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For Those Who Do Not Speak: Protecting Class Arbitration as the Last Collective-Action Option for Women

Jennifer L. Bame*

I write for those women who do not speak, for those who do not have a voice because they were so terrified, because we are taught to respect fear more than ourselves. We've been taught that silence would save us, but it won't.

—Audre Lorde¹

INTRODUCTION

Women have come to represent a substantial majority of the working poor in the United States.² On the whole, women earn less

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1. 1934–92. CONVERSATIONS WITH AUDRE LORDE 90 (Joan Wylie Hall ed., 2004) (reprinted from BLACK WOMEN WRITERS AT WORK 100–16 (Claudia Tate ed., 1985)).

2. Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 KAN. J.L. & PUB. POL'Y 26 (1994) [hereinafter Crain, *Collective Action*] (citing Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, MONTHLY LAB. REV., Dec. 1990, at 20, 21) (“The vast majority of working women are poor, and women are joining the ranks of the working poor at higher rates than men.”).

money than men,³ receive fewer benefits,⁴ and suffer greater discrimination in the workplace.⁵ In addition, women serve as the primary caregivers in the majority of households.⁶ Collective action strategies can help women bargain for increased workplace benefits⁷ and demand management address predominantly women-centered employment issues, like sexual harassment and family leave.⁸

The decline of unionization⁹ and the increasing difficulty of class certification¹⁰ have severely limited collective action options for women. With the rise of Mutual Arbitration Agreements (MAAs),¹¹

3. *Pay Equity and Discrimination*, INST. FOR WOMEN'S POL'Y RES. (2010), <http://www.iwpr.org/initiatives/pay-equity-and-discrimination> (Women earn 77 cents for every dollar a man earns.). "Women of color suffer from an even more severe gap. According to the National Partnership for Women and Families, African American women and Latinas in the United States are paid \$18,817 and \$23,298 less than non-Hispanic white men yearly, respectively. That's 64 cents and 55 cents for every dollar a man earns." *How Pay Inequality Hurts Women of Color*, CTR. FOR AM. PROGRESS (2014), <http://www.americanprogress.org/issues/labor/report/2013/04/09/59731/how-pay-inequity-hurts-women-of-color/>.

4. Women are almost twice as likely to work part time as men. *See Women's Employment during the Recovery*, U.S. DEPT. OF LAB., http://www.dol.gov/_sec/media/reports/femalelaborforce/ (last visited Apr. 30, 2014). The majority of common leave benefits, including retirement plans, holiday/vacation paid time off, jury duty, personal leave, sick leave, and funeral/bereavement leave, are not required by federal law, and are instead offered to full-time employees as part of an employer's compensation and benefits package. *Does My Business Have to Provide Part-Time Employees with Benefits?*, U.S. SMALL BUS. ASS'N (Jan. 9, 2013), <http://www.sba.gov/community/blogs/community-blogs/business-law-advisor/does-my-business-have-provide-part-time-employee>.

5. ABC NEWS/WASH. POST, ONE IN FOUR U.S. WOMEN REPS. WORKPLACE HARASSMENT 1 (Nov. 16, 2011), available at <http://www.langerresearch.com/uploads/1130a2/WorkplaceHarassment.pdf> [hereinafter WORKPLACE HARASSMENT] (One in four women have experienced workplace harassment, compared to one in ten men.).

6. *Who are Family Caregivers?*, AM. PSYCHOL. ASS'N (2014), <http://www.apa.org/pi/about/publications/caregivers/faq/statistics.aspx> ("The percentage of . . . caregivers who are women range from 59 percent to 75 percent . . .").

7. *See, e.g.*, THALIA KIDDER, OXFAM INT'L, RESEARCHING WOMEN'S COLLECTIVE ACTION: FINDINGS & RECOMMENDATIONS 1 (Feb. 1, 2013), available at <http://policy-practice.oxfam.org.uk/publications/womens-collective-action-findings-and-recommendations-294502> (finding women working in groups earned more money and had more decision-making power than women not in groups); *With Union, Street Vendors, Bidi Rollers No Longer Invisible in India*, SOLIDARITY CTR. (Mar. 6, 2014), <http://solidaritycenter.org/content.asp?contentid=1815>.

8. *See supra* notes 5–6 and accompanying text.

9. *See* Mark J. Perry, *Union Membership: Good News, Bad News*, CARPE DIEM (Feb. 11, 2010), <http://mjperry.blogspot.com/2010/02/union-membership-good-news-bad-news.html> ("Union membership as a percent of all U.S. workers is close to an all-time low of 12.3% in 2009.").

10. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

11. "Since the US Supreme Court's [*AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011)]

employees are contracting away their right to litigate workplace grievances, agreeing instead to resolve disputes through alternative methods, such as arbitration.¹² Women can utilize class arbitration to collectively address workplace inequalities, much as they would through class action litigation and unionization. Yet, like unionization, class arbitration has come under attack from big business interests, intent on preventing worker empowerment.¹³

In January of 2012, the National Labor Relations Board (NLRB or the “Board”)¹⁴ heard the case of D.R. Horton and Michael Cuda (“*DR Horton*”), and ruled that an employer may not require, as a condition of employment, an employee sign an MAA waiving that employee’s right to file joint, class, or collective claims addressing employee wages, hours, or working conditions.¹⁵ The NLRB held such claims were protected as “concerted activity” under § 7 of the National Labor Relations Act (NLRA).¹⁶ The Board explained that collective action seeking to redress workplace inequalities—in the courtroom or

decision in 2001, the use of mandatory arbitration agreements by employers has increased greatly, as have the decisions enforcing such agreements against employees.” *Arbitration Agreements*, WORKPLACE FAIRNESS (Mar. 25, 2013), <http://www.workplacefairness.org/arbitration>.

12. “[E]mployers often condition valuable benefits—such as getting or keeping a job—on your ‘agreement’ to submit claims which otherwise could have been presented to the public court system to arbitration.” *Id.*

13. See, e.g., Uclia Wang, *Why Target’s Anti-Union Video is No Joke*, GUARDIAN, Mar. 31, 2014, available at <http://www.theguardian.com/sustainable-business/target-anti-union-video-cheesy-but-effective> (“Target’s latest anti-union video highlights how effective corporate campaigns have been in undermining unionization efforts.”).

14. The NLRB is “an independent federal agency vested with the power to safeguard employee’ rights to organize. . . . The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions” by investigating charges of unfair labor practices, facilitating settlements, deciding cases, and enforcing orders. The NLRB was created under the National Labor Relations Act, 29 U.S.C. § 153 (1935).

15. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). Michael Cuda worked for D.R. Horton, a public corporation that builds residential homes. As a condition of Cuda’s employment, D.R. Horton required Cuda sign a Mutual Arbitration Agreement that required all employment-related disputes be handled by individual and not class arbitration. The right to judicial litigation was waived. Cuda filed an unfair labor practice charge under the Fair Labor Standards Act, 29 U.S.C. § 8 (1938), alleging D.R. Horton violated the NLRA, 29 U.S.C. § 158, by precluding class arbitration. *Id.* at 1.

16. See 29 U.S.C.A. § 157 (1947). “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”

through arbitration—was exactly what Congress intended to protect when it adopted the broad language of § 7.¹⁷ The NLRB emphasized that utilizing class arbitration “is not peripheral but central to the Act’s purposes.”¹⁸

Following the NLRB’s decision, the case was appealed to the Fifth Circuit, where, in a two to one decision, the court largely denied enforcement of the NLRB ruling, ostensibly sounding the death knell for class arbitration.¹⁹ It is unknown whether the NLRB will appeal the Fifth Circuit’s ruling to the Supreme Court,²⁰ although a realistic

17. See *American Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 313 (1965) (“A primary purpose of the National Labor Relations Act is to redress the perceived imbalance of economic power between labor and management.”).

18. *D.R. Horton*, 357 N.L.R.B. at 3 (citing *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962)).

19. See *D.R. Horton, Inc. v. N.L.R.B.*, No. 12-60031 (5th Cir. Dec. 3, 2013), <http://www.ilr.cornell.edu/law/events/upload/Horton-v-NLRB-Court-of-Appeals.pdf>. For a review of the arguments and analysis that led to the ruling, see *Fifth Circuit Rejects NLRB’s Ban on Class Action Waivers*, MORGAN LEWIS (Dec. 5, 2013), http://www.morganlewis.com/pubs/LEPG_LF_CourtRejectsNLRBBanonClassActionWaivers_05dec13 (“Only when an arbitration agreement is unenforceable ‘upon such grounds as exist at law or in equity,’ or when Congress has given a clear command in another statute to override the FAA, should an arbitration agreement not be enforced by the federal courts.” The court found neither exception applied.)

20. On June 26, 2014, the Supreme Court, in *N.L.R.B. v. Noel Canning*, unanimously held that President Obama’s 2012 recess appointments to the NLRB were invalid. 573 U.S. ___ (2014). In doing so, the Court appears to have invalidated the NLRB’s *DR Horton* decision. See Jeffrey D. Polsky, *9 Key Decisions Invalidated by the Supreme Court’s Noel Canning Decision*, MONDAQ (July 1, 2014), <http://www.mondaq.com/unitedstates/x/324276/employee+rights+labour+relations/9+Key+NLRB+Decisions+Invalidated+by+the+Supreme+Courts+Noel+Canning+Decision>. However, it is unknown whether the new Board will readopt its pre-*Noel Canning* decisions. *Id.* Rulings post-*Noel Canning* indicate the Board may continue to enforce its *DR Horton* decision. See, e.g., Steven M. Swirsky et al., *Two for One: Noel Canning and D.R. Horton Continue to Generate Waves at the NLRB*, MGMT. MEMO (July 21, 2014), <http://www.managementmemo.com/2014/07/21/two-for-one-noel-canning-and-d-r-horton-continue-to-generate-waves-at-the-nlr/>. “In *Fuji Food Products*, a decision issued on July 15, 2014, NLRB Administrative Law Judge Jeffrey D. Wedekind held that former NLRB Board Member Craig Becker’s recess appointment was *valid* and that *Fuji Food Product’s* arbitration agreement, which required employees to arbitrate all federal claims, was unlawful. Specifically, the ALJ concluded that Member Becker’s recess appointment was valid under *Noel Canning* because unlike the others appointments made by President Obama, his occurred during a 17-day intra-session recess, during which no sessions of the Senate (pro-forma or otherwise) took place. With regards to *D.R. Horton*, the ALJ acknowledged that the Fifth Circuit Court of Appeals had rejected the Board’s conclusion upon which his decision was based, but he explained that because of the doctrine of non-acquiescence, he was ‘required to follow Board precedent unless and until it is reversed by the Supreme Court.’” *Id.* As such, for the purposes of this Note, the author assumes the *DR Horton* decision will continue to be enforced and that appeal of the Fifth Circuit’s decision to the Supreme Court is possible.

assessment of the current Court makes an NLRB victory there seem improbable. The majority has already upheld arbitration agreements that preclude class arbitration in a consumer context.²¹ It is unlikely that shifting the discussion to a labor and employment context will create a meaningful distinction for the Court, which tends to defer to a company's "business judgment" in deciding employment disputes.²² However, continuing uncertainty on the question of an employee's right to class arbitration may compel the Court to hear the case and clarify the law.²³

This Note argues that the protection of class arbitration as a concerted activity should be upheld by the Supreme Court under § 7 of the NLRA, because it is an especially important tool for equalizing the power of women in the workplace. Through the preservation of class arbitration, women will be more successful in enforcing their workplace rights.

