (noting how the availability of childcare can profoundly help working mothers).

389. *Id.*

390. Martha C. White, *Biden's Newly Signed Rescue Plan Will Help Get Parents Back to Work—By Supporting Child Care*, NBC NEWS (Mar. 11, 2021, 3:10 PM), <https://www.nbcnews.com/business/economy/stimulus-bill-contains-billions-shore-daycare-centers-parents-child-care-n1260697> [https://perma.cc/Q6EP-57NX].

391. See *id.*

392. Richard Rubin & Eliza Collins, *Biden Pursues \$1.9 Trillion in Pandemic, Economic Relief*, WALL ST. J., Jan. 15, 2021, at A1.

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

393. White, *supra* note 390.

394. See Sara Mead, *Child Care Laggard*, U.S. NEWS (Feb. 23, 2017, 11:05 AM), <https://www.usnews.com/opinion/knowledge-bank/articles/2017-02-23/the-us-is-a-laggard-on-child-care> [<https://perma.cc/7B63-C64C>].

395. See BARNARDOS & START STRONG, TOWARDS A SCANDINAVIAN CHILDCARE SYSTEM FOR 0-12 YEAR OLDS IN IRELAND? (2012), https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Barnardos_-_Start_Strong_-_Childcare_Briefing_Paper_final_version.pdf [<https://perma.cc/JRW9-GUGJ>]; Explorer Publishing, *Childcare in France*, EXPATICA (June 15, 2021), <https://www.expatica.com/fr/living/family/childcare-in-france-106409> [<https://perma.cc/S2C3-M3NA>].

396. See Mead, *supra* note 394.

397. Megan O’Donnell, Ugonma Nwankwo, Ania Calderon & Callie Strickland, *Closing Gender Pay Gaps: Identifying Roles for Government and the Private Sector*, CTR. FOR GLOB. DEV. (Sept. 16, 2020), <https://www.cgdev.org/sites/default/files/closing-gender-pay-gaps-identifying-roles-for-government-and-private-sector.pdf> [<https://perma.cc/EM57-MEHP>].

398. *Id.*

399. See Rubin & Collins, *supra* note 392; Jim Tankersley & Michael D. Shear, *Biden Seeks to Define His Presidency by an Early Emphasis on Equity*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/business/biden-equity-racial-gender.html> [<https://perma.cc/3Y7-GQ8L>].

make it into the economic relief package,⁴⁰⁰ 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.⁴⁰¹ Correcting the wage gap would help women quickly reenter the workforce and alleviate some of the burdens imposed by childcare and eldercare expenses.⁴⁰² Numerous states have already committed to increasing the minimum wage, with several raising it to \$15 per hour.⁴⁰³ Even a lower increase would still constitute a step in the right direction.⁴⁰⁴

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.⁴⁰⁵ But given its current makeup, the Supreme Court is unlikely to address the issue.⁴⁰⁶ The addition of Amy Coney Barrett to the Court in October 2020 means that a majority of the Court are strict constructionists.⁴⁰⁷ Strict constructionists generally share the view that the Court's role is to enforce statutes strictly as

400. Elisabeth Buchwald, *\$15 Minimum Wage Won't Make It into Biden's \$1.9-Trillion COVID-19 Relief Bill—Lawmakers Have Other Ideas*, MARKETWATCH (Mar. 1, 2021, 9:35 AM), <https://www.marketwatch.com/story/15-minimum-wage-wont-make-it-into-bidens-1-9-trillion-covid-relief-package-but-lawmakers-have-other-options-11614299275> [<https://perma.cc/5YG8-L8ZL>].

401. See Tankersley & Shear, *supra* note 399.

402. See Alyssa Davis & Elise Gould, *Closing the Pay Gap and Beyond*, ECON. POL'Y INST. (Nov. 18, 2015), <https://www.epi.org/publication/closing-the-pay-gap-and-beyond/> [<https://perma.cc/VGV7-NALC>].

403. *Minimum Wage Tracker*, ECON. POL'Y INST., https://www.epi.org/minimum-wage-tracker/#/min_wage/Massachusetts [<https://perma.cc/YV2U-4NLQ>].

404. Cf. Carl Gibson, *Commentary, Why U.S. Workers Need a \$25 Per Hour Minimum Wage*, BARRON'S (Jan. 28, 2021, 1:28 PM), <https://www.barrons.com/articles/why-u-s-workers-need-a-25-per-hour-minimum-wage-51611858500> [<https://perma.cc/GN5W-ZBNT>].

