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Committee Chair Luke Clippinger
Committee Vice Chair J. Sandy Bartlett
Maryland House Judicial Committee
100 Taylor House Office Building
Annapolis, MD 21401

RE: Amendment of House Bill 1378

Dear Distinguished Members of the Committee:

I write in opposition to the Amendments to House Bill 1378. Through Representative Wilson's courageous and exhaustive efforts, the Child Victims Act of 2023 passed and went into effect October 1, 2023. The main purpose of the Act is to provide Survivors with a voice to be heard, for some of them, for the first time in their life. The original bill or Act allows Survivors to have their day in court, for there to be a redress of their grievances and for those responsible for their abuse, to be held accountable.

Unconstitutional Amendments

The proposed Amendments to House Bill 1378 will unconstitutionally deprive the Survivors of their right to a trial by jury and take away their vested rights of an $890,000 cap per incident. Any law which retroactively deprives a Survivor of their vested rights is patently unconstitutional. See Exhibit A (Maryland Law Review, 82:1, Friedman, Dan)

The Child Victims Act opened the courthouse doors and provided survivors of childhood sexual abuse a right to a jury trial for claims arising from their abuse. Mandatory arbitration would unconstitutionally strip that vested right away from survivors. Forced arbitration of sexual assault claims is, simply put, bad policy.

- The Maryland General Assembly recognized this when it passed the Disclosure of Sexual Harassment in the Workplace Act of 2018, which **voided provisions in employment agreements that waived an employee's substantive or procedural rights to raise future claims of sexual misconduct**.

- The United States Congress followed suit when it passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA") which **voided pre-dispute arbitration clauses in cases involving sexual-misconduct allegations.**

    - Maryland joined 55 other state and territorial Attorneys General to lobby Congress in support of this legislation arguing that "**access to the judicial**

system, whether federal or state, is a fundamental right of all Americans. That right should extend fully to persons who have been subjected to sexual harassment in the workplace . . . . **Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of laws, and are not positioned to ensure that such victims are accorded both procedural and substantive due process** . . . . Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims." Letter from Nat'l Assoc. Of Attorneys General to Congressional Leadership (Feb. 12, 2018)

- If prospectively inducing an adult employee to agree to arbitrate sexual misconduct claims as a condition of employment is unjust, retrospectively forcing children into arbitration--without even the illusion of a choice--is orders of magnitude more unjust.

- Forced arbitration disadvantages marginalized survivors and permits a rotten system to evade accountability
  - **"Forced arbitration is a sexual harasser's best friend: It keeps proceedings secret, findings sealed, and victims silent."** - Gretchen Carlson regarding the sexual misconduct perpetrated against her as a Fox News employee.

  - In the employment context, mandatory arbitration of sexual misconduct cases "reduces an employee's opportunities to win against their employers, reduces the awards they can receive from their arbitrators, reduces public awareness of corporate abuse, and reduces the likelihood that an employee brings a claim at all. **These consequences further deter the most marginalized survivors: queer people, people of color, and poor people.**" R. Schiff, *Not so Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases* 53 U.C. Davis L. Rev. 2693 (2020) (documenting the harm to employee-victims of workplace sexual misconduct arising from the use of mandatory arbitration provisions in employment contracts)

<u>Specific Claims Against the State</u>

While the Amendments to House Bill 1378 are clearly presented to address the reality of the State's liability for the childhood sexual abuse that occurred at the Department of Juvenile Services facilities, the amendments would have the unintended consequences of affecting other non-DJS claims. The Amendments would clearly deny children abused in the Foster Care system and private facilities from having access to the courts. Additionally, treating one class of

Survivors differently from those of another class, would function to deny certain Survivors of their Constitutional Right to Due Process. For there to be one set of laws that applies to a child abused in a DJS facility and a separate set of laws that applies to a child abused in a Clergy situation is fundamentally unfair and unconstitutional.

More importantly, it is clear that these proposed Amendments are being used as a negotiating tactic in the ongoing resolution process related to the 5000 Survivors who have claims against DJS. These Amendments are not needed, as there is already a reasonable, well developed system in place. It is important for this body to know that there is inaccurate information being provided by the Attorney General's office concerning the attempt to resolve these claims. The Survivors remain at the negotiation table and as recently as March 23, 2025, provided the Attorney General with a revised demand for resolution. Additionally, it has been reported that in order to resolve these matters it would cost the State $3-$6 billion. Nothing could be further from the truth. The initial demand for resolution was significantly lower than the bottom range of these reports.

In October 2023, Survivors' counsel reached out to the Assistant AG for DJS to open dialogue for resolution. The objective was to find a resolution that would be the least invasive on the Survivors, so as not to retraumatize them. The second objective was to find a resolution that worked for the State, as Survivors were mindful that the State could never satisfy the full liability, per the Child Victim Act. Survivors took two positions right from the beginning. First, resolution would be discussed from the standpoint of only one $890,000 cap applying per Survivor, even though the law provided for per incident. Second, although there was a good argument against, it was agreed that an Attorney Fee cap of 20% would apply. These positions were based off of discussions with the Assistant AGs for DJS and being mindful of the State's fiscal sensitivity.

The State then chose an Independent Third Party, The Center for Hope, to conduct interviews of a random sampling of the Survivors. The purpose was for the Center for Hope, to evaluate the Survivors for truthfulness and completeness of their accounts of abuse. These interviews, by agreement with counsel, were done without the Survivor's Lawyer's involvement, to ensure complete transparency. Additionally, Survivors' counsel provided the State with detailed information on all of the Survivors, so the State could validate that these Survivors were in a DJS facility. These steps were taken to give the State assurance that these claims were valid.

Thereafter, the State selected a Special Master by the name of Ellen Reisman. Ms. Reisman is a former civil defense lawyer who has served in a variety of ways as a Special Master in large Mass Tort cases. Ms. Reisman, a resident of Maryland, worked with the State, the Survivors' Attorneys, and the Center for Hope to establish a protocol for the evaluation of cases. The purpose being, that when a settlement is reached, an allocation of funds would be done to fairly compensate the Survivors based upon a myriad of factors. Ms. Reisman worked extensively with the Center for Hope to establish guidelines for a settlement process that would take into consideration, validation of the claims, truthfulness of the claims, and compensation for

each Survivor based upon the abuse suffered and their resulting trauma.

In August of 2024, Survivors' counsel made a very reasonable demand on the State to resolve all of the known claims at that time. From the beginning, we took it upon ourselves to corral all law firms known to have cases. When the State was made aware of new claims, we were given the law firm information, made contact and brought them into the process. This resulted in our demand being made on behalf of all or substantially all of the known claims as of the date of the demand. The demand was far below the $890,000 cap, per Survivor with a very straight forward message that the demand was purposely reasonable given the willingness of the State to participate in the resolution process.

Throughout this process, as the State continued to make statements that it wanted to resolve these cases and not litigate them, we agreed to stand down on litigation while the resolution played out. In December of 2024, the State retained the Saul Ewing firm in Philadelphia to "assist in the resolution of the claims." Communications with the Saul Ewing firm were very detailed and specific to help them understand what had happened to date and how the demand was arrived at. The first offer we ever received from the State was in February 2024, some six months after our initial demand. The offer was for less than 7% of the demand. While highly insulting, we continued to negotiate with the State and continue to negotiate with the State to this day.

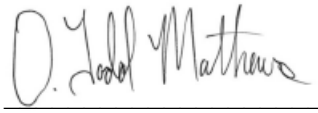
Finally, we understand and appreciate the fact that the State of Maryland is in a budget crisis. Recognizing that, we consulted one of the largest financial institutions in the world to give us an opinion as to the ability of the State to use a bond to pay for this liability. We have been advised that a bond to satisfy this liability can be done for the State of Maryland. Although the State is on a watch list already, this liability alone would not likely downgrade the AAA rating. In the event it did, it would not affect the AAA rating of the other credit watch groups. Therefore, at worst, the State would be in a split rating situation which would only increase a future lending rate by .05-.1 percent. The obvious benefit in using a bond is the ability to spread the liability out over the course of 15 years and therefore not create a more substantial cash crunch on the current budget.

Conclusion:

Representative Wilson fought for over 10 years to enact a just law that is a good and moral redress of immoral and heinous actions. The current proposed Amendments are clearly unconstitutional and designed simply to buy time for an unconstitutional law to proceed through the Appellate courts to arrive right back at square one.

There is already a system developed to address these claims in a very reasonable manner, far below what has been reported, which allows the Survivors to find closure. The proposed resolution has safeguards in place that protects the state and ensures the Survivors are compensated accordingly.

Finally, there is a financial mechanism, through use of a bond, that allows the State to follow the mantra of Governor Wes Moore, "Leave No One Behind". Governor Moore in his State of the State address this year referred to a quote by Fredrick Douglas - "It is easier to build strong children than to repair broken men." The State failed in raising the children entrusted to it in the DJS system, therefore the State must meet its obligation in attempting to repair these men and women today.



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Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly From Enacting Retroactive Civil Laws?

Dan Friedman

DOES ARTICLE 17 OF THE MARYLAND DECLARATION OF RIGHTS PREVENT THE MARYLAND GENERAL ASSEMBLY FROM ENACTING RETROACTIVE CIVIL LAWS?

DAN FRIEDMAN*

Article 17 of the Maryland Declaration of Rights provides "[t]hat retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto *Law ought to be made; nor any retrospective oath or restriction be imposed, or required." It is unclear whether this prohibition should apply only to retrospective criminal laws or if it should apply to retrospective criminal and civil laws. In this Article, I begin by looking at the Court of Appeals' fractured plurality, concurring, and dissenting opinions in* Doe v. Department of Public Safety & Correctional Services*, which, relying mostly on the common law method of constitutional interpretation, determine that Maryland's sex offender registration regime violated the prior jurisprudence concerning Article 17. Rather than being satisfied with the use of that one interpretive technique, however, I suggest that using several interpretive techniques—textualism and originalism, critical race theory, moral reasoning, structuralism, and comparative constitutional analysis—even when those interpretive techniques generate different results, provides a richer understanding of Article 17. In the end, I conclude that the Maryland Constitution should be—and already is—interpreted to prohibit retroactive laws irrespective of whether those laws are criminal or civil.*

* Judge, Court of Special Appeals of Maryland. I am grateful for the assistance of my law clerks, Elizabeth Bowery, Andrew Loewen, Mollie Soloway, and Paulina Taniewski and my student interns, Tyler B. Thren of the University of Baltimore School of Law and Alexandra "Lexi" Buchanan, Jason M. Owens, and Xing Zhang, all of the University of Maryland School of Law. They did good work under very difficult circumstances. Thanks also to my teaching partner and old friend, Professor Richard C. Boldt of the University of Maryland School of Law and to my new friends, Professor Khiara M. Bridges of UC Berkeley School of Law and Professor Evan C. Zoldan of the University of Toledo School of Law. As should be clear from the footnotes, each of their efforts made this Article better. The discussion in this Article is not intended to be (nor could it be) binding on me or my Court, nor should it be considered a "public comment that relates to a proceeding pending or impending in any court and that might reasonably be expected to affect the outcome or impair the fairness of that proceeding." MD. R. 18-102.10(a). The author has adopted the "Fair Citation Rule" and, as a result, the citations do not comply with Bluebook Rule 15.1.

INTRODUCTION

In *Doe v. Department of Public Safety & Correctional Services*,[1] the question presented was whether requiring sex offenders who had already committed their crimes, been tried and sentenced, and were serving or had completed serving their sentences to register on a sex offender registry violated Article 17 of the Maryland Declaration of Rights. The critical question wasn't whether the law was retroactive—everyone agreed that it was. Rather, the critical question was whether the law was criminal or civil and was thus either within or outside the scope of the protection of the *ex post facto* provision of Article 17 of the Maryland Declaration of Rights.[2] The

1. 430 Md. 535, 62 A.3d 123 (2013).

2. *Doe* was not completely clear in stating that it was establishing the test for determining whether a law was within the ambit of Article 17. *Doe*, 430 Md. at 551, 62 A.3d at 132 ("We are

Court of Appeals of Maryland split. Judge Clayton Greene, Jr., writing for a three-judge plurality including then-Chief Judge Robert M. Bell and Senior Judge John C. Eldridge,[3] understood the question as a choice between *stare decisis* and the Court's *in pari materia*[4] doctrine, that is whether the Court of Appeals should retain its historic use of the "disadvantage" standard[5] or use the U.S. Supreme Court's newer "intent-effects" standard.[6] Applying the Court's *stare decisis* rules, Judge Greene's plurality opinion decided to retain that "disadvantage" standard, found that the sex offender registry operated to Doe's disadvantage, and invalidated the registry as unconstitutional as

persuaded . . . to follow our long-standing interpretation of the *ex post facto* prohibition . . . ."). Some subsequent cases have mistakenly suggested that *Doe* states or modifies the test for laws within the ambit of Article 17. *See* cases cited *infra* note 11. *But see* Hill v. State, 247 Md. App. 377, 402 n.7, 236 A.3d 751, 765 n.7 (2020) (correctly distinguishing cases determining whether a statute is within the ambit of Article 17 from cases determining whether a statute violates Article 17).

3. The Maryland Constitution requires all judges to retire upon attaining the age of 70, MD. CONST. art. IV, §§ 3, 5A(f), but allows retired judges to sit by designation. MD. CONST. art. IV, § 3A. In *Doe*, Senior Judge Eldridge substituted for Judge Lynne A. Battaglia. Judge Battaglia's decision to recuse herself (following longstanding custom, we do not know the basis for her recusal) was likely outcome determinative. Judge Battaglia was a former prosecutor (she was the United States Attorney for the District of Maryland before being appointed to the bench in 2001) and sided with the government in every major *ex post facto* case during her tenure on the Court of Appeals (2001–2016), including in an important precursor to *Doe*, *Young v. State*, 370 Md. 686, 806 A.2d 233 (2002) (upholding constitutionality of sex offender registry). *See, e.g.*, Watkins v. Sec'y, Dep't of Pub. Safety & Corr. Servs., 377 Md. 34, 831 A.2d 1079 (2003); Khalifa v. State, 382 Md. 400, 855 A.2d 1175 (2004); State v. Raines, 383 Md. 1, 857 A.2d 19 (2004). Once Judge Battaglia recused herself from participating in *Doe*, then-Chief Judge Robert M. Bell selected as her replacement Senior Judge John C. Eldridge, who was decidedly less likely to favor the State, *see* Lynne A. Battaglia, *Obeisance to the Separation of Powers and Protection of Individuals' Rights and Liberties: the Honorable John C. Eldridge's Approach to Constitutional Analysis in the Court of Appeals of Maryland, 1974–2003*, 62 MD. L. REV. 387, 389–90 (2003) ("[Judge Eldridge's] opinions underscore the necessity of protecting the constitutionally guaranteed rights of the individual."), and who had already signaled his view that retroactive application of Maryland's sex offender registry was unconstitutional. *Young*, 370 Md. at 720, 806 A.2d at 253 (Bell, C.J. & Eldridge, J., dissenting) (finding that a sex offender registration statute was "broad" and "virtually unlimited" and dissenting on the grounds that "the punitive effect of the statute outweighs, and negates, any remedial purpose it has"). A welcome innovation of Chief Judge Mary Ellen Barbera's tenure (which continues today) was the decision to have the clerk's office select replacement judges on a rotation system.

4. The Court of Appeals uses the phrase *in pari materia* to describe its technique for interpreting the Maryland State Constitution as generally or usually similar to the interpretation given by the U.S. Supreme Court to the U.S. Constitution. This interpretive technique is discussed *infra* at Section I.C.

5. Judge Greene, in his *Doe* plurality opinion, described the "disadvantage" standard as a two-part test inquiring whether "[a] law is retroactively applied and the application disadvantages the offender." *Doe*, 430 Md. at 551–52, 62 A.3d at 133.

6. Judge Harrell, in his *Doe* concurrence, gave a concise definition of the "intent-effects" test: "[F]irst, the court must consider the legislative *intent* of the statute; second, even if the statute's stated purpose is non-punitive, the court must assess whether its *effect* overrides the legislative purpose to render the statute punitive." *Id.* at 570, 62 A.3d at 144 (Harrell, J., concurring) (emphasis added).

applied to Doe. Judge Robert N. McDonald, writing for himself and Judge Sally D. Adkins, concurred in the judgment but rejected the idea of an independent interpretation of Article 17. Judge McDonald would have applied the federal "intent-effects" test, and, as a result, would have come to a different conclusion, finding that the sex offender registry itself was not unconstitutional, but that the 2010 amendments were intended to and had the effect of punishing the defendant and, therefore, were unconstitutional.[7] Judge Glenn T. Harrell, Jr. concurred and wrote for himself alone and would have decided the question on the non-constitutional grounds that the State violated its plea agreement with Doe by trying to impose additional punishment.[8] As a result, Judge Harrell would have not allowed Doe to be placed on the sex offender registry.[9] Finally, soon-to-be-but-not-yet-Chief Judge Mary Ellen Barbera dissented. Judge Barbera understood the question differently. Judge Barbera understood the Court's prior cases as applying the Court's *in pari materia* doctrine by which the Court of Appeals had agreed to follow U.S. Supreme Court *ex post facto* precedents absent a compelling reason not to, and would have followed the U.S. Supreme Court's change from a "disadvantage" standard to an "intent-effects" standard. Moreover, under that intent-effects standard, she would have followed the U.S. Supreme Court's guidance[10] that sex offender registries did not violate the *ex post facto* provisions of the federal and state constitutions.[11]

7. *Id.* at 577–78, 62 A.3d at 148–49 (McDonald, J., concurring).

8. *See id.* at 569–77, 62 A.3d at 143–48 (Harrell, J., concurring).

9. Judges Harrell and Barbera also sparred over whether the State, by requiring sex offender registration, had violated a term of Doe's plea agreement. *See id.* at 576–77, 62 A.3d at 147–48 (Harrell, J., concurring); *see also id.* at 597–601, 62 A.3d at 160–63 (Barbera, J., dissenting). This non-constitutional analysis is not relevant to this Article's analysis of the constitutional claims.

10. Smith v. Doe, 538 U.S. 84 (2003) (regarding Alaska sex offender registry). For more on *Smith*, see *infra* notes 177–184 and accompanying text.

I am not certain that the difference between the verbal formulation of the "disadvantage" standard and the "intent-effects" standard is obvious to a reader of *Doe* or makes the difference that Judges Greene and Barbera ascribe to it. A better way of thinking about these issues might be to examine, as Judge McDonald suggested (and most other courts have done), how punitive the registration scheme is for the defendant. This topic is explored in more detail in Section VI.A (comparative constitutional law).

11. For a more detailed examination of the *Doe* case itself, see generally Timothy J. Gilbert, Comment, *Retroactivity and the Future of Sex Offender Registration in Maryland*, 45 U. BALT. L.F. 164 (2015). The caselaw interpreting Article 17 since *Doe* has been more concerned with making sense of *Doe* than making sense of Article 17. *See, e.g.*, Long v. Md. State Dep't of Pub. Safety & Corr. Servs., 230 Md. App. 1, 13–21, 146 A.3d 546, 553–58 (2016); *In re* Nick H., 224 Md. App. 668, 681–86, 123 A.3d 229, 236–39 (2015); Quispe del Pino v. Md. Dep't of Pub. Safety & Corr. Servs., 222 Md. App. 44, 51–56, 112 A.3d 522, 526–29 (2015). The Court of Special Appeals has applied a version of the *Marks* rule to determine that *Doe* requires application of the "intent-effects" test favored by the concurring and dissenting opinions. *In re Nick H.*, 224 Md. App. at 684–86, 123 A.3d at 238–39 (quoting Wilkerson v. State, 420 Md. 573, 594, 24 A.3d 703, 715 (2011)). For more on the *Marks* rule in Maryland courts, see Shane M.K. Doyle, *The Unsoundness of Silence: Silent Concurrences and Their Use in Maryland*, 79 MD. L. REV. ONLINE 129, 139–56 (2020).

In two previous articles, I have used several theories of constitutional interpretation developed for the federal Constitution—textualism, originalism, structuralism, moral theory, comparative constitutionalism, and "common law" constitutionalism—as tools for determining the meaning and best interpretation of a state constitutional provision.[12] This process has allowed me to explain and critique the prevailing interpretive methods, develop and promote a general approach for interpretation, and use this approach to consider different state constitutional provisions. This general approach encourages judges to use all available tools to come to the best possible interpretation. As I explained it:

> In my view, [judges] must use [their individual] judgment to develop the best possible interpretation of a constitutional provision that is constrained by a reasonable reading of the constitutional text and informed by the history of that provision's adoption, subsequent judicial and scholarly interpretation in this and comparable jurisdictions, core moral values, political philosophy, and state as well as American traditions. [Judges] ought to make use of all possible tools to come to a proper interpretation.[13]

In this Article, I begin by looking at the Court of Appeals' fractured plurality, concurring, and dissenting opinions in *Doe*, in which the Court, mostly relying on the common law method of constitutional interpretation, determined that Maryland's sex offender registration regime violated the

12. Dan Friedman, Jackson v. Dackman Co.*: The Legislative Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights*, 77 MD. L. REV. 949, 950 (2018) [hereinafter Friedman, *Article 19*]; Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 412 (2012) [hereinafter Friedman, *Special Laws*].

13. Friedman, *Article 19*, *supra* note 12, at 950 (quoting Friedman, *Special Laws*, *supra* note 12, at 467); *see also* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 5 (2002) ("[N]o single grand theory can successfully guide judges or provide determinate—or even sensible—answers to all constitutional questions. Only an amalgam of theories will do."); Friedman, *Special Laws*, *supra* note 12, at 412–17, 427–66. Of course, it isn't crucial that an interpreter uses only the interpretive techniques I have discussed or calls the techniques by the names I have called them. Rather, what matters is using all of the available tools to come to the best possible interpretation. And, as sometimes happens and, in fact, happens here with respect to Article 17, where the interpretive theories point in different directions, it is the role of the judge, exercising judgment, to determine the proper interpretation.

Professor Richard Boldt makes a related point about using multiple methods of interpretation (although he attributes the point to Professor Charles Black). Richard C. Boldt, *Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black's White Lectures*, 54 LOY. L.A. L. REV. 675 (2021). He argues that using a second interpretive technique (in that case, he is discussing structuralism as a supplement to textualism) "has the potential to broaden the information that litigants are likely to bring to the adjudicative process and to broaden the perspective of the judges charged with evaluating the resulting claims." *Id.* at 693. I think that the same thing can happen whenever an interpreter employs multiple interpretive techniques.

Court's Article 17 jurisprudence.[14] Rather than being satisfied with the use of that one interpretive technique, however, I suggest that using several interpretive techniques—textualism and originalism,[15] critical race theory,[16] moral reasoning,[17] structuralism,[18] and comparative constitutional analysis[19]—even when those interpretive techniques generate different results, provides a richer understanding of Article 17. In the end, I also conclude that the Maryland Constitution should be—and already is—interpreted to prohibit retroactive laws irrespective of whether those laws are criminal or civil.[20]

I. COMMON LAW CONSTITUTIONAL INTERPRETATION

A. The Opinions in Doe v. DPSCS *are Best Understood as Employing a "Common Law" Method of Constitutional Interpretation*

The best way to understand the principal opinions in *Doe* (Judge Greene's plurality, Judge McDonald's concurrence, and Judge Barbera's dissent) is under the rubric of "common law" constitutional interpretation. As I have described it:

> [Common law constitutional interpretation] argue[s] that . . . judges rely on precedent, rather than authoritative texts, to determine the Constitution's meaning. [Advocates for this technique do not] argue that common law constitutional interpretation is the best possible interpretive model[, but] . . . that it is "the best way to understand what we are doing; the best way to justify what we are doing; and the best guide to resolving issues that remain open."
>
> [T]here are two components of common law constitutional interpretation that, operating together, make this method work: *traditionalism* and *conventionalism*. . . . [T]raditionalism may be generally characterized as a general opposition to change. Conventionalism . . . is "the notion that it is more important that some things be settled than that they be settled right."[21]

14. *See infra* Part I.A.
15. *See infra* Part II.
16. *See infra* Part III.
17. *See infra* Part IV.
18. *See infra* Part V.
19. *See infra* Part VI.
20. *See infra* CONCLUSION.
21. Friedman, *Special Laws*, *supra* note 12, at 462–63; *see also* Friedman, *Article 19*, *supra* note 12, at 982. For more on common law constitutional interpretation (or as he calls it, doctrinal argument), see PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 39–58 (1982).

Following this rubric, Judge Greene's plurality opinion in *Doe* doesn't really make the case that he is offering the best interpretation of Article 17, or that his interpretation is truest to the text, or that his is the interpretation that is most historically accurate, or best reflects the intention of the constitutional framers, or is most consistent with the moral underpinnings of the Maryland Constitution and Declaration of Rights. Rather, he simply argues that his interpretation of Article 17 is most consistent with past Maryland practice.[22] Judge McDonald's concurrence disagrees with Judge Greene's plurality opinion on precisely that ground. That is, for Judge McDonald, the most important feature of the Court's precedents is that they followed federal interpretation, but not the precise content of what those federal precedents held.[23] And Judge Barbera's separate dissent, while it takes a stab at disagreeing with Judge Greene's description of the precedential history,[24] mostly argues that the critical aspect of our precedents is the determination that Article 17 is to be interpreted *in pari materia* (by which she seems to mean identically) with those interpreting the federal *ex post facto* provision.[25]

22. Doe v. Dep't of Pub. Safety & Corr. Servs. 430 Md. 535, 557, 62 A.3d 123, 136 (2013) (plurality opinion) ("Here, this Court is faced with a choice. We can follow *stare decisis* . . . . Or, this Court can . . . instead follow the [U.S.] Supreme Court's analysis of the parallel federal protection . . . .").

23. *Id.* at 577–78, 62 A.3d at 148 (McDonald, J., concurring).

24. *Id.* at 582, 62 A.3d at 151 (Barbera, J., dissenting) ("Neither am I persuaded . . . that the . . . cases of this Court demonstrate a lineage of *ex post facto* decisions that demands our adherence . . . under principles of *stare decisis.*").

25. *Id.* at 579, 62 A.3d at 149 (Barbera, J., dissenting) (stating that absent a "principled reason to depart" she would have Maryland *ex post facto* jurisprudence follow federal *ex post facto* jurisprudence). Judge Barbera did not identify what might, for her, constitute a "principled reason to depart" from federal jurisprudence. In a prior article, I identified some principled reasons that a state court might depart from federal constitutional jurisprudence, including:

> 1. TEXTUAL LANGUAGE DIFFERENCES, including both where a right unprotected by the Federal Constitution is protected by the state constitution, and where the language used to describe a right protected by both the federal and state constitution is so significantly different to permit independent evaluation;
> 2. a unique LEGISLATIVE HISTORY;
> 3. [preexisting] state law on the subject prior to the creation or recognition of a constitutional right;
> 4. situations where the DIFFERENT STRUCTURES of federal and state governments compel different results;
> 5. matters of particular STATE INTEREST or local concern;
> 6. unique STATE TRADITIONS; and
> 7. PUBLIC ATTITUDES.

Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMPLE L. REV. 637, 645–46 (1998) [hereinafter Friedman, *Maryland Declaration of Rights*] (footnotes omitted) (citing State v. Hunt, 450 A.2d 952, 965–69 (N.J. 1982) (Handler, J., concurring)) (suggesting that in addition to this list, "I would add virtually anything else, including the persuasiveness of dissenting or subsequently overruled opinions in the United States Supreme Court, persuasive decisions of sister state courts, or even a state court's ideological differences with

B. Explaining Calder v. Bull

Making sense out of those federal precedents requires a side trip, almost back to the founding. The case of *Calder v. Bull*[26] concerned an estate issue arising from the state courts of Connecticut. At issue specifically, was the validity of a law passed by the Connecticut state legislature ordering a second trial of the issues. The U.S. Supreme Court issued its opinion *seriatim*, meaning that each Justice wrote separately.[27] Justice Samuel Chase's opinion is the most famous and best remembered.[28] In it, Chase made three important observations that continue to influence American constitutional law. *First*, Chase proclaimed his support for the natural rights theory of constitutional interpretation, stating that "[a]n ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*; cannot be considered a *rightful exercise* of *legislative* authority."[29] *Second*, Chase expressed his view that the federal *ex post facto* provisions[30] apply only to

the [U.S.] Supreme Court"); *see also* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 146–62, 169–77 (2009) (discussing criteria approach). Recently, the Maryland Court of Appeals added another "principled reason to depart," which I cheerfully add to this collection: Where the federal constitutional doctrine is hopelessly confused and deadlocked. Leidig v. State, 475 Md. 181, 209, 237–39, 256 A.3d 870, 886, 902–04 (2021) (declining to follow federal Confrontation Clause jurisprudence regarding authors of scientific reports because the federal jurisprudence is hopelessly confused and deadlocked); *see also* Jedlicka v. State, 481 Md. 178, 201–02, 281 A.3d 820, 833 (2022) (describing *Leidig*).

26. 3 U.S. (3 Dall.) 386 (1798). For more on *Calder*, see WAYNE A. LOGAN, THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY 24–28 (forthcoming 2023) [hereinafter LOGAN, EX POST FACTO].

27. The notes of decision indicate that Chief Justice John Jay was absent. *Id.* at 386. As a result, we have the *seriatim* opinions of Justices Samuel Chase, William Paterson, James Iredell, and William Cushing, of which I consider only those of Chase and Iredell.

28. Samuel Chase, a native of Maryland, plays an outsize role in this story. In 1776, after he signed the American Declaration of Independence, he was a delegate to the Maryland constitutional convention, a member of the drafting committee, and, maybe, the actual drafter of Article 17. *See infra* note 65. By 1798, Chase was a Justice of the U.S. Supreme Court and wrote the most important of the *seriatim* opinions in *Calder v. Bull*, the most famous decision interpreting the federal *ex post facto* provision. On Chase's life, see generally JAMES HAW, FRANCIS F. BEIRNE, ROSAMOND R. BEIRNE, & R. SAMUEL JETT, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE (1980); Robert R. Bair & Robin D. Coblentz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365 (1967).

29. *Calder*, 3 U.S. at 388 (opinion of Chase, J.). Justice James Iredell famously took the opposite position, stating his view that "[i]f . . . [Congress or a state legislature] shall pass a law, within the general scope of their constitutional power, the [U.S. Supreme] Court cannot pronounce it to be void, merely because it is, in [our] judgment, contrary to the principles of natural justice." *Id.* at 399 (opinion of Iredell, J.). Justice Iredell's position in favor of positive law is generally understood to have prevailed, both in *Calder*, and in subsequent U.S. Supreme Court jurisprudence. *See, e.g.*, GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, & PAMELA S. KARLAN, CONSTITUTIONAL LAW 75 (5th ed. 2005) ("In one form or another, the dispute between Justice Chase and Justice Iredell [in *Calder*] has proved fundamental to constitutional law.").

30. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

criminal laws not civil laws.[31] And, *third*, Chase famously identified four categories of retroactive changes in the criminal law that he considered to violate the *ex post facto* provisions.[32]

I am concerned here only with Chase's second conclusion, that the federal *ex post facto* provisions apply exclusively to criminal laws, not civil. In support of this proposition, Chase relies on three categories of argument: (1) what I call comparative constitutional law, relying on comparisons to several state constitutions;[33] (2) what I call a structural argument, that if the *ex post facto* provision applied to civil laws it would be redundant to the Legal Tender Clause and the Contracts Clause;[34] and (3) what I categorize as an originalist argument, arguing that the phrase, *ex post facto*, had a well-known technical meaning limited to criminal cases.[35] The U.S. Supreme Court has largely if not perfectly followed Chase's dictum that the federal *ex*

31. *Calder*, 3 U.S. at 390 (opinion of Chase, J.).

32. *Id.* at 390–91 ("I will state *what laws* I consider *ex post facto* laws, within the *words* and the *intent* of the prohibition. *1st.* Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. *2d.* Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. *3d.* Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. *4th.* Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*. All these, and similar laws, are manifestly *unjust and oppressive*."). To this day, this quote sets the test for the *Ex Post Facto* Clause in criminal cases in both state and federal systems.

33. *Id.* at 391–92 (citing state constitutions of Massachusetts, Maryland, North Carolina, and Delaware). For the reasons that are discussed herein, neither Maryland nor North Carolina is strong evidence in his favor. *See infra* note 69 (regarding North Carolina Constitution) and notes 76–90 (regarding Maryland Constitution). Moreover, Chase cheated a bit by not mentioning the New Hampshire Constitution, which then (as now) expressly prohibits retroactive criminal *and* civil laws. N.H. CONST. art. XXIII (1784) ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws therefore should be made, either for the decision of civil causes, or the punishment of offences.").

34. *Calder*, 3 U.S. at 390 ("If the prohibition against making *ex post facto* laws was intended to secure *personal rights* from being affected, or injured, by such laws, and the prohibition is sufficiently extensive for that object, the *other* restraints, I have enumerated, were unnecessary, and therefore improper; for both of them are *retrospective*."). On its best day, alleged redundancy in the document is a very weak reed for interpreting the United States Constitution. *See generally* Akhil Reed Amar, Seegers Lecture, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998); Robert M. Black*, Redundant Amendments: What the Constitution Says When It Repeats Itself*, 94 U. DET. MERCY L. REV. 195 (2017). The Maryland Court of Appeals has even less trouble accepting that the protections of the provisions of the state constitution might be, and often are, redundant. *See, e.g.*, Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 629–30, 805 A.2d 1061, 1076 (2002) (holding that both Article 24 of the Declaration of Rights and Article III, Section 40 of the Maryland Constitution prevent legislation from being applied retrospectively if to do so would impair a vested right).

35. *Calder*, 3 U.S. at 391 ("The expressions '*ex post facto laws*,' are *technical*, they had been in use long before the Revolution, and had acquired an appropriate meaning, by *Legislators*, *Lawyers*, and *Authors*.").

post facto provisions apply exclusively to criminal law.[36] And although there are certainly some scholars and historians who agree with Chase's account,[37] the majority (and to me, stronger) position is that Chase's analysis was wrong.[38]

36. For the history of the U.S. Supreme Court's *ex post facto* jurisprudence, see, for example, LOGAN, EX POST FACTO, *supra* note 26, at 37–111; Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 444–65 (2004) (describing the history of federal *ex post facto* jurisprudence); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 6.2.3 (4th ed. 2011) (same).

37. This argument is well-summarized in Evan Zoldan, *The Civil Ex Post Facto Clause*, 2015 WIS. L. REV. 727, 735–43 (describing arguments in favor of the "narrow" or "criminal-only" interpretation advanced by, among others, Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489 (2003), and Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42 U. TOL. L. REV. 395 (2011)). Mr. Troy also supports the "criminal-only" understanding of the federal *ex post facto* provisions. DANIEL E. TROY, RETROACTIVE LEGISLATION 50–55 (1998). Professor Zoldan does a nice job of summarizing this evidence but doesn't discuss the apparent inconsistencies in Chase's own opinion, including that Chase's "criminal-only" view is in tension with his natural law views or that his structuralist argument, while avoiding redundancy with the Contracts Clause, creates redundancy with the Bill of Attainder Clause.

38. Again, this position is well-summarized by Professor Zoldan. Zoldan, *supra* note 37, at 743–50 (describing arguments in favor of the "broad" or "criminal-and-civil" interpretation advanced in *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416, app. at 683–84 (1829) (Johnson, J., concurring), and in 1 WILLIAM WINSLOW CROSSKEY, *The True Meaning of the Prohibition of the Ex-Post-Facto Clauses*, *in* POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 327–41 (1953), to which Zoldan adds his own research about evidence of the contemporaneous "professional" meaning of the clauses). For other views critical of Chase's "criminal-only" interpretation of the federal *Ex Post Facto* Clauses in *Calder v. Bull*, see John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto Law"*, 17 GEO. J. L. & PUB. POL'Y 79 (2019); William H. Widen, *Original Sin*—Calder v. Bull *Revisited* (Univ. of Mia. Legal Studs. Rsch. Paper No. 2011-33, 2011), http://ssrn.com/abstract=1930436; Steve Selinger, *The Case Against Civil Ex Post Facto Laws*, 15 CATO J. 191 (1996); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 791 n.51 (1936) ("It seems impossible, on the basis of authority, to decide this controversy, although [Justice Johnson's "criminal-and-civil" position] seems to have [been] the stronger position."); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 331 (1921–1922) (concluding that "[i]t would seem as though there have been reputable authorities, both past and present, who incline to the view that the *ex post facto* provisions of the Constitution prohibited civil as well as criminal legislation, when judged by the intention of the framers of the Constitution and by the understanding of the people of that day"); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 44–45 (1985); see also Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 959 n.122 (2002) [hereinafter Friedman, *Tracing the Lineage*] (reporting that "the academic literature supports" the broader interpretation); LOGAN, EX POST FACTO, *supra* note 26, at 28-36, 147-55. To these, I would add, at least, Justice Hugo L. Black (in *Galvan v. Press*, 347 U.S. 522 (1954), and *Lehmann v. United States ex rel. Carson*, 353 U.S. 685 (1957)); Justice William O. Douglas (in *Marcello v. Bonds*, 349 U.S. 302 (1955)); Chief Justice William H. Rehnquist (in *Collins v. Youngblood*, 497 U.S. 37 (1990)); and Justice Clarence Thomas (in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)).

C. Explaining Maryland's In Pari Materia *Doctrine*

All of which leads us back to the Maryland Court of Appeals' *in pari materia* doctrine, by which the Court of Appeals determines the persuasive weight to give the U.S. Supreme Court's interpretation of analogous provisions of the federal constitutional provisions when analyzing provisions of the Maryland Constitution. The Maryland Court of Appeals' *in pari materia* doctrine is a classic "common law" constitutional interpretive technique. The argument in favor of following federal precedent isn't based on what the best interpretation is, but rather which interpretation best fits with past interpretive practice, in this case, past federal interpretive practice. The phrase, *in pari materia*, is from Latin and translates roughly to "upon the same matter or subject."[39] In legal Latin, the phrase is used idiomatically to describe a canon of statutory interpretation by which the meaning of an ambiguous statutory term is defined by reference to another statute on the same topic.[40] Maryland courts, unique among American courts,[41] have long

39. *In pari materia*, BLACK'S LAW DICTIONARY 911 (10th ed. 2014) ("[I]n the same matter."); LATIN WORDS & PHRASES FOR LAWYERS 115 (1980) ("In pari materia: Upon an analogous matter or subject."); RUSS VERSTEEG, ESSENTIAL LATIN FOR LAWYERS 136 (1990) ("IN PARI MATERIA . . . 'In subject matter corresponding in function.' This canon of statutory construction tells us that statutes should be 'read together.' In other words, we should interpret statutes consistently with one another." (emphasis omitted)); JOHN GRAY, LAWYERS' LATIN 72 (2002) ("In pari materia 'in like material *or* substance', comparable, of equal relevance in an analogous case." (first emphasis omitted)).

40. *See, e.g.*, 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2009) §§ 51:1–51:8; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252 (2012) ("39. Related-Statutes Canon: Statutes *in pari materia* are to be interpreted together, as though they were one law."); WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 205 (2007). Maryland's use of the same phrase—*in pari materia*—as is used in statutory interpretation can be particularly confusing for the uninitiated, because in statutory interpretation it is a prerequisite of using the doctrine that you first find the provision that you seek to interpret to be ambiguous. Moreover, in statutory interpretation, courts generally look to an older law adopted by the same legislature to analyze as being *in pari materia*. In state constitutional interpretation, we are comparing provisions of the Maryland Declaration of Rights to the federal Bill of Rights, where the former is often newer and produced by an entirely different sovereign. *But see infra* note 106.

41. WILLIAMS, *supra* note 25, at 139 n.21, 197; *In pari materia*, BLACK'S LAW DICTIONARY 911 (10th ed. 2014) ("Loosely, in conjunction with <the Maryland constitutional provision is construed *in pari materia* with the Fourth Amendment>."); *see also* 2B SINGER & SINGER, *supra* note 40 §§ 51:3, at 237 (providing as an alternative definition of phrase *in pari materia*—and citing only a Maryland case—"A clause in the U.S. Constitution and one in a state Declaration of Rights may be *in pari materia*, and so decisions applying one provision are persuasive authority in cases involving the other, yet each provision is independent and a violation of one is not necessarily a violation of the other" (citing Andrews v. State, 291 Md. 622, 436 A.2d 1315 (1981)). *But see* Samuel Weaver, *Protecting Unbelief*, 110 KY. L.J. 173 (2021) (using phrase *in pari materia* to describe lockstep interpretive technique used by the Kentucky Supreme Court in *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012)).

used[42] the term also to describe the relationship between provisions of the state and federal constitution. Regrettably, it is not clear what the Court of Appeals means by this description, having used the phrase to indicate a range of relationship from as weak a relationship as *arose in response to the same impetus* all the way to the strong relationship position, which entails a prior commitment to automatically be given the *same interpretation as the U.S. Supreme Court gives to the federal analog*.

Judge John C. Eldridge has articulated the weak relationship position. Judge Eldridge described the Court's *in pari materia* doctrine as meaning only that the state constitutional provision is "in the same matter" or "[o]n the same subject" as the federal provision.[43] Under this weak relationship position, the federal interpretation provides a starting place, but is not presumptively correct or controlling of the Court's interpretation of the Maryland provision. At the other end of the spectrum, Judge Barbera adopts the strong relationship position. She is seemingly ready to commit in advance to keeping Maryland's interpretation of its constitutional provision consistent with the federal interpretation absent "a principled reason to depart."[44]

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42. The first use of the phrase *in pari materia* to describe the relationship between the Maryland and federal constitutions came in *Blum v. State*, 94 Md. 375, 382, 51 A. 26, 29 (1902), applying the U.S. Supreme Court's decision in *Boyd v. United States*, 116 U.S. 616 (1886), *abrogated by Fisher v. United States*, 425 U.S. 391 (1976). Based on the interrelationship between the Fourth and Fifth Amendments to the United States Constitution, *Boyd* had created an exclusionary rule applicable to documents produced in violation of the Fifth Amendment. Following *Boyd*, Judge James Alfred Pearce, Jr. wrote in *Blum* that:

> [T]he Fourth and Fifth Amendments to the Constitution of the United States, which are *in pari materia* with articles 26 and 22 of our Declaration of Rights, have been held in *Boyd v. U.S.*, 116 U.S. 616 [(1886)], to be intimately related to each other and to throw great light on each other.

Blum, 94 Md. at 382, 51 A. at 29. I have read this sentence often and, until recently, had always read it wrong. I had assumed that the last part of the sentence described the relationship between the federal and state provisions. But that's not what *Blum* was talking about. The correct reading of *Blum* is that "the rights protected by Article 22 and the Fifth Amendment, and the rights protected by Article 26 and the Fourth Amendment, are 'intimately related to each other and . . . throw great light on each other.'" Carrie Leonetti, *Independent and Adequate: Maryland's State Exclusionary Rule for Illegally Obtained Evidence*, 38 U. BALT. L. REV. 231, 243 (2009) (quoting *Blum*, 94 Md. at 382, 51 A. at 29). Where did Judge Pearce find the phrase? It appears that he found it in *Boyd*, where it was used in the discussion of two statutes that might have obviated the necessity of declaring one of the statutes unconstitutional. *Boyd*, 116 U.S. at 632–33 ("It has been thought by some respectable members of the profession that the two acts, that of 1868 and that of 1874, as being in *pari materia*, might be construed together so as to restrict the operation of the latter to cases other than those of forfeiture; and that such a construction of the two acts would obviate the necessity of declaring the act of 1874 unconstitutional."). Thus, *Boyd* used the phrase idiomatically to discuss statutory interpretation. Judge Pearce, in *Blum*, used the same phrase—*in pari materia*—but in its literal, not idiomatic meaning and, thus, imported the phrase into the vocabulary of Maryland state constitutional interpretation.

43. Marshall v. State, 415 Md. 248, 259–60 n.4, 999 A.2d 1029, 1035 n.4 (2010).

44. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 579, 62 A.3d 123, 149 (2013) (Barbera, J., dissenting). I am particularly troubled by judicial references to the *in pari materia*

Although these two judges have staked out relatively clear and consistent views on the correct relationship between the two constitutions, other judges simply adopt the *in pari materia* doctrine without saying more, making it impossible to determine where on this spectrum a judge's interpretive method falls.[45]

I am not a fan of Maryland's *in pari materia* doctrine or of its better known and better understood cousin, the so-called "lockstep approach" to state constitutional law.[46] Adherents to those approaches can, however, point to some demonstrable benefits, including uniformity, legitimacy, relative ease, and fewer inconsistent outcomes.[47] With respect to Article 17, however, I see no benefits from lockstepping. There is, for example, no law enforcement benefit for consistency here.[48] In such a circumstance, it seems to me that Chase's error in *Calder* and the U.S. Supreme Court's dogged

doctrine as a reason not to depart from *stare decisis*. *Id.* at 579–80, 62 A.3d at 149–50 (Barbera, J., dissenting); Leidig v. State, 475 Md. 181, 259–60, 256 A.3d 870, 917–19 (2021) (Watts, J., concurring). To me, such a statement gives the impression that the judge has committed in advance to following future U.S. Supreme Court precedent. If true, I believe this would be inappropriate. MD. R. 18-102.10 (b) (prohibiting prior judicial "commitment[s]"). *See, e.g.*, Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1521 (2005) ("[S]tatements [adopting federal constitutional doctrine] . . . should neither bind lawyers in their arguments nor the court itself in future cases. It is beyond the state judicial power to *incorporate* the Federal Constitution and its future interpretations into the state constitution.").

45. Professor Robert F. Williams has said that "[i]t is not entirely clear what the court means by [the phrase *in pari materia*], but it seems to be an 'unreflective adoptionism' approach." WILLIAMS, *supra* note 25, at 197; *see* Richard C. Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 344 n.193 (2017) [hereinafter Boldt & Friedman, *Constitutional Incorporation*] (discussing range of meaning of the phrase, *in pari materia*, as used to describe Maryland constitutional interpretation); Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 645, 682 n.111 (same).

46. Adherents of Maryland's *in pari materia* doctrine might object to my characterization of it as a "cousin" to lockstep, pointing to the occasions on which the Court of Appeals has reached a different result than the federal Constitution. *See, e.g.*, Miles v. State, 435 Md. 540, 548–49, 80 A.3d 242, 247 (2013) (Article 16's prohibition on cruel and unusual pains and penalties); *Leidig*, 475 Md. at 205, 256 A.3d at 884 (2021) (Article 21's confrontation right); *Marshall*, 415 Md. at 257, 999 A.2d at 1034 (Article 22's right against self-incrimination); and, of course, as discussed here, *Doe*. In my view, however, these exceptions don't vindicate the *in pari materia* approach, but rather demonstrate its inability to foster independent constitutional interpretation or allow bar and bench to predict when it might be employed. *See* WILLIAMS, *supra* note 25, at 197 (describing Maryland's *in pari materia* doctrine as giving a "mixed message" to the bench and bar).

47. Boldt & Friedman, *Constitutional Incorporation*, *supra* note 45, at 342–43 (discussing arguments in favor of "lockstep" interpretation of state constitutions).

48. In an early article critical of independent state constitutional analysis, then-California Attorney General George Deukmejian and a colleague argued that having to apply different constitutional standards would confuse law enforcement officers in the field. George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L. Q. 975, 994–96 (1979). With regard to Article 17, there is no similar concern as it is not applied or enforced by law enforcement officers in the field.

devotion to that error, could provide a judge with a "principled reason to depart" from the federal standard.[49]

D. Conclusion

As described above, common law constitutional interpretation proceeds from the premise that constitutional interpretation as practiced by judges rarely relies on an authoritative constitutional text, but instead begins with past constitutional decisions.[50] The twin goals of this school of interpretation are *traditionalism*, meaning minimal, if any, change, and *conventionalism*, meaning that it is more important that interpretations be settled than necessarily correct.[51] Common law constitutional interpretation can be a useful, if not terribly flexible, tool.[52] In my view, therefore, while common

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49. *Doe*, 430 Md. at 579, 62 A.3d at 149 (Barbera, J., dissenting). Professor Zoldan agrees. Zoldan, *supra* note 37, at 775 ("Because *Calder* is based on faulty factual assumptions, its reasoning is inconsistent with its conclusion. As a result, *Calder* does not present a strong case for *stare decisis*.").

I see at least one other "principled reason to depart" from the civil/criminal distinction in federal constitutional law: The federal and state constitutions fulfill different functions in prohibiting retroactive civil legislation. *See* Friedman, *Maryland Declaration of Rights*, *supra* note 25. Professor James A. Kainen argues that Chase's decision in *Calder* to abdicate federal constitutional protection from retroactive civil legislation necessitated greater not lesser state constitutional protection against retroactive civil legislation. James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 107 (1993). By Professor Kainen's thinking, it was acceptable for the federal government to withdraw protection against retroactive civil legislation precisely because the state constitutions were understood to substitute for the withdrawn protection. *Id.* Given this, it would be particularly bizarre for a state court to interpret its state constitution to match the protection that Justice Chase withdrew from the federal interpretation.

50. DAVID A. STRAUSS, THE LIVING CONSTITUTION 36 (2010) [hereinafter STRAUSS, LIVING CONSTITUTION] (noting that "the common law approach provides a far better understanding of what our constitutional law actually is"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) [hereinafter Strauss, *Common Law Constitutional Interpretation*] (arguing that the common law approach is most effective at constraining judges); FARBER & SHERRY, *supra* note 13, at 152–56 (arguing that a common law approach to constitutional interpretation offers a consistent approach that also affords the chance to reevaluate the current state of the law); *see also* Friedman, *Article 19*, *supra* note 12, at 982–83; Friedman, *Special Laws*, *supra* note 12, at 462–66.

51. *See supra* note 21; Strauss, *Common Law Constitutional Interpretation*, *supra* note 50, at 890–91 (describing traditionalism and conventionalism); *see also* STRAUSS, LIVING CONSTITUTION, *supra* note 50, at 104, 139 (discussing similar ideas but employing different terminology).

52. Theories of constitutional interpretation must be simultaneously capable of both constraint and flexibility:

> In my view, any credible theory of constitutional interpretation must avoid the problem of *Lochner* [*v. New York*, 198 U.S. 45 (1905),] while simultaneously allowing the possibility of *Brown* [*v. Board of Education*, 347 U.S. 483 (1954)]. An interpretive theory must sufficiently cabin judicial discretion to avoid allowing the personal preferences of the Justices to guide decision making, as was the case in *Lochner*, while allowing sufficient judicial discretion to permit the change of course that *Brown*'s rejection of

law constitutional interpretive technique can make a useful contribution, it ought not be, as it was in *Doe*, the only interpretive technique an interpreter uses.

In the sections that follow, I will explore other methods of constitutional interpretation to see whether and how they enrich our understanding of Article 17 and its application to people like Doe.

II. TEXTUALISM AND ORIGINALISM

Textualism and originalism are two separate but related interpretive techniques. Textualism requires a careful focus on the words, phrases, and, in this case, the grammar and punctuation of a constitutional provision.[53] Originalism, at least as I understand it, requires the interpreter to attempt to understand the original public meaning of a constitutional provision.[54] In the past, I have generally treated textualism and originalism as separate interpretive inquiries. In analyzing Article 17, however, I think it is better to discuss them together.

Article 17 of the Maryland Declaration of Rights was written in three stages: (A) the first clause, what I will call the preamble, was written in May of 1776 in Virginia;[55] (B) the first clause was modified, and the second clause written in August of 1776 by a drafting committee of the Maryland constitutional convention of 1776;[56] and (C) the third clause was written by

> *Plessy* [*v. Ferguson*, 163 U.S. 537 (1896),] symbolizes. It is my view that no preordained system of interpretation can steer a course that safely avoids the *Lochner* problem but also permits the result in *Brown*. That's the problem with foundationalism. To steer the proper course requires both the exercise of human judgment and the risk of human error. Our human system both created and corrected the *Lochner* error and reached the transformative decision in *Brown*.

Friedman, *Special Laws*, *supra* note 12, at 415. *But see infra* note 126 (discussing critical race theory's critique of *Brown*).

53. Friedman, *Special Laws*, *supra* note 12, at 427–28, 427–28 nn.83–87; Friedman, *Article 19*, *supra* note 12, at 958. For more on textualism, see BOBBITT, *supra* note 21, at 25–39 (1982).

54. Friedman, *Special Laws*, *supra* note 12, at 415–16, 433–36; Friedman, *Article 19*, *supra* note 12, at 963 n.74. This is, of course, an oversimplification. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (describing varieties of originalism); Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329 (2013) (same). As discussed in my previous work, I decline to adhere to originalism as a foundationalist interpretive technique because it does not and cannot provide answers to every interpretive question. Moreover, the importation of originalist interpretive theory to state constitutions is beset by both theoretical and practical problems. *See* Friedman, *Special Laws*, *supra* note 12, at 433–36 (discussing elected judges, ease of state constitutional amendment, and lack of information about intent as confounding application of originalism to state constitutional interpretation). Nevertheless, originalist technique and historical research can provide important information to a careful interpreter of state constitutions. For more on non-foundationalist originalism (or as he calls it, historical argument), see BOBBITT, *supra* note 21, at 9–24.

55. *See infra* Section II.A.

56. *See infra* Section II.B.

the Maryland constitutional convention of 1867.[57] I will discuss these three stages in turn.

Before I do, however, one critical observation is necessary: The phrase *ex post facto* is Latin and literally translates as, "from a thing done afterward."[58] The Latin text itself is unlimited. Nothing about those words indicates that the prohibition is on retroactive criminal legislation but that there is no prohibition on retrospective civil legislation. If such a limitation exists, it must come from a source external to the text.[59]

A. Virginia's May 27, 1776, Draft Ex Post Facto *Provision*

The first draft of the Virginia Declaration of Rights was the handiwork of George Mason and Thomas Ludwell Lee.[60] As to retrospective laws, they wrote in their May 27, 1776, draft[61] of the Virginia Declaration of Rights:

> That laws having retrospect to crimes, and punishing offen[s]es, committed before the existence of such laws, are generally oppressive, and ought to be avoided.[62]

57. *See infra* Section II.C.

58. *Ex post facto*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2007).

59. Because the critical question here concerns the meaning of the phrase *ex post facto* and because that phrase is, without much doubt, a legal term of art, *see, e.g.*, *supra* note 35 (Justice Chase describing *Ex Post Facto* Clause as a legal term of art), it is not susceptible to interpretation using the latest interpretive fad, corpus linguistics. *See, e.g.*, James C. Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 20, 29 (2016) (explaining corpus linguistics generally and stating that "general corpora are not appropriate for examining legal terms of art"); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 807 (2018); Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1111; Stefan T. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417; Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Recover Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017). Moreover, while I think its results can be interesting, I am skeptical that this new tool can live up to its advocates' desire to produce objectively correct interpretive results, *see* Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401 (2019) (explaining ways in which subjectivity necessarily affects corpus linguistics statutory interpretation analyses), or that perfect objectivity in judging is really an attainable or even worthwhile goal, *see supra* text accompanying notes 12–13.

60. Friedman, *Tracing the Lineage*, *supra* note 38, at 933–36; Dan Friedman, *Who Was First?: The Revolutionary-Era State Declarations of Rights of Virginia, Pennsylvania, Maryland, and Delaware*, 97 MD. HIST. MAG. 476, 478 (2002) [hereinafter Friedman, *Who Was First?*]; 1 THE PAPERS OF GEORGE MASON: 1725–1792, at 278 (Rutland ed. 1970).

61. For the importance of using the May 27, 1776, draft of the Virginia declaration of rights (not the June 12, 1776, version adopted by the constitutional convention) see Friedman, *Tracing the Lineage*, *supra* note 38, at 936 n.24.

62. Friedman, *Tracing the Lineage*, *supra* note 38, at 958 (quoting VA. CONST., Decl. of Rts., art. 9 (May 27, 1776, draft)). Mason and Lee had considered using the phrase *ex post facto* but rejected it in favor of this formulation, which was "thought to state with more precision the doctrine respecting ex post facto laws & to signify to posterity that it is considered not so much as a law of right, as the great law of necessity, which by the well[-]known maxim is—allowed to supersede all

It is hard to know precisely what Mason and Lee meant. I think it should be read as if it says that any law about crimes ("having retrospect to crimes") or punishments ("and punishing offen[s]es") is unconstitutional (is "generally oppressive" and "ought to be avoided") if applied to offenses committed before passage ("before the existence of such laws"). Whatever it was intended to mean precisely, however, it is crystal clear that Mason and Lee's formulation was aimed at criminal laws only. Their draft language was circulated throughout the American colonies and, on June 13, was reprinted in the *Maryland Gazette*.[63]

B. The Development of Maryland's 1776 Ex Post Facto *Provision*

Maryland's first constitutional convention convened on August 14, 1776,[64] appointed a drafting committee,[65] and produced a first draft of a

human institutions." 1 THE PAPERS OF GEORGE MASON: 1725–1792, *supra* note 60, at 278; Friedman, *Tracing the Lineage*, *supra* note 38, at 958 n.118. I do not share Mason and Lee's view that this language "state[d] with more precision the doctrine." To the modern eye, it appears very poorly worded indeed.

63. *Williamsburg, May 24*, MD. GAZETTE, June 13, 1776, at 95, https://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001282/html/m1282-1119.html; *see* Friedman, *Tracing the Lineage*, *supra* note 38, at 929, 935–36, 942, 958 (describing transmission of May 27, 1776 draft throughout the American colonies and abroad); Friedman, *Who Was First?*, *supra* note 60, at 479.

At Patrick Henry's urging, this provision was deleted from the final, adopted version of the 1776 Virginia Declaration of Rights. 1 THE PAPERS OF GEORGE MASON: 1725–1792, *supra* note 60, at 285; Friedman, *Tracing the Lineage*, *supra* note 38, at 958; PETER J. GALIE, CHRISTOPHER BOPST, & BETHANY KIRSCHNER, BILLS OF RIGHTS BEFORE THE BILL OF RIGHTS 104 (2020). Virginia's current constitution contains a prohibition on *ex post facto* laws, VA. CONST., art. I, § 9, but that provision was first added in 1830 and is not a direct descendent of Mason and Lee's draft language. JOHN J. DINAN, THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 62 (2d. ed. 2014).

64. Although this was the first *constitutional* convention, this was actually the ninth convention of the Association of Freemen of Maryland. *Constitution Making in Maryland*, *in* CONSTITUTIONAL CONVENTION COMM'N, REPORT OF THE CONSTITUTIONAL CONVENTION COMM'N 25 (1967) ("What appears in the proceedings to have been the ninth of such assemblies . . . ."); PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS IN 1774, 1775, & 1776 (1836), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html [hereinafter Proceedings of Maryland's First Constitutional Convention]; Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. BALT. L. REV. 217, 232 n.162 (2007); Friedman, *Tracing the Lineage*, *supra* note 38, at 937, 937 n.26; Friedman, *Who Was First?*, *supra* note 60, at 480; Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 639–40, 647; CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND: 1634–1776, at 559 (1980) ("[T]he ninth Convention, being the Constitutional Convention, began on August 14, 1776 . . . .").

65. The identity of the drafters of Maryland's first declaration of rights remains a mystery. We know that the convention appointed a drafting committee made up of Charles Carroll, Barrister; Charles Carroll of Carrollton; Samuel Chase; Robert Goldsborough; William Paca; George Plater; and Matthew Tilghman. Friedman, *Tracing the Lineage*, *supra* note 38, at 1003; Friedman, *Who Was First?*, *supra* note 60, at 480; THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE

declaration of rights on August 27, 1776.[66] It is now well-understood that the Maryland drafting committee worked from the Mason and Lee draft of May 27, 1776.[67] With regard to what is now Article 17, the drafting committee took Mason and Lee's language (1) made a few improvements in the language; (2) turned it into a preamble, and (3) added the second clause, which became the first[68] constitutional prohibition on *ex post facto* laws:

> That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared to be criminal, are oppressive, unjust, and incompatible with liberty; therefore, no *ex post facto* law ought to be made.[69]

I have previously written that Maryland's modifications to the May 27, 1776, Virginia Declaration of Rights were thoughtful, careful, and well-considered.[70] More specifically, I have observed that the Maryland framers executed a "well-conceived strategy to extend some rights beyond the

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PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION, at Aug. 17, 1776 (Edward C. Papenfuse & Gregory A. Stiverson, eds., 1977); Proceedings of Maryland's First Constitutional Convention, *supra* note 64, at 220. We don't know who did the actual work of writing the August 27, 1776, draft, but credit has been given alternatively to Charles Carroll, Barrister or to a team of Charles Carroll of Carrollton and Samuel Chase. Friedman, *Tracing the Lineage*, *supra* note 38, at 937–38 n.28 (and materials cited therein); Friedman, *Who Was First?*, *supra* note 60, at 492 n.33.

66. Friedman, *Tracing the Lineage*, *supra* note 38, at 937–38; Friedman, *Who Was First?*, *supra* note 60, at 480.

67. Friedman, *Tracing the Lineage*, *supra* note 38, at 935, 935 n.21, 935 n.24, 941; Friedman, *Who Was First?*, *supra* note 60, at 482–83.

68. This was the first use of the phrase *ex post facto* in a written American constitution. Friedman, *Tracing the Lineage supra* note 38, at 958 n.118 (citing BERNARD SCHWARTZ, 1 BILL OF RIGHTS: A DOCUMENTARY HISTORY 279 (1971)); LOGAN, EX POST FACTO, *supra* note 26, at 7; Joyce A. McCray Pearson, *The Federal and State Bills of Rights*, 36 HOWARD L.J. 43, 52 (1993); GALIE ET AL., *supra* note 63, at 155 n.39 (2020).