Part I of this Note reviews how the division of labor along gender lines has created devastating economic consequences for women, leading women to constitute a large majority of the working poor in America. It explores the underlying causes of this gendered division

21. See generally *Concepcion*, 563 U.S. at 321.

22. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas* is a landmark employment discrimination case in which the Court held that once a plaintiff makes her prima facie case, the employer can rebut the inference of discrimination by presenting a legitimate business reason for the adverse employment action. The employer has only a burden of production, and the proffered legitimate business reason can be a lie and still sufficient. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993) ("The books are full of procedural rules that place the perjurer (initially, at least) in a better position than the truthful litigant who makes no response at all."). See also Kevin J. Smith, *U.S. Supreme Court Rulings in Arbitration and Employment Matters*, METRO. CORP. COUNS. (Aug. 15, 2013), <http://www.metrocorp.counsel.com/articles/24966/us-supreme-court-rulings-arbitration-and-employment-matters> ("The United States Supreme Court continued its trend of business-friendly decision making in the 2012-2013 term, ruling more often than not in favor of business interests.").

23. See *Leslie's Poolmart, Inc.*, No. 21-CA-102332 (N.L.R.B. Jan. 17, 2014); see also McGuire Woods LLP, *NLRB Judge Invalidates Arbitration Agreement without Express Class Action Waiver*, LEXOLOGY (Feb. 3, 2014), <http://www.lexology.com/library/detail.aspx?g=bb5d0ad4-7b7c-423a-83a0-c049624c8c00> ("The [*Leslie's Poolmart, Inc.*] ruling demonstrates the ongoing divergence between the federal courts and the NLRB over the lawfulness of class action waivers in employment arbitration agreements . . . Unless and until the Supreme Court weighs in on whether such waivers violate the NLRA, employees will continue to seek NLRB intervention as a means to preclude enforcement of class and collective action waivers. . . . [C]lass action waivers will continue to be an area of legal uncertainty for employers seeking to enforce such provisions in arbitration agreements.").

of labor through the lens of divergent feminist theories. It then argues that, as a result of occupational sex segregation, women can benefit greatly from collective action as a means of addressing workplace grievances. Part II discusses the decline of unionization as a tool for collective action and rights enforcement in the workplace, and how the history of collective action has affected working women in America. Part III examines the increasing difficulty of winning class certification and using class action litigation as a tool to assert workplace rights, following *Wal-Mart Stores, Inc. v. Dukes*.²⁴ Part IV considers the use of class arbitration, how it compares to traditional litigation, and why it is currently at risk. This Note concludes that the decline of unionization and other collective-action strategies has left class arbitration as a last-ditch option for working women to collectively address workplace grievances. As such, the Fifth Circuit's decision in *DR Horton* should be reversed, and class arbitration should be protected in the employment context as a necessary form of concerted activity.

I. WORKING WOMEN IN AMERICA

Women now comprise a large majority of the working poor in America.²⁵ Occupational sex segregation and "labor market hostility to working mothers, whose cultural roles continue to include the obligation to serve as primary caretakers for children,"²⁶ make it difficult for women to obtain employment positions that pay well, provide opportunities for advancement, and ensure necessary benefits and protections, such as overtime pay²⁷ and paid family leave.²⁸

24. *Supra* note 10.

25. See Crain, *Collective Action*, *supra* note 2, at 26.

26. *Id.*

27. Home healthcare workers, the majority of whom are women, recently secured collective bargaining rights and minimum wage and overtime protections. See Melanie Trotman & Kris Maher, *Labor Department Adds Protections for Home-Health-Care Workers*, WALL ST. J., Sept. 18, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323981304579081251516291502>. However, a number of women-dominated professions are not entitled to overtime pay under the FLSA, 29 U.S.C. § 201 (2007). See, e.g., *Exemptions to the Fair Labor Standards Act*, U.S. DEPT. OF LAB., <http://www.dol.gov/elaws/esa/flsa/screen75.asp> (farmworkers and commissioned sales employees not covered).

28. The Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 (1993), does not apply to women who work for small businesses with less than fifty employees. Further, leave is unpaid

While more women today are entering the labor force than in the past forty years,²⁹ women still earn significantly less than men³⁰ and still occupy a majority of low-paying jobs.³¹

According to the Institute for Women's Research, women earn 77 cents for every dollar that men earn.³² The education and health services industries employ the most women, followed by the trade, transportation, and utilities sectors.³³ Within these industries, elementary school teacher, nurse, home health aide, cashier, housekeeper, waitress, salesperson, and receptionist make up a disproportionate number of the careers occupied by women.³⁴ And these are among the lowest-paying jobs in America.³⁵

A. *Feminist Perspectives on Workplace Inequality*

Feminist scholars propose a number of theories as to why women have come to occupy the majority of low-paying jobs. Cultural feminists, like the psychologist Carol Gilligan, argue that a woman's moral sensibility differs from that of men, and leads women to place greater emphasis on relationships, causing increased interdependence among women.³⁶ According to Gilligan, women experience internal

and limited to twelve weeks; and leave to care for domestic partners or siblings is not provided. See *Family and Medical Leave Act*, U.S. DEPT. OF LAB., <http://www.dol.gov/whd/fmla/> (last visited Feb. 6, 2014).

29. *Women at Work*, BUREAU LAB. STATS. (Mar. 2011), <http://www.bls.gov/spotlight/2011/women/> ("Women's labor force participation rates are significantly higher today than they were in the 1970s.")

30. *Id.* (Ratio of Women's to Men's Earnings by Occupation).

31. *Id.* (Women's Earnings and Employment by Occupation).

32. See *Pay Equity and Discrimination*, *supra* note 3.

33. See *Women at Work*, *supra* note 29 (Employment by Industry).

34. *Id.* (Women's Earnings and Employment by Occupation).

35. Shan Li, *Women Still Work More Low-Pay Jobs, Report on Gender Gap Finds*, L.A. TIMES, June 13, 2013, available at <http://articles.latimes.com/2013/jun/13/business/la-fi-mo-gender-gap-jobs-20130613>.

36. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: WOMEN'S CONCEPTIONS OF SELF AND OF MORALITY 3 (1982), available at <http://sfoonline.barnard.edu/sfxxx/documents/gilligan.pdf> (last visited Feb. 10, 2013). But see Naomi Weisstein, *Power, Resistance and Science*, NEW POLITICS (1997), available at <http://nova.wpunj.edu/newpolitics/issue22/weisst22.htm> (arguing that "feminist psychologists," like Gilligan, "put forth a notion of female difference which, while no longer biologically based, is nevertheless essentialist, or at least highly decontextualized . . . they assume that female difference is fixed, rather than contingent on social context").

conflict when faced with external pressures, torn between compassion for others and a desire for autonomy—between acts of “virtue and power.”³⁷ If a woman speaks up about an injustice like low wages, she fears she is betraying her role as a compassionate caregiver.³⁸ She is less likely than a man to object to a particular practice or to challenge the status quo, if doing so leads to alienation.³⁹ She becomes particularly susceptible to suffer inequality where power imbalances lead to gender exploitation, as in the workplace.⁴⁰

This conception of a woman’s moral sensibility can have direct consequences for women in the workplace, serving to perpetuate and justify the movement of women into low-paying jobs. In *EEOC v. Sears, Roebuck & Co.*, a group of employees brought a class action employment discrimination lawsuit against Sears, claiming women were disproportionately hired for non-commission, lower-paying jobs.⁴¹ In defense of its hiring practices, Sears claimed its female employees showed little interest in commission sales jobs, arguing the “interests of men and women often diverged along patterns of traditional male and female interest.”⁴² Sears insisted its female employees “feared or disliked the perceived ‘dog-eat-dog’ competition” of commission sales, preferring non-commission selling “because it was more enjoyable and friendly.”⁴³

In support of its argument, Sears called historian Rosalind Rosenberg to testify. Rosenberg argued a woman’s “commitment to the home and family internalized values predominantly relationship-

37. See GILLIGAN, *supra* note 36, at 10.

38. *Id.* (It is “in their care and concern for others that women have both judged themselves and been judged.”).

39. *Id.* (“The ‘good woman’ masks assertion in evasion, denying responsibility by claiming only to meet the needs of others, while the ‘bad woman’ forgoes or renounces the commitments that bind her in self-deception and betrayal.”).

40. See also SARA RUDDICK, *MATERNAL THINKING: TOWARDS A POLITICS OF PEACE* (1989); ANN FERGUSON, *BLOOD AT THE ROOT: MOTHERHOOD, SEXUALITY AND MALE DOMINANCE* (1989).

41. 628 F. Supp. 1264 (N.D. Ill. 1986).

42. *Id.* at 1307. The EEOC countered, arguing the employment make-up was the result of systemic discrimination, that “women are influenced only by the opportunities presented to them, not by their preference,” and that women do seize “opportunities for greater income in nontraditional jobs” when such jobs are made available. *Id.* at 1314.

43. *Id.* at 1307.

centered rather than work-centered . . . and led women to have different attitudes, goals and expectations toward work than men.”⁴⁴ The majority agreed, finding “many applicants for sales jobs at Sears were not in fact interested in selling on commission.”⁴⁵ The court explained that a female employee’s dislike of what she perceived as cut-throat competition and increased pressure deterred her from pursuing a commission sales job.⁴⁶ Non-commission selling, on the other hand, was more social and friendly.⁴⁷ Like Gilligan, the court endorsed a conception of women as innately more interested in relationships than in pursuing economic gains.