405. See Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know*, CTR. FOR AM. PROGRESS (Jan. 29, 2020, 4:05 PM), <https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/> [<https://perma.cc/M489-8GN2>].

406. See Ken Coleman, *Women Have Been Waiting Almost a Century for the ERA. Will It Finally Become Law?*, MICH. ADVANCE (Apr. 19, 2021), <https://www.michiganadvance.com/2021/04/19/women-have-been-waiting-almost-a-century-for-the-era-will-it-finally-become-law/> [perma.cc/FLD8-UNYL].

407. See Alaina Lancaster, *How Justice Amy Coney Barrett Is Already Changing the Supreme Court*, LAW.COM (May 14, 2021, 5:04 PM), <https://www.law.com/therecorder/2021/05/14/how-justice-amy-coney-barrett-is-already-changing-the-supreme-court/?slreturn=20210510081610> [perma.cc/4NTE-744F].

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).

409. *See generally* Alex Cohen & Wilfred U. Codrington, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained> [perma.cc/QXJ4-5MJU].

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.*

413. *See* Dan Bosch, *The Consequences of Over-Reliance on Executive Action*, AM. ACTION F. (Mar. 1, 2021), <https://www.americanactionforum.org/insight/the-consequences-of-over-reliance-on-executive-action/> [perma.cc/VVM9-SWA8].

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

414. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

415. See 2021 Joseph R. Biden Jr. Executive Orders, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021> [perma.cc/25ZL-AG2M].

416. See Jeffrey S. Klein & Nicholas J. Pappas, *A Shift in Federal Government Priorities for Diversity, Equity, and Inclusion*, LAW.COM (Apr. 6, 2021, 12:45 PM), <https://www.law.com/newyorklawjournal/2021/04/06/a-shift-in-federal-government-priorities-for-diversity-equity-and-inclusion/> [perma.cc/R7NE-QW8P].

417. Leary, *supra* note 411, at A4.

418. *Id.*

419. Green & Smith, *supra* note 412, at A13.

420. Kate Davidson, *Biden Signs Orders on Workers, Benefits—Moves Direct Agencies to Speed Virus Aid and Reverse Trump Moves on Hiring Protections*, WALL ST. J., Jan. 23, 2021, at A4.

421. See *The Biden Plan to Build back Better by Advancing Racial Equity Across the American Economy*, JOEBIDEN.COM, <https://joebiden.com/racial-economic-equity/> [perma.cc/QKG9-4UJJ].

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

423. P.R. Lockhart, *Women of Color in Low-Wage Jobs Are Being Overlooked in the #MeToo Moment*, VOX (Dec. 19, 2017, 4:10 PM), <https://www.vox.com/identities/2017/12/19/16620918/sexual-harassment-low-wages-minority-women> [perma.cc/2DQJ-F4BE].

424. See generally Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997) (presenting overview of the history of the sex discrimination provisions in the Civil Rights Act).

425. Binder et al., *supra* note 340, at 305.

426. Many companies urged Trump to withdraw the order. Khadeeja Safdar & Lauren Weber, *Business Groups Urge Trump to Pull Back Diversity-Training Order*, WALL ST. J., Oct. 16, 2020, at A4.

427. See Jessica Guynn, *President Joe Biden Rescinds Donald Trump Ban on Diversity Training About Systemic Racism*, USA TODAY (Jan. 26, 2021, 4:10 PM), <https://www.usatoday.com/story/money/2021/01/20/biden-executive-order-overturns-trump-diversity-training-ban/4236891001/> [perma.cc/Q2T6-NT9Q].

428. See Carrie Baker, *Ten Legislative Changes Needed to Prevent and Redress Sexual Harassment in All American Workplaces*, SCHOLARS STRATEGY NETWORK (Feb. 1, 2019), <https://scholars.org/contribution/ten-legislative-changes-needed-prevent-and-redress-sexual-harassment-all-american> [perma.cc/QM7N-VUAX].