Professor Haimo Li argues that Maryland's *ex post facto* provision provides the "intellectual origin" for the federal *ex post facto* provision, at least that one found in Article I, Section Nine. Haimo Li, *The Intellectual Origin of the U.S Constitution Article 1, Section 9, Clause 3: An Important Contribution from Maryland*, J. AM. REV. (June 23, 2021), https://allthingsliberty.com/2021/06/the-intellectual-origin-of-the-us-constitution-article-1-section-9-clause-3-an-important-contribution-from-maryland/. While I don't have a specific alternative theory as to the origins, *but see supra* notes 37–38 (and sources therein), I don't find Professor Li's evidence compelling.

69. Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 656 (quoting MD. CONST. Decl. of Rts., art. 13 (Aug. 27, 1776, draft)). North Carolina's constitutional framers copied Maryland's draft verbatim and that provision remains in the North Carolina Declaration of Rights today. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 63 (2d ed.); LOGAN, EX POST FACTO, *supra* note 26, at 7. North Carolina's article I, section 16, uses the word "therefore" rather than "wherefore" suggesting that the North Carolina framers were working from the August 27, 1776, Maryland draft, not a subsequent draft. North Carolina has also added a second sentence to their provision, which provides that "[n]o law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." N.C. CONST., art. I, § 16.

70. Friedman, *Tracing the Lineage*, *supra* note 38, at 946; Friedman, *Who Was First?*, *supra* note 60, at 484–87.

criminal context and into the civil."[71] I specifically identified: (1) the right against self-incrimination;[72] (2) the right to venue;[73] (3) the right to due process;[74] and likely (4) the right to trial by jury,[75] as rights that the May 27, 1776, Virginia draft protected only in the criminal context, but that the Maryland framers revised so as to apply in both the criminal and civil context. It is possible that the *ex post facto* provision ought to be counted as a fifth instance.

As mentioned above, the Mason and Lee draft was focused exclusively on retroactive criminal laws. Compare Mason and Lee's original language to that of the Maryland preamble:

> That retrospective laws, ~~having respect to crimes, and~~ punishing acts ~~offen[s]es,~~ committed before the existence of such laws, and by them only declared to be criminal, are ~~generally~~ oppressive, unjust, and ~~ought to be avoided~~ incompatible with liberty.[76]

The definition of the problem as being "retrospective laws" is clarified. A description of those retrospective laws is moved between the first and third commas. And the reason for the prohibition is added at the end. The critical move, grammatically, was to move the discussion of criminal law to its current position and therefore transform it into a nonrestrictive appositive phrase, that is, as describing not defining the subject of the sentence.[77] If I'm right that it functions as a nonrestrictive appositive phrase, then the provision

71. Friedman, *Tracing the Lineage*, *supra* note 38, at 947, 964–67; *see also* Friedman, *Who Was First?*, *supra* note 60, at 484–85.

72. Friedman, *Tracing the Lineage*, *supra* note 38, at 965 n.149 (describing how Maryland framers, by removing the right against compelled self-incrimination from a catalog of the rights of criminal defendants, and placing it alone in an independent provision, made the right against self-incrimination applicable in civil context as well); Friedman, *Who Was First?*, *supra* note 60, at 485 (same). Subsequent amendments have once again made the right against self-incrimination apply only in the criminal context. 6 LYNN MCLAIN, MARYLAND EVIDENCE—STATE AND FEDERAL, § 514:1, at 301–02 (3d ed., 2013); 2 BYRON L. WARNKEN, MARYLAND CRIMINAL PROCEDURE 12-554–12-556 (2013); Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 659, 697 n.350.

73. Friedman, *Tracing the Lineage*, *supra* note 38, at 965–66 (describing how Maryland framers transformed the right from a right for a criminal defendant to be tried in his vicinage, into a right to trial in the same venue, which applied in the civil context as well); Friedman, *Who Was First?*, *supra* note 60, at 485 (same).

74. Friedman, *Tracing the Lineage*, *supra* note 38, at 966–67 (describing how Maryland framers, by removing the right to due process from a catalog of the rights of criminal defendants, and placing it alone in an independent provision, made the right applicable in the civil context as well); Friedman, *Who Was First?*, *supra* note 60, at 486 (same).

75. Friedman, *Tracing the Lineage*, *supra* note 38, at 964 n.148 (describing the possibility that Maryland framers modified the May 27, 1776, Virginia draft to guarantee a right to trial by jury in the civil as well as criminal context).

76. VA. CONST., Decl. of Rts., art. 9 (May 27, 1776, draft); MD. CONST. Decl. of Rts., art. 13 (Aug. 27, 1776, draft).

77. *Apposition*, FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE 60 (4th ed. 2015); *see also Appositives*, BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 62 (4th ed. 2016).

could be read without the nonrestrictive appositive phrase as: "That retrospective Laws . . . are oppressive, unjust and incompatible with liberty."[78] In such a reading, the discussion of criminal laws is transformed so that it is just a particularly egregious example of retrospective laws.[79] In the absence of more evidence,[80] I think it is intended to describe the worst kinds of retrospective laws, but not to define retrospective laws as *only* applying to criminal matters. Finally, the reworked language of the first clause lists three problems with retrospective laws: (1) that retrospective laws are oppressive; (2) that retrospective laws are unjust; and (3) that

78. Of course, this reading makes the omitted language nugatory and superfluous, which constitutional interpreters are not supposed to do. *See, e.g.*, Bernstein v. State, 422 Md. 36, 53, 29 A.3d 267, 277 (2011) ("[C]onstitutional provision[s] . . . on the same subject are 'read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or any portion, meaningless, surplusage, superfluous or nugatory.'" (quoting Whiting-Turner Contracting Co. v. Fitzpatrick, 366 Md 295, 303, 783 A.2d 667, 671 (2001))); Whitley v. Md. State Bd. of Elections, 429 Md. 132, 149, 55 A.3d 37, 47 (2012) (same). Despite this oft-repeated injunction, I think that the constitutional framers were entitled to use a nonrestrictive appositive phrase as a description if they so desired.

79. I think that's the correct reading and matches our modern understanding of the punctuation. *Apposition*, FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE 60 (4th ed. 2015) ("When apposition is restrictive, you do not separate the item in apposition with commas, but when it is non-restrictive, you do . . . ."); *see also* David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 722–24, 726 (2012) (describing punctuation of restrictive and nonrestrictive clauses in the U.S. Constitution).

Of course, it is also possible that the material between the first and third commas is a restrictive appositive phrase and is intended to define the term "retrospective laws" not merely describe it. If that was the intended meaning, the punctuation is nonstandard to the modern reader, but the Maryland framers, as was common at the time, frequently employed nonstandard punctuation. Friedman, *Special Laws*, *supra* note 12, at 433 n.118; Friedman, *Tracing the Lineage*, *supra* note 38, at 950. *But see* Yellin, *supra*, at 705 (arguing that arguably-erroneous punctuation marks in the federal Constitution "make logical sense under Framing-era grammar rules"). Under this reading, the preamble is telling us information, not about all retrospective laws, but about a subset of retrospective laws; that is, those retrospective laws that punish retrospectively and declare conduct to be criminal retrospectively. On this reading, the preamble means that retrospective laws that punish acts committed before the existence of such laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty. If that is correct, then the operative clause prohibits *ex post facto* laws *because* (cf. "wherefore") they are the *subset* of retrospective law that are "oppressive, unjust and incompatible with liberty." In other words, under this reading, not all retrospective laws are oppressive; but retrospective laws about crimes, i.e. *ex post facto* laws, are oppressive; wherefore, no *ex post facto* law ought to be made.

I prefer the first, but I acknowledge the possibility that the second could well be correct.

80. We have no remaining record to explain the convention delegates' views on the meaning of the provision. And, as to the public meaning of the phrase *ex post facto*, we can only guess that the historical record is completely mixed in much the same way it was thirteen years later when the phrase was used in the federal Constitution. *See supra* notes 37–38 (discussing debate about the original public meaning of the *ex post facto* clauses of the federal Constitution). For a discussion of the problem of lack of information about the original public meaning of state constitutional provisions and the implications of that lack of information for originalism, see Friedman, *Special Laws*, *supra* note 12, at 436–38; see also Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625 (2012) (discussing difficulties for originalism posed by public ignorance of the meaning of federal constitutional provisions).

retrospective laws are incompatible with liberty. The rewritten first clause of Article 17 was then pressed into service by the Maryland framers as a preamble. Nobody argues that the preamble provides operative language. The only question is whether the preamble limits the effect of the operative clauses that come after it.[81] As a general rule, we don't give limiting effect to preamble language, but that rule is neither clear nor consistently applied.

81. Even those who interpret constitutions don't have much experience interpreting constitutional preambles. The Maryland Constitution and Declaration of Rights has its own preamble: "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare: . . . ." But this preamble has never been interpreted and is probably not justiciable. DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 12 (Praeger ed. 2006) [hereinafter FRIEDMAN, THE MD. STATE CONSTITUTION] (updated 2d edition with Kathleen Hoke forthcoming from Oxford Univ. Press 2023). *See generally* Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQ. L. REV. 757 (2017) (regarding state constitutional preambles). Three other Articles (besides Article 17) also contain individual preambles, each of which is introduced by the word "wherefore": Articles 6, 33, and 36. *See infra* note 84; MD. CONST., DECL. OF RTS., arts. 6, 33, 36. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra*, at 42–43 (describing preamble to Article 36 as judicially unenforceable and likely unconstitutional). Article 7 of the Declaration of Rights (the "free and frequent" elections provision) might also be said to contain a preamble and an operative clause. MD. CONST., DECL. OF RTS., art. 7. *See generally* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998) (arguing that a prefatory statement and an operative clause was a common structure among Revolutionary-era state constitutions).

The preamble to the U.S. Constitution, while well-known, is generally not thought to be judicially enforceable. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (well-known recently as the U.S. Supreme Court's mandatory vaccination case, stating: "Although th[e] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the [G]overnment of the United States or on any of its [D]epartments"); *see also* United States v. Boyer, 85 F. 425, 430–31 (W.D. Mo. 1898) ("The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se. It can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature and extent and application of the powers actually conferred by the constitution, and not substantively to create them." (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833))); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 471 (2005) ("The modern Supreme Court has almost nothing to say about the Preamble . . . ."). Despite this, the federal preamble is currently enjoying an unlikely intellectual renaissance. *See, e.g.*, William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 48–59 (2021) (describing claim that preamble's authors, including principally Gouverneur Morris, intended it as a grant of power to the federal government); David S. Schwartz, *Framing the Framer: A Commentary on Treanor's Gouverneur Morris as "Dishonest Scrivener"*, 120 MICH. L. REV. ONLINE 51, 56 (2022) (stating that Treanor's article "lays the groundwork for a long-overdue debate about [the federal preamble's] status"); David S. Schwartz, *Reconsidering the Constitution's Preamble: The Words that Made Us U.S.*, 37 CONST. COMMENT. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930694; John Mikhail, McCulloch v. Maryland*, Slavery, the Preamble, and the Sweeping Clause*, 36 CONST. COMMENT. 131 (2021); Eliot T. Tracz, *Towards A Preamble-Based Theory of Constitutional Interpretation*, 56 GONZ. L. REV. 95, 115 (2020–2021) (arguing for preamble-based constitutional interpretation); John W.

Now we come to the second clause. In the August 27, 1776, draft, the second clause began with the word "therefore."[82] Beginning with the September 17, 1776, draft, and continuing today, it begins with the word "wherefore."[83] We don't know whether the change from "therefore" to "wherefore" was intentional or accidental and, if intentional, why it was done.[84] That is, to my knowledge, lost to history. The word "wherefore" generally means "why" or "for that reason."[85] I think we can take it, however, that the second clause means that because of the first clause, the second clause.[86] As noted above, the key phrase, *ex post facto*, is Latin and means

Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1022 (2018) (arguing that the preamble "deserves a primary place" in the interpretation of the federal Constitution); Milton Handler, Brian Leiter, & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117 (1990); *see also* Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714 (2010) (suggesting increased role for preambles in international constitutional interpretation). And, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court refused to let the Preamble (or as Justice Scalia called it, the "prefatory statement") to the Second Amendment—regarding the militia context—restrict the meaning the Court found of the operative clause: an individual right to handgun ownership for self-defense in the home unconnected to militia service. *Id.* at 577, 636; *see also infra* note 86.

82. Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 656.

83. *Id.*

84. We do know that, during the same period (between August 27 and September 17, 1776), the drafting committee also changed the word "therefore" to the word "wherefore" in what is currently Article 33 of the Maryland Declaration of Rights, concerning judicial independence. Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 663. The result is that today, there are four instances in which the Maryland Declaration of Rights uses the word "wherefore": Articles 6, 17, 33, and 36. Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 652, 656, 663, 666. Each of those uses is non-standard in modern English. Today, we would likely use "whereas," not "wherefore."

85. *Wherefore*, FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE 880 (4th ed. 2015). The two words are not synonyms.

86. The use of the word, "wherefore" in Article 17, distinguishes it from the Second Amendment to the U.S. Constitution, which lacks any text—just a comma—to explain the relationship between its two clauses. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. *Amici* in *Heller* suggested that linguistically the preamble to the Second Amendment should be read as an absolute clause, which "functions to modify the main clause the way an adverbial clause does. In traditional grammar, absolute constructions are considered grammatically independent from the main clause, but they add meaning to the entire sentence." Brief for Professors of Linguistics and English Dennis E. Baron, Richard W. Bailey, & Jeffrey P. Kaplan as Amici Curiae in Support of Petitioners at 6–7, *Heller*, 554 U.S. 570 (No. 07-290), 2008 WL 157194 (footnote omitted). The U.S. Supreme Court rejected that interpretation and held that the preamble adds nothing to the understanding of the operative provision. *Heller*, 554 U.S. at 577; *see supra* note 81, (discussing *Heller*); Yellin, *supra* note 79, at 688 n.5 (describing "diametrically opposed constructions" between linguists' analysis and the U.S. Supreme Court's); *see also* James C. Phillips & Josh Blackman, *Corpus Linguistics and* Heller, 56 WAKE FOREST L. REV. 609, 617–18, 655 (2021) (discussing but not resolving complexities in determining the relationship between the Second Amendment's prefatory and operative clauses).

"from a thing done afterward."[87] In itself, the Latin phrase does not suggest a limitation, and certainly not a limitation based on a civil/criminal distinction. The word "ought," as used in Article 17, is understood as a prohibition on legislative action.[88] Thus, at least from 1776 to 1867 (when the third clause was added), Article 17 essentially provided that because retrospective laws are bad, *ex post facto* laws are prohibited.[89]

That same language remained in place when the Maryland Declaration of Rights was adopted on November 3, 1776, and when the provision was readopted without changes in 1851 and 1864.[90]

C. 1867 Amendments to Maryland's Ex Post Facto *Provision*

The third stage of the drafting of Article 17 of the Maryland Declaration of Rights occurred in 1867, but to understand it, we have to go earlier, to 1864. The Maryland constitutional convention of 1864 met during the height of the Civil War and the convention delegates were mostly members of the Union Party.[91] The Maryland Constitution of 1864 included a series of "iron-clad" oaths, which required, as a precondition to voting and holding office, that people had to swear oaths that they had not supported, assisted, or joined the Confederacy.[92] A mere three years later, another constitutional convention was convened, with an explicit goal of undoing the changes made by the previous Constitution.[93] Thus, the Maryland Constitution of 1867 not only repealed the "iron-clad" oaths, but also amended Article 17 to prevent similar oaths from being imposed in the future. Here's the final language of Article 17 as adopted in 1867 and that continues in force today:

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87. *See supra* note 58.

88. Miles v. State, 435 Md. 540, 555–56, 80 A.3d 242, 251 (2013) (holding that the word "ought," as used in the Maryland Declaration of Rights, conveys a spectrum of meaning, but stating in dicta that "the word 'ought' may reasonably be interpreted [in Article 17] as conveying a prohibition upon the . . . General Assembly").

89. *See supra* note 79.

90. Friedman, *Maryland Declaration of Rights*, *supra* note 25. We don't know what the Maryland framers in 1851 and 1864 knew about the 1776 provision or to what extent they understood and believed Chase's view, expressed in *Calder*, that the federal *ex post facto* provision had a "criminal-only" technical meaning. I have found no evidence of an original public meaning of the phrase, although I would assume that, by 1851 and 1864, Chase's view from *Calder v. Bull*, that *ex post facto* had a "criminal-only" meaning, had been widely adopted.

91. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 6–7; William Starr Myers, *The Maryland Constitution of 1864*, 19 JOHNS HOPKINS U. STUD., IN HIST. & POL. SCI., Aug.–Sept. 1901.

92. ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 1634–1980, at 303 (1988); William A. Russ, Jr., *Disfranchisement in Maryland (1861–67)*, 28 MD. HIST. MAG. 309 (1933).

93. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 8; William Starr Myers, *The Self-Reconstruction of Maryland, 1864–1867*, 27 JOHNS HOPKINS U. STUD., IN HIST. & POL. SCI., Jan.–Feb. 1909; Russ, Jr., *supra* note 92, at 309.

> That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required.[94]

The language that the framers used is important: The particular evil in the iron-clad oaths was that they were retrospective "because they had the effect of disenfranchising Democrats for activities, which at the time undertaken, were legal."[95] Thus, I think we can safely assume that the framers intended to prohibit "retroactive oaths" by which they at least meant that oaths, to be sworn, required you to promise not to have done something you had already done.[96] Beyond that, we don't know what other sorts of "retroactive oaths" concerned the framers and there has been no subsequent interpretation by the Maryland appellate courts. We know even less about the "retroactive . . . restriction[s]" that the framers prohibited. That phrase was not discussed in the records of the constitutional convention, or in the surrounding press accounts, nor has it been the subject of subsequent appellate consideration.[97] We just don't know.

I think that we can reach a few conclusions, however, based on the grammar, word placement, and word choice of the third clause. *First*, the framers of this third clause separated it from the second clause with a

94. MD. CONST. Decl. of Rts., art. 17 (1867).

95. Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 693 n.284; Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (finding Missouri's iron-clad oaths to violate federal *ex post facto* provision). *But see* JOHN J. CONNOLLY, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION: REPORTS OF THE 1867 MARYLAND CONSTITUTIONAL CONVENTION BY THE BALTIMORE *AMERICAN AND COMMERCIAL ADVERTISER*, 144 n.142 (2018) [hereinafter CONNOLLY, REPUBLICAN PRESS] (pointing out that the "Republican press of the day, however, likely would not have considered activities such as joining the Confederate States Army legal at the time they were undertaken"). In any event, however, it was clear that after adoption of the Maryland Constitution of 1867, it would have been unconstitutional to require anyone to take an "iron-clad" oath. *Id.* (citing BALT. SUN, Oct. 15, 1867).

96. Just the year before, in 1866, the U.S. Supreme Court had found that enforcement of Missouri's iron-clad oaths violated the federal *ex post facto* provision. *Cummings*, 71 U.S. 277 (1866) (finding Missouri's iron-clad oaths to violate federal *ex post facto* provision). I don't know whether the Maryland framers in 1867 were unaware of the recent decision in *Cummings*, felt it insecure, or just wished to emphasize the contempt in which they held these iron-clad oaths and did so by adopting a belt-and-suspenders protection in Article 17.

97. Although Doe also argued that the requirement of being on the sex offender registry was a "retrospective . . . restriction" under the third clause of Article 17, none of the judicial opinions reached the issue. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 543 n.7, 62 A.3d 123, 127 n.7 (2013) (quoting MD. CONST. Decl. of Rts., art. 17). Implicit in Doe's argument was the understanding that the third clause of Article 17 includes a separate prohibition on retrospective restrictions. I think that, grammatically, this makes sense (and avoids the redundancy problem if we were to believe that retrospective oaths are the same thing as retrospective restrictions), but I am not sure precisely what "retrospective . . . restriction[s]" the framers were worried about. MD. CONST. Decl. of Rts., art. 17.

semicolon, presumably to give it equal weight with the second clause.[98] *Second*, the framers also began the third clause with the word "nor," which is defined "as a function word to introduce the second or last member or the second and each following member of a series of items each of which is negated."[99] Retroactive oaths and restrictions are prohibited in the same language and with the same force as *ex post facto* laws. *Third*, the second clause is clearly directed at the General Assembly and prohibits it from making *ex post facto* Laws. By contrast, the third clause is directed more broadly, although its passive voice construction prevents us from determining exactly which officials are covered. It certainly includes the elections officials who had until recently enforced the iron-clad oaths;[100] after adoption of the third clause those elections officials—and likely everyone else in the executive department—would be prohibited from "requir[ing]" retrospective oaths. The more challenging question, turns on the other verb, "impos[ing]." The iron-clad oaths were imposed, as described above, by the Constitution of 1864.[101] If the third clause, by its literal terms, seeks to prohibit future constitutional framers from imposing retrospective oaths or restrictions, I'm not sure that it would be effective, because, as a formal matter, a state constitution can't restrict future state constitutional framers.[102] *Fourth* and finally, it seems clear to me that neither "retrospective oaths" nor "retrospective . . . requirements" have anything to do with criminal law. The iron-clad oaths, with which the third clause was most immediately concerned, prevented those who couldn't swear them from voting or holding office.[103] This necessarily means that the 1867 framers didn't think that the mention of criminal laws in the preamble prevented them from prohibiting "retrospective oaths" and "retrospective . . . requirements" in non-criminal contexts in the third clause. That is, the 1867 framers treated the phrase, "punishing acts committed before the existence of such laws, and by them only declared to be criminal" as it appears in the first clause/preamble, as a nonrestrictive

98. Another drafter might have written the phrase: "Wherefore, no *ex post facto* Law, retrospective oath, or retrospective restriction ought to be made, imposed, or required," but our framers didn't.

99. *Nor*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 845 (11th ed. 2007).

100. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 7 (discussing imposition of iron-clad oaths); Myers, *supra* note 93.

101. MD. CONST. art. I, §§ 4, 7 (1864).

102. The future framers could both repeal Article 17, and adopt new retrospective oaths and restrictions and, if the voters approved, that would be constitutional (so long as they didn't violate the federal Constitution). *See generally* John Dinan, *The Unconstitutional Constitutional Amendment Doctrine in the American States: State Court Review of State Constitutional Amendments*, 72 RUTGERS U. L. REV. 983, 1002–07 (2020) (discussing constitutional provisions purporting to preclude future constitutional amendment).

103. MD. CONST. art. I, §§ 4, 7 (1864).

appositive phrase, as an example of retrospective laws, not a limitation.[104] Moreover, I believe that that view of the 1867 framers ought to be binding on us. That is, because even if the framers in 1776 believed that they were adopting a restrictive clause,[105] their intentions were replaced by those of the 1867 framers, who clearly thought that it was a nonrestrictive clause when they repealed and replaced the entire provision.[106]

In the end, it seems clear from the text and history that the prohibition on "retrospective Laws" in Article 17 is not limited in its application to "criminal-only" but envisions a "civil-and-criminal" application. Moreover, the additional prohibitions, on "retrospective oath[s]" and "retrospective . . . restriction[s]" must necessarily apply in a "civil-and-criminal" context.[107]

III. CRITICAL RACE THEORY

Although my prior work in this vein focused on six important theories of constitutional interpretation, I do not intend to suggest that these are the only interpretive theories or the only ones that might provide useful insight into the understanding of state constitutions. One theory of interpretation, about which I have not previously written, but which provides important

104. They did this despite the prevailing understanding, derived from Chase's opinion in *Calder v. Bull*, that the phrase *ex post facto* had a technical meaning limited to the criminal context only. *See supra* Section I.B. The Maryland framers in 1867 might not have known about *Calder v. Bull* or its "criminal-only" limitation, but if they did, they overcame that to apply the phrase in a "civil-and-criminal" context.

105. *See supra* note 79.

106. It is critical to appreciate that after a constitutional convention, the people of Maryland are asked to approve the whole constitution, not just the provisions that are changed. Friedman, *Article 19*, *supra* note 12, at 966 n.92 (discussing failure to explore effect of subsequent readoption of Maryland constitutional provisions); *see also* Dan Friedman, Magnificent Failure *Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 534 (1999) [hereinafter Friedman, Magnificent Failure *Revisited*] (discussing significance and consequences of an "all-or-nothing" vote on proposed new constitution). The significance for an originalist interpretation ought to be profound. Theoretically, the relevant original public meaning of a provision of the Maryland Constitution is always the 1867 re-adoption (or in the case of subsequent amendments, later), never before. But that isn't the way we usually conduct the inquiry. I think this is roughly analogous to Professor Jamal Greene's observation that mainstream originalism regarding the federal Constitution generally fails to account for the intervening adoption of the Fourteenth Amendment. *See generally* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012).

107. MD. CONST. Decl. of Rts., art. 17.

insight into Article 17, is critical race theory.[108] Arising in response to ahistorical and inaccurate claims that "[o]ur Constitution is color-blind,"[109]

> [Critical Race Theory's] basic premises are that race and racism are endemic to the American normative order and a pillar of American institutional and community life. Further, it suggests that law does not merely reflect and mediate pre-existing racialized social conflicts and relations. Instead law, as part of the social fabric and the larger hegemonic order, constitutes, constructs and produces races and race relations in a way that supports white supremacy. Critical Race Theory . . . "coheres in the drive to excavate the relationship between the law, legal doctrine, ideology, and [white] racial power and the motivation 'not merely to understand the vexed bond between law and racial power but to change it.'"[110]

We are reminded by the critical race theorists that accommodating slavery, promoting racism, and maintaining white supremacy, were important and intentional features of the federal constitutional design and have, in large measure, defined American constitutional history.[111] Thus,

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108. Critical race theory is not entirely like the other interpretive theories that I have discussed. It is broader, in that it is not limited to constitutional interpretation, and it is narrower, because there are likely constitutional provisions about which it can provide little interpretive help. The classic taxonomy, BOBBITT, *supra* note 21, doesn't mention critical race theory at all (although the blame for that may be put on timing). The book from which Richard Boldt and I teach our seminar in constitutional interpretation, MICHAEL J. GERHARDT, STEPHEN M. GRIFFIN, & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY (3d ed. 2007), doesn't place critical race theory in Part II, which traces interpretive theories, but in Part III, which tracks, "Perspectives." *Id*. at 21–23, 575–629. For me, the taxonomy questions are secondary. What matters is that critical race theory can help develop better understanding of a constitutional provision. *See supra* text accompanying notes 12–13. I have placed the critical race theory section of this Article here because the story it tells is so closely connected to the historical discussion that immediately precedes it.

109. *E.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 n.14 (2007) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *see also* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991) (arguing that federal Constitution is not, and was not intended to be, "color-blind").

110. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. L. REV. 329, 333–34 (2006) (footnotes omitted) (quoting Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1218 (2002)); *see also* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 10–15 (2019) (identifying key agreements among critical race theorists); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 3–4 (3d ed. 2017) (defining critical race theory); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3–7 (1993). *See generally* GERHARDT ET AL., *supra* note 108, at 575–629. In discussing critical race theory, I am, of course, discussing critical race theory as that intellectual movement's adherents describe it, not as its opponents have chosen to misunderstand it. *See infra* note 128.

111. *See generally, e.g.*, Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Derrick Bell, *Reconstruction's Racial Realities*, 23 RUTGERS L.J. 261 (1992);

critical race theory reminds us that slavery, racism, and white supremacy are often relevant and explanatory as we seek to understand the federal Constitution.

And, if that is true for the federal Constitution (and it is), it is doubly true for the Maryland Constitution.[112] Slavery, racism, and white supremacy were important, if not central features of every Maryland constitutional convention and every version of the Maryland Constitution produced. The Maryland Constitution of 1776 was relatively silent on the subjects of slavery and race relations, but incorporated existing provincial law, which allowed for and facilitated slavery.[113] The Declaration of Rights that the 1776 constitutional convention produced guaranteed due process and the right to a remedy, but only for free (white) men.[114] And, it specifically protected the interests of Eastern Shore slaveowners by requiring a special two-thirds vote in the legislature for any amendment to the Constitution regarding slavery.[115] An 1837 amendment to the Constitution went even farther, by specifically endorsing slavery and requiring a unanimous vote to abolish it.[116] The

Gotanda, *supra* note 109; Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 67–97.

112. For more on this, see John J. Connolly's outstanding new monograph, John J. Connolly, *Racial Laws in Maryland (1776–1864) (and What They Mean for Me)*, BAR ASS'N OF BALT. CITY, https://www.baltimorebar.org/UserFiles/files/Racial%20Laws%20in%20Maryland%20and%20What%20They%20Mean%20for%20Me.pdf (last visited July 27, 2022) [hereinafter Connolly, *Racial Laws*]; *see also* CONNOLLY, REPUBLICAN PRESS, *supra* note 95, at xiv–xxi.

113. Connolly, *Racial Laws supra* note 112, at 5; Stephan Stohler, *Slavery and Just Compensation in American Constitutionalism*, 44 L. & SOC. INQUIRY 102, 120 (2019) (discussing ways in which Maryland's 1776 Constitution favored and perpetuated slavery).

114. Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 658, 660; *see also* Friedman, *Tracing the Lineage*, *supra* note 38, at 1012 (discussing Maryland framers' apparent decision not to copy Virginia's declaration, "[that] all men are born equally free" because of the threat that language posed to slavery); *id.* at 1008 (discussing draft provision prohibiting importation of slaves as intended to increase monetary value of enslaved persons to slaveowners); Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 672, 707 n.546 (same).

115. MD. CONST. art. LIX (1776) ("That this Form of Government, and the Declaration of Rights, and no part thereof, shall be altered, changed, or abolished, unless a bill so to alter, change or abolish the same shall pass the General Assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly, after a new election of Delegates, in the first session after such new election; provided that nothing in this form of government, *which relates to the* [*E*]*astern* [*S*]*hore particularly*, shall at any time hereafter be altered, unless for the alteration and confirmation thereof at least two-thirds of all the members of each branch of the General Assembly shall concur." (emphasis added)). The provision was framed in the type of "polite euphemism" common at the time but that was well-understood to protect ownership of enslaved persons.

116. 1836 Md. Laws, ch. 197, § 26 ("That the relation of master and slave, in this State, shall not be abolished unless a bill so to abolish the same, shall be passed by a unanimous vote of the members of each branch of the General Assembly, and shall be published at least three months before a new election of delegates, and shall be confirmed by a unanimous vote of the members of each branch of the General Assembly, at the next regular constitutional session after such new

Maryland constitutional convention of 1850–1851 almost didn't occur because of slaveowners' fears of the abolition of slavery. Only by limiting the scope of the convention bill to prevent changes to the protections for the institution of slavery, was a constitutional convention held at all.[117] Moreover, the 1851 Constitution was explicit in protecting slavery: "The [L]egislature shall not pass any law abolishing the relation of master or slave, as it now exists in this State."[118] The 1864 constitutional convention was held during the Civil War and the convention delegates were overwhelmingly representatives of the Union Party.[119] The Maryland Constitution of 1864 abolished slavery,[120] emancipated the enslaved people, and prohibited the State (although not the federal government) from compensating the slaveowners for their lost human property.[121] The 1867 Constitution could not (as I have no doubt that many of the convention delegates would have preferred) reestablish slavery because of the intervening adoption of the Thirteenth Amendment to the U.S. Constitution, but demanded compensation from the federal government for the lost "property."[122] The convention delegates, in vulgar, racist language also debated restricting the rights of the newly freed, formerly enslaved people to vote, serve as witnesses, and receive public education.[123]

election, nor then, without full compensation to the master for the property of which he shall be thereby deprived."). For context, see Stohler, *supra* note 113.

117. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 4–5.

118. MD. CONST. art. III, § 43 (1851).

119. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 7; Myers, *supra* note 91, at 35–39.

120. MD. CONST. Decl. of Rts., art. 24 (1864) ("That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted: and all persons held to service or labor as slaves are hereby declared free."); MD. CONST. art. III, § 36 (1864) ("The General Assembly shall pass no law, nor make any appropriation to compensate the masters or claimants of slaves emancipated from servitude by the adoption of this Constitution."); *id.* art. III, § 45 (regarding receipt of grants from the United States); *see also* Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 660.

121. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 128 (discussing MD. CONST. art. III, § 46).

122. MD. CONST. Decl. of Rts., art. 24 (1867) ("That slavery shall not be re-established in this State, but having been abolished, under the policy and authority of the United States, compensation, in consideration therefor, is due from the United States."); *see also* Connolly, *Racial Laws*, *supra* note 112, at 6; CONNOLLY, REPUBLICAN PRESS, *supra* note 95, at xv (describing this provision as "both shameful and mendacious"); Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 660, 698 n.373; FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 128 (discussing MD. CONST. art. III, § 46 (1867)).

123. PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867 (1923), at 228, 230–39 (regarding voting); *id.* at 156–64, 167–70, 320–22, 324, 340–47, 433 (regarding serving as witnesses); *id.* at 198–203, 243–48, 251–57, 439 (regarding public education); CONNOLLY, REPUBLICAN PRESS, *supra* note 95, at xiv–xxiv.

This nearly unbroken history[124] of Maryland constitutional concern for preserving and protecting slavery, racism, and white supremacy, suggests that the constitutional framers (particularly in 1867 but maybe also in 1776, when they were drafting Article 17) might have intended it to protect against more than just retroactive criminal penalties, but also to protect pre-existing legal relationships, like slavery, from what they would have considered retroactive legislative modification, that is, emancipation.[125] That is, the constitutional framers might well have intended Article 17 as a protection against legislative emancipation.

I am not sure, however, what use critical race theory would make of that insight.[126] Would a critical race theorist seek to apply and effectuate a slaveowner's desire to maintain his pre-existing legal relationship with an enslaved person? I don't think so. Now that slavery is prohibited, would a critical race theorist seek to apply and effectuate that slaveowner's desires with respect to other pre-existing legal relationships? Again, I don't think so. Why should a critical race theorist seek to vindicate the slaveowner's desires? But even if critical race theory doesn't provide a complete answer to how we

124. As described above, the Constitution of 1864 provided only the briefest respite from the overwhelming racism of Maryland constitutions from the founding. Remarkably, the last overt vestiges—the last explicitly racist textual references—weren't removed from the Maryland Constitution until 1976. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 81, at 257, 358 n.12 (discussing MD. CONST. art. XIII, § 1) (regarding the formation of new counties).

125. Professor Stohler makes a similar claim, arguing that the politics of emancipation informed the debate about the adoption of "just compensation" provisions in various state constitutions. Stohler, *supra* note 113.

126. Critical race theory does not typically generate proposed constitutional interpretations but reminds us to be skeptical of even landmark civil rights victories if the remedies in those cases fail to address systemic racism. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 15–31 (1992); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); BRIDGES, *supra* note 110, at 438–49 (discussing critiques of *Brown v. Board of Education* (*Brown I*), 347 U.S. 483 (1954)); Tifanei Ressl-Moyer, Pilar Gonzalez Morales, & Jaqueline Aranda Osorno, *Movement Lawyering During a Crisis: How the Legal System Exploits the Labor of Activists and Undermines Movements*, 24 CUNY L. REV. 91, 95–98 (2021) ("In the end, *Brown*, though lauded as remarkable for its recognition of the need for equality in principle and practice, did not actually achieve equality, desegregation, or a significant reduction in harm for Black communities.").

should interpret Article 17,[127] it is a valuable tool and enriches our understanding of this provision of the Maryland Declaration of Rights.[128]

IV. MORAL REASONING

Ronald Dworkin argues that we should use moral reasoning, constrained by history and integrity, to interpret constitutions.[129] He advocates a three-step process:

> 1. The interpreter must decide whether the provision either (1) states an abstract moral principle or (2) is more specific and does not involve a moral principle. If the provision is specific, it is interpreted according to its terms. On the other hand, if the provision states an abstract moral principle, the interpreter then moves to step 2.[130]
>
> 2. The interpreter must determine what moral principle the framers intended to enact by adopting the provision. Dworkin conducts this inquiry "by constructing different elaborations of the [abstract phrases the framers used,] each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know."[131]

127. I have generally adopted the distinction between foundationalist interpretive theories, by which their adherents seek to provide answers to all interpretive questions with a single technique, and non-foundationalist interpretive theories, by which adherents can interpret individual constitutional provisions. *See supra* note 52 (discussing foundationalism); FARBER & SHERRY, *supra* note 13, at 1 (noting that foundationalism "seeks to ground all of constitutional law on a single foundation"). Here, by noting that critical race theory doesn't provide a complete answer to every interpretive question, I am merely acknowledging that it is a non-foundationalist form of constitutional interpretation.

128. Recently, critical race theory has become a target for white supremacist state legislatures, who seem unaware of what critical race theory is (it is not diversity and inclusion training, anti-racism education, or intended to make white children feel badly about themselves), to whom it is taught (it is not taught in primary or secondary schools), or that, by banning academic discussion of critical race theory, these state legislatures are acting to uphold systemic racism precisely as critical race theory predicts. *See* Khiara M. Bridges, *Language on the Move: "Cancel Culture," "Critical Race Theory," and the Digital Public Sphere*, 131 YALE L.J.F. 767, 784–90 (2022); Khiara M. Bridges, Commentary, *Evaluating Pressures on Academic Freedom*, 59 HOUS. L. REV. 803, 812–17 (2022).

129. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–19 (1996); Friedman, *Special Laws*, *supra* note 12, at 444–48 (discussing constitutional interpretation by moral reasoning).

130. DWORKIN, *supra* note 129, at 8.

131. *Id.* at 9.

> 3. "The moral reading [then] asks [constitutional interpreters] to find the best conception of constitutional moral principles . . . that fits the broad story of America's historical record."[132]

Thus, the first question we must ask is whether nonretroactivity of legislation is an abstract moral principle. Remarkably, we know precisely what Dworkin thought of that claim. We know because Dworkin's contemporary, jurisprudence scholar, Lon Fuller, wrote a book in which he identified eight principles of lawmaking that, according to Fuller, generate an "internal morality of law."[133] Those eight principles are that law be (1) general, (2) publicly promulgated, (3) clear, (4) non-contradictory, (5) possible to comply with, (6) relatively constant through time, (7) *nonretroactiv*[*e*], and (8) that there be congruence between official action and declared rule.[134] According to Fuller, irrespective of the substantive content of the laws made, a lawmaking process that comports with these eight principles "must necessarily contain some moral dimension."[135] Thus, we know that Fuller believed that nonretroactivity is, in some sense, an abstract moral principle. Finally, we also know that Fuller distinguished between retroactive criminal laws, which he found always to be "objectionable," and retroactive civil laws, which he argued, could be acceptable in limited situations.[136] We know also, however, that Dworkin disagreed with Fuller. In fact, Dworkin wrote a whole law review article explaining why, in his view, Fuller's eight principles are useful standards for lawmaking, but do not create morality.[137] Thus Dworkin—perhaps the chief exponent of the moral theory of constitutional interpretation—would be unlikely to find that nonretroactivity is an abstract moral principle. Presumably, then, Dworkin would find Article 17 to be specific and simply apply it according to its terms.

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132. *Id.* at 11. For more on moral theory (or as he calls it, ethical interpretation (in intentional contradistinction to moral interpretation)), see BOBBITT, *supra* note 21, at 93–119, 123–77.

133. LON FULLER, MORALITY OF LAW 42–43 (1964); *see also id.* at 91.

134. *Id.* at 39 (describing "eight distinct routes to disaster"; that is, if a system of laws lacks these characteristics it will "not properly [be] called a legal system at all"); *id.* at 41 (describing "eight kinds of legal excellence toward which a system of rules may strive"); *id.* at 46–91 (explaining each of the eight); *see also* Kristen Rundle, *Fuller's Internal Morality of Law*, PHIL. COMPASS 499, 501 (2016); SEAN COYLE, MODERN JURISPRUDENCE 212–27 (2d. ed. 2017); GILLIAN MACNEIL, LEGALITY MATTERS: CRIMES AGAINST HUMANITY AND THE PROBLEMS AND PROMISE OF THE PROHIBITION ON OTHER INHUMANE ACTS 16 (2021); Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW & PHIL. 239, 240–41 (2005).

135. *See* Rundle, *supra* note 134, at 501.

136. MACNEIL, *supra* note 134, at 19–20 (discussing FULLER, *supra* note 133, at 57–59, 93).

137. Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668 (1965) (rejecting Fuller's claim that his eight principles of lawmaking were aspects of morality).

Despite Dworkin's view, however, I think a serious claim can be made that retroactive laws are immoral.[138] Even if we assume that retroactive laws are immoral, however, an insurmountable difficulty remains at Dworkin's step 2, in selecting the moral principle that the framers intended from between the two obvious choices: (1) Don't pass retroactive laws; or (2) don't pass retroactive criminal laws. In my judgment, all else equal, a deprivation of liberty is a greater deprivation than a deprivation of property.[139] As a result, in my view, retroactive laws that deprive people of their liberty are necessarily worse—and necessarily less moral—than retroactive laws that deprive people of their property. But even if that proposition is true and could garner universal agreement, it does not help us determine the proper interpretation of Article 17 under moral reasoning interpretive theory. The constitutional framers could have wanted to prohibit only the greater moral failure, retroactive deprivation of liberty. Or the constitutional framers could have wanted to prohibit both the greater and lesser moral failures, both the retroactive deprivation of liberty and the retroactive deprivation of property. The historical record is unclear as to which of these elaborations would have won the respect of the Maryland framers in 1776 (or the federal framers in 1787–89), but it is clear that by 1798, Chase unilaterally selected the second elaboration in *Calder v. Bull*. Thus, it doesn't seem that Dworkin's interpretive technique adds much to our understanding of Article 17.[140]

V. STRUCTURALISM

Structuralism suggests that, in addition to studying the text of a constitutional provision, we should also reason from the structure and relation created by the text.[141]

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138. *See, e.g.*, Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 239 (1999) ("Retroactive laws are immoral because they do not give citizens advance notice of their legal obligations."); DANIEL E. TROY, RETROACTIVE LEGISLATION 1 (1998) ("A retroactive law is truly a monstrosity." (quoting FULLER, *supra* note 133, at 53)); *id.* at 17 ("Where no law is, there is no transgression." (quoting *Romans* 4:15)); *id*. at 26 (invoking Caligula and Blackstone); Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promise of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 63–65 (2013) (citing children and child psychologists, dog trainers, philosophers, and law professors).

139. I say this despite Troy's efforts to explain the immorality of retroactive deprivations of property. *See* TROY, *supra* note 138, at 17–24.

140. Just because an interpretive theory doesn't help in interpreting a specific provision doesn't mean we shouldn't use it. In my view, we need to rehearse the use of all methods of interpretation each time or leave ourselves vulnerable to charges of an outcome-determinative selection of techniques.

141. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969); *see also* Friedman, *Article 19*, *supra* note 12, at 972–75; Friedman, *Special Laws*, *supra* note 12, at 458–59 (applying structuralism to state constitutional interpretation); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 868 (2021) (arguing that "plentiful text [of state constitutions] facilitates the 'close and perpetual

A. Penumbral Reasoning

Structural reasoning, as a theory of constitutional interpretation, requires an interpreter to consider not just the text of the constitution, but to reason from the structure and relation created by the text.[142] A principal technique of structuralism is so-called penumbral reasoning.[143]

It seems to me that a penumbral reasoning analysis of our constitutional prohibitions on retroactive legislation might proceed in three steps. *First*, the U.S. Constitution has four separate but related prohibitions on aspects of retroactive legislation.[144] *Second*, one could read those four prohibitions as exemplars of a greater, all-encompassing, preexisting prohibition against

interworking between the textual and the relational and structural modes of reasoning' that Charles Black advocated but that is often difficult for the federal document" (citation omitted)); Rex Armstrong, *Justice Linde's Structural Approach to Constitutional Construction*, 10 OR. APP. ALMANAC 3 (2020). For more on structural interpretation, see BOBBITT, *supra* note 21, at 74–92.

142. BLACK, JR., *supra* note 141, at 7, 22 (describing a "method of inference from the structures and relationships created by the constitution in all its parts or in some principal part"); Friedman, *Special Laws*, *supra* note 12, at 458–59.

143. Because of Justice William O. Douglas' language ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees[,] that help give them life and substance") and the result in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing a constitutional right to privacy), this is a controversial method of constitutional interpretation. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 95–100 (1990); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7 (1999) (critiquing Bork's critique of *Griswold*); *see also* Boldt, *supra* note 13, at 687–89 (explaining different visions of *Griswold* in Bork and Luban). Despite this, however, it is a common interpretive technique that has been used at least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819) (holding that despite the lack of an "express provision" prohibiting Maryland from taxing the Bank of the United States, it cannot do so because of a "principle which so entirely pervades the [C]onstitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds"); see also Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29 (1992) (comparing reasoning in *McCulloch* and *Griswold*); and is used by judges from across an ideological spectrum. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921, 935 (1997) (relying on structural reasoning to hold that the Constitution prevents Congress from enlisting state law enforcement to conduct background checks on handgun purchasers); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 827 (1995) (relying on structural reasoning to reject state imposition of congressional term limits); *see also* Brannon P. Denning & Glenn H. Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1098–1100 (1997) (describing the U.S. Supreme Court's use of structural or "penumbral" reasoning in various cases); Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1334–37 (1992) (same).

144. The Takings Clause also acts as a limitation on a state's power to undo pre-existing legal relationships through retroactive legislation. TROY, *supra* note 37, at 66–72 (reviewing history); Usman, *supra* note 138, at 74–76. Although it has become such a limitation, it clearly wasn't at the founding in 1789. Even after the federal Bill of Rights was adopted in 1791, its provisions didn't apply against the states, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (declining to apply the Takings Clause against the City of Baltimore), and didn't become applicable against the states until the adoption of the Fourteenth Amendment in 1868, and incorporation by the U.S. Supreme Court in *Chicago, Burlington, & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). Thus, we can't consider the Takings Clause as part of the federal founders' design to prevent retroactive state legislation.

retroactive legislation. And *third*, one could apply the same analysis to the Maryland Declaration of Rights. I explain.

Depending how you count them, Article I, Section 10, clause 1 of the U.S. Constitution prohibits States from doing nine things:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.[145]

Four of these nine prohibitions are concerned with preventing state legislatures from undermining pre-existing legal relationships. Those are:

> 1. *"No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts."* That is, if you loaned somebody money backed by gold or silver, state legislatures cannot pass a law requiring you to accept repayment in something other than gold or silver. In this Article, I will refer to this clause as the Legal Tender Clause.
>
> 2. *"No State shall . . . pass any Bill of Attainder."* A bill of attainder is a legislative act criminalizing individual behavior. The prohibition on bills of attainder prohibits state legislatures from functioning as a judicial actor, punishing individual acts. Thus, the prohibition on bills of attainder's principal function is to enforce the separation of powers. It also has an extra purpose of restraining state legislatures from passing retroactive laws penalizing acts that weren't illegal when committed.[146]

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145. Another way to count the prohibitions in Article I, § 10, cl. 1 is by using the semicolons. If counted in this way, there are six prohibitions, no State shall (1) "enter into any Treaty, Alliance, or Confederation;" (2) "grant Letters of Marque and Reprisal;" (3) "coin Money;" (4) "emit Bills of Credit;" (5) "make any Thing but gold and silver Coin a Tender in Payment of Debts;" and (6) "pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." This counting method is suggested by Yellin, *supra* note 79, at 716, 732 (describing function of semicolons in the U.S. Constitution, including "separating the items in a list where those items contain internal commas").

146. Chase discusses this additional purpose of the bills of attainder provisions in *Calder*:

> The prohibition against their making *any ex post facto* laws was introduced for *greater* caution, and very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass *such laws*, under the denomination of *bills of attainder*, or *bills of pains and penalties*; the *first* inflicting *capital*, and the other *less*, punishment. *These acts were legislative judgments*; *and an exercise of judicial power*. *Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed, at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence.* The ground

3. *"No State shall . . . pass any . . .* ex post facto *Law."* The prohibition on *ex post facto* laws prohibits state legislatures from passing laws giving consequences to acts that when taken did not have consequences (or had different consequences).
4. *"No State shall . . . pass any . . . Law impairing the Obligation of Contracts."* The prohibition on laws impairing contracts protects settled legal expectations. The Contracts Clause prohibits state legislatures from changing the legal regime in such a way as to impair existing contractual relationships.[147]

> for the exercise of such *legislative* power was this, that the *safety* of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when *discovered*, could be so formidable, or the government so insecure! With very few exceptions, the advocates of *such* laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of *attainder*; or any *ex post facto law*.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (opinion of Chase, J.) (emphasis added). In this passage, Chase is discussing how bills of attainder were used to change the legal rules after the commission of a crime. Additionally, it is funny how Chase—acting under the pretext of keeping *ex post facto* laws separate from those that violate the Contracts Clause—cannot help himself from mixing up bills of attainder with *ex post facto* laws.

For a student comment on using the federal bills of attainder provision to challenge sex offender registries, see Joel A. Sherwin, Comment, *Are Bills of Attainder the New Currency? Challenging the Constitutionality of Sex Offender Regulations that Inflict Punishment Without the "Safeguard of a Judicial Trial"*, 37 PEPP. L. REV. 1301 (2010).

For more on the federal bills of attainder prohibition as a restriction on retroactive legislation, see Usman, *supra* note 138, at 68–70; 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2009) § 41:1, at 386 ("Retroactivity is not a definitional characteristic of bills of attainder, but they frequently are, in fact, retroactive, and this feature is often emphasized in statements concerning their unfairness."); see also Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203.

147. For more on the Contracts Clause as a restriction on retroactive legislation, see Usman, *supra* note 138, at 70–73; Elmer W. Roller, *The Impairment of Contract Obligations and Vested Rights*, 6 MARQ. L. REV. 129 (1922).

It appears that a prohibition on laws impairing contracts first appeared in the Northwest Ordinance of 1787. The same prohibition was then incorporated in the U.S. Constitution in 1788. Interestingly, despite the obvious similarities between the prohibitions on the U.S. Congress, U.S. CONST. art. I, § 9, and state legislatures, *id.* art. I, § 10, Congress is not prohibited from impairing contracts. As Michael McConnell wrote, "[t]he omission of a contracts clause from section 9 is too obvious to be anything but deliberate." Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 269 (1988); *see also* LOGAN, EX POST FACTO, *supra* note 26, at 12-13. After the passage of the Northwest Ordinance, prohibitions on the impairment of contracts became a regular feature in state constitutions: South Carolina (1790), Art. IX, § 2; Pennsylvania (1790), Art. IX, § 17; Kentucky (1792), Art. XII, § 18; Kentucky (1799), Art. X, § 18; Ohio (1802), Art. VIII, § 16; Louisiana (1812), Art. VI, § 20; Mississippi (1817), Art. I, § 19; Indiana (1819), Art. I, § 18; Alabama (1819), Art. I, § 19, and so on. Author's original research at John Joseph Wallis, *NBER/University of Maryland State Constitution Project*, UNIV. OF MD., www.stateconstitutions.umd.edu (last visited July 29, 2022). Today, the constitutions of 39 states contain prohibitions on the impairment of contracts. Brian A. Schar, *Contracts Clause Law Under*

Courts and commentators often interpret these four provisions separately, in a very clause-bound way,[148] and rarely consider the relationship amongst the four prohibitions.[149] Chase's interpretation in *Calder v. Bull* interpreted the provisions as separate entities and, in fact, specifically rejected an interpretation of the *Ex Post Facto* Clause because he thought that it would overlap with the Contracts Clause.[150] And, over time, the U.S. Supreme Court has reduced the scope of each of these four.[151] The result is

State Constitutions: A Model for Heightened Scrutiny, 1 TEX. REV. L. & POL. 123, 129 (1997). Maryland's Constitution, however, does not include a prohibition on the impairment of contracts.

148. The derisive epithet, "clause-bound," is taken from JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12–13 (1980).

149. For example, every constitutional law casebook on my shelf treats these four provisions separately. *See, e.g.*, GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 508, 557 (2009) (discussing the prohibition on bills of attainder in a chapter about separation of powers, while discussing the Contracts Clause in a chapter on protection of economic liberty); CHEMERINSKY, *supra* note 36, at 491, 496, 645 (discussing the prohibition of bills of attainder and the *Ex Post Facto* Clause in a chapter on the Constitution's protection of civil rights and civil liberties, while discussing the Contracts Clause in a chapter on economic liberties); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 587, 613, 632, 641 (2d ed. 1988) (discussing the Contracts Clause in one chapter and the *Ex Post Facto* Clause and prohibition on bills of attainder in another). Other casebooks talk about the provisions together, but do not discuss their focus on retroactivity. *See, e.g.*, MICHAEL STOKES PAULSON, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL, & SAMUEL L. BRAY, THE CONSTITUTION OF THE UNITED STATES 283–95 (2d ed. 2013) (describing these and other provisions as "ensur[ing] a kind of procedural regularity"); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 538, 545 (9th ed. 2009) (discussing the Contracts Clause and the prohibition on bills of attainder in the same chapter on due process); JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW 217–21 (7th ed. 2005) (discussing the Contracts Clause, *Ex Post Facto* Clause, and prohibition on bills of attainder consecutively in a chapter on due process of law); JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 209 (2d ed. 2004) (discussing the Contracts Clause, *Ex Post Facto* Clause, and prohibition on bills of attainder in the same chapter on substantive due process); *see also* THE FEDERALIST NO. 44 (James Madison); Evan C. Zoldan, *The Permanent Seat of Government: An Unintended Consequence of Heightened Scrutiny Under the Contract Clause*, 14 N.Y.U. J. LEG. & PUB. POL'Y 163, 206–07 (2011) (reading the clauses together as an individual protection against oppressive state legislation); Duane L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 CAMPBELL L. REV. 227, 246–48 (2010) (considering these provisions together as a form of protection of private property). *But see* Zoldan, *supra* note 37, at 775–79 (making structuralist arguments in favor of broad reading of *ex post facto* clauses as prohibition on retroactive legislation); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); TROY, *supra* note 37.

150. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) ("If the prohibition against making *ex post facto laws* was intended to secure *personal rights* from being affected, or injured, by such laws, and the prohibition is sufficiently extensive for that object, the *other* restraints, I have enumerated, were unnecessary, and therefore improper; for both of them are *retrospective*."). Of course, by so doing, Chase made the Bill of Attainder Clause redundant to the *Ex Post Facto* Clause.

151. Today, the U.S. Supreme Court's jurisprudence in these four areas is so constricted that it is difficult for a state legislature to be found to have violated these provisions of the federal Constitution. *First*, the Legal Tender Clause mostly has not been tested. Juilliard v. Greenman, 110 U.S. 421, 446 (1884) (creditor entitled to demand payment in gold or silver); *see also* Farmers &

that most retroactive laws are constitutional under the U.S. Constitution. My hypothesis here, however, is that rather than seeing these as four separate clauses, they might be better understood as four examples of a more general notion of prohibited retroactive legislation.[152]

This is the technique of interpretation by penumbral reasoning. Using this method of interpretation, one might say that these four provisions were the only examples known to the constitutional framers (or the four of which they thought at the time), but together they indicate the framers' inclination to prohibit all kinds of retroactive legislation, including but not necessarily limited to retroactive legislation ascribing guilt to specific individuals (bills of attainder);[153] retroactive legislation generally (*ex post facto* laws); retroactively changing the rules agreed to by the parties to contracts (Contracts Clause); and retroactively changing the currency in which a creditor could receive payment of a debt (Legal Tender Clause).[154]

This is a difficult argument, and it is even harder to make with respect to the Maryland Declaration of Rights, which in 1776 contained three

Merchs. Bank v. Fed. Rsrv. Bank, 262 U.S. 649, 659 (1923) (state law allowing creditor to choose to accept alternative payment is constitutional). *Second*, courts have restricted the definition of what constitutes a bill of attainder to legislation that satisfies three essential elements: It must (1) specify affected persons, (2) inflict punishment, and (3) lack a judicial trial. *See, e.g.*, Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 852 (1984); *see also* TROY, *supra* note 37, at 56–58. *Third*, if one believes that the original intention of the *ex post facto* provision was to prevent all retroactive legislation, the decision in *Calder* to restrict its application to criminal laws only constitutes a substantial constriction. TROY, *supra* note 37, at 47–53. And *fourth*, under current Contracts Clause jurisprudence, even a substantial governmental interference with an existing private contractual relationship will be upheld if it is reasonably related to achieving a significant and legitimate public purpose. *See, e.g.*, Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–13 (1983). Only governmental interference with governmental contracts is subjected to more searching review. U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977); TROY, *supra* note 37, at 60–62. The result is that there is no effective federal constitutional limitation on retroactive legislation.

152. Selinger makes a similar point in a different way: He argues that the *Ex Post Facto* Clause is a general prohibition on all retroactive legislation and that the Legal Tender Clause and the Contracts Clause are specific examples of this general prohibition. Selinger, *supra* note 38, at 195.

153. *But see* Matthew Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767 (2016) (arguing that the distinctive features of a bill of attainder is that it is a summary proceeding, not that it is conducted by the legislature).

154. Professor Eugene McCarthy, in explaining the structuralist reasoning in *Griswold*, argues that the constitutional framers intended but omitted the constitutional right to privacy, similar to the way Ernest Hemingway wrote using the so-called iceberg theory of omission. Eugene McCarthy, *In Defense of* Griswold v. Connecticut*: Privacy, Originalism, and the Iceberg Theory of Omission*, 54 WILLAMETTE L. REV. 335 (2018). I admire Professor McCarthy's effort to use literary theory, but very much doubt that conscientious and careful constitutional drafters (unlike conscientious and capable literary authors) would intentionally leave out a concept that they wanted protected. Instead, I think it is much more likely that our constitutional framers were fumbling toward the best possible expression of ideas that they were just then developing. It is no slight to George Mason's draftsmanship in writing the Virginia Declaration of Rights, to note that the framers of the Maryland Declaration of Rights took Mason's language and improved on it. *See* Friedman, *Tracing the Lineage*, *supra* note 38, at 946–47; Friedman, *Who Was First?*, *supra* note 60, at 484–85.

provisions that restricted aspects of retroactive legislation: the predecessor to Article 17 (*ex post facto* laws); the predecessor to Article 18 (bills of attainder); and the predecessor to Article 24 ("Law of the Land" or "due process").[155] Nonetheless, I think it is possible to argue from these three data points that the Maryland framers were concerned about and wished to prohibit the General Assembly from passing any sort of retroactive legislation.[156]

B. Placement Within the Constitution

Another possible aspect of structuralist constitutional interpretation concerns the relative placement of a provision within a constitution.[157] Certainly it is relevant and helpful of interpretation to note that a provision appears in the Maryland Declaration of Rights rather than in the Maryland Constitution (or, as it was originally known, the Form of Government).[158] Professor G. Alan Tarr, however, counsels against using this method of interpretation for state constitutions: "State constitutional provisions should generally be understood as discrete units, because state constitutions typically lack a unifying theory or set of extraconstitutional assumptions."[159] Despite that caution, I think it can be an important method of interpretation if used with care.[160]

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155. *See generally* Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 656, 660. Article 24 is one of the two sources identified for the state constitutional protection of vested rights. The other is the eminent domain provision found in Article III, Section 40 of our current constitution. Muskin v. State Dep't of Assessments & Tax'n, 422 Md. 544, 30 A.3d 962 (2011); Dua v. Comcast Cable of Md. Inc., 370 Md. 604, 805 A.2d 1061 (2002). That eminent domain provision, however, was not part of our 1776 Maryland Constitution. *See supra* note 144.

156. I hasten to add that the penumbral reading is helpful but not necessary to my thesis. If I am right that the original meaning of Article 17 was to prohibit all retroactive laws, then we don't need penumbras from a preexisting right against retroactive legislation to protect us.

157. Friedman, *Special Laws*, *supra* note 12, at 458–60.

158. *See* Mayor & City Council of Balt. v. State, 15 Md. 376, 459 (1860); Murphy v. Liberty Mut. Ins. Co., 478 Md. 333, 383–84, 274 A.3d 412, 441–42 (2022).

159. G. Alan Tarr, *Understanding State Constitutions*, 65 TEMPLE L. REV. 1169, 1170–71, 1194 (1992). Of course, if Professor Tarr is correct, that we must interpret constitutional provisions in isolation, then it is unwise to use the method of penumbral reasoning described above in Section V.A.

160. By this, I mean that it is easy to get carried away with placement-type arguments. While we can track, for example, that various constitutional conventions moved some provisions earlier in the declaration of rights, I don't think we can place much, if any, interpretive weight on this reordering. *See, e.g.*, Friedman, *Maryland Declaration of Rights*, *supra* note 25, at 648, 651, 684 n.131, 687 n.174 (noting 1864 placement of "all men are equally free" provision as Article 1, "paramount allegiance" to national government as Article 5); *id*. at 656–57, 694 nn.299–301 (discussing 1776 moving of Articles recognizing "sole and exclusive right" of "internal government" and right to retain common law). On the other hand, the choice to put a provision in the Declaration of Rights (as opposed to in the Constitution itself) must have some meaning. Friedman, *Special Laws*, *supra* note 12, at 458–60 (considering significance of placement of special laws prohibition in legislative article of the Constitution rather than in the Declaration of Rights); *see also* FRIEDMAN, THE MD.

Using this technique, Justice Warren M. Silver of the Maine Supreme Judicial Court has suggested that the juxtaposition of the placement of the federal *ex post facto* provision in a section of the federal Constitution that restricts state legislative power with the state constitutional placement in the state declaration of rights, which enumerates personal rights, suggests that a higher standard of judicial scrutiny is appropriate under the state constitution than under the federal.[161] Obviously, Article 17 is located in the Maryland Declaration of Rights, not Article III of the Maryland Constitution, suggesting, at least, that this is a personal right to be free from retroactive legislation rather than a prohibition on the General Assembly's otherwise plenary power to pass legislation. While I think this observation is interesting and useful, it doesn't seem to advance our understanding of the scope of the prohibition on retroactive laws and specifically whether it is a "criminal-only" or a "criminal-and-civil" right.