In contrast, liberal feminists see the subordination of women not as the result of any innate female characteristic but as resulting from the systemic manipulation of the very claims espoused by cultural feminists. Second-wave feminist Betty Friedan articulated this view in her groundbreaking book *The Feminine Mystique*:

Over and over women heard in voices of tradition . . . they could desire no greater destiny than to glory in their own femininity. Experts told them how to catch a man and keep him, how to breastfeed children and handle their toilet training, how to cope with sibling rivalry and adolescent rebellion; . . . They were taught to pity the neurotic, unfeminine, unhappy women who wanted to be poets or physicists or presidents. They learned that truly feminine women do not want careers, higher education, political rights . . .⁴⁸

Instead of relying on traditional notions of femininity and the female “moral sensibility,” liberal feminists argue for personal autonomy

44. See Stephanie Riger, *Comment on “Women’s History Goes to Trial: EEOC v. Sears, Roebuck and Company,”* 13 SIGNS 897, 897 (Summer 1998), available at <http://www.jstor.org/discover/10.2307/3174130?uid=2134&uid=2&uid=70&uid=4&sid=21103399566697>.

45. *Sears, Roebuck & Co.*, 628 F. Supp. at 1302. On appeal, the dissent saw it differently, arguing, “[T]here is scarcely any recognition of the employer’s role in shaping the ‘interests’ of applicants . . . [L]ack of opportunity may drive lack of interest.” *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 361 (7th Cir. 1988). “These conclusions are of a piece with the proposition that women are by nature happier cooking, doing the laundry and chauffeuring the children to softball games than arguing appeals or selling stocks. The stereotype of women as less greedy and daring than men is one that the sex discrimination laws were intended to address.” *Id.*

46. *Sears, Roebuck & Co.*, 628 F. Supp. at 1307.

47. *Id.*

48. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 15 (1963).

and choice, and view a woman's lack of individual rights as the main source of inequality in the workplace.⁴⁹ Liberal feminists advocate for "formal equality," under which women are equal to men and entitled to the same protections.⁵⁰ They work towards the passage of laws that promote equal rights, like Title VII of the Civil Rights Act of 1964, which forbids arbitrary employment decisions based on sex.⁵¹

The legal consequences of a liberal feminist interpretation of female subordination and inequality can be seen in cases like *Gilbert v. General Electric*, where the limitations of Title VII were laid bare.⁵² There, the majority held that the exclusion of pregnancy leave from an employer's disability plan was not discrimination based on

49. One of the major goals of the liberal feminist movement in the 1960s and 70s, during the civil rights movement, was the passage of the Equal Rights Amendment (ERA). "In 1972, after 49 years of effort by supporters, Congress proposed an amendment declaring that 'equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex,' referred to hereinafter as 'the proposed Equal Rights Amendment,' or 'the proposed ERA.'" THOMAS H. NEALE, CONGRESSIONAL RESEARCH SERVICE, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 2 (May 21, 2013), available at http://www.equalrightsamendment.org/misc/CRS_2013_summary.pdf. The ERA has yet to be adopted. For more on the ERA, see *id.*

50. For a thorough discussion of formal equality, see Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998), available at <http://scholarship.law.wm.edu/wmlr/vol40/iss1/5>.

51. 42 U.S.C. § 2000e-2 (1978) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

52. 429 U.S. 125 (1976), in which discrimination based on pregnancy was not considered discrimination based on sex. This changed with the passage of the Pregnancy Discrimination Act in 1978, which amended Title VII to prohibit sex discrimination on the basis of pregnancy. 42 U.S.C. § 2000e (1978). However, Title VII currently fails to provide protection for lesbian women, because discrimination based on sexual orientation is neither covered under Title VII nor is it considered discrimination based on sex. See *Onacle v. Sundowner Offshore Services*, 523 U.S. 75 (1989) (distinguishing between discrimination based on sex and discrimination based on sexual orientation, and finding the latter not forbidden under federal law). This is likely to change in the coming years. See *Macy v. Department of Justice*, No. 0120120821 (EEOC Apr. 20, 2012) (where the EEOC held that discrimination against an individual because that person is transgender is discrimination because of sex); *Castello v. U.S. Postal Service*, No. 0520110649 (EEOC Dec. 20, 2011) (where the EEOC found claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping did state sex discrimination claims under Title VII).

sex.⁵³ In defending its rationale, the Court explained that General Electric's plan was "a gender-free assignment of risks in accordance with normal actuarial techniques."⁵⁴ In *Gilbert*, the Court acknowledged the need to treat men and women equally, and denying pregnancy leave to *all* employees, regardless of sex, did just that.⁵⁵

In contrast to a liberal feminist interpretation, Marxist and radical feminists see the movement of women into low-paying jobs as the result of structural patterns inherent in capitalism and patriarchy that cannot be corrected by granting rights.⁵⁶ According to Sylvia Walby, a radical feminist sociologist, female subordination is the result of patriarchy, by which men dominate women to reap both private and public advantages.⁵⁷ With the onset of industrial capitalism, private patriarchy, which worked to exclude women from economic and political positions of power, transformed into public patriarchy, whereby women entering the labor force were segregated into low-paying jobs.⁵⁸ Similarly, Marxist feminists view women's subordination as the natural result of capitalism, in which the dominant social structure is the economic exploitation of one class (or group) over another.⁵⁹

In her book *Sexual Harassment of Working Women*, Catherine MacKinnon exemplifies how "the social creation of differences, and the transformation of differences into social advantages and disadvantages," allows society to rationally predicate inequality and

53. *Gilbert*, 429 U.S. at 134 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.").

54. *Id.* at 148.

55. *Id.*

56. Edward N. Zalta (ed.), *Feminist Perspectives on Class and Work*, STAN. ENCYCLO. OF PHILO. (Oct. 12, 2010), <http://plato.stanford.edu/entries/feminism-class/>.

57. See generally SYLVIA WALBY, *THEORIZING PATRIARCHY* (1991).

58. *Id.* at 24 ("The change from private to public patriarchy involves a change both in the relations between the structures and within the structures. In the private form, household production is the dominant structure; in the public form, it is replaced by employment and the state. In each form, all the remaining patriarchal structures are preset—there is simply a change in which are dominant.").

59. *Id.* at 33–34.

economic exploitation.⁶⁰ According to MacKinnon, women's sexual differences, like their ability to become pregnant, are used by society to perpetuate inequality and maintain a social hierarchy in which men are placed firmly at the top.⁶¹ According to MacKinnon, decisions like the one in *Gilbert* manifest and perpetuate the structural hierarchy in which men dominate, serving only to reinforce "a system of second-class status for half of humanity."⁶² To address the problems faced by women in the workplace, MacKinnon argues society must reevaluate and reinterpret how those problems are addressed. For example, to truly tackle sex discrimination, discrimination must be redefined as not only arbitrary distinctions based on sex but as any act that perpetuates the existing hierarchy, regardless of real or arbitrary differences.⁶³

While these varying feminist perspectives promote diverging sources of and solutions to the existence of inequality in the workplace, they share a common observation: workplace exploitation of women has become normalized. The perpetuation of stereotypes and the denial of rights, combined with an economic system dependent on inter-group hierarchies, have left women the objects of social and economic subordination.

B. Collective Action Strategies for Women

The social and economic subordination of women can be seen in current employment patterns, which reveal women overwhelmingly employed in low-wage occupations.⁶⁴ Despite the grim statistics, collective action strategies can help to empower women employees.⁶⁵ Labor and employment law expert Marion Crain argues that "collective action strategies are superior to individual rights"⁶⁶ in helping women achieve workplace equality in a number of ways.

60. CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 105 (1979).

61. *Id.*

62. *Id.*

63. *Id.* For a more nuanced discussion of MacKinnon's perspective on male/female hierarchies, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

64. See generally Crain, *Collective Action*, *supra* note 2.

65. See *id.*

66. *Id.* at 26.

First, in the context of union collective action, “women-centered unions can attack sex-segregation” by bargaining for benefits that uniquely address the interests of women in a particular occupation—benefits such as equal pay, paid family leave, and employer-provided day care.⁶⁷ Second, collective action through unionization “distributes the burdens and costs of asserting women’s interests as workers across the organized working class.”⁶⁸ Resolving disputes can be costly and slow; collective action can more efficiently allocate resources and lower costs.⁶⁹ In some cases, collective action may be the only feasible option for women employees seeking to address a claim, given the high cost of bringing employment grievances—both economically and emotionally.⁷⁰ Additionally, collective action can empower women to take control of their working conditions.⁷¹ A woman can become empowered by seeing herself as a member of a group—specifically, as one of many exploited female wage workers.⁷² Working together, women are awakened to their potential to enact change and gain necessary protections and benefits. Crain argues that when a woman becomes aware of what is possible through collective action, she is “like a new person, . . . not like that meek little person that worked in that office for twenty years and never opened [her] mouth[.]”⁷³

II. UNIONIZATION IN DECLINE

Unionization is on the decline,⁷⁴ yet the success of unionization among low-wage workers demonstrates how collective action can

67. *Id.* at 31.

68. *Id.* at 32.

69. *Id.* at 27 (A collective action approach “is more equitable because it distributes the costs of empowering women and enforcing statutory rights over organized labor as a whole, rather than saddling individual women or feminist advocacy groups with those costs.”).

70. *Id.*

71. *Id.* at 31.

72. *Id.* at 27 (Collective action “is more likely to foster self-esteem and thus enhance activism and enforcement of other statutory rights . . .”).

73. *Id.* at 31 (quoting a telephone interview with anonymous female union organizer (May 17, 1991)).

74. Steven Greenhouse, *Labor’s Decline and Wage Inequality*, *ECONOMIX* (Aug. 4, 2011), <http://economix.blogs.nytimes.com/2011/08/04/labors-decline-and-wage-inequality/>. One study found the decline in union power and density since 1973 explained one third of the increase in

increase women's rights in the workplace.⁷⁵ Through unionization, women can bargain collectively and counteract the imbalance of power that favors management.⁷⁶ Management can exploit its power over employees by lowering wages, eliminating benefits, increasing work hours, and providing unsafe working conditions.⁷⁷ Female employees can leverage their numbers to negotiate for living wages and increased benefits, with the union serving as their representative and shield against the unpredictability of management, workplace harassment, and employer retaliation.⁷⁸

The American Federation of Labor (AFL) was one of the first and largest labor unions in the United States, organized as an association of trade unions in 1886.⁷⁹ The AFL focused mainly on working conditions and income, and was instrumental in securing victories for male *and* female workers.⁸⁰ However, the AFL did not always

wage inequality among men since then, and one fifth of the increased inequality among women. Bruce Western & Jake Rosenfeld, *Unions, Norms and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513 (2011). The study noted that from 1973 to 2007, union membership in the private sector dropped to 8 percent from 34 percent among men and to 6 percent from 16 percent among women. During that time, wage inequality in the private sector increased by more than 40 percent. *Id.*

75. Derek Thompson, *Indispensable: Why the Middle Class Needs Unions Now More Than Ever*, THE ATLANTIC, June 12, 2012, available at <http://www.theatlantic.com/business/archive/2012/06/indispensable-why-the-middle-class-needs-unions-now-more-than-ever/258404/>.