429. See *infra* Appendix (listing state laws restricting various aspects of nondisclosure agreements).

430. See Gerald Sauer, *The Nondisclosure Agreement: Time to Revamp?*, BLOOMBERG L. (Nov. 19, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/the-nondisclosure-agreement-time-to-revamp> [perma.cc/5V8B-TWCP].

commissioners appointed by the President.⁴³¹ In January 2021, Biden named a new chair and vice chair.⁴³² It is the Commission's responsibility to "provide[] leadership and guidance" on the federal government's equal employment opportunity program.⁴³³ 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.⁴³⁴ 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.⁴³⁵

A reconfigured EEOC could also push for change in the workplace by promoting salary transparency⁴³⁶—one of Biden's stated goals during his campaign.⁴³⁷ 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.⁴³⁸ Women made progress toward equal pay before the pandemic, especially among younger workers, but the gap widens as women move up the

431. *What You Should Know: ABCs of EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 20, 2015), <https://www.eeoc.gov/laws/guidance/what-you-should-know-abc-eeoc> [perma.cc/CQ5B-KUKZ].

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].

433. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/overview> [https://perma.cc/48MM-Y4AK].

434. *What Laws Does EEOC Enforce?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce> [https://perma.cc/FQT2-VFAA].

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/P3G4-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-nlr-and-9615503/> [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.*

436. *See generally* Jake Rosenfeld & Patrick Denice, *The Power of Transparency: Evidence from a British Workplace Survey*, 80 AM. SOCIO. REV. 1045 (2015), <https://doi.org/10.1177/0003122415597019> [https://perma.cc/33PQ-QRH2] (arguing for the importance of financial transparency in workplaces to aid workers in bargaining for wages).

437. Green & Smith, *supra* note 412.

438. *See, e.g.*, Terry Morehead Dworkin, Cindy A. Schipani, Frances J. Milliken & Madeline K. Kneeland, *Assessing Progress of Women in Corporate America: The More Things Change, the More They Stay the Same*, 55 AM. BUS. L.J. 721, 750–54 (2018).

organizational hierarchy.⁴³⁹ 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,⁴⁴⁰ 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.⁴⁴¹

The EEOC could also more aggressively promote salary equity by closing a loophole in the Equal Pay Act that essentially guts the legislation.⁴⁴² The Act requires women be paid the same as men for equal work in the same establishment.⁴⁴³ However, an employer can justify different pay simply by showing that the difference was based on "any factor other than sex."⁴⁴⁴ Courts have interpreted this phrase generously in favor of employers.⁴⁴⁵ Many efforts have sought to correct this loophole, with the proposed Paycheck Fairness Act (PFA) perhaps having the potential to be the most effective.⁴⁴⁶ 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.⁴⁴⁷ 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

439. See, e.g., Lauren Weber, *Younger Workers Report Biggest Gains in Happiness with Pay*, WALL ST. J. (Aug. 29, 2019, 5:30 AM), <https://www.wsj.com/articles/younger-workers-report-biggest-gains-in-happiness-with-pay-11567071000> [<https://perma.cc/CPE3-NLVL>]; Grace Hauck, *When Will Women Get Equal Pay? Not for Another 257 Years, Report Says*, USA TODAY (Dec. 22, 2019, 12:49 PM), <https://www.usatoday.com/story/news/nation/2019/12/20/gender-pay-gap-equal-wages-expected-257-years-report/2699326001/> [<https://perma.cc/4JUT-7ZKE>] (reporting that in the World Economic Forum's annual survey, the United States ranked 53rd out of 153 countries in terms of pay equity).

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

441. Stephen Miller, *Transparency Shrinks Gender Pay Gap?*, SOC. HUM. RES. MGMT. (Jan. 31, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/transparency-shrinks-gender-pay-gap.aspx> [<https://perma.cc/69X7-N74S>].

442. Equal Pay Act of 1963, 29 U.S.C. § 206(d).

443. *Id.*

444. *Id.*

445. See Sabrina L. Brown, *Negotiating Around the Equal Pay Act: Use of the "Factor Other than Sex" Defense to Escape Liability*, 78 OHIO STATE L.J. 471, 473 (2017).

446. See S.862 (114th): *Paycheck Fairness Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s862/summary> [<https://perma.cc/Y2F6-K4BP>].

447. *Id.*

Act's failure to be enacted by Congress over many years,⁴⁴⁸ several states have adopted most or parts of the PFA.⁴⁴⁹ In this period of inflection, enacting such an act may even be possible in Congress.⁴⁵⁰

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.”⁴⁵¹ 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

448. Catherine Lerum, *Equal Pay for Women Can Become a Reality: A Proposal for Enactment of the Paycheck Fairness Act*, 34 N. ILL. U. L. REV. 221, 223 (2013) (noting that the PFA was first considered in 1997).