C. "Making Sense"—Avoiding Jurisprudential Incoherence

In Professor Black's landmark book, *Structure and Relationship in Constitutional Law*, he urged constitutional interpreters to find interpretations that "make sense."[162] One aspect of finding constitutional interpretations that "make sense," in my view,[163] is to avoid jurisprudential incoherence by ensuring that similar provisions are treated similarly (and to avoid situations where a plaintiff's invocation of the wrong constitutional provision precludes appropriate relief).[164] The Court of Appeals' decision in *Doe* frames one of these situations nicely.

STATE CONSTITUTION, *supra* note 81, at 32 (discussing moving what is now Article 23 of the Declaration of Rights—jury as judges of law and fact—from Article XV of the Constitution); Friedman, Magnificent Failure *Revisited*, *supra* note 106, at 546 n.95 (same).

161. State v. Letalien, 985 A.2d 4, 27–28 (Me. 2009) (Silver, J., concurring); *see also* Lauren Wille, Note, *Maine's Sex Offender Registry and the Ex Post Facto Clause: An Examination of the Law Court's Unwillingness to Use Independent Constitutional Analysis in* State v. Letalien, 63 ME. L. REV. 367, 375–76 (2010). Maine's *Letalien* decision is also discussed *infra* at notes 189, 192.

162. BLACK, JR., *supra* note 141, at 22.

163. Richard Boldt argues that this is not really a structuralist interpretation (although he is willing, he says, to call it "meta-structuralism"). Richard knows more about Professor Black than I do. *See* Boldt, *supra* note 13. He's certainly right that I am pushing Professor Black's desire for interpretations that "make sense" beyond what Black, himself, intended. But Professor Black was thinking about the relatively short and generally coherent U.S. Constitution. With respect to state constitutions, however, written and adopted at many different times by many different framers, the risk of jurisprudential incoherence is a serious problem, and the desire to find interpretations that create jurisprudential coherence is, in my view, a worthwhile goal. Friedman, *Special Laws*, *supra* note 12, at 458–59. And I think this interpretive goal fits best (although imperfectly) within the rubric of structuralism.

164. Friedman, *Special Laws*, *supra* note 12, at 461–62 (arguing that applying different levels of deference to democratically-selected policy choices under two similar state constitutional provisions does not "make sense"); *see also* Friedman, *Article 19*, *supra* note 12, at 972–74 (arguing that state constitutional interpretation that resurrected repudiated *Lochner*-style constitutional theory doesn't

Judge Greene's plurality opinion in *Doe* makes clear that a law must be a criminal law or sufficiently criminal law adjacent to receive protection under Article 17 of the Maryland Declaration of Rights. Judge Greene was explicit: "Article 17's prohibition is not implicated in purely civil matters."[165] The various concurring and dissenting opinions take this dichotomy for granted and disagree only about the appropriate standard for determining if a law is sufficiently criminal law adjacent.[166]

In other cases, however, the Court of Appeals has been very clear that retroactive civil laws are unconstitutional if they disturb settled, legally enforceable expectations, that is, vested rights.[167] For example, in *Muskin v. State Department of Assessments & Taxation*,[168] the Court of Appeals was very protective of the vested property interests of ground rent owners against retrospective registration and right of purchase legislation.[169] The Court specifically rejected applying any standard that took into consideration the General Assembly's purpose and adopted an absolute standard: Any retroactive legislative interference with vested rights is unconstitutional.[170] The Court of Appeals hasn't been particularly clear in identifying the source of that protection (sometimes locating it in the requirements for exercise of eminent domain, Article III, Section 40), it is most often understood as flowing from Article 24 of the Declaration of Rights: Our "Law of the Land" provision (and due process analog).[171]

It is my view that the *Doe* plurality and the concurring and dissenting opinions are wrong when they suggest that retrospective civil laws are

"make sense"); *id.* at 974–75 (arguing that state constitutional interpretation that places too much interpretive weight on which plaintiff's case arrives first at the appellate court doesn't "make sense").

165. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 559, 62 A.3d 123, 137 (2013) (citing Spielman v. State, 298 Md. 602, 609, 471 A.2d 730, 734 (1984)) ("[I]n Maryland, 'the prohibition of *ex post facto* laws applies only to criminal cases. There is no clause in the Maryland Constitution prohibiting retrospective laws in civil cases.'" (quoting Braverman v. Bar Ass'n of Balt., 209 Md. 328, 348, 121 A.2d 473, 483 (1956))).

166. *See supra* Part I.

167. *See infra* note 214.

168. 422 Md. 544, 30 A.3d 962 (2011).

169. *Id.* For other vested rights cases, see, for example, John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc., 406 Md. 139, 957 A.2d 595 (2008); Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 630 n.9, 805 A.2d 1061, 1076 n.9 (2002); Langston v. Riffe, 359 Md. 396, 754 A.2d 389 (2000).

170. *Muskin*, 422 Md. at 557, 30 A.3d at 969.

171. MD. CONST. Decl. of Rts., art. 24 ("That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."). Selinger is particularly critical of using due process-type provisions—as Maryland's Article 24 is usually considered—to enforce prohibitions on retroactive civil legislation. Selinger, *supra* note 38, at 198–99 (discussing *General Motors Corp. v. Romein*, 503 U.S. 181 (1992)).

constitutional. I think the criminal/civil dichotomy is unnecessary.[172] Instead, I would say that retroactive laws—either civil or criminal—that disturb legally-enforceable rights are unconstitutional. Minor retroactive changes in the criminal law (those that don't operate to a defendant's disadvantage) are acceptable, but more major changes (those that operate to the defendant's disadvantage) are unconstitutional. Minor retroactive changes in the civil laws (those that don't operate to impair a vested right) are acceptable, but more major changes (those that operate to impair a vested right) are unconstitutional.[173] This construct avoids a false dichotomy, more correctly

172. Selinger argues that often the difference between civil and criminal law is in the discretion of the prosecutor. Selinger, *supra* note 38, at 198 (discussing discretion of federal Securities and Exchange Commission to seek criminal or civil penalties).

173. I think this is generally correct but oversimplifies a complex area of Maryland law. The common law rules governing retroactive civil legislation in Maryland are as follows (although I organize these a little differently than the Court of Appeals does). I ask, first, whether the legislation concerns substantive or procedural rights. *Langston*, 359 Md. at 406–07, 754 A.2d at 394–95 (explaining difference between legislation that effects substantive and procedural rights). If the legislation concerns procedural rights (sometimes framed as remedies and evidence), then it is *per se* constitutional. Moreover, if the legislation concerns procedure, absent an express contrary intention, the legislation applies to all actions—accrued, pending, or future. Mason v. State, 309 Md. 215, 219–20, 522 A.2d 1344, 1345–46 (1987); *Muskin*, 422 Md. at 561, 30 A.3d at 971 ("We have held consistently that the [General Assembly] has the power to alter the rules of evidence and remedies . . . ."); *see also* Phillip Morris Inc. v. Glendening, 349 Md. 660, 668–69 n.6, 709 A.2d 1230, 1233–34 n.6 (1998) (describing the effect of retroactive procedural legislation on pending litigation). If, on the other hand, the legislation purports to modify substantive rights, we proceed to the next inquiry. Here, we ask about legislative intent. Est. of Zimmerman v. Blatter, 458 Md. 698, 728, 183 A.3d 223, 241 (2018) (describing importance of determining legislative intent). If the legislature manifested an intent that the legislation should apply prospectively, the courts must honor that intent. Doe v. Roe, 419 Md. 687, 20 A.3d 787 (2011). Moreover, if the legislature was silent about whether it intended the legislation to operate prospectively or retroactively, courts apply a strong presumption in favor of prospective application. State Ethics Comm'n v. Evans, 382 Md. 370, 387, 855 A.2d 364, 374 (2004); *Langston*, 359 Md. at 406, 754 A.2d at 394; s*ee also* Janda v. Gen. Motors Corp., 237 Md. 161, 205 A.2d 228 (1964) (providing rules for discerning legislative intent with respect to retroactivity). Only if the legislature has clearly expressed its intention that legislation concerning substantive rights be applied retroactively, will courts find it to be so. Finally, we come to the last question. Having thus far determined that the legislation concerns substantive rights and is clearly intended to apply retroactively, we next ask whether it (1) impairs vested rights; (2) denies the due process of law; or (3) creates an *ex post facto* law? *Muskin*, 422 Md. 544, 30 A.3d 962; *Dua*, 370 Md. 604, 805 A.2d 1061. If the answer to any of these three questions is yes, the legislation is unconstitutional. *Muskin*, 422 Md. 544, 30 A.3d 962; *Dua*, 370 Md. 604, 805 A.2d 1061. If the answer to all three questions is no, then the legislation is constitutional and will be applied as written. *Muskin*, 422 Md. 544, 30 A.3d 962; *Dua*, 370 Md. 604, 805 A.2d 1061. There is also a bizarre, upside-down exception to these retroactivity rules that applies only in zoning and land use cases. Yorkdale Corp. v. Powell, 237 Md. 121, 205 A.2d 269 (1964). In zoning and land use cases only, if legislation makes a substantive change in the law, the courts apply a presumption in favor of retroactivity and will apply the new law unless by so doing a vested right is impaired. By contrast, if the legislation concerns a procedural right, it will only apply prospectively. STANLEY D. ABRAMS, GUIDE TO MARYLAND ZONING DECISIONS § 3.06, at 3–59 (5th ed. 2021). While cases have questioned the validity of this odd doctrine, Layton v. Howard Cnty. Bd. of Appeals, 399 Md. 36, 71–72, 922 A.2d 576, 597 (2007) (Wilner, J., dissenting), and narrowly cabined its application,

reflects the reality of our constitutional protections, and "makes sense." Importantly, this does not require a different constitutional interpretation. Instead, it only requires a different way of talking about the existing constitutional interpretation. That is, rather than identifying Article 24 (and Article III, Section 40) as the sources of the prohibition on retroactive civil legislation that impairs vested rights, we should identify the source as being Article 17, the *ex post facto* article.

VI. COMPARATIVE CONSTITUTIONAL LAW

Comparative constitutional law can be an important tool in constitutional interpretation.[174] A constitutional interpreter should use a three-part test to determine the weight to ascribe to a foreign precedent: "(1) the extent to which the issue presented in [the foreign court's] case parallels the question [being considered]; (2) the similarities and differences between the relevant provisions of the two constitutions and the systems that they create; and (3) the persuasiveness of the arguments made by the foreign court."[175] Here, there are useful comparisons to be made to the analyses of other jurisdictions' interpretations of their prohibitions on retroactive laws. In the following subsections, I will use comparative constitutional law to compare the interpretation of retroactive use of sex offender registries in the federal courts and sister state courts; the interpretation of other state constitutions prohibitions on retroactive civil laws; and international prohibitions on retroactive legislation.

A. Federal and Sister State Decisions Regarding Retroactive Application of Sex Offender Registries

I begin with the U.S. Supreme Court and the lower federal courts' interpretation of the federal *ex post facto* provision. It may seem odd to consider the federal constitutional provision as comparative constitutional law, but although states must apply the federal standard as a minimum, that

McHale v. DCW Dutchship Island, LLC, 415 Md. 145, 999 A.2d 969 (2010), it remains firmly intact. *Layton*, 399 Md. at 51–70, 922 A.2d at 584–96 ("[W]e reaffirm the *Yorkdale* rule . . . .").

174. Friedman, *Special Laws*, *supra* note 12, at 417, 448–50; *see also* Friedman, *Article 19*, *supra* note 12, at 978; Bruce D. Black & Kara L. Kapp, *State Constitutional Law as a Basis for Federal Constitutional Interpretation: The Lessons of the Second Amendment*, 46 N.M. L. REV. 240 (2016) (advocating use of comparative constitutional law to inform interpretation of federal constitutional provision); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 349–52 (2011) (discussing comparative constitutionalism).

175. Friedman, *Special Laws*, *supra* note 12, at 417 n.29, 449–50 (footnote omitted) (relying on Daniel A. Farber, *The Supreme Court, The Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1360–62 (2007)).

federal standard is just a persuasive authority as to how to interpret the state's constitutional provision.[176]

In *Kansas v. Hendricks*[177] and, most importantly, in *Smith v. Doe*,[178] the U.S. Supreme Court upheld retroactive application of state sex offender statutes against challenges under the federal Constitution's prohibition on states passing *ex post facto* laws.[179] In *Hendricks*, the Court permitted the retroactive application of a law allowing certain sex offenders to be civilly committed after they served their prison sentences.[180] In *Smith*, the Court permitted the retroactive extension of the time that certain sex offenders were required to register on Alaska's sex offender registry.[181] In both cases, the U.S. Supreme Court majority applied the "intent-effects" test[182] and held that the laws were civil, nonpunitive regulatory measures and thus were not within the ambit of the prohibition against *ex post facto* laws.[183] The U.S. Supreme Court has not considered the topic again since.

Since 2003, the majority of state and federal courts have followed *Smith* and found that the registration schemes are constitutional.[184] These courts have continued to follow *Smith* despite: (1) the increasingly rigorous (or punitive) sex offender registration schemes adopted by the states;[185] (2) the

176. I confine my discussion here to the constitutionality of retroactive application of sex offender registry laws and do not discuss retroactive laws more generally.

177. 521 U.S. 346 (1997).

178. 538 U.S. 84 (2003).

179. U.S. CONST., art. I, § 10.

180. *Hendricks*, 521 U.S. at 351–53.

181. *Smith*, 538 U.S. 84; Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 373–77 (2009).

182. In applying the "intent-effects" test, the U.S. Supreme Court directed courts to apply the *Mendoza-Martinez* factors to determine if a law was punitive. *Smith*, 538 U.S. at 97 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

183. *Hendricks*, 521 U.S. at 371; *Smith*, 538 U.S. at 105–06. For an analysis of these cases, see LOGAN, EX POST FACTO, *supra* note 26, at 119-35.

184. *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); United States v. Parks, 698 F.3d 1 (1st Cir. 2012); United States v. W.B.H., 664 F.3d 848 (11th Cir. 2011); *see also* Ryan W. Porte, *Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution*, 45 HASTINGS CONST. L.Q. 715, 733 n.142 (2018) (and cases cited therein); Yung, *supra* note 181, at 370–71 nn.15–20 (and cases cited therein). This is an example of the shadow cast over state constitutional practice by the U.S. Supreme Court as described by Robert F. Williams. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

185. It is beyond the scope of this Article to trace the history and increasing rigor of sex offender registration requirements. *See, e.g.*, Porte, *supra* note 184; Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 S.W. L. REV. 1 (2017). My complaint here—and the only concern of the *ex post facto* provision—is not with the rigor of sex offender registration requirements but with their retroactive application. Suffice it to say that the federal Congress first established national standards for sex offender registration in 1994, and significantly strengthened those standards in 2006. Although the federal law itself does not require states to adopt

possibility of independent interpretation of state constitutional protections against retroactive legislation; and (3) social science research refuting prior assumptions of sex offenders' high risk of recidivism and insusceptibility to treatment.[186]

Despite that strong trend of following *Smith*, there have been state and federal courts that have found retroactive sex offender registration laws to violate either a state or the federal constitution or both. For example, the United States Court of Appeals for the Sixth Circuit found by the clearest proof that Michigan's sex offender registry was a punishment and therefore that its retroactive application violated the federal *Ex Post Facto* Blause.[187] Similarly, the Pennsylvania Supreme Court found that Pennsylvania's sex offender registry violated the federal *Ex Post Facto* Clause when applied retroactively.[188] The Maine Supreme Court found that the retroactive application of the Maine sex offender registry violated the federal Constitution.[189] In addition to Maryland, state supreme courts in Alaska,[190]

retroactive registration requirements, it delegates rulemaking authority to the U.S. Attorney General, who has adopted rules requiring states to adopt increasingly onerous and retroactive registration schemes or risk losing access to federal grant funding. Porte, *supra* note 184, at 718–26; Yung, *supra* note 181; Gilbert, *supra* note 11, at 167–69 (describing efforts to implement federal regulations in Maryland). Many states, including Maryland, have complied and are certified by the DOJ as having substantially implemented the federal registration requirements. The DOJ keeps a scoreboard of those states, territories, and other jurisdictions that have attained "substantial compliance" at *SORNA Implementation Status*, U.S. DEP'T OF JUST., OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING & TRACKING (SMART), https://smart.ojp.gov/sorna/sorna-implementation-status (last visited Aug. 16, 2022).

186. Of course, post-enactment developments in social science have a limited role in constitutional adjudication. *See, e.g.,* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180 (1997); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994); William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261 (1998). *But see* Does Nos. 1–5 v. Snyder, 834 F.3d 696, 704–05 (6th Cir. 2016) (citing "troubling" social science evidence that sex offender registration statutes like Michigan's may actually increase recidivism).

187. *Does Nos. 1–5*, 834 F.3d 696. The Michigan Supreme Court also independently concluded that the Michigan sex offender registry violates the federal *ex post facto* provision. People v. Betts, 968 N.W.2d 497, 515 (Mich. 2021). In that same opinion, the Michigan Supreme Court also held that the Michigan statute violated the state constitutional prohibition on *ex post facto* laws. *Id.*; *see infra* note 193; Alexander William Furtaw, Note, *Sex Offender Legislation Ex Post Facto: The History and Constitutionality of Michigan's Sex Offenders Registration Act*, 48 J. LEGIS. 301 (2021).

188. Commonwealth v. Muniz, 164 A.3d 1189, 1218 (Pa. 2017). In the same opinion, the Pennsylvania Supreme Court also found that the retroactive application of the sex offender registry violated the *ex post facto* provision of the Pennsylvania Constitution. *Id.* at 1218–23; *see infra* note 197.

189. State v. Letalien, 985 A.2d 4, 14 (Me. 2009). In the same opinion, the Maine Supreme Court also found that the retroactive application of the sex offender registry violated the Maine State Constitution. *Id.*; *see infra* note 192.

190. Doe v. State, 189 P.3d 999, 1007–19 (Alaska 2008) (applying intent-effects test to find that the retroactive application of the sex offender registry violated Article I, Section 15 of the Alaska Constitution).

Indiana,[191] Maine,[192] Michigan,[193] New Hampshire,[194] Ohio,[195] Oklahoma,[196] and Pennsylvania[197] have all found that the retroactive application of their state's sex offender registry violated their state constitutional prohibition on *ex post facto* laws or retroactive legislation.[198]

Having reviewed these decisions of state and federal courts, I can make two observations. *First*, it is amazing to observe the outsize shadow that the U.S. Supreme Court's decision in *Smith v. Doe* has cast.[199] Many state and

191. Wallace v. State, 905 N.E.2d 371, 379–84 (Ind. 2009) (applying intent-effects test to find that the retroactive application of the sex offender registry violated Article I, Section 24 of the Indiana Constitution).

192. *Letalien*, 985 A.2d at 14, 26 (Me. 2009) (applying intent-effects test to find that the retroactive application of the sex offender registry violated Article I, Section 11 of the Maine Constitution).

193. People v. Betts, 968 N.W.2d 497, 508–15 (Mich. 2021) (applying intent-effects test to determine that retroactive application of sex offender registration law violates Article I, Section 10 of the Michigan Constitution); *see supra* note 187.

194. Doe v. State, 111 A.3d 1077, 1089–1104 (N.H. 2015) (applying intent-effects test to find that the retroactive application of the sex offender registry violated Part I, Article 23 of the New Hampshire Constitution).

195. State v. Williams, 952 N.E.2d 1108, 1110–13 (Ohio 2011) (finding that the retroactive application of the sex offender registry violated Article II, Section 28 of the Ohio Constitution, which prohibits both retroactive civil and criminal laws).

196. Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1017–30 (Okla. 2013) (applying intent-effects test to find that the retroactive application of the sex offender registry violated Article II, Section 15 of the Oklahoma Constitution); Alex Duncan, Note, *Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post*-Starkey, 67 OKLA. L. REV. 323 (2015).

197. Commonwealth v. Muniz, 164 A.3d 1189, 1218–23 (Pa. 2017) (finding retroactive application of sex offender registry violated Article I, Section 17 of the Pennsylvania Constitution particularly because of its special focus on reputational harms).

198. After some back-and-forth, it is now settled that the retroactive application of the Missouri sex offender registry does not offend the Missouri Constitution. Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006) (holding that retroactive application of sex offender registry is unconstitutional); Doe v. Keathley, No. ED 90404, 2009 WL 21097, at *3–*4 (Mo. Ct. App. Jan. 6, 2009) (holding that *Phillips* is moot due to requirements of a federal sex offender registration statute), *aff'd on transfer*, 290 S.W.3d 719, 720 (Mo. 2009); *see also* Sarah E. Ross, Recent Development, *Retrospective Laws—Do New Statutory Obligations on Sex Offenders Violate the Missouri Constitutional Principle Forbidding Retrospective Laws?* F.R. v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.3d 56 (Mo. 2010)*., 42 RUTGERS L.J. 1093 (2011). Similarly, it now seems settled that the retroactive application of the Kansas sex offender registry does not offend the Kansas Constitution. Doe v. Thompson, 373 P.3d 750, 771 (Kan. 2016) (holding that sex offender registration system is punitive); State v. Buser, 371 P.3d 886 (Kan. 2016) (same); State v. Redmond, 371 P.3d 900 (Kan. 2016) (same). *But see* State v. Petersen-Beard, 377 P.3d 1127, 1141 (Kan. 2016) (sex offender registration system does not violate state *ex post facto* clause); Porte, *supra* note 184, at 733–34 ("In one confusing day in 2016, two contradicting opinions came out of the Supreme Court of Kansas. *Doe v. Thompson* held that the Kansas sex registration statute was punishment, and thus, violated the ex post facto clause, while *State v. Petersen-Beard* overruled the first case, holding the opposite.").

199. The metaphor of shadows cast by Supreme Court precedents is from Robert F. Williams, *supra* note 184.

federal courts dutifully followed *Smith*, even when the statute being evaluated was considerably different (and increasingly, more onerous) than that early Alaska sex offender registry, and even when interpreting a different constitutional provision (with different text, history, and possible scope). *Second*, none of the states that found that its state constitution prohibited the retroactive application of the sex offender registry questioned the classic criminal/civil distinction from *Calder v. Bull*,[200] and only Maryland declined to adopt the U.S. Supreme Court's "intent-effects" test.[201] Despite this, however, these courts each came to a different conclusion than did the U.S. Supreme Court in *Smith*.[202]

200. A particularly perceptive critique of the fleeting and increasingly difficult to police line between criminal and civil legislation across many different areas of the law is offered in Carol S. Steiker, Foreword, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

201. Professor Wayne A. Logan proposes an alternative test to determine the constitutionality of these sex offender registries. LOGAN, EX POST FACTO, *supra* note 26, at 137–44.

202. For a summary of state court treatment of sex offender registries, see LOGAN, EX POST FACTO, *supra* note 26, at 135–37.

B. Sister State Constitutional Prohibitions on Retroactive Civil Laws

There are eight states that have specific constitutional prohibitions on retroactive civil legislation: Colorado,[203] Georgia,[204] Idaho,[205] Missouri,[206]

203. "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." COLO. CONST. art. II, § 11; Ficarra v. Dep't of Regul. Agencies, Div. of Ins., 849 P.2d 6, 15 (Colo. 1993) ("It is well settled that an act is deemed to be violative of [Article II, Section 11 of the Colorado Constitution] if it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" (quoting P-W Invs., Inc. v. City of Westminster, 655 P.2d 1365, 1371 (Colo. 1982))); Grant T. Sullivan & Patrick R. Thiessen, *The* Dewitt *Test: Determining the Retroactivity of New Civil Legislation in Colorado*, 40 COLO. LAW., July 2011, at 73.

204. "No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed." GEORGIA CONST. art. I, § 1, para. X; Deal v. Coleman, 751 S.E.2d 337, 343 (Ga. 2013) ("Even when the General Assembly clearly provides that a law is to be applied retroactively, our Constitution forbids statutes that apply retroactively so as to 'injuriously affect the vested rights of citizens.'" (quoting Bullard v. Holman, 193 S.E. 586, 588 (Ga. 1937))).

205. "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed." IDAHO CONST. art. I, § 16. "The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past." *Id.* art. XI, § 12. Coburn v. Fireman's Fund Ins. Co., 387 P.2d 598, 601 (Idaho 1963) (holding that because "the enactment constitutes substantive law, we cannot accord unto it a retroactive effect"); Rogers v. Hawley, 115 P. 687, 691 (Idaho 1911) (holding retroactive legislation was "in furtherance purely of the state's proprietary interests," and thus did not violate the state constitution's prohibition on retroactive legislation "for the benefit of any railroad or any other corporation, or any individual, or association of individuals").

206. "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." MO. CONST. art. I, § 13; State v. Honeycutt, 421 S.W.3d 410, 419 (Mo. 2013) (holding that Missouri's State Constitution prohibits retrospective civil laws that affect "vested right[s]"). In determining that the prohibition on retrospective laws applied to civil laws only, the *Honeycutt* Court found persuasive that the Missouri constitutional framers understood, based on *Calder v. Bull*, that the *ex post facto* provision was criminal only.

New Hampshire,[207] Ohio,[208] Tennessee,[209] and Texas.[210] The judicial interpretation given to these provisions in each of the eight states requires the courts to invalidate any law that retroactively invalidates an existing vested right.[211] Moreover, the other 42 states, lacking a clear, express constitutional prohibition on retroactive civil laws, nonetheless require the courts to invalidate any law that retroactively invalidates an existing vested right.[212] Those states simply base that requirement on another provision of the state constitution.[213] Although the definition of a "vested right" is notoriously slippery[214] and may result in different outcomes from state to state and from

207. "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. CONST. pt. I, art. 23; *In re* Goldman, 868 A.2d 278, 281 (N.H. 2005) ("[Since] 1826, we [have] interpreted Article 23 to mean that 'every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'" (quoting Burrage v. N.H. Police Standards Council, 506 A.2d 342, 344 (N.H. 1986))).

208. "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts . . . ." OHIO CONST. art. II, § 28; State v. Walls, 775 N.E.2d 829, 835 (Ohio 2002) ("It is now settled in Ohio that a statute runs afoul of this provision if it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" (quoting Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489, 496 (Ohio 1988))).

209. "That no retrospective law, or law impairing the obligations of contracts, shall be made." TENN. CONST. art. I, § 20; Todd v. Shelby Cnty., 407 S.W.3d 212, 221 (Tenn. 2012) (holding that the Tennessee Constitution "has uniformly been interpreted to mean that the Legislature may enact laws that have a retrospective application only so long as they do not impair the obligations on contracts or impair vested rights. However, statutes that are considered to be procedural or remedial in nature may generally be applied retrospectively to cases pending at the time of their effective date" (citations omitted)).

210. "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16; Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 633 (Tex. 1996) ("Under our state charter, retroactive laws affecting vested rights that are legally recognized or secured are invalid."); Hyeongjoon David Choi, Note, Robinson v. Crown*: Formulation of a New Test for Unconstitutional Retroactivity or Mere Restatement of Century-Old Texas Precedents?*, 64 BAYLOR L. REV. 309 (2012).

211. *See supra* notes 203–210.

212. 2 SINGER & SINGER, *supra* note 146 § 41:3; Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1927).

213. 2 SINGER & SINGER, *supra* note 146 § 41:3; Smith, *supra* note 212 (identifying extraconstitutional and constitutional bases for invalidating retroactive laws that invalidate vested rights, including the nature of republican government; the inherent limits on the powers of the state legislature; the separation of powers; state due process provisions and others).

214. 2 SINGER & SINGER, *supra* note 146 § 41:6, at 455 ("Most attempts to define [vested rights] are circuitous, as in the pronouncement that 'a vested right, as that term is used in relation to constitutional guarantees, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice.'"); James A. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 120 (1993); Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253 (2018); Smith, *supra* note 212, at 231 (stating that defining a vested right is "impossible"); *id.* at 237–38

time to time, there is a remarkable uniformity among the states in the prohibition.

Maryland, once it had determined that Article 17 was "criminal-only," lacked a clear, express constitutional prohibition on retroactive civil laws. Despite this, Maryland's courts will nonetheless invalidate any retroactive law that impairs a vested right based on the interpretation of other constitutional provisions, namely Article 24 of the Declaration of Rights (the "Law of the Land" provision) and Article III, Section 40 of the Maryland Constitution (the condemnation/eminent domain provision).[215] My observation here is that the example of our sister states suggests that, like Maryland, irrespective of whether a state constitution contains an express prohibition on retrospective civil laws, courts will enforce the constitution as if there is one. The result is that, to me, it does not seem to matter much if a state constitution's *ex post facto* provision is interpreted, following *Calder v. Bull*, as being "criminal-only" or "criminal-and-civil" because the state constitution will be read, as a whole, as prohibiting retroactive criminal *and* civil laws.

C. International Prohibitions on Retroactive Laws

In international law, the prohibition on retroactive criminal legislation is explicitly recognized in fundamental documents and is "one of 'the general principles of law recognized by civilized nations.'"[216] By contrast, there is no

(showing pairs of cases in which courts have come to opposite result about whether the right was "vested" and whether it could be changed by retroactive legislation); Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 309 (1925) ("[T]he chameleon character of the term . . . 'vested right' . . . is not an absolute standard, but a variant which each [person], lay[person], legislator, and judge, determines individually out of [their] own background.").

215. Muskin v. State Dep't of Assessments & Tax'n, 422 Md. 544, 30 A.3d 962 (2011) (relying on Article 24 of the Declaration of Rights and Article III, Section 40 of the Maryland Constitution); Dua v. Comcast Cable of Md. Inc., 370 Md. 604, 805 A.2d 1061 (2002) (same). *See supra* notes 169–171.

216. Yarik Kryvoi & Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17 UTRECHT L. REV. 46, 47 (2021) (quoting Int'l L. Comm'n, *Second Rep. on General Principles of Law*, U.N. Doc A/CN.4/741, at 53–54 (Apr. 9, 2020)); MACNEIL, *supra* note 134, at 4 (arguing that "a fair legal system does not need to absolutely prohibit the retroactive creation and application of criminal law"); Suri Ratnapala, *Reason and Reach of the Objection to* Ex Post Facto *Law*, 1 INDIAN J. CONST. L. 140, 141 (2006) ("The narrowness of [these] prohibition[s] allows legislatures to inflict pain for innocent acts in the guise of civil liability. . . . [T]he U[nited] S[tates] being a notable exception."); UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Art. 15(1) (1966) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 7(1) (1950) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."); *see also* HUMAN RIGHTS ACT (U.K.) (1998); CONST. OF INDIA, Part III, Art. 20(1) (2020); NEW ZEALAND BILL OF RIGHTS ACT (1990), § 26(1); CHARTER OF RIGHTS & FREEDOMS

general principle of international law that prohibits retroactive application of civil law.[217] I suspect that the reason for this dichotomy is significantly related to the adoption of these fundamental documents of human rights in the post-World War II period and soon after the most famous prosecution arguably in violation of this principle in history: the trials of Nazi war criminals in Nuremberg.[218] In any event, however, the judgment of international law—that a prohibition on retroactive *criminal* laws is a general principle of law recognized by all civilized nations, while a prohibition on retroactive *civil* laws is not—runs significantly counter to much of the other evidence that I have reported here. Oh well.