76. "Recent advances in trade and technology have severely exacerbated the imbalance between employers and employees. The emergence of the global economy has put great pressure on American business to reduce costs in order to compete internationally. Corporate reorganizations, downsizing, and a growing reliance on contingent workers increasingly became the norm beginning in the early 1980s. These measures, in turn, have significantly eroded employee job security. Similarly, modern information and communication technology has made capital considerably more mobile than labor. Employers can move, or threaten to move, production facilities to locations with lower labor costs. This mobile capacity thus greatly enhances the relative bargaining power of employers vis-a-vis employees." Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351 (2002), available at https://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/43_2/02_TXT.htm.

77. See generally DAVID EDWARD O'CONNOR & CHRISTOPHER C. FAILLE, BASIC ECONOMIC PRINCIPLES: A GUIDE FOR STUDENTS (2000).

78. Thompson, *supra* note 75.

79. See PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES VOL. 2: FROM THE FOUNDING OF THE A. F. OF L. TO THE EMERGENCE OF AMERICAN IMPERIALISM (1975). In 1955, the AFL merged with its longtime rival, the Congress of Industrial Organizations (CIO), to form the AFL-CIO, a federation in place today. The AFL has comprised the longest lasting and most influential labor federation in the United States. *Id.*

80. WILLIAM CLARK ROBERTS, AMERICAN FEDERATION OF LABOR: HISTORY,

support the right of women to unionize and initially viewed women as strike-breakers and low-wage labor reserves.⁸¹ From the founding of the AFL through the 1920s, women remained practically invisible within the union, with only two affiliated unions openly including women.⁸²

At the same time, however, the AFL, prompted by the Women's Trade Union League,⁸³ took efforts on behalf of women in support of protective legislation.⁸⁴ The AFL advocated fewer work hours for women, but it did so based on the underlying assumption that female workers were weak and needed to be protected as potential child-bearers.⁸⁵ Most support for protective legislation for women stemmed from a desire to protect men's jobs.⁸⁶ If a woman's hours could be limited, a man's employment opportunities and earning potential could be improved.⁸⁷

ENCYCLOPEDIA, REFERENCE BOOK (1919); see also ALICE KESSLER-HARROS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* (1982).

81. See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991) [hereinafter Crain, *Feminizing Unions*]. Crain explains, "Despite rapid expansion in the number of working women in the industrial labor force between 1897 and 1920, the AFL was able to organize no more than 1.5% of the women engaged in industrial occupations by the year 1910; only new organizing among garment workers was responsible for raising the figure by 6.6% in 1920." *Id.* at 1161. For an extensive study, see R. MILKMAN, *GENDER AT WORK* (1987).

82. See *Union 101*, CALEDONIA FIREFIGHTERS LOCAL 2740 (Nov. 29, 2008), http://www.iaff2740.org/?zone=/unionactive/view_page.cfm&page=Union20101 ("The AFL hired its first female organizer, Mary Kenney O'Sullivan, only in 1892 and after releasing her after five months, and it did not replace her or hire another women national organizer until 1908. Women who organized their own unions were often turned down in bids to join the Federation, and even women who did join unions found them hostile or intentionally inaccessible.")

83. Founded in 1903 at an AFL meeting, the League served as a liaison to the AFL and did most women's union organizing in the 1900s. See NANCY SCHROM DYE, *Creating A Feminist Alliance: Sisterhood and Class Conflict in the New York Women's Trade Union League, 1903-1914*, 2 FEM. STUD. 24 (1975).

84. See ELIZABETH ANNE PAYNE, *REFORM, LABOR, AND FEMINISM: MARGARET DREIER ROBINS AND THE WOMEN'S TRADE UNION LEAGUE* 1-3 (1988).

85. *Id.* at 143 ("An ideology of motherhood was behind the League's programs for protective legislation.")

86. See Crain, *Feminizing Unions*, *supra* note 81, at 1164. Quoting the national Trade Union's proclamation of its ideology regarding women in the workplace, Crain states, "We stand for the principle . . . that it is wrong to permit any of the female sex of our country to be forced to work, as we believe that the man should be provided with a fair wage in order to keep his female relatives from going to work." *Id.*

87. *Id.*

During the Great Depression, vital pieces of legislation were passed that significantly increased the ability of workers to unionize. In 1932, Congress passed the Norris–LaGuardia Act,⁸⁸ banning the use of “yellow dog contracts”⁸⁹ and restricting the use of court injunctions to end labor strikes.⁹⁰ Shortly after, as part of his New Deal legislation, President Roosevelt signed into law the Wagner Act, also known as the NLRA,⁹¹ and the Fair Labor Standards Act (FLSA).⁹² Combined, these acts solidified the right of workers, both men and women, to bargain collectively, and led to a dramatic increase in unionization.⁹³

At the onset of World War II, an increased number of married and unmarried women joined the workforce due to the sudden need for workers.⁹⁴ As a result, trade unions were forced to recognize equal

88. 29 U.S.C. § 101 (1932). The Norris LaGuardia Act banned contracts between employer and employee in which the employee promised not to join a union as a condition of employment; barred the federal courts from issuing injunctions against nonviolent labor disputes; and created a positive right of noninterference by employers against workers joining trade unions. *See* *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (finding a boycott of race discrimination falls within the meaning of protected “labor disputes”).

89. An agreement between an employer and an employee in which the employee agrees, as a condition of employment, not to be a member of a labor union. *See* ROBERT EMMETT DOHERTY, *INDUSTRIAL AND LABOR RELATIONS TERMS: A GLOSSARY* 24, 36 (1989).

90. *See* *Norris–LaGuardia Act of 1921*, SOC’Y FOR HUMAN RESOURCE MGMT., <http://www.shrm.org/legalissues/federalresources/federalstatutesregulationsandguidanc/pages/norris-laguardiaactof1932.aspx> (last visited Feb. 10, 2013).

91. 29 U.S.C. § 151 (1935). “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees . . .” *Id.*

92. 29 U.S.C. § 8 (1938). Among other things, the Act set a minimum wage and maximum number of work hours an employee could work per week. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22.

93. *See* *Norris–LaGuardia Act of 1921*, *supra* note 90 (“[H]igh unemployment of the Great Depression made it difficult for workers to express their unified preference for union representation. By the third year of the Depression, however, workers with jobs began to push for unionization anyway. Labor solidarity was borne of desperation. . . . [T]he union movement grew by more than 300 percent. . . . By 1941 [union membership] stood at over ten million.”); *see also* *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (finding the NLRA, “does not invade the constitutional rights of employers and employees”).

94. *See* Crain, *Feminizing Unions*, *supra* note 81, at 1166.

protection for women under union contracts.⁹⁵ This new strength of unions, and particularly women in unions, concerned many anti-labor Republicans.⁹⁶ In 1947, Congress passed the Taft–Hartley Act, to mitigate the growing influence of labor unions in the workplace.⁹⁷ The Taft–Hartley Act drastically curtailed the economic power of unions, declaring the closed shop illegal⁹⁸ and permitting workplace unionization only after a majority vote by employees.⁹⁹ The Act forbade jurisdictional strikes¹⁰⁰ and secondary boycotts,¹⁰¹ and gave employers the right to refuse to bargain with unions.¹⁰²

From its heyday in 1945, following World War II, when union membership peaked at 35 percent of non-agricultural workers, unionization has steadily declined. Today, only 12 percent of all

95. *Id.*

96. See Steven Wagner, *How Did the Taft-Hartley Act Come About?*, HIST. NEWS NETWORK (Oct. 14, 2002), <http://hnn.us/articles/1036.html> (“In the mid-term elections of 1946, the Republican Party won control of the upcoming Eightieth Congress, gaining majorities in both houses for the first time since 1931. . . . These freshmen congressmen were eager to overturn as much New Deal legislation as possible and one of their first priorities was to amend the Wagner Act.”).

97. 29 U.S.C.A. § 186 (1947). The Act passed only after overriding President Truman’s veto, and was known to many as the “slave-labor bill.” Wagner, *supra* note 96.

98. A form of union security agreement under which the employer agrees to hire union members only. Employees must remain members of the union at all times in order to remain employed. See DOHERTY, *supra* note 89, at 17.

99. “Even though employers are free to recognize a union without an election, in practice they almost always request an election Requesting an election [] gives them more time to lobby against unionization. . . . [T]he secret ballot isn’t so secret. . . .” Christopher Beam, *Does Card Check Kill the Secret Ballot or Not?*, SLATE (Mar. 12, 2009), http://www.slate.com/articles/news_and_politics/politics/2009/03/uncivil_union.html. “Sadly, many employers resort to spying, threats, intimidation, harassment and other illegal activity in their campaigns to oppose unions. The penalty for illegal activity, including firing workers for engaging in protected activity, is so weak that it does little to deter law breakers. . . . The employer has all the power; they control the information workers can receive, can force workers to attend anti-union meetings during work hours, can force workers to meet with supervisors who deliver anti-union messages, and can even imply that the business will close if the union wins. Union supporters’ access to employees, on the other hand, is heavily restricted.” 153 CONG. REC. E260 (Feb. 5, 2007) (statement of Rep. George Miller).

100. A concerted refusal to work, enacted by a union to assert its members’ right to a particular job, and to protest the assignment of disputed work to members of another union or unorganized workers. See DOHERTY, *supra* note 89, at 20.

101. An industrial action by a trade union to support the strike of workers in another enterprise. See *id.* at 21.

102. Alexander Cockburn, *An Anti-Labor Day that Lives in Infamy: How Many Democrats Voted for Taft-Hartley?*, COUNTERPUNCH (Sept. 2004), <http://www.counterpunch.org/2004/09/06/how-many-democrats-voted-for-taft-hartley/>.

workers are union members.¹⁰³ Economists disagree as to the cause of this decrease. Some argue the passage of the Taft-Hartley Act, combined with a systemic political and corporate campaign to eliminate unions, has caused this significant decline.¹⁰⁴ Others cite the changing composition of the workforce from a concentration of manufacturing jobs to the rise of service industries.¹⁰⁵ And yet others argue the shift to a highly competitive US economy, in which the requirement to pay higher wages prevented US companies from competing globally, has led to a decrease in political and public support for unions.¹⁰⁶ Whatever the reason, this trending decline in unionization has had significant effects on workers' ability to utilize collective action to challenge workplace power imbalances.