449. Dworkin et al., *supra* note 438, at 759–60, app. A.

450. See Christina Pazzanese, *Where Are We Now After a Second Impeachment?*, HARV. GAZETTE (Jan. 13, 2021), <https://news.harvard.edu/gazette/story/2021/01/american-democracy-could-be-at-inflection-point-say-experts/> [<https://perma.cc/8E8H-JUAK>].

451. Kantor & Twohey, *supra* note 1.

that after the fall from grace of prominent businessmen and the rise of the #MeToo movement that “the times, they are a-changin’.”⁴⁵²

452. BOB DYLAN, *The Times They Are a Changin',* on THE TIMES THEY ARE A CHANGIN' (Columbia Records 1964).

APPENDIX. STATE REGULATION OF HARASSMENT CLAIMS

| State | Does the state . . . prohibit confidentiality provisions? | provide any exceptions to such confidentiality prohibition? | prohibit waiving one's rights or remedies generally? | explicitly prohibit mandatory arbitration? |
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| Arizona | NDAs are not prohibited, but claimants can violate their terms to discuss sexual misconduct with law enforcement or respond to a court's request. The bill defines an NDA as "a confidentiality agreement or contract provision that prohibits the disclosure of information by a party." ARIZ. REV. STAT. § 12-720 (2020). | N/A | N/A | N/A |
| California | <p><u>Generally:</u> 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. CAL. CIV. PROC. CODE § 1001 (West 2020). **This prohibition applies only to claims filed in civil or administrative actions. It does not apply to pre-litigation settlements. **</p> <p><u>For Employers:</u> Employers cannot force employees to sign a non-disparagement agreement or similar document which gives up the employee's right to discuss unlawful acts in the workplace, including sexual harassment. CAL. GOV'T CODE § 12964.5(a)(2) (West 2020).</p> | <p>The provision is allowed if: (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.</p> <p>An agreement may require that the settlement amount remain confidential. CAL. CIV. PROC. CODE § 1001 (West 2020).</p> | <p>No contract or settlement provision may waive a party's right to testify regarding sexual harassment in a proceeding by court request. CAL. CIV. CODE § 1670.11 (West 2020).</p> <p>Employers cannot prevent employees from disclosing "unlawful acts in the workplace," including sexual harassment, in return for a raise or bonus. CAL. GOV'T CODE § 12964.5(a)(2) (West 2020).</p> | <p>The state legislature attempted to enact AB 51, which would have effectively banned mandatory arbitration clauses, but a federal district court enjoined the law's enactment in February 2020. Chamber of Com. v. Becerra, No. 19-cv-02456, 438 F. Supp. 3d 1078 (E.D. Cal. 2020), <i>aff'd in part, vacated in part, rev'd in part sub nom.</i> Chamber of Com. v. Bonta, 13 F.4th 766 (9th Cir. 2021); Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019).</p> |

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| Illinois | <p><u>For Employers:</u> Cannot unilaterally include a confidentiality provision in any settlement or termination agreement. 820 ILL. COMP. STAT. 96/1-30(b) (2020).</p> | <p>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).</p> | <p> voids any clause that, as a condition of employment, requires employees to waive substantive or procedural rights related to “unlawful employment practice[s].” 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 “good faith” allegations to government officials and seek legal advice. 820 ILL. COMP. STAT. 96/1-25(c) (2020).</p> | <p> voids any clause that, as a condition of employment, requires employees to arbitrate claims of “unlawful employment practice[s].” 820 ILL. COMP. STAT. 96/1-25(b) (2020). EXCEPTION: the clause is allowed if: (1) it is in writing, (2) both parties provide bargained-for consideration, and (3) the employee can still report “good faith” allegations to government officials and seek legal advice. 820 ILL. COMP. STAT. 96/1-25(c) (2020).</p> |
| Louisiana | <p><u>For Public Agents:</u> 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. LA. STAT. ANN. § 13:5109.1 (2020).</p> | <p>Settlement agreements not involving a public entity or agent, or where public funds are not used. <i>See</i> LA. STAT. ANN. § 13:5109.1 (2020).</p> | N/A | N/A |
| Maryland | N/A | N/A | <p><u>For Employers:</u> voids provisions waiving substantive or procedural rights or remedies regarding a sexual harassment claim. If an employer attempts to enforce such a provision, they are liable for the employee's attorney's fees. MD. CODE ANN., LAB. & EMPL. § 3-715(a) (West 2020).</p> | <p>The provision voiding waiver of rights or remedies also voids mandatory arbitration of sexual harassment claims. <i>See</i> MD. CODE ANN., LAB. & EMPL. § 3-715(a) (West 2020).</p> |
| Nevada | <p>A settlement agreement cannot contain a confidentiality clause if the claim relates to sexual misconduct. NEV. REV. STAT. § 10.195(1) (2020).</p> | <p>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).</p> | N/A | N/A |