CONCLUSION

The process of constitutional interpretation that I have proposed—using all available tools even when those tools might, individually, point in different directions, to determine the best possible interpretation[219]—is worthwhile, even when it does not always change the outcome. Here, we have seen that textualism provides inconclusive results, turning at least in part, on whether or not we read the reference to criminal laws as part of a nonrestrictive appositive phrase. Originalism too, provides us with inconclusive results, at least until the readoption of the provision, with amendments, as part of the 1867 Maryland Constitution. Critical race theory provides us with meaningful—but perhaps not actionable—insights into the meaning of the provision. Moral reasoning theory, given the specific textual command of the *ex post facto* provision, cannot provide us with useful direction. I think structuralism's command, that constitutional interpretations "make sense," compels us to harmonize our views on retrospective criminal and civil legislation under Articles 17 and 24, respectively of the Maryland Declaration of Rights. And comparative constitutional law provides us with a series of comparisons that may—or may not—inform our analysis. All of these methods help deepen our understanding of Article 17.

In the end, I think Judge Greene's plurality opinion and Judge McDonald's concurrence in *Doe v. DPSCS* each used forms of common law constitutional interpretation to come to the correct answers when they found

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OF CANADA (Canadian Charter), § 11(g) (1982); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (Basic Law for the Federal Republic of Germany), Art. 103(2) (1949). *See also* LOGAN, EX POST FACTO, *supra* note 26, at 171–90 (discussing international application of ex post facto principles).

217. Kryvoi & Matos, *supra* note 216, at 57–58.

218. James Popple, *The Right to Protection from Retroactive Criminal Law*, 13 CRIM. L.J. 251 (1989) (discussing three examples of retroactive prosecutions: the Nazi war crime trials in Nuremburg (1945–1947); *Shaw v. Dir. of Pub. Prosecutions* [1961] 2 WLR 897 (HL); and the so-called "bottom of the [Sydney, Australia] harbour" tax cases (1982)).

219. *See supra* text accompanying notes 12–13.

that the retroactive application of the Maryland sex offender registry was unconstitutional.[220] Using our newfound knowledge, however, I would say further that Article 17 generally prohibits *all* retroactive legislation. All retroactive criminal laws are unconstitutional. Most retroactive civil laws are unconstitutional too, unless they involve procedural or *de minimis*, unvested substantive rights.[221] Thus, it is possible that the only actionable insight in this Article is to correct the statement from *Braverman v. Bar Ass'n of Baltimore*,[222] cited in *Doe*, that "[t]here is no clause in the Maryland Constitution prohibiting retrospective laws in civil cases."[223] There is.[224] The question is only whether it is the *ex post facto* provision of Article 17, as I believe, or it is the less explicit, "Law of the Land" provision of Article 24 and the eminent domain provision of Article III, Section 40.

220. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 62 A.3d 123 (2013).

221. I would also allow retroactive procedural and corrective laws (although I acknowledge the difficulty in defining those categories). I am also not attempting to define the categories of "vested rights" or that of "unvested rights." Those are notoriously difficult and often useless exercises. *See supra* note 214. But if I can't precisely define the terms, neither has the Court of Appeals. *See, e.g.*, Muskin v. State Dep't of Assessments & Tax'n, 422 Md. 544, 30 A.3d 962 (2011); Dua v. Comcast Cable of Md. Inc., 370 Md. 604, 805 A.2d 1061 (2002).

222. 209 Md. 328, 121 A.2d 473 (1956).

223. *Doe*, 430 Md. 535, 559–60, 62 A.3d 123, 137–38 (citing Braverman v. Bar Ass'n of Balt., 209 Md. 328, 348, 121 A.2d 473, 483 (1956)). *See supra* note 165.

224. *See supra* notes 167–171.

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February 12, 2018

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Hon. John Cornyn
Majority Whip
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Hon. Richard J. Durbin
Minority Whip
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Washington, DC 20510

RE: Mandatory Arbitration of Sexual Harassment Disputes

Dear Congressional Leadership:

As the duly-elected and appointed Attorneys General and chief legal officers of our respective States, District of Columbia, and territories, we ask for your support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace. Specifically, we seek to ensure these victims' access to the courts, so that they may pursue justice and obtain appropriate relief free from the impediment of arbitration requirements.

Access to the judicial system, whether federal or state, is a fundamental right of all Americans. That right should extend fully to persons who have been subjected to sexual harassment in the workplace. Yet, many employers require their employees, as a condition of employment, to sign arbitration agreements mandating that sexual harassment claims be resolved through arbitration instead of judicial proceedings.

These arbitration requirements often are set forth in clauses found within the "fine print" of lengthy employment contracts. Moreover, these clauses typically are presented in boilerplate "take-it-or-leave-it" fashion by the employers. As a consequence, many employees will not even recognize that they are bound by arbitration clauses until they have been sexually harassed and attempt to bring suit.

While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.

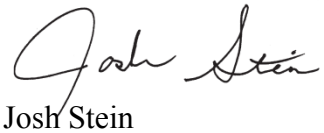
Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.

We applaud Microsoft Corporation for recently announcing that it will discontinue arbitration requirements with respect to sexual harassment claims and for supporting legislation to ensure that victims of sexual harassment be accorded the right of access to our judicial system. As Microsoft's President and Chief Legal Officer has fairly noted, "[b]ecause the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard."

Congress today has both opportunity and cause to champion the rights of victims of sexual harassment in the workplace by enacting legislation to free them from the injustice of forced arbitration and secrecy when it comes to seeking redress for egregious misconduct condemned by all concerned Americans. We are aware that the Senate and the House are considering legislation to address this issue. Whatever form the final version may take, we strongly support appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court.

Sincerely,

Pamela Jo Bondi
Florida Attorney General



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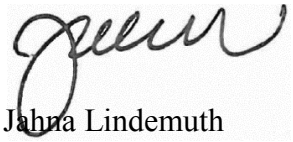

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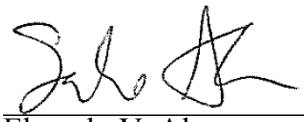

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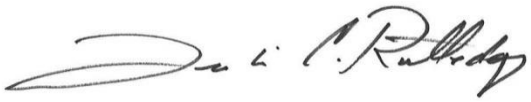

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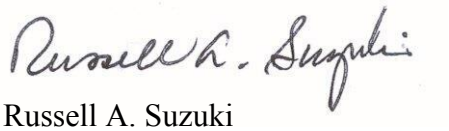

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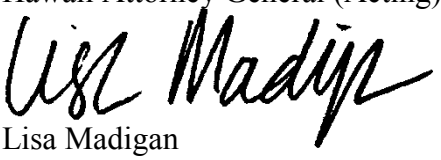

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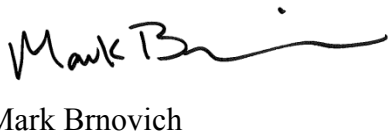

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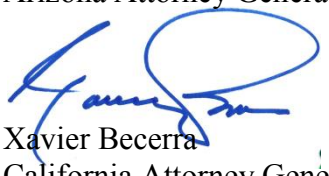

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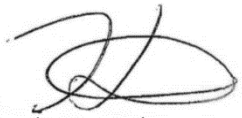

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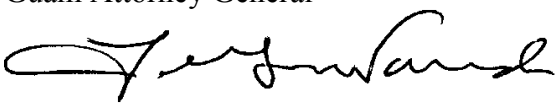

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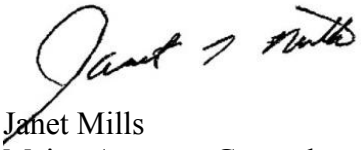

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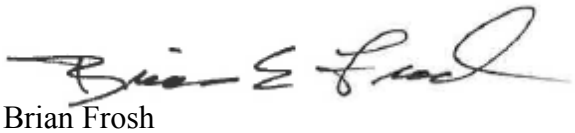

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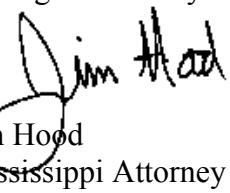

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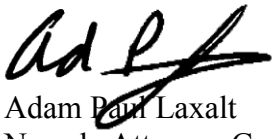

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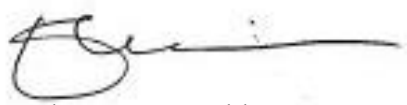

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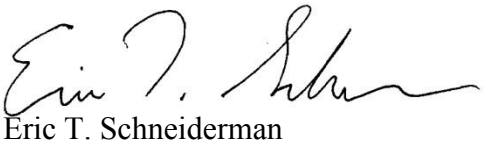

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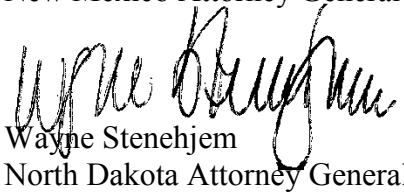

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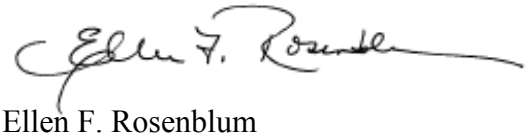

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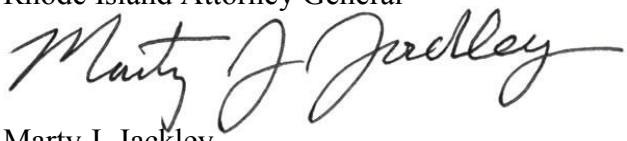

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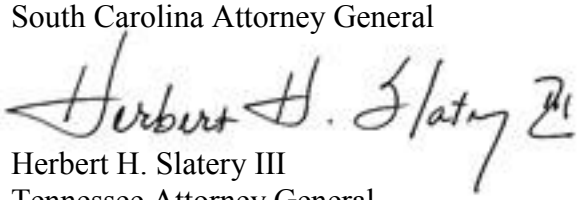

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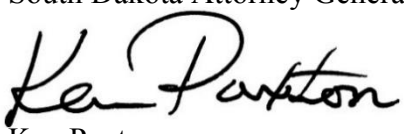

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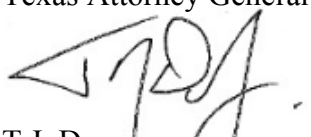

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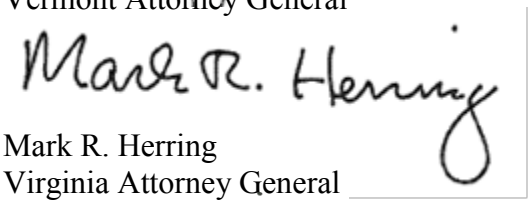

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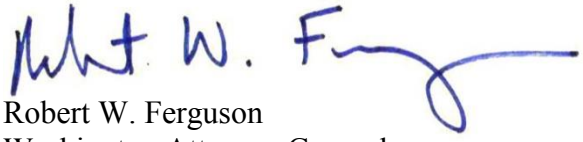

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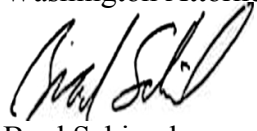

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Peter K. Michael
Wyoming Attorney General

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

Public Law 117–90
117th Congress

An Act

Mar. 3, 2022
[H.R. 4445]

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.
9 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021".

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

9 USC 401 prec.

"CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

9 USC 401.

"§ 401. Definitions

"In this chapter:

"(1) PREDISPUTE ARBITRATION AGREEMENT.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

"(2) PREDISPUTE JOINT-ACTION WAIVER.—The term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"(3) SEXUAL ASSAULT DISPUTE.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

"(4) SEXUAL HARASSMENT DISPUTE.—The term 'sexual harassment dispute' means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

"§ 402. No validity or enforceability 9 USC 402.

"(a) IN GENERAL.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

"(b) DETERMINATION OF APPLICABILITY.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.". Contracts.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting "or as otherwise provided in chapter 4" before the period at the end;

(B) in section 208—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."; and

(C) in section 307—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following: 9 USC 201 prec.

"208. Application.".

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following: 9 USC 301 prec.

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following: 9 USC 1 prec.

"4. Arbitration of disputes involving sexual assault and sexual harassment ..... 401".

9 USC 401 note.

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

Approved March 3, 2022.

LEGISLATIVE HISTORY—H.R. 4445 (S. 2342):

HOUSE REPORTS: No. 117–234 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 168 (2022):
Feb. 7, considered and passed House.
Feb. 10, considered and passed Senate.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2022):
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NOTE

Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases

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This Note addresses the particular difficulty arbitration agreements pose to survivors of sexual harassment in the workplace. While arbitration agreements were originally intended to facilitate transactions between two commercial parties with equal bargaining power, due to the Supreme Court's expansive reading of the Federal Arbitration Act ("FAA") arbitration clauses are ubiquitous in consumer, retail, and employment contracts. Today, more than half of all employment contracts contain a mandatory arbitration provision. Despite their prevalence, employees and consumers rarely recognize the clause's implications.

Instead of filing a lawsuit in court, individuals subject to arbitration go before an arbitrator. The decision of that arbitrator is binding — there is no right to an appeal. The proceedings are private, and often confidential. Mandatory arbitration reduces an employee's opportunities to win against their employers, reduces the awards they can receive from their arbitrators,

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reduces public awareness of corporate abuse, and reduces the likelihood that an employee brings a claim at all. These consequences further deter the most marginalized survivors: queer people, people of color, and poor people.

The Supreme Court vastly expanded the power and purview of the FAA while striking down contract defenses, such as unconscionability and public policy, that were potential vehicles to dampen the effect of these provisions. As the Supreme Court does not appear to be interested in altering its understanding of the FAA, legislative action is needed to curb their prevalence and support sexual harassment survivors.

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INTRODUCTION

The #metoo movement was originally founded by the Black feminist activist, Tarana Burke, in 2006.[1] The mission of the movement was "to help survivors of sexual violence, particularly . . . young women of color from low wealth communities, find pathways to healing."[2] While Tarana Burke coined the phrase "me too" more than a decade ago, the phrase ignited the national consciousness on October 15, 2017.[3] After the *New York Times* published its exposé on Harvey Weinstein, actress Alyssa Milano invited Twitter users "to write 'me too' as a reply to [her] tweet if they had been sexually harassed or assaulted."[4] Within twenty-four hours, over 500,000 "#metoo" replies unfurled across Twitter.[5]

As survivors[6] shared their stories, the country began reckoning with the pervasiveness of sexual assault and sexual harassment in the workplace and beyond.[7] The impact of this national conversation is

[1] Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 106 n.5, 107-08 (2018) (internal quotations omitted) (describing the timeline of the #metoo movement); Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 30 n.22 (2018); *History & Vision*, ME TOO MOVEMENT, https://metoomvmt.org/about/#history (last visited Nov. 20, 2019) [https://perma.cc/E5X6-EXHK]. Please note that Tarana Burke's website states the movement was founded in 2006, while numerous articles, including Professor Onwuachi-Willig and Professor Schultz's articles, give the origin year as 2007.

[2] *History & Vision*, *supra* note 1.

[3] *See* Onwuachi-Willig, *supra* note 1, at 106.

[4] *Id.*

[5] Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?* , 54 HARV. C.R.-C.L. L. REV. 155, 193 (2019) [hereinafter *Mandatory Arbitration*].

[6] While this Note recognizes the extent of harassment against cisgender women in the workforce, this Note also acknowledges that harassment knows no gender. Harassment happens against cisgender men, gender non-binary people, transgender women, and transgender men who are often left out of the mainstream #metoo conversation. *See* Meredith Talusan, *Trans Women and Femmes Are Shouting #MeToo — But Are You Listening?*, THEM. (Mar. 2, 2018), https://www.them.us/story/trans-women-me-too [https://perma.cc/CHL9-9V9N]. This is disheartening especially because the people most left out of the mainstream conversation are often the ones most impacted and vulnerable. One study reflected that 90% of transgender individuals in the workplace encountered mistreatment or harassment in the workplace. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/ [https://perma.cc/Q3W7-M6FR].

[7] Schultz, *supra* note 1, at 33 ("The #MeToo movement has exposed sexual assaults and abuse in arenas other than workplaces, such as schools, churches, fraternities, families, and prisons.").

multifaceted and complex.[8] This Note focuses on one of those facets: how mandatory or forced arbitration in employment contracts shelters serial sexual harassers and predators in the private, and often confidential, arbitral process.[9] This Note hones in on both the #metoo movement and its impact, as well as on arbitration agreements and the use of mandatory arbitration in employment contexts.[10] This Note is

[8] *See* Onwuachi-Willig, *supra* note 1, at 106-08 (describing how the #MeToo movement erases the voices of women of color); Eric Bachman, *In Response To #MeToo, EEOC Is Filing More Sexual Harassment Lawsuits and Winning*, FORBES (Oct. 5, 2018, 11:20 AM), https://www.forbes.com/sites/ericbachman/2018/10/05/how-has-the-eeoc-responded-to-the-metoo-movement/#55ca7fb57475 [https://perma.cc/9PW9-2N9H] (discussing how the #metoo movement has led to an increase in EEOC filings, including a "50% increase in suits challenging sexual harassment over FY 2017"); Graham Bowley, *Bill Cosby, Citing #MeToo Bias, Files New Appeal*, N.Y. TIMES (Jan. 9, 2020), https://www.nytimes.com/2020/01/09/arts/television/bill-cosby-appeal.html?searchResultPosition=1 [https://perma.cc/P34F-E9ZW] (noting that Bill Cosby's attorneys appealed his conviction arguing "#MeToo hysteria" improperly influenced the trial court's evidentiary rulings); KC Clements, *In The #MeToo Conversation, Transgender People Face A Barrier To Belief*, THEM. (Apr. 18, 2018), https://www.them.us/story/believe-trans-people-when-we-say-me-too [https://perma.cc/D6QJ-SRQT] (explaining how non-binary and transgender people are left out of the #metoo movement); Vanessa Friedman, *Airbrushing Meets the #MeToo Movement. Guess Who Wins.*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/fashion/cvs-bans-airbrushing.html [https://perma.cc/45AM-8EVD] (analyzing how the #metoo movement impacts the beauty industry); Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html [https://perma.cc/5WMA-5C55]; *see also* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 67-72 (2018), https://www.yalelawjournal.org/forum/queering-sexual-harassment-law [https://perma.cc/UU95-5Y6L] (discussing how the #metoo movement may have inspired a judge to describe in unflinching detail the disturbing facts of the harassment of lesbian firefighter in *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018), as opposed to leaving the facts sparse as some judges want to do).

[9] *See* Ramit Mizrahi, *Sexual Harassment Law After #Metoo: Looking to California as a Model*, 128 YALE L.J.F. 121, 135, 151 (2018) ("However, in light of the #MeToo and #TimesUp movements, there is a growing effort to end forced arbitrations in sexual harassment cases.").

[10] *See generally, e.g.*, Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 10-11 (2014) (exploring the detriments of mandatory arbitration but omitting conversation of the #metoo movement); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 381 (2018) (providing context for the FAA and the Court's foreclosure of unconscionability but omitting conversation of the #metoo movement); Mizrahi, *supra* note 9 (discussing ways in which California employment law has evolved to address the concerns of sexual harassment survivors stemming from the #metoo movement); Onwuachi-Willig, *supra* note 1 (focusing on the ways in which the mainstream #metoo movement leaves out women of color); Sternlight, *Mandatory Arbitration*, *supra* note 5 (exploring mandatory arbitration and the #metoo movement but omitting conversation of unconscionability and public policy).

unique in that it specifically unpacks why the Supreme Court's misreading of the Federal Arbitration Act ("FAA") forecloses unconscionability and public policy contract defenses as avenues to curb mandatory arbitration and why federal legislative intervention is thus required.

Arbitration agreements were originally intended to facilitate transactions between commercial parties.[11] Instead of filing a lawsuit in court, individuals subject to arbitration go before an arbitrator.[12] The decision of that arbitrator is binding — there is no right to an appeal.[13]

Historically, two commercial parties — with equal bargaining power — contracted to resolve their business disputes in arbitration in order to gain a speedier and more cost-effective resolution to their disagreement.[14] Arbitration now extends far beyond this context.[15]

Today, more than half of all employment contracts contain a mandatory arbitration provision.[16] A recent study estimates that more than 60 million American employees are subject to forced arbitration.[17] Arbitration clauses are found in the fine print of consumer transactions, credit card contracts, job applications, employment handbooks, and car

[11] Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 971 (1999).

[12] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 173. Sometimes arbitration proceeds before a panel of arbitrators, not just a single individual. Sharon K. Campbell, *Going the Arbitration Route*, AM. BAR ASS'N (Jan. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/january_2012/arbitration/ [https://perma.cc/6Y63-HFK7].

[13] Comsti, *supra* note 10, at 9. While there is no right to an appeal, the FAA does provide grounds on which an award may be set aside. 9 U.S.C. § 10 (2019).

[14] Comsti, *supra* note 10, at 11.

[15] *See, e.g.*, Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. 1, 5 (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/NQX9-K4BN].

[16] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers [https://perma.cc/4XH8-6GHY] [hereinafter *Growing*] (conducting a "nationally representative survey" of private non-union employers on their practices regarding mandatory arbitration and finding that "53.9 percent . . . of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures. Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures").

[17] *Id.*

dealership contracts.[18] Despite their prevalence, employees and consumers rarely recognize the clauses' implications.

Commentators often distinguish between voluntary and mandatory arbitration. Voluntary arbitration primarily consists of arbitration clauses in agreements between two corporations or two savvy business partners where the parties have voluntarily and knowingly negotiated terms on equal footing and resources.[19] In the employment context, this may look like a high-level executive or an employee with special skills negotiating an employment contract directly with an employer.[20] In contrast, mandatory arbitration or "forced"[21] arbitration occurs when consumers or employees trade their right to a day in court for access to a product or employment.[22] In the employer-employee context, forced arbitration exists when an employee is forced to consent to an arbitration provision as a condition of their employment.[23] Individual employees often have no knowledge of these provisions, which can be buried in the fine print of job applications, employment contracts, and employment handbooks — some have even been included in company-wide emails, computerized applications on websites, and job offers.[24] Victims of sexual harassment and assault are particularly impacted by mandatory arbitration as it often shields serial harassers from public accountability.[25]

For example, events in 2016 and 2017 at Fox News ("Fox") demonstrate this reality. Fox's mandatory and confidential arbitration provisions shielded Fox's toxic corporate culture from public view for

[18] Comsti, *supra* note 10, at 6 n.3; *see, e.g.*, Mance v. Mercedes-Benz USA, 901 F. Supp. 2d 1147, 1152 (N.D. Cal. 2012) (discussing an arbitration clause in a "Retail Installment Contract" in a Mercedes-Benz dealership).

[19] Stone & Colvin, *supra* note 15, at 5.

[20] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 171.

[21] "Forced" arbitration may strike some as a polemical word choice. However, this is the current word of choice for both the media and legal scholars and thus I have chosen to use it intermittently throughout this article. *See, e.g.*, Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (Dec. 26, 2017); James Dawson, Comment, *Contract After* Concepcion*: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014) (utilizing the term "forced-arbitration clauses" throughout the article); Douglas MacMillan, *Google to End Force Arbitration for Sexual-Harassment Claims*, WALL ST. J. (Nov. 8, 2018, 7:18 PM), https://www.wsj.com/articles/google-to-end-forced-arbitration-for-sexual-harassment-claims-1541696868 [https://perma.cc/4P74-BY8S].

[22] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 203-04.

[23] *See id.* at 172 & n.110.

[24] Comsti, *supra* note 10, at 8.

[25] Mizrahi, *supra* note 9, at 134-36.

more than a decade.[26] It took the actions of Gretchen Carlson, a former Fox reporter and a current #metoo survivor and advocate, to break the silence.[27] In July 2016, Carlson filed a complaint against Roger Ailes, former Chairman and CEO of Fox.[28] A mandatory arbitration clause in her employee contract barred Carlson from suing her employer under Title VII.[29] Yet, Carlson was able to circumvent this clause by filing her complaint directly against Roger Ailes in New Jersey State Court.[30] Ultimately Carlson entered a confidential settlement[31] with Ailes, but the information in the complaint helped launch investigations into the culture at Fox.[32]

Since Carlson's complaint in 2016, dozens of women have come forward to describe sexual harassment from Roger Ailes and Bill O'Reilly, a former high-profile anchor at the network.[33] Some of the

[26] Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 467 (2018).

[27] *Id.* at 466; *see* John Koblin, *Gretchen Carlson, Former Fox Anchor, Speaks Publicly About Sexual Harassment Lawsuit*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/business/media/gretchen-carlson-fox-news-interview.html [https://perma.cc/WRY7-23U2].

[28] Complaint and Jury Demand at 1, Carlson v. Ailes, No. L-5016-16 (N.J. Super. Ct. Law. Div. July 6, 2016).

[29] Nuñez, *supra* note 26, at 468-69. Since the parties settled Carlson's suit, we can only speculate regarding the motives of filing the suit in New Jersey State Court. *Id.* at 470.

[30] *Id.* at 468. It appears Carlson was able to sue in New Jersey State Court by not suing her employer, Fox News, directly and not suing under the federal anti-discrimination act. *Id.* at 469. Scholars suppose this strategic move allowed her to evade the arbitration clause (an option not likely for a lower income plaintiff, or a plaintiff experiencing harassment from an employee of a large corporation that does not have the ability to pay for damages like Roger Ailes did). *See id.*

[31] The practice of confidentiality provisions or non-disclosure agreements in sexual harassment suits is similarly controversial. Mizrahi, *supra* note 9, at 140-41; Nicole Hong, *End of the Nondisclosure Agreement? Not So Fast*, WALL ST. J. (Mar. 26, 2018, 5:30 AM), https://www.wsj.com/articles/end-of-the-nondisclosure-agreement-not-so-fast-1522056601 [https://perma.cc/ATA4-6CEB]. Confidential settlement agreements may prevent survivors from speaking out about the specific facts of their case. Mizrahi, *supra* note 9, at 140-41. On the other hand, the practice of non-disclosure agreements in settling sexual harassment suits may also enable victims to receive larger settlement awards in exchange for their silence. Hong, *supra*. The full complexity of this practice and how it may impact survivors is unfortunately beyond the scope of this Note.

[32] *See* Michael M. Grynbaum & John Koblin, *Gretchen Carlson of Fox News Files Harassment Suit Against Roger Ailes*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/07/business/media/gretchen-carlson-fox-news-roger-ailes-sexual-harassment-lawsuit.html [https://perma.cc/EB72-N2ZJ] (describing Carlson's complaint as "unprecedented" as Mr. Aisles "typically enjoys absolute loyalty from his employees").

[33] Nuñez, *supra* note 26, at 467.

harassment claims span more than a decade.[34] In 2017, the *New York Times* reported that the network spent 45 million dollars to settle harassment claims solely against Bill O'Reilly.[35] The earliest known settlement against Bill O'Reilly was in 2002.[36] Despite this extensive and prolonged harassment, the public (and often victims in the same company) were unaware of the pervasiveness of sexual harassment at the network.[37] This was primarily due to the fact that arbitration clauses in victims' employee contracts barred them from suing in court.[38]

Publicity was ultimately the key to ensuring Fox acted to protect its workforce from a serial predator.[39] On July 21, 2016, less than three weeks after Carlson's suit, Roger Ailes resigned from Fox.[40] On April 1, 2017, the *New York Times* published an article delineating five confidential settlements Fox settled against Bill O'Reilly.[41] Following that article, more than fifty advertisers pulled out from his show.[42] On April 19, 2017, eighteen days after the publication of the initial article, Bill O'Reilly was fired.[43]

The fallout from Fox illuminates the importance of publicity and the difficulty of tracking abusers when mandatory arbitration is in play.[44]

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[34] *Id.*

[35] Emily Steel, *2 Women Who Settled with O'Reilly Over Sexual Harassment Sue for Defamation*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/business/media/oreilly-sexual-harassment-defamation.html?module=inline [https://perma.cc/376C-C2QD].

[36] *See id.*

[37] *See* Emily Steel & Michael S. Schmidt, *Fox News Settled Sexual Harassment Allegations Against Bill O'Reilly, Documents Show*, N.Y. TIMES (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/business/media/bill-oreilly-sexual-harassment-fox-news-juliet-huddy.html?module=inline [https://perma.cc/BB35-ARBW] (reporting allegations of sexual harassment against Bill O'Reilly to the public for the first time).

[38] Nuñez, *supra* note 26, at 509.

[39] *See* John Koblin et al., *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html?module=Promotron&region=Body&action=click&pgtype=article [https://perma.cc/4HNP-G5VT].

[40] *See id.*

[41] *See* Emily Steel & Michael S. Schmidt, *Bill O'Reilly Is Forced Out at Fox News*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html [https://perma.cc/C7TU-MQP9].

[42] *See id.*

[43] *See id.*

[44] *See* Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow.*, WASH. POST (Nov. 12, 2018, 1:42 PM), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.5e7ff973f96c [https://perma.cc/435G-TAZF].

Serial predators and their employers are able to capitalize on private proceedings to prevent public awareness of misdeeds.[45] In response to this concern, corporations are starting to renounce the use of forced arbitration in sexual harassment cases.[46] In 2017, Microsoft announced that it was eliminating arbitration provisions on sexual harassment claims brought by its employees.[47] Other companies have followed suit, particularly in the technology industry, including the ride-hailing companies Uber and Lyft.[48] In November 2018, 20,000 Google employees walked out of their offices to protest the company's handling of sexual misconduct.[49] A week later, Google ended the use of forced arbitration in sexual harassment and assault suits.[50] A day later, Facebook set out a similar policy.[51] Most recently, in February 2020, Wells Fargo announced it was ending the use of forced arbitration in sexual harassment cases due to pressure from stakeholders.[52]

[45] *Id.*; *see also* Terri Gerstein, Opinion, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html [https://perma.cc/ZV4G-664G].

[46] Jamie Hwang, *Uber and Lyft End Mandatory Arbitration for Sexual Assault Claims*, ABA J. (May 15, 2018, 5:19 PM), http://www.abajournal.com/news/article/uber_and_lyft_end_mandatory_arbitration_clauses_for_sexual_assault_claims [https://perma.cc/MDY9-QT2C]; Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html [https://perma.cc/YMD8-GPY4].

[47] Wingfield & Silver-Greenberg, *supra* note 46.

[48] Greg Bensinger, *Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims*, WALL ST. J. (May 15, 2018, 6:00 AM), https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400 [https://perma.cc/6PQY-U9EJ].

[49] *See* Gerstein, *supra* note 45.

[50] *See id. See also* Elizabeth Winkler, *Facebook and Google are Right to End Forced Arbitration*, WALL ST. J. (Nov. 11, 2018, 10:00 AM), https://www.wsj.com/articles/facebook-and-google-are-right-to-end-forced-arbitration-1541948401 [https://perma.cc/4XQ7-CXEL].