The effect of union decline might be most dramatic for women, who have been historically underrepresented in unions to begin with.¹⁰⁷ As more and more women enter the workforce,¹⁰⁸ the need for benefits traditionally associated with union membership, including healthcare and pension plans, becomes more salient for women, who are increasingly concentrated in low-wage jobs.¹⁰⁹ The

103. Brad Plumer, *Was the Decline of American Unions Inevitable? Not If You Ask Canada*, WASH. POST, Sept. 4, 2012, available at <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/09/04/was-the-decline-of-american-unions-inevitable-ask-canada/>; see also *Organized Labor Fails in the South*, N.Y. TIMES, Feb. 18, 2014, available at <http://www.nytimes.com/roomfordebate/2014/02/17/organized-labors-future-in-the-south> (describing the unexpected failure of the United Auto Workers to unionize a Volkswagen plant, despite its employer's openness to union representation in the shop.).

104. KRIS WARNER, CTR. FOR ECON. & POL'Y RES., PROTECTING FUND. LAB. RIGHTS: LESSONS FROM CAN. FOR THE U.S. 11 (Aug. 2012), available at <http://www.cepr.net/documents/publications/canada-2012-08.pdf>.

105. Gary Becker, *Will the Decline in Union Membership be Reversed?*, BECKER-POSNER BLOG (Jan. 25, 2009), <http://www.becker-posner-blog.com/2009/01/will-the-decline-in-union-membership-be-reversed-becker.html> ("The shift of jobs to smaller service-sector firms has also had a big impact since unions have been unimportant in these firms.").

106. Michael Wachter, *The Rise and Decline of Unions*, REG. (2007), <http://www.cato.org/pubs/regulation/regv30n2/v30n2-2.pdf>.

107. NANCY R. HOOYMAN AND JUDITH GONYEA, FEMINIST PERSPECTIVES ON FAMILY CARE: POLICIES FOR GENDER JUSTICE 66 (1995) ("Women have always been underrepresented in labor organizations. One primary reason for the lower numbers of women in unions is that historically, unionization has been highest in the blue-collar manufacturing jobs where fewer women are employed.").

108. See *supra* note 29 and accompanying text.

109. HOOYMAN & GONYEA, *supra* note 107, at 65 ("In addition to wages or salaries, fringe benefits such as health insurance and pension coverage are critical to ensuring a family's well-being. . . . [W]omen of all races are less likely to have this coverage than their male

decline of women in unions makes gaining access to these crucial benefits more difficult, and leaves women more vulnerable to wage inequality.¹¹⁰ In their book, *Feminist Perspectives on Family Care*, feminist scholars Nancy Hooyman and Judith Gonyea lament the decline in union membership, noting, “Membership in unions or labor organizations correlates with both increased wages and fringe benefits”—benefits that have traditionally eluded women workers.¹¹¹

Moreover, the costly increase in employment grievance procedures and resulting litigation¹¹² should be no surprise. Where workers once turned to the union to address issues of workplace inequality and to bargain for better employment conditions, today, the decline in union representation ensures workers no longer have a reliable workplace forum for protecting their labor and employment rights.¹¹³

III. CLASS ACTION LAWSUITS TO ADDRESS WORKPLACE GRIEVANCES

In 2011, the Supreme Court heard the case of *Wal-Mart Stores, Inc. v. Dukes*,¹¹⁴ in which female employees of the retail giant Wal-Mart brought Title VII¹¹⁵ charges against the employer in a class action lawsuit. The non-unionized female employees alleged that

counterparts. . . . Women’s lower pension coverage is a result of their concentration in lower-wage jobs.”)

110. *Id.* at 66.

111. *Id.*

112. See *Employment Litigation and Dispute Resolution*, U.S. DEPT. OF LAB., http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (last visited Feb. 10, 2013) (“In the federal courts alone, the number of suits filed concerning employment grievances grew over 400 percent in the last two decades. Complaints lodged with administrative agencies have risen at a similar rate: for example, in 1993, the EEOC received nearly 90,000 discrimination complaints from employees across the country.”).

113. For an extensive study on how unions work to raise wages and reduce workplace conflict, see RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).

114. 131 S. Ct. 2541 (2011). In 2000 Betty Dukes, a fifty-four-year-old Wal-Mart worker in California, sued her employer for sex discrimination. See Steven Malanga, *The Tort Plague Hits Wal-Mart*, CITY J. (June 24, 2004), http://www.city-journal.org/html/eon_06_24_04sm.html. Despite six years of work and positive performance reviews, she was denied the training she needed to advance to a higher salaried position. *Id.* Wal-Mart argued Dukes clashed with a female Wal-Mart supervisor and was disciplined for returning late from lunch breaks. *Id.*

115. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, prohibits discrimination by covered employers on the basis of race, color, religion, sex, or national origin.

Wal-Mart practiced unlawful sex discrimination in its promotion decisions, and sought back pay and punitive damages.¹¹⁶ The plaintiff class argued that “local managers’ discretion over pay and promotions [was] exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees.”¹¹⁷

The Court ultimately ruled against the women plaintiffs, finding they had failed to meet class certification requirements.¹¹⁸ Because the plaintiffs failed to present proof that the company operated under a general policy of discrimination, they did not satisfy the commonality requirement for class certification.¹¹⁹ The Court explained, “What matters to class certification is not the raising of common questions, even in droves, but rather the capacity of a class-wide proceeding to generate common answers apt to drive resolution of litigation.”¹²⁰ Because the evidence presented regarding gender bias was considered merely anecdotal,¹²¹ it was impossible to prove that a condemnation of store-wide policy would provide relief for the entire class. Moreover, because of the variability of plaintiffs’ circumstances,¹²² the class failed to provide the required showing that *all* female Wal-Mart employees were subject to sex-disparity,

116. *See Dukes*, 131 S. Ct. at 2548.

117. *Id.*

118. FED. R. CIV. P. 23, 28. The Federal Rules of Civil Procedure (FRCP) govern certification of a class for class action lawsuits. For a guide to the FRCP, see 56 AM. JUR. TRIALS § 293 (1995).

119. FRCP 23(a) states, “One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Further, class members must meet one of the three requirements under 23(b). The *Dukes* class claimed status under Rule 23(b)(2), which states, “A class action may be maintained if Rule 23(a) is satisfied and if: (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2).

120. *Dukes*, 131 S. Ct. at 2551.

121. *Id.* at 2555 (“Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.”).

122. *Id.* at 2557 (“[M]embers of the class: held a multitude of different jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.”) (internal quotation marks omitted).

especially when the company itself had a policy against discrimination.¹²³

The Court also ruled that the plaintiffs could not go forward as *any* kind of class.¹²⁴ The majority argued that because the plaintiffs were seeking back pay, it was not appropriate for the case to continue, even with a showing of discrimination.¹²⁵ The Court explained, “[W]hen the plaintiff seeks individual relief such as reinstatement or back pay after establishing a pattern or practice of discrimination, ‘a district court must usually conduct additional proceedings . . . to determine the scope of individual relief.’”¹²⁶ Because back pay was integral and not incidental to the case, respondents’ class could not be certified.¹²⁷

In her dissenting opinion,¹²⁸ Justice Ginsburg elucidated the consequences of the Court’s interpretation of the class certification requirements, which failed to provide the female plaintiffs with any protection. “Women fill 70 percent of the hourly jobs in the retailer’s stores,” she explained, “but make up only ‘33 percent of management employees.’”¹²⁹ Further, “The plaintiffs’ ‘largely uncontested descriptive statistics’ also show that women working in the company’s stores ‘are paid less than men in every region’ and ‘that the salary gap widens over time even for men and women hired into the same jobs at the same time.’”¹³⁰ Ginsburg noted the “gender bias” that “suffused Wal-Mart’s company culture,”¹³¹ quoting senior management, who referred to female employees as “little Janie

123. See *Dukes*, 131 S. Ct. at 2554. “The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy’ of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices.” *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 2561 (citing *Teamsters v. United States*, 431 U.S. 324, 361 (1977)).

127. For a more thorough discussion of the back pay distinction, see Grace E. Speights, Esq. & Paul C. Evans, Esq., *Wal-Mart v. Dukes: Supreme Court Announces Stricter Class-Certification Standards*, WESTLAW J. EXPERT COMMENTARY SERIES (Dec. 5, 2011), http://www.morganlewis.com/pubs/SpeightsEvans_Dukes_WestlawCommentary.pdf.

128. The dissent was joined by Justices Breyer, Sotomayor, and Kagan. *Dukes*, 131 S. Ct. 2561.

129. *Id.* at 2563 (citing *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 146 (2004)).

130. *Id.* (citing *Dukes*, 22 F.R.D. at 151).

131. *Id.*

Qs.”¹³² One manager even told a female employee, “Men are here to make a career and women aren’t.”¹³³

Despite the likelihood that Wal-Mart’s female employees were victims of workplace sex discrimination under the law, class action litigation provided no recourse. Even Justice Ginsburg, who believed the female employees may have been certifiable,¹³⁴ ultimately agreed that the class “should not have been certified under Federal Rule of Civil Procedure 23(b)(2)” because of the monetary relief requested.¹³⁵ The decision left many startled,¹³⁶ and it became evident that addressing workplace gender-bias would become much more difficult for women following the Court’s decision.¹³⁷ Even if the employees decided to bring individual lawsuits seeking damages, such suits could not challenge the pervasion discrimination that defined Wal-Mart’s workplace culture.¹³⁸

The implications would be long-lasting.¹³⁹ Feminist scholars throughout the country criticized the ruling, in one instance

132. *Id.* at 2564.

133. *Id.*

134. *Id.* at 2561 (“A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions ‘predominate’ over issues affecting individuals—e.g., qualification for, and the amount of, back pay or compensatory damages—and that a class action is ‘superior’ to other modes of adjudication. Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.”).

135. *Id.*

136. See, e.g., Sarah Kellog, *Wal-Mart V. Dukes: The Implications*, DC BAR (Sept. 2011), <http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/september-2011-walmart-dukes.cfm>. “The Supreme Court’s recent decisions may make some wonder whether the Supreme Court has now decided that some corporations are too big to be held accountable,” said U.S. Sen. Patrick Leahy (D-Vt.), chair of the Senate Judiciary Committee, at a June 29 hearing examining the Court’s recent decisions affecting businesses. “You get the unfortunate feeling that many of the justices view plaintiffs as a mere nuisance to corporations.” *Id.*

137. See Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34 (2011) (“To satisfy commonality generally, judges may now require a stronger causal connection between an employer’s discretionary decision-making policy and a disparity or adverse employment action. This shift will make it harder for employees relying on this theory to act collectively.”).