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| New Jersey | <p><u>For Employers:</u> Confidentiality prohibited in settlements or contracts with a current or former employee if it relates to: (1) discrimination, (2) retaliation, or (3) harassment.</p> <p>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."</p> <p>Employers who attempt to enforce a prohibited confidentiality provision are liable for the employee's litigation costs. N.J. STAT. ANN. § 10:5-12.8, 12.9 (West 2020).</p> | N/A | <p><u>For Employers:</u> 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. N.J. STAT. ANN. § 10:5-12.7 (West 2020).</p> | <p>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).</p> |
| New Mexico | <p><u>For Employers:</u> Private employers cannot, as a term of employment, require employees to sign confidentiality provisions in settlements of sexual harassment claims. N.M. STAT. ANN. § 50-4-36 (2020).</p> | <p>Settlement agreements with an employee may include a confidentiality provision if it:</p> <ul style="list-style-type: none"> (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. <p>N.M. STAT. ANN. § 50-4-36(B)-(C) (2020).</p> | N/A | N/A |

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| New York | <p><u>For Employers:</u> Prohibited in settlements or other means of resolving discrimination claims outside of litigation. N.Y. C.P.L.R. 5003-B (CONSOL. 2020).</p> | <p>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.</p> <p>Parties may agree to keep the settlement amount confidential. N.Y. C.P.L.R. 5003-B (CONSOL. 2020).</p> | <p>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. S.B. S6382A, 2017 Leg., Reg. Sess. (N.Y. 2017).</p> | <p>Mandatory arbitration clauses for discrimination claims are prohibited if an employer has four or more employees. N.Y. C.P.L.R. 7515 (CONSOL. 2020). In 2019, however, a federal court ruled that New York's ban on mandatory arbitration is preempted under the Federal Arbitration Act. <i>Latif v. Morgan Stanley & Co.</i>, No. 18-cv-11528, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019).</p> |
| Oregon | <p><u>For Employers:</u> Prohibited from using confidentiality provisions with employees that cover claims of sexual discrimination or assault. OR. REV. STAT. § 659A.370(1) (2020).</p> | <p>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.</p> <p>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. OR. REV. STAT. § 659A.370(2)–(4) (2020).</p> | N/A | N/A |
| Tennessee | <p><u>For Local Education Agencies:</u> Public school districts and other educational agencies cannot enter into or require an NDA in any settlement of a sexual misconduct claim. TENN. CODE ANN. § 49-2-131 (2020).</p> <p><u>For Employers:</u> An employer cannot impose a term of employment requiring an employee to sign an NDA regarding sexual harassment. TENN. CODE ANN. § 50-1-108 (2020).</p> | N/A | N/A | N/A |

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| Vermont | <p><u>For Employers:</u> 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).</p> <p>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(h)(2) (2020).</p> | N/A | <p>An employer cannot, as a term of employment, require someone to waive substantive or procedural rights or remedies regarding sexual harassment claims. VT. STAT. ANN. tit. 21, § 495h(g) (2020).</p> | <p>The provision prohibiting the waiver of rights or remedies would prohibit mandatory arbitration agreements as a condition of employment. See VT. STAT. ANN. tit. 21, § 495h(g) (2020).</p> |
| Virginia | <p><u>For Employers:</u> May not require employees to sign an employment contract agreeing to keep details relating to a sexual assault claim confidential. VA. CODE ANN. § 40.1-28.01 (2020).</p> | N/A | N/A | N/A |
| Washington | <p><u>For Employers:</u> 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).</p> | <p>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).</p> | N/A | <p>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).</p> |