[51] Douglas MacMillan, *Facebook to End Forced Arbitration for Sexual-Harassment Claims*, WALL ST. J. (Nov. 9, 2018, 4:35 PM), https://www.wsj.com/articles/facebook-to-end-forced-arbitration-for-sexual-harassment-claims-1541799129?mod=article_inline [https://perma.cc/YR3K-F4SK].

[52] Jena McGregor, *New Database Aims to Expose Companies that Make Employees Arbitrate Sexual Harassment Claims*, WASH. POST (Feb 27, 2020, 4:00 AM), https://www.washingtonpost.com/business/2020/02/27/new-database-reveals-which-companies-prevent-employees-filing-sexual-harassment-lawsuits/ [https://perma.cc/2MKK-3374].

Despite these announcements, the national corporate trend is still strongly in favor of mandatory arbitration in sexual harassment cases.[53] Companies prefer arbitration for sexual harassment claims because it is understood to be more cost-effective, and confidential arbitration often spares them from bad publicity.[54] The Supreme Court's pro-arbitration stance fosters this environment by protecting employer's decisions to place arbitration provisions in any employee contract.[55]

State legislatures are attempting to curtail mandatory arbitration using the contract defenses of unconscionability and public policy.[56] However, due to the Supreme Court's broad interpretation of the federal statute governing arbitration, most legal scholars believe the laws are unenforceable.[57] Some governors are even refusing to sign them, citing preemption concerns.[58] In California, for example, lawmakers passed legislation in 2018 aimed at eliminating mandatory arbitration in sexual harassment cases, but Governor Jerry Brown vetoed the bill citing preemption concerns.[59] In October 2019, the new California governor, Gavin Newsom, appeared willing to take on critics when he signed into law a piece of legislation that bans mandatory arbitration in employment discrimination suits.[60] Within three months, the California

[53] *See* Colvin, *Growing*, *supra* note 16 (noting statistics that were updated as recently as April 6, 2018, where Microsoft announced its plan to eliminate arbitration in December 2017).

[54] MacMillan, *supra* note 51.

[55] *See, e.g.*, Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105, 119 (2001) (holding that the FAA applies to all employment contracts except ones of transportation workers).

[56] *See, e.g.*, S. 121, 218th Leg. (N.J. 2018), https://www.njleg.state.nj.us/2018/Bills/S0500/121_I1.HTM [https://perma.cc/GT29-CNWC] ("The bill also provides that a provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment, including claims that are submitted to arbitration, would be deemed against public policy and unenforceable.").

[57] *See* Sternlight, *Mandatory Arbitration*, *supra* note 5, at 189.

[58] *See* Vin Gurrieri, *Calif. #MeToo Bills May Help Harassment Suits Reach Juries*, LAW360 (Sept. 17, 2018, 6:41 PM), https://www.law360.com/articles/1082219/calif-metoo-bills-may-help-harassment-suits-reach-juries [https://perma.cc/8F7P-HJY5]; *see also* Assemb. B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

[59] *See* Gurrieri, *supra* note 58.

[60] *Assembly Bill No. 51*, CAL. LEG. INFO (Oct. 11, 2019, 9:00 PM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 [https://perma.cc/342Z-LJT2].

Chamber of Commerce challenged the bill in court citing the Federal Arbitration Act.[61] The proceedings are currently ongoing.[62]

As pressure from the public to end forced arbitration continues to build, and state legislative options are thwarted due to preemption, narrowly tailored federal legislation is imperative. This Note proceeds in five parts. Part I provides a summary of the legal landscape that grounds the origin, rise, and expansion of arbitration agreements since the Federal Arbitration Agreement of 1925.[63] Part II investigates how arbitration provisions specifically impact victims of sexual harassment.[64] Part III explores why the contract grounds of unconscionability and public policy are closed avenues to lawyers hoping to strike down arbitration provisions.[65] Part IV highlights the stark difference between the original scope of the FAA and the Court's current interpretation.[66] Part V calls upon Congress to pass federal legislation returning the FAA to its original scope, and eliminating the use of mandatory arbitration in sexual harassment suits.[67]

I. LEGAL LANDSCAPE OF THE FEDERAL ARBITRATION ACT

A. The Origins of the Federal Arbitration Act

From the inception of the country until the early twentieth century, American courts questioned the validity of arbitration.[68] American justices inherited their disdain for arbitration from their English counterparts.[69] English courts believed arbitration clauses were improper attempts to divest the court of jurisdiction.[70] English courts

[61] Laurence Darmiento, *Judge Halts California Law Banning Forced Arbitration at the Workplace*, L.A. TIMES (Dec. 30, 2019, 5:28 PM), https://www.latimes.com/business/story/2019-12-30/california-forced-arbitration-law-blocked [https://perma.cc/BJ6M-UDXC].

[62] *See id.*

[63] *See infra* Part I.

[64] *See infra* Part II.

[65] *See infra* Part III.

[66] *See infra* Part IV.

[67] *See infra* Part V.

[68] *Compare* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1034-35 (2012) (discussing anti-arbitration sentiment arising in the beginning of the 1900s) [hereinafter *Testamentary*], *with* IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 15-37 (2013) (discussing pro-arbitration sentiment in America prior to the 20th century).

[69] Horton, *Testamentary*, *supra* note 68, at 1034.

[70] *Id.*

nullified arbitration clauses frequently and "allowed parties to retract their consent to arbitrate."[71]

American courts, following English precedents, adopted these practices and similarly nullified arbitration contracts even between commercial parties.[72] Prior to 1925, it was often impossible for two merchants with equal bargaining power to enter into a binding contract to resolve their future disputes through arbitration.[73] If one party decided to pursue litigation over arbitration, arbitration agreements were voided regardless of the original content of the pre-dispute agreement.[74]

This judicial practice troubled commercial parties who wanted to resolve disputes in a less burdensome and costly way than traditional litigation.[75] Seeking a more efficient and economical resolution of their commercial disputes, business groups organized and lobbied for enforceable arbitration clauses.[76] In response to this lobbying effort, a select number of state courts authorized arbitration.[77] These states allowed arbitrators to resolve factual issues and prevented parties from retracting their assent to arbitrate in certain circumstances.[78]

While arbitration gained ground in America, the rules still varied greatly by jurisdiction.[79] Instead of enduring this piecemeal approach, pro-arbitration lobbyists set their sights on a federal statute that would uphold arbitration clauses as "universally enforceable."[80] First, the lobbyists worked with an American Bar Association ("ABA") committee to produce a draft federal statute.[81] The ABA approved a draft in 1922.[82] Three years later, with very few changes to the original draft, Congress passed the Federal Arbitration Act.[83]

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[71] *Id.*

[72] *Id.*

[73] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644-45 (1996) [hereinafter *Panacea*].

[74] *Id.*

[75] *See* SZALAI, *supra* note 68, at 31.

[76] Sternlight, *Panacea*, *supra* note 73, at 645-46.

[77] Horton, *Testamentary*, *supra* note 68, at 1038.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Sternlight, *Panacea*, *supra* note 73, at 645.

[82] *Id.* at 645-46.

[83] *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219 (2013) [hereinafter *Preemption*].

B. The FAA Savings Clause

The FAA legislatively abolished judicial hostility to arbitration.[84] No matter a court's bias against arbitration, arbitration clauses were now judicially enforceable.[85] The statute's centerpiece is section 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[86]

Section 2 contains two crucial parts. The first makes arbitration clauses presumptively "valid, irrevocable, and enforceable."[87] The second consists of the savings clause — "save upon such grounds as exist at law or in equity for the revocation of any contract." The savings clause provides the mechanism for courts to strike down arbitration clauses.[88] The meaning of the savings clause is hotly debated,[89] but in today's Supreme Court jurisprudence, it includes standard contract defenses such as "fraud, duress, or unconscionability."[90]

Sections 3 and 4 of the FAA contain procedural mechanisms for enforcing agreements to arbitrate.[91] Section 3 requires that federal courts grant a stay of litigation when a lawsuit is brought over a matter covered by a valid arbitration agreement.[92] If the parties agreed to arbitrate, the court must stay litigation pending the completion of an arbitration proceeding.[93] Section 4 requires federal courts to compel arbitration if the arbitration agreement is valid.[94]

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[84] *Id.*

[85] *Id.* at 1217.

[86] 9 U.S.C. § 2 (2006).

[87] *Id.*

[88] Horton, *Preemption*, *supra* note 83, at 1228.

[89] *See id.* at 1251.

[90] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

[91] Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 722 (2015).

[92] *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2039 (2011).

[93] *See* Brief for Chamber of Commerce of the U.S. as Amici Curiae Supporting Petitioners at 4, Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524 (2019) (No. 17-1272).

[94] Friedman, *supra* note 92, at 2039.

C. Contract Defenses in Arbitration Proceedings

Section 2's savings clause provides a mechanism to nullify arbitration "upon such grounds as exist at law or in equity for the revocation of any contract."[95] The last two words of this savings clause imply that courts may only strike down arbitration provisions under rules that are extensive enough to govern any contract.[96] Although the precise definition of this phrase continues to evolve, it is generally understood to include a handful of contract defenses which govern all contracts including employment contracts, business-to-business contracts, and automobile rental agreements.[97] Contract defenses that are relevant to this Note are unconscionability[98] and public policy.[99]

Generally, courts require a showing of both procedural and substantive unconscionability to triumph on an unconscionability defense.[100] In California, the procedural element encapsulates "oppression" or "surprise" due to unequal bargaining power.[101] Substantive unconscionability focuses on "overly harsh" or "one-sided" results.[102]

For the public policy defense, a court may strike down a contract if it violates legislation enacted to "protect some aspect of the public welfare."[103] The Restatement (Second) of Contracts provides in full that a promise is void "if legislation provides that . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[104] The Restatement offers an example of two individuals betting on a basketball game in a state with a statute that makes wagering a crime.[105] In this example, the contract to pay money to the winning party of the basketball game bet is void due to the legislation.[106]

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95 9 U.S.C. § 2 (2006).

96 *See* Horton, *Preemption*, *supra* note 83, at 1219.

97 *Id.* at 1219-20.

98 *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (defining unconscionability).

99 *See generally id.* (describing public policy reasons for unconscionability).

100 *But see* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism — The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 6-7 (2012).

101 Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

102 *Id.*

103 RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

104 *Id.*

105 *Id.*

106 *Id.*

D. The Impact of the FAA

The FAA's initial influence was marginal.[107] Until the 1960s, individuals rarely utilized the FAA in state court.[108] State judges and lawmakers even adopted specific anti-arbitration rules and felt free to enforce them.[109] However, in the last half of the twentieth century, the Court profoundly expanded the scope and reach of the FAA.[110] The FAA no longer merely stands for the right of commercial parties engaging in interstate commerce to manage their disputes outside of the court system.[111] Instead, the FAA extends to cover almost every contract, including credit-card agreements, pay-day loans, employee handbooks, union employees, and computer purchases.[112] The pervasiveness of arbitration agreements in employer-employee contracts and how that impacts sexual harassment survivors is the focus of this Note.

II. MANDATORY ARBITRATION AND ITS CONSEQUENCES FOR SEXUAL HARASSMENT VICTIMS

Courts have come a long way and begun to recognize that sexual harassment is perpetrated by and against people of all genders, takes sexual and non-sexual forms, and is often motivated by hostility, not sexual desire.[113] And yet, as the #metoo movement demonstrates, the insidiousness and widespread nature of sexual harassment is far from over.[114] While the movement has inspired "the firing, resignation, or embarrassment of leading men in the world of Hollywood, politics, news media, cooking, technology, entertainment, the armed forces, [and the] law," meaningful change still feels out of reach in the workplace of regular people.[115] This is partly because the law has not caught up to the mental health and financial needs of survivors.[116] One

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107 Horton, *Testamentary*, *supra* note 68, at 1039.

108 *Id.*

109 *Id.*

110 *See infra* Part III.

111 *See* SZALAI, *supra* note 68, at 9-10; Comsti, *supra* note 10, at 11.

112 *See* Alex Brunino, Comment, *A Modest Proposal: Review of the National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act*, 95 OR. L. REV. 569, 570 (2017); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2907 (2015).

113 Mizrahi, *supra* note 9, at 121-22.

114 *Id.* at 121.

115 Sternlight, *Mandatory Arbitration*, *supra* note 5, at 194-96.

116 *Id.* at 196-201.

way to hasten justice is to address how mandatory arbitration further diminishes the rights of sexual harassment survivors.[117]

As discussed in the Introduction,[118] arbitration is a method of dispute resolution in which a private and objective third person, or a panel of such persons, determines the outcome of a disagreement between two parties.[119] Arbitration occurs outside of the traditional courtroom litigation process,[120] and the regular rules of procedure and evidence do not apply.[121] Proceedings and damage awards are private,[122] and decisions by the arbitrator are typically binding and afford no right to an appeal.[123]

Commentators distinguish between two types of arbitration proceedings: voluntary and mandatory. In an employer-employee context, mandatory arbitration exists when an employee is forced to either consent to an arbitration provision in their contract or be denied employment with a company.[124] Arbitration clauses in employee contracts often hide in boilerplate language. When employees review their contract or handbooks, most do not realize that the language exists or understand how arbitration may affect them.[125] Arbitration clauses may be hidden in company orientation materials or employee applications,[126] where employees do not think to look for contractual information that waives their right to sue in court.[127]

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117 *See infra* notes 130–202 and accompanying text.

118 *See supra* INTRODUCTION.

119 *See, e.g.*, *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining arbitration as "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute").

120 *See* John H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration or Through the Courts?* , *in* HANDBOOK ON ARBITRATION PRACTICE 3 (2d ed. 2016).

121 Louis L.C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, *in* HANDBOOK ON ARBITRATION PRACTICE, *supra* note 120, at 15.

122 *Id.*

123 *See* Comsti, *supra* note 10, at 9-10.

124 Stone & Colvin, *supra* note 15, at 4-5.

125 *Id.* at 4; *see also* Dov Waisman, *Preserving Substantive Unconscionability*, 44 SW. L. REV. 297, 308 n.12 (2014).

126 *See* Marmolejo v. Fitness Int'l LLC, 2018 WL 1181240, at *4 (Cal. Ct. App. filed Mar. 7, 2018) (holding an arbitration contract in employee application valid); Johnson v. Vatterott Educ. Ctrs., Inc., 410 S.W.3d 735, 738 (Mo. Ct. App. 2013) ("[A]n arbitration agreement contained within an employee handbook may constitute an enforceable agreement . . . ."). *But see* Shockley v. PrimeLending, 929 F.3d 1012, 1019-20 (8th Cir. 2019) (finding an arbitration clause in employee handbook invalid because employee did not sign the handbook or objectively manifest acceptance).

127 Stone & Colvin, *supra* note 15, at 4-5.

This is in sharp contrast to voluntary arbitration.[128] Voluntary arbitration primarily consists of arbitration clauses in agreements between two corporations or individuals with equal bargaining power.[129] The impact of this difference is stark. In a study comparing the success rates of mandatory arbitration versus individually negotiated arbitration, the employees who had the ability to negotiate their employment contracts and arbitration agreements had nearly a forty percent higher win rate.[130] Additionally, these actively negotiating employees were better-paid, received higher damages (on average), and were more likely to be represented by an attorney.[131] While the FAA was originally intended to cover voluntary arbitration between merchants, today's mandatory arbitration looks vastly different from the arbitration lawmakers originally intended to protect.[132]

Mandatory arbitration provisions impact employees in a number of ways. First, arbitration reduces employee's opportunities to win against their employers.[133] Second, it reduces the awards they can receive from their arbitrators.[134] Third, it reduces public awareness of corporate abuse.[135] Fourth, especially combined with class action waivers, it reduces the likelihood that an employee brings a claim at all.[136] This is especially true for low-income workers.[137] Fifth, it prevents the creation

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[128] *Id.* at 5.

[129] *Id.*

[130] Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 75-76 (2014) [hereinafter *Inequality*].

[131] *Id.*

[132] *See infra* Part III.

[133] Comsti, *supra* note 10, at 9-10 ("A recent social science study found that employees are almost twice as likely to prevail in federal court than in forced arbitration.").

[134] *Id.* ("In addition, judges and juries awarded employees damages that were 150 percent greater than those received in arbitration.").

[135] *Id.*

[136] Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J. (Jan. 25, 2018, 5:30 AM), https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201 [https://perma.cc/FML3-NZ88].

[137] Stone & Colvin, *supra* note 15, at 22 ("Whereas on average plaintiffs' attorneys accepted 15.8% of potential cases involving employees who could go to litigation, they accepted about half as many, 8.1%, of the potential cases of employees covered by mandatory arbitration. Thus, in addition to producing worse case outcomes than litigation, mandatory arbitration also reduces the likelihood of obtaining the legal representation that will help employees bring a claim in the first place."); *see also* Colvin, *Growing*, *supra* note 16 ("Of the employers who require mandatory arbitration, 30.1% also include class action waivers in their procedures—meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through

of precedent because the entire process occurs outside of a judicial system.[138] These negative consequences affect all types of individuals, but they compound to produce particularly painful effects on sexual harassment victims.[139]

Statistically, arbitration decreases employee's likelihood of success against their employers.[140] In a 2011 study evaluating outcomes of 1,213 mandatory arbitration cases administered over five years, employee win rates in mandatory arbitration was 21.4%.[141] This was compared to 38% in state courts and 59% in federal courts.[142] In a 2014 study, plaintiff-side attorneys provided information regarding their most recent employment cases in litigation and mandatory arbitration.[143] In these cases, attorneys reported a 32% lower win rate in mandatory arbitration compared to litigation.[144]

Mandatory arbitration also decreases the average damages award for employees.[145] In the previously cited 2011 study, the median award in mandatory arbitration was $36,500.[146] In comparison, the median federal court employment award was $176,426 and $85,560 in state court.[147] Thus, not only are arbitration claims less likely to succeed than similarly situated claims brought in federal or state court, but when employees do beat the odds and win, they are awarded significantly smaller damages.[148] Some attorneys suggest one reason for the skewed

collective legal action."); Terri Gerstein & Sharon Block, Editorial, *Supreme Court Deals a Blow to Workers*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/opinion/supreme-court-arbitration-forced.html.

138 *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* , 57 STAN. L. REV. 1631, 1634 (2005) [hereinafter *Creeping Mandatory Arbitration*].

139 While I focus on the impacts of mandatory arbitration on sexual harassment victims, I agree with many other activists and organizers that mandatory arbitration is painful for most employees. I believe that mandatory arbitration should be barred in many additional instances including discrimination suits and disability suits. However, the full impact of mandatory arbitration is beyond the scope of this Note. *See, e.g.*, Gerstein, *supra* note 45.

140 *See* Stone & Colvin, *supra* note 15, at 19.

141 *Id.*

142 *Id.*

143 *Id.* at 20.

144 *Id.*

145 *Id.* at 19.

146 *Id.* at 20 tbl.1.

147 *Id.*

148 *See* Colvin, *Inequality*, *supra* note 130, at 80-81.

results are that companies hire the same arbitrator in multiple cases which may produce an economic incentive for the arbitrator.[149]

Mandatory arbitration also reduces public awareness of corporate abuse.[150] This effect is particularly poisonous in sexual harassment cases.[151] As events at Fox and the Weinstein Company demonstrate, public awareness of corporate misconduct ensures companies take action to protect their employees.[152] Fox settled lawsuit after lawsuit for Bill O'Reilly — only in the face of public outcry did scales tip toward protecting vulnerable employees.[153] In contrast, in 2008, sixty former employees of a national jewelry company, Signet, alleged in arbitration proceedings that the company fostered rampant sexual harassment and discrimination.[154] However, news of this did not break until 2017 when the *Washington Post* gained access to arbitration documents made public by the employee's attorneys.[155] For almost ten years, the public was unaware of allegations against the company — including the alleged annual manager meetings described as a 'sex fest' where attendance was mandatory and women were aggressively pursued, grabbed, and harassed."[156] Once the report was released, Signet's stock dropped to an annual low.[157] The published documents also likely spurred the CEO, who was named in the suit, to step down.[158] Despite the company being aware of the allegations in 2008, it took the public pressure of the released documents to move the corporate needle and effectuate

149 Genie Harrison, *INSIGHT: Forced Arbitration Is Bad News for Employees, California Stats Show*, BLOOMBERG L. (Aug. 15, 2019, 1:01 AM), https://news.bloomberglaw.com/business-and-practice/insight-forced-arbitration-is-bad-news-for-employees-california-stats-show [https://perma.cc/768W-626L].

150 *See* Comsti, *supra* note 10, at 10.

151 *See*, Nuñez, *supra* note 26, at 467-75.

152 *See supra* INTRODUCTION.

153 *See* Sternlight, *Mandatory Arbitration*, *supra* note 5, at 202.

154 Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html?utm_term=.7f4bc0423a61 [https://perma.cc/E3S8-87MK].

155 *Id.*

156 *Id.*

157 Daphne Howland, *Signet Jewelers Losing Customers Over Sexual Harassment Claims*, RETAIL DIVE (Dec. 15, 2017), https://www.retaildive.com/news/signet-jewelers-losing-customers-over-sexual-harassment-claims/513134 [https://perma.cc/RPV2-Z9KJ].

158 While Light stepped down six months prior to the *Washington Post* publishing the documents, for his "health," the documents were released only upon agreement between both party's lawyers. It is highly probable the resignation was planned in advance. *See id.*

change.[159] Without sunshine, arbitration proceedings can nullify the important deterrent effect that results from public enforcement of employee protection laws.[160]

Arbitration also affects the most marginalized and vulnerable workers.[161] Employers are most likely to impose mandatory arbitration on their lowest-paid employees.[162] In Professor Colvin's 2018 study, he found that individuals who are paid less than $13 an hour have the highest rate of mandatory arbitration.[163] While the most public faces of the #metoo movement have been primarily white and high-income earners, arbitration agreements disproportionally impact low-wage workers who are already disadvantaged in finding legal assistance.[164] While high-income earners such as Gretchen Carlson may obtain relief via expensive legal battles to circumvent arbitration clauses, that type of creative and costly legal strategy is unavailable to most marginalized and vulnerable workers.[165]

For low-wage earners, the cost is compounded when class action waivers enter the mix.[166] Class action waivers are provisions that waive an individual's ability to bring a claim against an employer with other similarly impacted employees. For example, in 2013, an employee of Waffle House alleged that the diner fired her in 2012 after she reported that her boss texted her images of his penis and then threatened her with a knife if she complained about him. [167] Her job paid $3.95 an hour.[168] When her attorney uncovered that she, like other Waffle House workers, signed an arbitration agreement he advised her that the claim was not worth pursuing.[169] The employee reflected, "I knew I couldn't

[159] *See* David Gelles & Rachel Abrams, *Hundreds of Workers Allege Sex Bias by Jeweler, Files Show*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/business/sterling-kay-jewelers-jared.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/G6R3-7RUA].

[160] *See* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 138, at 1662; *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting).

[161] *See* Colvin, *Growing*, *supra* note 16, at 9.

[162] *See id.*

[163] *Id.* at 9 tbl.4.

[164] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 183-84.

[165] *See id.* at 183-86. Additionally, it feels important to note that a 2015 study of practicing employment arbitrators paints another concern about mandatory arbitration. Of the arbitrators surveyed, 74% were male and 92% were white. Stone & Colvin, *supra* note 15, at 18.

[166] *See* Sternlight, *Mandatory Arbitration*, *supra* note 5, at 183-84.

[167] *See* Gershman, *supra* note 136.

[168] *Id.*

[169] *Id.*

fight it so I just let it go . . . [i]t was a humiliating situation. I felt like I was nobody and didn't have a chance."[170] As Justice Ginsburg underlined in her scorching dissent in *Epic Systems Corp. v. Lewis*, the result of class waivers in mandatory arbitration provisions is "the inevitable decline of private representation" and in turn, the decline of "the enforcement of federal statutes."[171]

Class action waivers not only discourage low-wage earners, but employees of any pay range from coming forward.[172] Individuals fear retaliation and dread proceeding with their claims alone.[173] Additionally, attorneys are less likely to represent them if class actions are barred.[174] Regardless of the reasoning behind this depression of claims, the impact is harrowing for a nation genuinely interested in addressing its sexual harassment crisis.[175] If America is truly striving to

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[170] *Id.*

[171] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646-47 (2018) (Ginsburg, J., dissenting) ("If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries.").

[172] *Cf.* COLVIN, GROWING, *supra* note 16, at 11 ("In an earlier study, Colvin and Gough (2015) found an average of 940 mandatory employment arbitration cases per year being filed with the American Arbitration Association (AAA), the nation's largest employment arbitration service provider . . . . Other research indicates that about 50 percent of mandatory employment arbitration cases are administered by the AAA. This means that there are still only about 1,880 mandatory employment arbitration cases filed per year nationally. Given the finding that 60.1 million American workers are now subject to these procedures, this means that only 1 in 32 employees subject to these procedures actually files a claim under them each year . . . . These findings indicate that employers adopting mandatory employment arbitration have been successful in coming up with a mechanism that effectively reduces their chance of being subject to any liability for employment law violations to very low levels.").

[173] *Lewis*, 138 S. Ct. at 1647.

[174] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

[175] Many Americans appear committed to addressing sexual harassment, though it is certainly not the entire nation. *See* Margie Omero & Christine Matthews, Opinion, *#MeToo Is One of Many Issues Driving American Women to Vote*, HILL (Dec. 22, 2017, 12:00 PM), https://thehill.com/opinion/civil-rights/366158-metoo-is-one-of-many-issues-driving-american-women-to-vote [https://perma.cc/4YQB-SD2H]. *But see* Tovia Smith, *A Year Later, Americans Are Deeply Divided over the #MeToo Movement*, NPR (Oct. 31, 2018, 4:54 PM), https://www.npr.org/2018/10/31/662696717/a-year-later-americans-are-deeply-divided-over-the-metoo-movement [https://perma.cc/Q4YV-WF3G].

create a more safe world for women and survivors, we want to encourage people to come forward — not the other way around.[176]

Lastly, the loss of precedent is harmful to sexual harassment victims on an individual basis and to society as a whole.[177] No precedent is created in these black box proceedings.[178] This impedes society's ability to develop a nationwide solution to address pervasive sexual harassment.[179] Professor Jean Sternlight argues arbitration stymies the development of progressive laws.[180] Since arbitrators are seeking to resolve individual crises, they are not interested in figuring out how one individual case may shape future cases.[181] Further, there is no incentive for arbitrators to create innovative laws.[182] This mindset further discourages a national response to the epidemic of sexual harassment.[183]

Proponents of arbitration clauses may argue that arbitration itself is not harmful as it is confidentiality that suppresses these important narratives.[184] They can point to how the majority of litigable cases are settled prior to trial.[185] Since many of those settled cases will include

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[176] *See* Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet*, N.Y. TIMES (Sept. 23, 2018), https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html [https://perma.cc/8YAA-28ZV].

[177] Elizabeth Dias & Eliana Dockterman, *The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard*, TIME (Oct. 21, 2016), http://time.com/4540111/arbitration-clauses-sexual-harassment [https://perma.cc/JM3N-6G3X].

[178] Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 703-11 (2004) (critiquing mandatory arbitration in part because it erodes public knowledge and precedent).

[179] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 190-91 (citing EEOC Notice No. 915.002 (1997), *reprinted in* 133 Daily Lab. Rep. (BNA) at E (July 11, 1997)).

[180] *Id.* at 191-201.

[181] *See id.* at 189 (citing Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 436 (1999)).

[182] *See id.* at 190.

[183] *See id.* at 189 ("Further, because arbitrators are hired privately they 'have limited incentive to consider the effects of their awards on third parties,' such as on the public . . . . [b]ecause their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public.'") (first quoting Christopher R. Drahozal, *Is Arbitration Lawless?* , 40 LOY. L.A. L. REV. 187, 192 (2006), then quoting Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 436 (1999)).

[184] Danielle Paquette, *How Confidentiality Agreements Hurt — and Help — Victims of Sexual Harassment*, WASH. POST (Nov. 2, 2017, 9:40 AM), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment/?utm_term=.e9552600fd10 [https://perma.cc/PH6T-EPUM].

[185] *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling [https://perma.cc/R6EH-7AFF].

confidentiality agreements between parties, banning mandatory arbitration does not address the root of the problem.[186]

There are a number of responses to this argument.[187] First, while the parties are not bound to confidentiality, according to arbitration regulations, the arbitrator must keep all matters confidential.[188] The American Arbitration Association Code of Ethics states: "Unless otherwise agreed by parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."[189] Secondly, unlike courtroom litigation, arbitration hearings are private and neither the public nor the press may observe the proceedings.[190] While court proceedings are recorded through court reporters, arbitration proceedings are almost never transcribed.[191] Therefore, while arbitration does not bind the parties to confidentiality, it certainly prevents the public from gaining access to the proceedings by its very nature.[192]

Unlike the private proceedings of arbitration, courtroom documents are generally available to public.[193] Anyone has the right to review the court file and attend court proceedings, unless a case is sealed which is an arduous and rare process.[194] Judges also make many decisions as a civil case progresses, beyond just the final judgment.[195] These decisions — such as summary judgments or evidentiary rulings — are all crucial to developing precedent. [196] Lastly, for the cases that do go to trial, they

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[186] *See, e.g.*, Bryan Logan, *The Weinstein Co. Just Canceled Every Nondisclosure Agreement Between Harvey Weinstein and the Women Who Accused Him of Sexual Misconduct*, BUS. INSIDER (Mar. 19, 2018, 9:11 PM), https://www.businessinsider.com/harvey-weinstein-non-disclosure-agreements-with-victims-canceled-2018-3 [https://perma.cc/8KH2-BFM6].

[187] One should also note that companies are advised to include additional confidentiality clauses alongside arbitration provisions that wind up barring victims from speaking out about the process as well. *E.g.*, Henn, *supra* note 120, at 11-12.

[188] Steven C. Bennett, *Who Is Responsible for Ethical Behavior by Counsel in Arbitration?* , *in* HANDBOOK ON ARBITRATION PRACTICE, *supra* note 120, at 523, 534.

[189] *Id.*

[190] Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, *in* HANDBOOK ON ARBITRATION PRACTICE, *supra* note 120, at 41, 51-52.

[191] *Id.* at 53.

[192] *See id.* at 52.

[193] *See id.* at 52-53.

[194] *See id.* at 51-52.

[195] Sternlight, *Mandatory Arbitration*, *supra* note 5, at 192.