138. See Natasha Lennard, *The Supreme Court Sides with Wal-Mart*, SALON (June 20, 2011), http://www.salon.com/2011/06/20/supreme_court_sides_with_wal_mart/.

139. *Id.*

comparing *Dukes* to Rosa Parks.¹⁴⁰ Many cited Wal-Mart's corporate structure as perpetuating a culture of sex discrimination.¹⁴¹ The feminist group Alliance for Justice argued, "If our Nation's largest employer—with approximately 1.4 million employees, more than 860,000 of whom are women, a large percentage of whom are women of color—can avoid liability for systemic discrimination across its nationwide chain of stores, [such] will undermine the equal rights of all women workers."¹⁴²

Many worried about the increased difficulty of filing class action litigation in an employment context.¹⁴³ Satisfying commonality would be more difficult, and the high standard of proof required to bring sex discrimination class actions would certainly deter women from bringing claims.¹⁴⁴ How should women proceed in an effort to protect their workplace rights? *Dukes* appeared to be the latest step in a systemic corporate campaign to "roll back the clock and destroy many of the gains [women workers] made during the Civil Rights era."¹⁴⁵

The decision also made it uncertain whether back pay would be a valid legal remedy for employment discrimination class action lawsuits.¹⁴⁶ In the first Title VII case heard after *Dukes*, the district court judge exclaimed, "[A] unanimous Supreme Court reduced to rubble more than forty years of precedent in the Courts of Appeals, which had long held that back pay is recoverable in employment discrimination class actions certified under Rule 23(b)(2)."¹⁴⁷ Back pay is an important remedy for women who are subject to

140. See Sherrilyn A. Ifill, *Wal-Mart Has Civil Rights against a Wall*, NAT'L PUB. RADIO (Mar. 29, 2011), <http://www.npr.org/2011/03/29/134948498/the-root-wal-mart-has-civil-rights-against-a-wall>.

141. See ALLIANCE FOR JUST., *WAL-MART V. DUKES: WILL THE SUPR. CT. PROTECT WAL-MART'S DISCRIM. AGAINST WOMEN?* 4 (2010), available at <http://www.afj.org/wp-content/uploads/2013/11/wal-mart-v-dukes-report-final.pdf> (last visited Mar. 22, 2014).

142. *Id.* at 1.

143. See Malveaux, *supra* note 137.

144. *Id.*

145. ALLIANCE FOR JUST., *supra* note 141.

146. See Malveaux, *supra* note 137, at 45 ("The Court's unanimous conclusion that back pay was not appropriate for the type of class action certified in *Dukes* was surprising. This gratuitous decision effectively reversed almost a half-century of Title VII jurisprudence permitting back pay under such circumstances.")

147. *United States v. City of New York*, No. 07-CV-2067, at 698 (E.D.N.Y. July 8, 2011).

discrimination, because it allows women who are fired or forced to quit as the result of unlawful sex discrimination to recover earnings they would have otherwise received.¹⁴⁸ Moreover, back pay “encourages voluntary compliance with the law,” providing employers a financial incentive to prevent discriminatory practices.¹⁴⁹ When female victims are prevented from recovering back pay, the benefits of filing a class action lawsuit are severely reduced.¹⁵⁰

Despite the challenges women now face in bringing class action lawsuits, the potential benefits can be great.¹⁵¹ A number of recent class actions lawsuits, alleging unpaid overtime work hours, have promised meaningful settlements for low-wage workers.¹⁵² For example, the retail giant Victoria’s Secret, whose workforce is 90 percent women¹⁵³ and whose sales associates average \$8.33 an

148. See *Back Pay*, U.S. DEPT. OF LAB., <http://www.dol.gov/dol/topic/wages/backpay.htm> (last visited May 3, 2014). (“A common remedy for wage violations is an order that the employer make up the difference between what the employee was paid and the amount he or she should have been paid.”).

149. See Malveaux, *supra* note 137, at 45 (“Back pay compensates employees for earnings they would have received in the absence of discrimination. Back pay not only makes victims of discrimination ‘whole.’ More importantly, it encourages voluntary compliance with the law. In enacting Title VII of the Civil Rights Act, Congress made clear that back pay, like injunctive and declaratory relief, is essential to law enforcement. Because of the importance of back pay, there is even a presumption in favor of it when discrimination is established.”).

150. For a more detailed discussion of the problems associated with bringing class action lawsuits regarding wages, see Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 523 (2012) (“Courts apply to wage rights cases an aggressive scrutiny that not only disadvantages low-wage workers, but is fundamentally incorrect on the law . . . [C]onditioning [29 U.S.C. § 216(b)] collective actions on certification motions proving commonality is incorrect.”).

151. “Class action lawsuits are designed to help streamline the legal process by combining tens, hundreds, or even thousands of potential individual lawsuits into a single class action lawsuit. This saves time, money and resources for all parties involved. For example, defendants only face a single class action lawsuit, the court system . . . has to only hear a single case, and plaintiffs can share legal fees among themselves, making it cheaper for plaintiffs to seek legal redress.” Robert J. Boumis, *Metro PCS Unpaid Overtime Class Action Lawsuit Settlement Reached*, TOP CLASS ACTIONS (Aug. 27, 2014), <http://topclassactions.com/lawsuit-settlements/lawsuit-news/38337-metropcs-unpaid-overtime-class-action-lawsuit-settled/>.

152. See, e.g., *Palma et al. v. MetroPCS Wireless Incorporated*, No. 8:13-cv-00698 (M. D. Fla.) (filed March 28, 2013) (where it is estimated that each member of the Class will receive as much as \$5,314 after attorney fees).

153. See Ashley Lutz, *What a Straight Man Learned from Working at Victoria’s Secret*, BUS. INSIDER (May 9, 2013), <http://www.businessinsider.com/yes-victorias-secret-does-hire-men-2013-5>.

hour,¹⁵⁴ currently faces a class action lawsuit alleging the company failed to pay employees entitled overtime wages.¹⁵⁵ If the lawsuit is successful, Victoria's Secret may end up paying workers a combined \$73 million.¹⁵⁶ Yet the move by employers to require that workers resolve employment disputes through mandatory arbitration has further undercut the efficacy of class action litigation.¹⁵⁷

IV. MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES

A. *The Pros and Cons*

Since the early 1990s, a trend has emerged to keep the resolution of employment disputes out of the courtroom.¹⁵⁸ Litigation can be avoided by utilizing alternative dispute resolution programs¹⁵⁹ and by

154. *Victoria's Secret Stores Hourly Pay*, GLASSDOOR (Sept. 17, 2014), <http://www.glassdoor.com/Hourly-Pay/Victoria-s-Secret-Stores-Hourly-Pay-E13903.htm>.

155. Karina Basso, *Victoria's Secret Faces \$37M Unpaid Overtime Class Action Lawsuit*, TOP CLASS ACTIONS (Aug. 25, 2014), <http://topclassactions.com/lawsuit-settlements/lawsuit-news/37916-victorias-secret-faces-37m-unpaid-overtime-class-action-lawsuit/> ("According to the Victoria's Secret unpaid overtime class action lawsuit, 'employees who work a closing shift routinely find themselves locked in the store at the end of daily operational hours and must await a manager to permit them to leave the store. Because this occurs after the employees have clocked out for the day, they are not compensated for the time spent under their employer's control[.]'").

156. *Id.*

157. *See infra* Part IV.A.

158. *See Employment Litigation and Dispute Resolution*, *supra* note 112 ("Employment litigation is a costly option for both employers and employees. . . . Further, while the prospective costs of court awards do serve to deter employers from illegal actions, it is not clear that litigation protects all kinds of employees equally well. . . . Finally, even for those employees properly situated to file suit, the pursuit of a legal claim through litigation often proves stressful and unsatisfying. . . . These problems with the legislative model have led many employers, employee groups, and lawmakers to seek alternatives.").

159. *See, e.g.*, Robert M. Shea, *Should Employers Require that Workplace Disputes Be Arbitrated?*, MORSE BARNES-BROWN PENDLETON, PC, <http://www.mbbp.com/resources/employment/arbitration.html> (last visited Feb. 10, 2013) ("A survey of more than 20 Fortune 500 companies' dispute resolution programs found that most employers who have implemented mandatory arbitration have done so in a way that makes arbitration the last step in a multi-step dispute resolution process. Most programs require that employment claims first be submitted to a human resources and/or management panel review. Claims that are not resolved are then submitted to mediation. Programs typically provide for the use of a professional outside mediator who will work to obtain a mutually acceptable resolution of the dispute. If mediation is unsuccessful, claims are then submitted to binding arbitration.").

requiring employees sign an MAA as a condition of employment.¹⁶⁰ The use of arbitration clauses in employment contracts is regulated by the Federal Arbitration Act (FAA),¹⁶¹ which requires parties who have agreed to arbitrate do so in lieu of litigation. Proponents of binding arbitration argue the method is less expensive, more expedient, and more informal than traditional adjudication, and that it allows parties to maintain a degree of privacy that is lost inside the courtroom.¹⁶²

Yet, the use of arbitration as an alternative to courtroom adjudication has been criticized,¹⁶³ because of its inability to develop the law and provide relief for those outside the confines of the arbitration room.¹⁶⁴ Further, because the employer dictates the terms of the arbitration and forces some of the costs on the employee,¹⁶⁵ he essentially maintains that same position of strength that led to the employment dispute.¹⁶⁶ Arbitration can be particularly tricky for women, who are already at a disadvantage in the workplace.¹⁶⁷ Individually, female employees possess less bargaining power than their employer counterparts, because of their “disproportionate

160. See *What are the California Rules Regarding Mandatory Arbitration Agreements, and How Do They Differ from Federal Law?*, SOC'Y FOR HUMAN RESOURCE MGMT. (Dec. 3, 2012), <http://www.shrm.org/TemplatesTools/hrqa/Pages/CaliforniaMandatoryArbitration.aspx> (“Mandatory arbitration generally refers to an arbitration agreement that an employer requires new hires or existing employees to sign as a condition of employment or of continued employment.”).

161. 9 U.S.C. § 1 (1925).

162. See Shea, *supra* note 159.

163. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

164. See Rebecca Bielski, *Legality of Pre-Dispute Mandatory Arbitration Agreements*, JURIST (Oct. 8, 2012), <http://jurist.org/dataline/2012/10/rebecca-bielski-mandatory-arbitration.php> (“Employees are waiving their right to a judicial forum, foregoing the impartiality of a judge appointed under Article III of the US Constitution and giving up their right to a jury who is chosen in a fair, objective and non-discriminatory manner. Furthermore, they waive the right to appeal an adverse verdict.”).

165. Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 173–74 (2003) (“The employer promulgating the agreement selects the rules under which the arbitration will proceed. Some businesses are using arbitration agreements in an attempt to avoid class action law suits. Others impose at least half of the cost of arbitration on the employee.”).

166. *Id.* at 175.

167. Cindy Hsu, *Gender Inequality in the Workplace*, HARV. INDEP. (Dec. 1, 2011), <http://www.harvardindependent.com/2011/12/gender-inequality-in-the-workplace-education-does-not-equal-success-1201/> (“Despite the huge advances women have made within the education system, women are still at a disadvantage in the workplace.”).

location in temporary, contingent, and part-time jobs,”¹⁶⁸ and because of the widely-held perception that, “sooner or later, women will leave [their jobs] to attend to family obligations.”¹⁶⁹ This power imbalance is inevitably reflected in the arbitration room.¹⁷⁰

Working as a group, women can combat the power imbalance present in individual employment arbitrations.¹⁷¹ When an MAA prohibits *class* arbitration, the benefits women receive from collective action are erased.¹⁷² A female employee cannot distribute the burden and cost of asserting her rights, and she cannot benefit from identifying herself as one of a group of exploited workers.¹⁷³

Such was the case for Michael Cuda, when in 2008, he filed an unfair labor practices claim against his employer, D.R. Horton, Inc., for failure to abide by wage and overtime laws under the Fair Labor Standards Act.¹⁷⁴ Because of his relatively little bargaining power as compared to that of his employer, Cuda was forced to confront the very predicament low-wage workers encounter on a regular basis: challenge the status quo and risk termination, or quietly accept exploitation. For Cuda, that choice was made more difficult because

168. See Crain, *Collective Action*, *supra* note 2, at 26 (“Women are more vulnerable than men to cut backs and layoffs in hard economic times because of our disproportionate location in temporary, contingent, and part-time jobs . . .”).

169. *Id.* (“[T]he vast majority of working women are crowded into low-wage, dead-end jobs that are structured around the assumption that, sooner or later, women will leave to attend to family obligations.”).

170. Hodges, *supra* note 165, at 179 (“Courts have found unenforceable arbitration agreements that fail to specify the rules and procedures governing arbitration or are overwhelmingly favorable to the employer.”).

171. *Id.* at 215 (“Class actions bring the power of the group to bear on the employer accused of discrimination or other violations of employee rights. The employees, combining their resources, are better able to combat unlawful actions by the more powerful employer.”).

172. See Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents A Gloomy Future for Consumers*, 58 DUKE L.J. 103, 112 (2008), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1375&context=dlj> (“Opponents of class waivers argue that . . . by aggregating the claims of many consumers, [class arbitration] lower[s] the costs faced by each. A related and perhaps more serious problem with class arbitration waivers is that they potentially allow the drafting corporation’s misconduct to go unpunished. When individual consumers are unable to assert claims, companies are not held accountable for their misconduct.”).

173. See Crain, *Collective Action*, *supra* note 2, at 27.

174. *D.R. Horton*, 357 N.L.R.B. at 1. D.R. Horton argued his employer misclassified his employment status as exempt from FLSA requirements. *Id.* See *Exemptions to the Fair Labor Standards Act*, *supra* note 27.

he had signed an MAA waiving his right to litigate.¹⁷⁵ Like many employees at the time, Cuda had agreed, as a condition of his employment, that all disputes and claims relating to his employment would be determined through binding arbitration.¹⁷⁶ By signing the MAA, he also waived his right to “fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration.”¹⁷⁷ In other words, if other employees had similarly been denied their rights under the FLSA, they could not join Cuda and arbitrate as a class.

The dispute Cuda experienced is demonstrative of the challenges many female workers confront each day in the workplace. Because women constitute a majority of the working poor in America, they possess the lowest level of bargaining power when it comes to negotiating workplace disputes. Moreover, because of their perceived and actual status as primary caregivers, women face an additional disadvantage in the workplace, as compared to men.¹⁷⁸ It is worthwhile, then, to consider how the facts would have changed had Cuda been a woman.

B. Women in Male-Dominated Industries

Were Michael Cuda a woman, she surely would have been a minority at her workplace, given the male-dominated nature of the construction industry, as a result of occupational sex segregation and systemic stereotypes about feminine and masculine work.¹⁷⁹ Undoubtedly, her superiors would be male, and her opportunities for

175. *D.R. Horton*, 357 N.L.R.B. at 1.

176. *Id.*

177. *Id.*

178. *See Who are Family Caregivers*, *supra* note 6; *see also* Crain, *Collective Action*, *supra* note 2, at 26 (“Gender disadvantage in the wage labor force is institutionalized through occupational segregation by sex and race and through labor market hostility to working mothers, whose cultural roles continue to include the obligation to serve as primary caretakers for children.”).

179. *See Women in Male-Dominated Industries and Occupations in U.S. and Canada*, CATALYST (Mar. 13, 2013), <http://www.catalyst.org/knowledge/women-male-dominated-industries-and-occupations-us-and-canada> (finding women represent 9 percent of construction industry employees in the US).

advancement would be limited because of stereotypes.¹⁸⁰ Supervisors might expect Cuda to prefer a more subordinate or “friendly” position, because of her delicate moral sensibility.¹⁸¹ To appear competent and strong, Cuda might take-on additional responsibilities, going above and beyond her male counterparts to convince supervisors and coworkers of her sameness.¹⁸² She would likely perform “shadow work,” as well, serving as the primary caregiver in her home.¹⁸³ Because of her minority status, Cuda would be more likely to experience sexual harassment or sex discrimination.¹⁸⁴ And employers might deny her essential rights, such as pregnancy leave, because they already viewed her as a temporary employee.¹⁸⁵

Had Cuda been a woman, her potential claims would likely extend beyond noncompliance with the FLSA. As an individual, Cuda would have limited options for redress, and she might seek the comradery of her fellow workers. But because of her minority status, Cuda might be excluded from unionization efforts, because her interests would

180. *Id.* (“Catalyst research has found that talent management systems are frequently vulnerable to pro-male biases that inevitably result in less diverse employee pools. Because senior leadership teams, which tend to be dominated by men, set the tone for talent management norms, masculine stereotypes can creep into HR tools. Employees who meet criteria (potentially based on masculine stereotypes) are selected for promotion and/or tapped as future leaders and/or offered development opportunities. Because male-dominated industries and occupations tend to be particularly vulnerable to masculine stereotypes due to lack of diversity, women may find excelling in these industries or occupations to be particularly difficult.”).

181. *See supra* notes 36–40 and accompanying text.

182. *See, e.g.,* John R. Platt, *How Women Can Survive in Male-Dominated Industries*, THE INST. (May 6, 2010), <http://theinstitute.ieee.org/benefits/products-and-services/how-women-can-survive-in-male-dominated-industries677> (A woman in construction “should take on additional responsibilities, be vocal in meetings or wherever decisions are made, be prepared with answers so she is not left speechless, and be confident in expressing new business ideas.”).

183. *See* Ivan Illich, *Shadow-Work*, 26 PHILOSOPHIEA 7, 8 (1980) (“This kind of unpaid servitude does not contribute to subsistence. Quite the contrary, equally with wage-labor, it ravages subsistence. I call this complement to wage labor ‘shadow-work.’ It comprises most housework women do in their homes and apartments, the activities connected with shopping, most of the homework of students cramming for exams, the toil expended commuting to and from the job. It includes the stress of forced consumption, the tedious and regimented surrender to therapists, compliance with bureaucrats, the preparation for work to which one is compelled, and many of the activities usually labeled ‘family life.’”).

184. *See* WORKPLACE HARASSMENT, *supra* note 5.

185. NAT’L COMM’N ON WORKING WOMEN, WORKING POOR WOMEN IN THE U.S.: NO WAY OUT 30 (1988) (Women are disproportionately located in part-time or temporary employment positions, which are most vulnerable to cutbacks and layoffs and least likely to have significant non-wage benefits.).

differ from, and therefore detract from, those of her male coworkers.¹⁸⁶ But because of her unequal bargaining power, Cuda would nonetheless benefit from some form of collective action—relying on coworkers with similar complaints to share in the costs of dispute resolution.¹⁸⁷

In attempting to arbitrate her FLSA dispute collectively, Cuda would rely on § 7 of the NLRA,¹⁸⁸ which protects concerted activity—the right of an employee “to solicit fellow employees in the representation of rights for a legal claim under the FLSA.”¹⁸⁹ Just as Cuda did, she would challenge the MAA as a violation of her right to engage in concerted activity.

C. *DR Horton and Class Arbitration*

After hearing Cuda’s case, the NLRB ruled against D.R. Horton, finding the class arbitration waiver violated Cuda’s right to concerted activity.¹⁹⁰ The Board explained that filing a workplace grievance or a complaint as a group was protected activity, just like pursuing a grievance under a collectively-bargained for arbitration process.¹⁹¹ The NLRB cited *Brady v. NFL*,¹⁹² where the Eighth Circuit held “a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the NLRA.”¹⁹³

Opponents of the Board’s decision, largely comprised of pro-business interests,¹⁹⁴ argued that the decision conflicted with the

186. See *supra* notes 81–82 and accompanying text.

187. See *supra* Part I.B.

188. See *supra* note 16.

189. Hodges, *supra* note 165, at 208.

190. *D.R. Horton*, 357 N.L.R.B. at 1.

191. *Id.* at 2–3 (citing *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984), in which the Court observed “no one doubts that the processing of a grievance in such a manner is a concerted activity within the meaning of § 7” of the NLRA.).

192. 644 F.3d 661, 673 (8th Cir. 2011).

193. *D.R. Horton*, 357 N.L.R.B. at 2 n.4.

194. See Brief for Chamber of Commerce as Amici Curiae Supporting Petitioner/Cross-Respondent at 1, *D.R. Horton, Inc. v. N.L.R.B.*, No. 12-60031 (5th Cir. Dec. 3, 2013), available at https://www.ilr.cornell.edu/law/events/upload/14558140_Final-Brief-in-Horton-Filed-on-Behalf-of-the-NCLC-in-the-5th-Circuit-with-ECF-4.pdf (“The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber

FAA,¹⁹⁵ which provides “an arbitration agreement ‘shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.’”¹⁹⁶ Moreover, opponents claimed, the decision violated fundamental principles of freedom of contract,¹⁹⁷ representing “a full frontal attack on the [FAA’s] mandate that [arbitration] agreements must be enforced ‘according to their terms.’”¹⁹⁸ Critics also noted that when *DR Horton* was decided, the Board was composed of only two of its five members,¹⁹⁹ and thus, the Board did not possess the authority to make legally binding decisions.²⁰⁰

On appeal, the Fifth Circuit did not dispute that class arbitration was indeed concerted activity; however, it found the NLRA did not create a substantive right to such activity, and that the right to arbitrate as a class was merely a procedural right.²⁰¹ Furthermore, because class arbitration “makes the process slower, more costly, and more likely to generate procedural morass than final judgment,”²⁰² it

represents 300,000 direct members and indirectly represents three million businesses and organizations.”)