[196] *See id.*

are powerful for individuals and the community.[197] No matter the outcome, they inspire and comfort survivors.[198]

One could also argue that arbitration agreements are more efficient and could award a plaintiff compensation in months as opposed to years.[199] However, other factors offset this advantage.[200] When individuals go before arbitration courts they win less frequently, and when employees do win, they are awarded significantly less money than their counterparts in court.[201] Additionally, how does one measure efficiency? If a company must go to arbitration three times for the same person — as opposed to having a public trial where the public is put on notice about their sexually harassing CEO — one might say duplicative arbitrations are less efficient.[202]

III. UNCONSCIONABILITY AND PUBLIC POLICY CONTRACT DEFENSES: CLOSED AVENUES FOR SEXUAL HARASSMENT VICTIMS IN ARBITRATION AGREEMENTS

Considering the national outcry inspired by the #metoo movement, one might argue that the text of the FAA savings clause provides a mechanism to nullify arbitration agreements in sexual harassment cases.[203] Specifically, the defenses of "unconscionability"[204] or "public policy"[205] should protect victims of sexual harassment and assault. However, as Professor David Horton discusses, the Supreme Court has interpreted the FAA to immunize arbitration agreements from the defense of public policy.[206] Additionally, as recent Supreme Court cases

197 *See* Emma Hinchliffe, *Trailblazer: 11 Women on What Ellen Pao's Fight Meant to Them*, MASHABLE (Sept. 19, 2017), https://mashable.com/2017/09/19/ellen-pao-women-in-tech/ [https://perma.cc/L3CK-J5Y8].

198 *Id.*

199 *See, e.g.*, Henn, *supra* note 120, at 4; Gershman, *supra* note 136.

200 *See supra* notes 133–148 and accompanying text.

201 *See supra* notes 140–149 and accompanying text.

202 *See, e.g.*, Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html [https://perma.cc/UUT2-Z2SP].

203 *See supra* Part I.

204 *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

205 *Id.* § 178 (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable . . . .").

206 *See* Horton, *Preemption*, *supra* note 83, at 1220. Professor Horton discusses the "total preemption theory" which rests on two pillars. *Id.* First, the FAA preempts state law as "state lawmakers virtually never pass statutes that are inclusive enough to regulate 'any contract.' Rather, they attempt to shield the rights of vulnerable parties through laws that invariably apply to some contracts: those involving consumers,

have confirmed, the Court views the FAA as similarly protected from arguments regarding unconscionability.[207]

This Part traces the arc of FAA expansion through four seminal Supreme Court cases. This Part explains why these two crucial contract defenses are not viable for sexual harassment victims. Additionally, this Part discusses preemption and the severability doctrine and how both of these legal concepts further foreclose the availability of unconscionability or public policy as a defense to mandatory arbitration clauses in sexual harassment cases.

The first case to broaden the scope of the FAA was *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*[208] Two key themes gird *Prima Paint*. First, the Supreme Court recognized the severability rule.[209] The severability rule treats arbitration clauses as separate from the underlying agreements in which they are contained.[210] This means that every agreement that includes an arbitration clause is seen as containing two separate agreements: "(1) the agreement to arbitrate and (2) the overarching container contract."[211] This legal fiction enables arbitrators to nullify the container "contract without simultaneously foreclosing their own ability to make such a ruling."[212]

Consider an example where a party alleges that a contract with an arbitration provision is invalid under the defense of duress. If the party seeks to overturn the contract, the arbitration provision is seen as free-standing and kicks in.[213] Thus, the arbitrator (not the judge) must resolve the matter.[214] The severability principle means that even if there are clear signs that the container contract is invalid, the case still goes to arbitration.[215] A party must therefore argue the arbitration clause *itself* is unenforceable or a court cannot decide the issue.[216]

employees, franchisees, construction, or 'contracts of adhesion.'" *Id.* Second, the FAA's purpose was to protect the nullification of arbitration clauses under public policy. *Id.* "Arguably, giving states authority over the validity of arbitration clauses would create a loophole the size of the statute itself. Under the guise of the public policy defense, state lawmakers could pass regulations that resurrect the very hostility to arbitration that the FAA eradicated." *Id.*

207 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622-23 (2018).

208 388 U.S. 395 (1967).

209 *See* Horton, *Arbitration About Arbitration*, *supra* note 10, at 380-81.

210 *Id.*

211 *Id.* at 381.

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 Horton, *Testamentary*, *supra* note 68, at 1040.

The second important theme in *Prima Paint* is the Court's characterization of the FAA. Prior to 1967, federal courts were interpreting the FAA to be a source of federal procedural law only.[217] However, in *Prima Paint*, the Court held that the FAA is a source of federal substantive law under the Commerce Clause of the Constitution.[218] Thus the Court ruled that the FAA (not state law) controlled federal courts and could not be displaced by state law.[219] This characterization planted a seed that blossomed two decades later in *Southland Corp. v. Keating*.[220]

In 1984, the Supreme Court greatly expanded the power and purview of the FAA. [221] In *Southland*, a group of 7-Eleven franchisees in California sued Southland, their franchisor in California State court.[222] They sued for fraud, misrepresentation, breach of contract, and violation of California's Franchise Investment Law ("CFIL").[223] Southland attempted to compel arbitration due to the arbitration provision in the franchise agreement.[224]

The Court held that the FAA was not only substantive federal law but that it also applied in state court and preempted contrary state law.[225] The preempted California law at issue was the CFIL.[226] In relevant part, the CFIL provided: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."[227] The California Supreme Court interpreted this provision to negate arbitration provisions in franchisee contracts.[228]

But the U.S. Supreme Court reversed,[229] holding that the California Supreme Court's interpretation of the CFIL violated the Supremacy

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217 *See* Brunino, *supra* note 112, at 575.

218 *Id.*

219 *Id.* "*Prima Paint* thus established that the FAA would henceforth be interpreted and applied as substantive law, albeit only in federal courts. However, despite *Prima Paint*, lower courts were reluctant to hold that the FAA preempted state law for almost two decades longer." *Id.*

220 Southland Corp. v. Keating, 465 U.S. 1 (1984).

221 *See id.*; Horton, *Preemption*, *supra* note 83, at 1219.

222 *Southland*, 465 U.S. at 4-5.

223 *Id.* at 4.

224 *Id.*

225 *See id.* at 15-16.

226 *Id.* at 10.

227 *Id.*

228 *See id.* at 5.

229 *Id.* at 17 (noting that the Court reversed in part and remanded in part).

Clause.[230] The Court stated that in enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration."[231] Additionally, the court confirmed the *Prima Paint* view that Congress's ability to pass the FAA was through the commerce power.[232] Thus, the FAA was a substantive law and not a procedural law.[233] This ruling foreclosed any opportunity for a future state law which conflicted with the FAA.

Southland ultimately launched the Court into the beginnings of its aggressive pro-arbitration stance.[234] Prior to the Court's decision in *Southland,* many believed the FAA only applied in federal courts.[235] However, in 1984, the Supreme Court ruled that limiting the enforcement of arbitration to federal courts would "frustrate" Congress's intent "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[236] This was a radical shift in the understanding and scope of the FAA.[237] After *Southland* and until 2015, there were more than two dozen Supreme Court decisions in arbitration cases, almost all of them greatly expanding the scope of the FAA.[238]

In a contemporary case, *AT&T Mobility LLC v. Concepcion*,[239] the Supreme Court held that the FAA preempted a California rule of contract law.[240] The preempted ruling involved a finding that class arbitration waivers in consumer contracts were unconscionable.[241] In *Concepcion*, the class action waiver at issue was one where AT&T required its customers to relinquish their class action rights.[242] However, in exchange for that relinquishment, AT&T promised to pay customers $7,500 and double their attorney's fees if they recovered more in individual arbitration than AT&T's last written settlement

230 *Id.* at 16-17.

231 *Id.* at 10.

232 *Id.* at 11-12.

233 Justice O'Connor contested this view in her dissent. *Id.* at 25-26 (O'Connor, J., dissenting).

234 Horton, *Preemption*, *supra* note 83, at 1227.

235 *See* Horton, *Arbitration About Arbitration*, *supra* note 10, at 387.

236 *Southland*, 465 U.S. at 15-16.

237 Blankley, *supra* note 91, at 713.

238 Stone & Colvin, *supra* note 15, at 7.

239 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

240 *Id.*

241 Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. 333.

242 Horton, *Preemption*, *supra* note 8383, at 1239.

offer.[243] The Ninth Circuit struck down the class action waivers as unconscionable.[244]

The Ninth Circuit based their reasoning on a prior California Supreme Court decision, *Discover Bank v. Superior Court*.[245] In *Discover Bank*, the California Supreme Court held that at least some class action waivers (which resulted in mandated individual arbitration proceedings) were unconscionable under California law.[246] In an adhesion contract[247] involving "small amounts of damages" and unequal bargaining power, arbitration provisions that act as class action waivers were unconscionable.[248] Additionally, the California Supreme Court held that this legal interpretation was not preempted by the FAA.[249]

However, in *Concepcion*, the Supreme Court abrogated *Discover Bank* and reversed the holding from the Ninth Circuit.[250] The majority, led by Justice Scalia, looked to the text, congressional intent, and the purpose of the FAA to determine their holding.[251] Justice Scalia stated that Congress intended to facilitate "streamlined proceedings" and thus state law may not "require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[252] Justice Scalia wrote that if "state law prohibits outright the arbitration of a particular type of claim . . . the conflicting rule is displaced by the FAA."[253]

This decision is significant for two primary reasons. One, it effectively obliterated attorney representation for individuals with class action waivers in their adhesion contracts.[254] As the damages of each contract

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[243] *Concepcion*, 563 U.S. at 337.

[244] *Id.* at 338.

[245] *Discover Bank*, 113 P.3d, *abrogated by Concepcion*, 563 U.S. 333.

[246] *See id.* at 1108.

[247] An adhesion contract is one that is drafted by one party (usually a corporation or business) and signed by a second party (usually an individual or one with a weaker bargaining power). The second party usually is unable to modify the terms of the contract. *Adhesion Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29 (last visited Nov. 20, 2018) [https://perma.cc/337L-L353].

[248] *Discover Bank*, 113 P.3d at 1108-10.

[249] *Id.* at 1110.

[250] *Concepcion*, 563 U.S. at 352.

[251] *See id.* at 339, 344, 349, 352.

[252] *Id.* at 344, 351.

[253] *Id.* at 341.

[254] *Id.* at 365 (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

is nominal, attorneys only take these cases if they can amalgamate the damages for the whole class.[255] Second, and more importantly for this Note, *Concepcion* held that the defense of unconscionability does not pierce the armor of an arbitration provision if unconscionability is being alleged "in a fashion that disfavors arbitration."[256] Thus, despite the language of the savings clause in Section 2, courts may not apply the defense of unconscionability if the reason the provision is unconscionable is simply due to the fact that there is an arbitration provision in the contract.[257] While California courts or any state court might want to strike down mandatory arbitration provisions in sexual harassment suits as unconscionable, they are unable to do so.[258] The FAA both preempts state law, and is interpreted to exclude defenses of unconscionability.[259]

The most recent case to uphold this interpretation of the FAA was *Epic Systems Corp. v. Lewis*.[260] In a five to four decision written by Justice Gorsuch, the Court held that the FAA savings clause did not provide a defense to arbitration agreements.[261] Specifically, the court rejected the idea that the savings clause was designed to protect individuals from the unconscionable nature of mandatory arbitration.[262] The majority stated that the employee's argument failed because the employee did not argue that his arbitration agreement was extracted by "an act of fraud or duress or in some other unconscionable way."[263] Instead, the employee argued that his agreement was unconscionable "precisely because they require individualized arbitration proceedings instead of class or collective ones."[264]

In a scorching dissent, Justice Ginsburg reflected that "the inevitable result of today's decision will be the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[265] In painting that grim picture, Justice Ginsburg points to

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255 *Id.*

256 *See id.* at 341 (majority opinion).

257 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1645-46 (2018).

258 *See* Kate S. Gold & Jaime D. Walter, *California Considers Ban on Forced Arbitration By Employers*, NAT'L L. REV. (June 13, 2018), https://www.natlawreview.com/article/california-considers-ban-forced-arbitration-employers [https://perma.cc/X3KP-3DFD].

259 *Id.*

260 *Lewis*, 138 S. Ct. 1612.

261 *See id.* at 1616.

262 *See id.* at 1622.

263 *Id.*

264 *Id.*

265 *Id.* at 1646-47 (Ginsburg, J., dissenting).

the inevitable decline of private representation which is crucial to the enforcement of federal statutes.[266] Additionally, she underlines that individuals may fear retaliation without the backing of their fellow employees, and thus not pursue redress by themselves.[267] Lastly, she underlines a concern with arbitration process: anomalous resorts.[268] Since arbitration agreements are often confidential, and arbitrators are barred from giving prior proceedings precedential effect, arbitrators may render conflicting awards in cases involving similarly situated employees.[269]

In sum, these four decisions paint the picture of why standard contract defenses are inaccessible as a vehicle to defeat arbitration clauses in sexual harassment cases.[270] *Prima Paint* established the supremacy of the FAA over state law.[271] *Southland* extended *Prima Paint* and invalidated an actual state law that prevented arbitration.[272] *Concepcion* struck down a California law that curbed the use of mandatory arbitration in specific consumer contracts.[273] Lastly, *Epic Systems* upheld an arbitration clause in an employment contract.[274] *Epic Systems* also foreclosed challenges to mandatory arbitration clauses in court if the only basis for the challenge was the mandatory aspect of the arbitration proceeding itself. [275] Thus, while lawyers, activists, and legislators may have hoped to use the contract defense of unconscionability or public policy to strike down mandatory arbitration clauses in sexual harassment suits, the Supreme Court has clearly foreclosed this as an option.[276]

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[266] *See id.* at 1647.

[267] *Id.* at 1647-48.

[268] *Id.* at 1648.

[269] *Id.*

[270] *See supra* Part III.

[271] *See supra* notes 208–219 and accompanying text.

[272] *See supra* notes 220–238 and accompanying text.

[273] *See supra* notes 239–259 and accompanying text.

[274] *See supra* notes 260–269 and accompanying text.

[275] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018); Katherine Stone, *Symposium: Majority Gives Short Shrift to Worker Rights*, SCOTUS BLOG (May 23, 2018, 2:43 PM), http://www.scotusblog.com/2018/05/symposium-majority-gives-short-shrift-to-worker-rights [https://perma.cc/2WPR-RR7Z].

[276] *See Lewis*, 138 S. Ct. at 1622.

IV. THE COURT HAS IMPROPERLY DISTORTED THE ORIGINAL INTENT AND SCOPE OF THE FAA

The expansion of the FAA stings on two fronts: (1) it prevents state legislators from enacting legislation to curb mandatory arbitration in sexual harassment cases and (2) it distorts the original intent of the FAA. While the FAA's initial influence was marginal, as the Court expanded the reach of the FAA, companies caught on and greatly increased their utilization of arbitration provisions in adhesion contracts.[277] The FAA no longer merely stands for the right of commercial parties engaging in interstate commerce to manage their disputes out of the court system.[278] Instead, the FAA extends to cover almost every contract including credit-card agreements, pay-day loans, employee handbooks, union employees, and computer purchases.[279]

This expansive reading of the FAA flies in the face of the drafters' original intent. Numerous articles, cases, and books have been written about the history surrounding the FAA and Congress's intent in passing the legislation.[280] Most commentators conclude that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power.[281] The corporate environment of 1925 and legislative history of the FAA both lead to that conclusion.[282]

During the period from 1890 to 1920, America underwent a period of rapid economic growth and industrialization.[283] Industries became consolidated, production increased to cater to a national market, and businesses began to engage in mass production and mass distribution of products.[284] In the throes of urbanization, there were still substantially few commercial transactions between large merchants and individual consumers.[285] Primarily, transactions occurred between businesses attempting to meet new national needs.[286]

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277 Horton, *Testamentary*, *supra* note 68, at 1039-43.

278 *See* SZALAI, *supra* note 68, at 9-10; Comsti, *supra* note 10, at 13-14.

279 *See* Brunino, *supra* note 112, at 570; Resnik, *supra* note 112, at 2907.

280 *See, e.g.*, SZALAI, *supra* note 68, at viii-x; Christopher R. Drahozal, *In Defense of* Southland: *Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Horton, *Preemption*, *supra* note 83; Sternlight, *Panacea*, *supra* note 73, at 647.

281 Sternlight, *Panacea*, *supra* note 73, at 647.

282 *See id.* at 647-48.

283 SZALAI, *supra* note 68, at 98.

284 *Id.*

285 *See* Sternlight, *Panacea*, *supra* note 73, at 647-48.

286 *See* SZALAI, *supra* note 68, at 98.

In response to this wave of industrialization, businesses needed a dispute resolution method that was less costly and more efficient than the court system.[287] Reformers turned to arbitration, in order to avoid the costly backlog of the court system. As mentioned in the background, business lobbyists ensured the passage of the FAA.[288]

Congressional hearings during this time demonstrate that Senators wanted to ensure that arbitration only covered businesses of equal bargaining power.[289] For example, one senator elevated a concern that arbitration contracts might be "offered on a take-it-or-leave-it basis to captive customers or employees."[290] He added that arbitration contracts in those cases "are really not voluntar[y] things at all" because "there is nothing for [employees] to do except to sign it."[291] However, the bill's supporters emphatically assured the Senator that they did not intend to cover such unequal situations.[292]

Additionally, the FAA did not originally intend to cover arbitration provisions in employment contracts.[293] When the legislation was originally introduced, organized labor voiced concern.[294] In response, then-Secretary of Commerce Herbert Hoover suggested that Congress amend the legislation to explicitly exclude employment contracts.[295] His almost exact language was ultimately included in section 1 of the FAA.[296]

While the FAA was not originally intended to cover employment agreements,[297] today 53.9% of nonunion private-sector employers have mandatory arbitration procedures.[298] Among companies with 1,000 or more employees, 65.1% have mandatory arbitration procedures.[299] Among all types of contracts, employment agreements are the most likely to include an arbitration provision.[300]

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287 *See supra* Part I.A.

288 *Id.*

289 *See* Sternlight, *Panacea, supra* note 73, at 647.

290 *Id.*; *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018).

291 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967).

292 *Id.*; *see also Lewis*, 138 S. Ct. at 1643.

293 *Lewis*, 138 S. Ct. at 1643.

294 *Id.*

295 *Id.*

296 *Id.*

297 Horton, *Arbitration About Arbitration*, *supra* note 10, at 378.

298 Colvin, *Growing*, *supra* note 16, at 5.

299 *See id.* at 6.

300 *See* Sarath Sanga, *A New Strategy for Regulation Arbitration*, 113 NW. U. L. REV. 1121, 1126-27 (2019) (utilizing "filings with the Securities and Exchange Commission

Lower federal courts have even enforced arbitration clauses signed by employees in non-contracts.[301] In *Patterson v. Tenet Healthcare, Inc.*, the Eighth Circuit enforced an arbitration clause found in an employee handbook.[302] The court did so even though an employee handbook is not a contract under state law.[303] Additionally, this specific handbook even provided that it was "not intended to constitute a legal contract" and that "no written statement or agreement in this handbook concerning employment is binding."[304] This case reflects that there may be an even greater number of employees impacted by arbitration clauses that are not reflected in the aforementioned statistics.[305]

Since the Court foreclosed state legislators from passing state legislation that curbs mandatory arbitration, and the Court distorted the scope and intent of the FAA, the only way to rectify this statutory misinterpretation is federal legislation.[306]

V. A LEGISLATIVE CALL TO ACTION

Since the rise of the #metoo movement, there has been a renewed call for legislative reform to address how mandatory arbitration curbs the rights of sexual harassment survivors.[307] Numerous bills have been introduced by both state and federal legislators.[308] None have been successful.[309] Federal legislation has failed to pass, but numerous states have attempted to take matters into their own hands and pass state-wide legislation.[310] However, due to the Supreme Court's expansive reading of the FAA, state laws curbing arbitration are likely preempted by the FAA.[311]

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and create a database of nearly 800,000 contracts" and then parsing them out by type to uncover this trend).

301 *See* Horton, *Testamentary*, *supra* note 68, at 1056-57.

302 *See* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997).

303 *Id.* at 835.

304 *Id.*

305 *See id.*

306 *See infra* Part V.

307 *E.g.*, Gerstein, *supra* note 45.

308 *See supra* INTRODUCTION.

309 *See* Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

310 *See, e.g.*, S7848A, 2018 Leg., 241st Sess. (N.Y. 2018) https://www.nysenate.gov/legislation/bills/2017/s7848 [https://perma.cc/6WKJ-QX4X].

311 Ann-Elizabeth Ostrager & Jacob Singer, *The Limitations of NY's Anti-Sexual Harassment Law*, LAW360 (Sept. 12, 2018, 4:14 PM), https://www.law360.com/

In 2018, California legislators passed a bill barring employers from implementing arbitration or non-disclosure agreements "as a condition of employment."[312] However, on October 3, 2018, the California Governor, Jerry Brown, vetoed the bill citing preemption concerns.[313] In a letter to the California State Assembly, Governor Brown wrote that "the direction from the Supreme Court . . . [is] clear — states must follow the Federal Arbitration Act and the Supreme Court's interpretation of the Act."[314] Recently, Governor Newsom signed AB 51.[315] The bill prohibits "a person from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit."[316] In simpler terms, an employer may not ask an employee to waive their right to file a civil complaint in court.[317] Lawmakers clearly expected this to be challenged in court, and attempted to circumvent any illegality by including the language: "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)."[318] However, within three months the California Chamber of Commerce, with two other plaintiffs, challenged the bill and a court in the Eastern District of California granted a preliminary injunction blocking its enforcement.[319] Interestingly, the

articles/1082204/the-limitations-of-ny-s-anti-sexual-harassment-law [https://perma.cc/5Q3A-L7VD].

312 Assemb. B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

313 *Status, AB-3080 Employment Discrimination: Enforcement*, CAL. LEG. INFO, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080 (last visited Jan. 21, 2019) [https://perma.cc/N5DD-LJ8U].

314 *Id.*

315 Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 (last visited Nov. 21, 2019) [https://perma.cc/7VG9-GK58].

316 *Id.*

317 Alana Thorbourne Carlyle, *Third Time's A Charm: Governor Signs Legislation Prohibiting Mandatory Arbitration Agreements*, NAT'L L. REV. (Oct. 30, 2019), https://www.natlawreview.com/article/third-time-s-charm-governor-signs-legislation-prohibiting-mandatory-arbitration [https://perma.cc/7RPH-2Q63].

318 *See* Assemb. B. 51, 2019 Leg., Reg. Sess. (Cal. 2019) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 (last visited Nov. 21, 2019) [https://perma.cc/7VG9-GK58].

319 *See* Chamber of Commerce of the U.S. v. Becerra, No. 2:19-cv-02456-KJM-DB, 2019 U.S. Dist. LEXIS 222561, at *2-4 (E.D. Cal. 2019).

plaintiffs did not raise concerns regarding preemption but focused instead on its potential disruption of employment contracts.[320]

On March 12, 2018, the New York Senate Legislature passed a comprehensive sexual harassment law "to help prevent sexual harassment in the workplace, ensure accountability, and combat the culture of silence that victims face."[321] A provision included in the bill banned mandatory arbitration in sexual harassment suits.[322] However, commentators suggest that the mandatory arbitration ban is without teeth, as it is likely preempted by the FAA.[323]

Due to preemption concerns, the only viable solution is federal legislation.[324] There has been limited success in passing extremely narrow laws constricting mandatory arbitration in special circumstances.[325] For example, the Military Lending Act prohibited lenders from including arbitration clauses in credit contracts with military personnel and their dependents.[326] Another example is the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") which bars lenders from using mandatory arbitration clauses in mortgage agreements.[327]

In 2017, parallel bills were introduced in both the U.S. House of Representatives and the U.S. Senate entitled, "Ending Forced Arbitration of Sexual Harassment Act of 2017."[328] Both bills received bipartisan support.[329] Both bills were under one thousand words, and contained a provision that made any "pre-dispute arbitration agreement"[330] invalid and unenforceable.[331] The bills addressed the

320 Plaintiffs' Notice of Motion and Motion for a Temporary Restraining Order, Chamber of Commerce v. Becerra, No. 2:19-cv-02456-KJM-DB, 2019 U.S. Dist. LEXIS 222561, at *2 (E.D. Cal. Dec. 29, 2019).

321 S7848A, 2018 Leg., 241st Sess. (N.Y. 2018) https://www.nysenate.gov/legislation/bills/2017/s7848 [https://perma.cc/6WKJ-QX4X].

322 *Id.*

323 Even a senator who had a hand in passing a similar state bill had concerns, stating that she doubted "whether the legislation 'actually . . . provide[d] any new protections' given that the . . . FAA, 'generally preempts state law that treats arbitration less favorably than other arrangements.'" Ostrager & Singer, *supra* note 311.

324 Sternlight, *Mandatory Arbitration*, *supra* note 5, at 205-08.

325 *See, e.g.*, Brunino, *supra* note 112, at 588-89.

326 *Id.*

327 *Id.*

328 *See* Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

329 *See* H.R. 4570; S. 2203.

330 *See* H.R. 4570; S. 2203.

331 *See* H.R. 4570; S. 2203.

severability doctrine by stating that "the applicability of this chapter . . . and the validity and enforceability of an agreement to [arbitrate] . . . [shall] be determined by a court, rather than an arbitrator."[332] Attorneys general from all fifty states encouraged signing this bill into law.[333] Despite this momentum, the bill did not progress past the congressional floor.[334]

The parallel bills garnered national attention, but there is little evidence as to why the bill did not survive.[335] The Senate bill was read twice, and then referred to the Committee on Health, Education, Labor, and Pensions.[336] The House bill was referred to the Subcommittee on Regulatory Reform, Commercial And Antitrust Law.[337] It is possible one reason that bill did not move forward is due to private lobbying by business groups.[338] However, there is no clear evidence of why the bill did not survive.[339]

In September 2019, the U.S. House attempted again with the "Forced Arbitration Injustice Repeal Act."[340] The bill proposes to prohibit all "predispute arbitration agreements" in the "employment, consumer, antitrust, or civil rights" arena. The bill is the broadest yet in its attempt to curtail use of forced arbitration. However, after passing the House, the bill met its fate once again on the Senate floor. It was read twice, and then referred to the Committee on the Judiciary.

With the current rancor in Washington, it is difficult to imagine bipartisan support on legislation curbed at ending sexual harassment.[341]

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[332] *See* H.R. 4570; S. 2203.

[333] Jacqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, HILL (Feb. 13, 2018, 6:33 PM), https://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual [https://perma.cc/TDQ6-XV4D].

[334] There is no clear evidence as to why the bill did not progress despite its bipartisan support. One might conjecture that the current divide in Washington was simply insurmountable. And while there was bipartisan support, Democrats supported the bill significantly more than Republicans. *See* Marina Fang, *Business Groups Might Be Quietly Killing A Bill That Would Bring Sexual Abuse Claims to Light*, HUFFPOST (May 17, 2018, 4:02 PM), https://www.huffingtonpost.com/entry/forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019e0a [https://perma.cc/6LJB-VL9N].

[335] *See, e.g.*, Fang, *supra* note 334; Thomsen, *supra* note 333.

[336] S. 2203.

[337] *See* H.R. 4570.

[338] *See* Fang, *supra* note 334.

[339] *See id.*

[340] Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

[341] *See* Ramesh Ponnuru, *Election Shows That U.S. Divisions Are Only Growing Wider*, BLOOMBERG (Nov. 7, 2018, 5:25 AM), https://www.bloomberg.com/opinion/articles/

However, with public outcry and pressure from constituents, it is not an impossibility.[342] For a narrower law — that is more likely to garner bipartisan support and therefore pass the legislature quickly — this Note recommends utilizing the 2017 bill.[343] As this bill had bipartisan support, it has the highest likelihood of survival in today's political climate.[344]

While this Note might prefer a more strongly worded bill or a more inclusive bill (banning mandatory arbitration in all employment discrimination cases, not just sexual harassment), a more inclusive bill will likely not gain bipartisan traction.[345] For example, in October 2018, Democrats in the House introduced the "Restore Justice for Workers Act" and attempted to ban mandatory arbitration in all employment contracts.[346] This expansive bill was rejected by every Republican in Congress.[347] In order to ensure protection for survivors as quickly as possible, Congress must act and unite to pass legislation that returns the FAA to its original scope.[348]

Some argue that extrajudicial activism is an effective way to counter mandatory arbitration. Instead of relying on the legislature, activists and organizers should turn their attention to available means of protest. Due to the consistent logjam on the congressional floor, this tactic may be an important complementary action to a legislative solution. Unfortunately, there are two layers of difficulty with this request. First, it requires that employees are aware that mandatory arbitration clauses exist in their contract.[349] Note that Google employees only resisted the

2018-11-07/congress-will-reflect-a-u-s-more-divided-than-ever [https://perma.cc/5PAT-NEHW].

342 *See* Brittany Shoot, *Congress Passes Bipartisan Bill Making Lawmakers Personally Liable for Paying Sexual Harassment Settlements*, FORTUNE (Dec. 13, 2018, 3:45 PM), http://fortune.com/2018/12/13/congress-sexual-harassment-policies-accountability-act-update-2018 [https://perma.cc/L3D5-4GMH].

343 *See* Ending Forced Arbitration of Sexual Harassment Act, H.R. 4570, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

344 *See* Alexia Fernández Campbell, *House Democrats Have a Sweeping Plan to Protect Millions of Workers' Legal Rights*, VOX (NOV. 14, 2018, 1:40 PM), https://www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats [https://perma.cc/2NED-7YQE].

345 *See id.*

346 Restoring Justice for Workers Act, H.R. 7109, 115th Cong. (2018).

347 Fernández Campbell, *supra* note 344.

348 *See supra* Part IV.

349 *See* Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html [https://perma.cc/45WT-5EPP].

existence of arbitration clauses in their employee contracts *after* it was leaked that a top Google executive walked away with a $90 million severance package after facing credible allegations of sexual misconduct.[350] Second, it requires that employees organize on an extremely large scale adding additional strain on a potentially disadvantaged workforce.

CONCLUSION

The arbitration agreements deemed protected by the FAA are unrecognizable to the ones envisioned by the Congress of 1925.[351] The Supreme Court has vastly expanded the power and purview of the FAA while striking down contract defenses that were potential vehicles for advocates.[352] Mandatory arbitration reduces an employee's opportunities to win against their employers,[353] reduces the awards they can receive from their arbitrators,[354] reduces public awareness of corporate abuse,[355] and reduces the likelihood that an employee brings a claim at all.[356] These negative consequences are particularly detrimental to sexual harassment victims.[357] Sexual harassment survivors need to know that they are not alone, especially if victims are enduring similar behavior at the same company. If the nation is serious about listening to the rising tide of voices from the #metoo movement, mandatory arbitration must be addressed through federal legislation.[358]

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350 *Id.*

351 *See supra* Part I.

352 *See supra* Part III.

353 Comsti, *supra* note 10, at 9-10 ("A recent social science study found that employees are almost twice as likely to prevail in federal court than in forced arbitration.").

354 *Id.* ("In addition, judges and juries awarded employees damages that were 150 percent greater than those received in arbitration.").

355 *Id.*

356 Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J. (Jan. 25, 2018, 5:30 AM), https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201 [https://perma.cc/D4VF-Y523].

357 *See, e.g.*, Gerstein, *supra* note 45.

358 *See supra* Part IV.