195. *Id.* at 3.

196. *Id.* at 6 (citing 9 U.S.C. § 2).

197. See Luke Wake, *NFIB Legal Center’s Winning Streak Continues with Three Victories in Two Days!*, NAT’L FED. OF INDEP. BUS. (Dec. 5, 2013) (calling the 5th Circuit’s ruling, which overturned the NLRB decision, “a win for the freedom of contract”).

198. Brief for Chamber of Commerce, *supra* note 194, at 3.

199. 29 U.S.C. § 153 states, “The National Labor Relations Board . . . shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate.” Prior to the *DR Horton* decision, President Obama attempted to fill three vacancies on the NLRB. Because his nominees were perceived as pro-labor, a hostile Republican congress refused to confirm two of them. Obama went on to fill the vacancies by issuing controversial recess appointments. See Stephen Dinan, *Obama’s End Run around Congress Draws Further Review from Supreme Court*, WASH. TIMES, Jan. 12, 2014, available at <http://www.washingtontimes.com/news/2014/jan/12/recess-appointment-question-supreme-courts-first-c/?page=all>.

200. 29 U.S.C. § 153(b) states, “[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.” On June 26, 2014, the Supreme Court, in *N.L.R.B. v. Noel Canning*, unanimously held that President Obama’s 2012 recess appointments to the NLRB were invalid. 573 U.S. ___ (2014). However, NLRB Administrative Law Judge Jeffrey D. Wedekind has since continued to enforce the *DR Horton* decision, pending a Supreme Court reversal. See *supra* note 20.

201. See *D.R. Horton*, No. 12-60031, at 16.

202. *Id.* at 19.

conflicted with the FAA, “the overarching purpose of which . . . [is] to facilitate streamlined proceedings.”²⁰³

If *DR Horton* is appealed to the Supreme Court, the NLRB will have to prove its decision does not conflict with the FAA, demonstrating grounds “exist at law or in equity for the revocation” of the arbitration contract.²⁰⁴ This would certainly be an uphill battle; in 2011, the Supreme Court heard *AT&T Mobility v. Concepcion*, and held that class arbitration waivers were permitted under the FAA and the NLRA.²⁰⁵ There, the Court found that the FAA preempted a California court ruling that class arbitration waivers were unconscionable if included in consumer contracts of adhesion.²⁰⁶ In light of federal policy favoring arbitration²⁰⁷ and the fundamental policy that arbitration is a matter of contract, the Court in *Concepcion* reasoned that § 2 of the FAA, making agreements to arbitrate “valid, irrevocable and enforceable,” controlled.²⁰⁸

Proponents of the NLRB’s position contend that, unlike agreements made in a consumer context, as was the case in *Concepcion*, “[t]he distinctive character of the NLRA is that it *does* vest employees with a substantive right to act in concert to

203. *Id.*

204. *See supra* note 19 and accompanying text.

205. 131 S. Ct. 1740 (2011).

206. *Id.* *See also* Jeremy Wilson & William Lowery, *Arbitration in New York*, CMS LEGAL, available at http://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_NEW%20YORK.pdf (last visited Feb. 10, 2013). The guide explains that § 2 of the FAA declares arbitration provisions will be subject to invalidation only for the same grounds applicable to contractual provisions generally, such as unconscionability or duress. *Id.* Consequently, most state law that disfavors the enforcement of arbitration agreements will be preempted by the FAA. *Id.* *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (establishing the applicability of the FAA to contracts under state law); *Pereston v. Ferrer*, 128 S. Ct. 978 (2008) (holding the Act requires arbitration first even when state law provides for administrative dispute resolution).

207. *See Concepcion*, 131 S. Ct. at 1751.

208. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 at 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Supreme Court has repeatedly emphasized that the FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum “so long as a party does not forgo the substantive rights afforded by the statute.” *Id.* Further, *J.I. CASE Co. v. NLRB* held that wherever private contracts conflict with the functions of the NLRA, they must yield to the Act. 321 U.S. 332 (1994).

protect their interests as employees.”²⁰⁹ Because *Concepcion* does not concern the NLRA or an employee’s concerted activity, it is not determinative of the issue.²¹⁰ Moreover, the NLRB is entitled to deference in interpreting employee rights;²¹¹ however, in making its decision, the Fifth Circuit “failed to give any effect to the board’s analysis that the right to engage in concerted activity through class or collective action is a ‘core right’ under the NLRA.”²¹²

In arguing that the NLRA grants a core, substantive right, proponents point to § 1 of the NLRA, which “expressly declares that it is the national policy of the U.S. to protect the right of workers covered by the Act to improve their working conditions in a concerted fashion.”²¹³ There, Congress wrote, “It is hereby declared to be the policy of the United States . . . [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”²¹⁴ Employees bring class action lawsuits and arbitrate as a class for the same reason they engage in other forms of protected concerted activity: to level the playing field.²¹⁵ Moreover, it is § 7 “and its articulation of a right to concerted employee action that breathes life into the congressional vision of leveling the playing field for employees in relation to their employers.”²¹⁶ Allowing low-wage employees “to act in solidarity with one another rather than as lone targets for possible retaliation,

209. See Lawrence E. Dubé, *NLRB Asks Fifth Circuit to Rehear Horton; Panel Split Over Board View on Class Waivers*, BLOOMBERG BNA (Mar. 17, 2014), <http://www.bna.com/nlr-asks-fifth-n17179885658/>.

210. *Id.*

211. See *NLRB v. City Disposal Systems*, 104 S. Ct. 1505 (1984) (holding it is the function of the Board to establish the scope of § 7, and that a reasonable construction by the Board is entitled to great deference).

212. Dubé, *supra* note 209.

213. Brief for Public Justice & Public Citizen Litigation Group as Amici Curiae Supporting Respondent/Cross-Petitioner the National Labor Relations Board at 8, *D.R. Horton, Inc. v. N.L.R.B.*, No. 12-60031 (5th Cir. Dec. 3, 2013), available at <http://publicjustice.net/sites/default/files/downloads/D.R.Horton-5th-Circuit-Amicus-Brief-of-Public-Justice-%26-Public-Citizen.pdf>.

214. *Id.* (citing 29 U.S.C. § 151).

215. *Id.* at 9.

216. *Id.*

[means] concerted legal actions are thus truly a form of ‘concerted activity for . . . mutual aid and protection’” under § 7.²¹⁷

CONCLUSION

Women constitute a growing majority of the working poor in the United States.²¹⁸ Occupational segregation by sex and a labor market hostile to working mothers have prevented women from earning the same level of independence and power as men in the workplace.²¹⁹ The decline of unionization and the onerous standards for class certification necessary to bring a class action lawsuit have made it increasingly difficult for low-wage women workers to collectively challenge institutional wage inequalities and other injustices in the workplace.²²⁰ Further, the costs of litigation and arbitration discourage women from bringing individualized complaints.²²¹

Class arbitration can help to remedy this power imbalance. Working collectively, women are more likely to assert their legal rights and to challenge male dominance in the workplace.²²² One woman seeking to challenge an unjust practice cannot, by herself, effect broad structural change. Working as a class exerts pressure on a large scale, increasing the likelihood of wide-ranging institutional change that can benefit other disadvantaged employees. When women work as a group, employers are made aware that the group is a worthy adversary. Further, collective action allows women to pool their resources and distribute the costs and burdens that accompany any action.

217. *Id.* at 10.

218. *See supra* note 2 and accompanying text.

219. *See supra* notes 2–6 and accompanying text.

220. *See supra* Parts I.B, II, and III.

221. Hodges, *supra* note 165, at 215 (“Class actions bring the power of the group to bear on the employer accused of discrimination or other violations of employee rights. The employees, combining their resources, are better able to combat unlawful actions by the more powerful employer.”).

222. According to feminist psychologist Carol Gilligan, women place greater emphasis on relationships, causing increased interdependence among women. *See* GILLIGAN, *supra* note 36. When a woman is aware of what is possible through collective action, she is “like a new person, . . . not like that meek little person that worked in that office for twenty years and never opened [her] mouth[.]” *See* Crain, *supra* note 2, at 31.

The increase in MAAs as a condition of employment has left class arbitration as the only platform from which women workers may collectively assert their demands. And the value of preserving this last-ditch form of collective action as a form of concerted activity under § 7 of the NLRA extends beyond legal precedent and traditional policy aims. Examining class arbitration through the lens of divergent feminist theories demonstrates the pivotal role class arbitration can play for all women.

From a cultural feminist perspective class arbitration naturally utilizes a woman's heightened sense of interdependence and virtue to build strong women-centered workplace relationships. Instead of betraying her role as a compassionate caregiver by challenging authority, a woman working in a group or a class might begin to see herself as *fulfilling* that role, caring for those women who do not feel empowered to speak-up individually. As such, the act of fighting inequality would no longer feel alienating or unfriendly, if women could see themselves as part of a larger group of exploited women wage workers, fighting the same fight together.

From a liberal feminist perspective, the right to arbitrate as a class works to equalize power imbalances between women and men employees. The historical exclusion of women from unionization efforts and workplace representation has left women at a disadvantage when it comes to rights assertion in the workplace. The passage of Title VII and other equalizing legislation was a starting point for promoting formal equality in the workplace. But women's issues still earn less attention than men's, in and out of organized labor. Class arbitration, as a last-ditch form of collective action, can help women employees bring women's issues, like equal pay and paid family leave, to the forefront.

For radical feminists, collective action in the form of class arbitration is necessary to fight the dominance of capitalist structures in the workplace. Management uses its power to exploit the working poor—a group now dominated by women. Women wage workers can use their numbers to challenge the status quo, demanding higher wages and better working conditions. And as employees are routinely excluded from the court room by signing arbitration agreements, women employees can pool their resources in the arbitration room,

challenging not only patriarchy but all forms of workplace subordination, as a class.

Protecting class arbitration is a feminist imperative, and feminists must defend the right of all workers to arbitrate as a class, regardless of the Supreme Court's holding, should it review the ruling in *DR Horton*. Section 7 of the NLRA, protecting a worker's right to concerted activity, was passed to rectify the power imbalance inherent in the workplace, ensuring no woman would be forced to face her employer alone, that no employer could take advantage of a single employee's vulnerability, and that those of us intent on ending injustice could work together to fight for those who do not speak.