

# Discrimination, Mandatory Arbitration, and Courts

ERIK ENCARNACION\*

*Members of Congress have recently proposed legislation that would effectively ban the commercial practice of requiring individuals to arbitrate claims of sexual harassment. Congress previously tried in the 1990s to prohibit mandatory arbitration of all discrimination claims, not just those grounded in sexual misconduct. At first glance, these attempts to adopt discrimination-specific reforms appear unprincipled. After all, the criticisms of mandatory arbitration invoked to oppose arbitration of discrimination claims typically apply equally to all claims, not just those involving discrimination. But this Article argues that, regardless of the merits of broader attempts to rein in mandatory arbitration, discrimination-specific prohibitions have a compelling but overlooked justification. Specifically, rectifying wrongful discrimination requires empowering victims to vindicate both their status as equal citizens as well as the status of the groups to which they belong, in the face of challenges to those statuses. Because equal status—both of individuals and their groups—must be guaranteed in part by the public, victims must be empowered to demand reaffirmation of that status by an authoritative public institution. And because a person's status concerns her treatment across a range of social and institutional settings, fully vindicating that status potentially requires reaffirming her equal status in public. Confidential, private arbitration cannot accomplish these ends. But courts can. Given problems facing existing arguments against mandatory arbitration, the need for a new status-based approach is all the more pressing in the wake of the #MeToo movement.*

---

\* Assistant Professor of Law, University of Texas School of Law. © 2020, Erik Encarnacion. I owe thanks to faculty audiences at Emory Law School, the University of Southern California Gould School of Law, and the University of Texas School of Law, as well as participants in the legal theory workshop at UCLA School of Law. This paper also benefitted from feedback and support from participants in the Emerging Scholars Workshop & Culp Colloquium. For helpful comments and conversations, I thank Tendayi Achiume, Scott Altman, Lynn Baker, Rabia Belt, Steve Bero, Bob Bone, William Boyd, Oren Bracha, Dorothy Brown, Rebecca Brown, Bobby Chesny, LaToya Baldwin Clark, Elinor Cohen, Jane Cohen, John Deigh, Joshua Dienstag, Debbie Dinner, Jessica Eaglin, Kristen Eichensehr, Ward Farnsworth, Martha Fineman, Joey Fishkin, George Georgiev, Steve Goode, Ariela Gross, Jasmine Harris, James Hughes, Tim Holbrook, Jennifer Laurin, Kay Levine, Richard Markovits, Andrei Marmor, Tom McGarity, Nicole Morris, Susie Morse, Shyam Nair, Jonathan Nash, Rafael Pardo, K-Sue Park, David Rabban, Michael Perry, Stephen Rich, Daria Roithmayr, Elizabeth Sepper, Joanna Shepherd, Seana Shiffirin, Fred Smith, Rebecca Stone, Gregg Strauss, Martin Sybblis, Steve Vladeck, Sasha Volokh, Melissa Wasserman, Aness Webster, Sean Williams, and Moran Yahav. I also thank Amy Chau, Erin O'Neill, Justin Rattey, Lauren Simenauer, Janae Staicer, and the other editors of *The Georgetown Law Journal* for their thoughtful recommendations. I owe special debts of gratitude to Aziza Ahmed, Guy Charles, Willy Forbath, Mark Greenberg, Greg Keating, Larry Sager, and Franita Tolson.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	857
I. DISCRIMINATION AS A WRONG AND AS A STATE CONCERN . . . . .	863
A. SITUATING THE EQUAL-STATUS CONCEPTION . . . . .	868
B. THE “STATUS” IN EQUAL STATUS . . . . .	870
C. FAILURES TO RESPECT EQUAL STATUS, TWICE OVER . . . . .	873
II. HOW COURTS, NOT ARBITRATORS, VINDICATE EQUAL STATUS . . . . .	875
A. COURTS: RECOMMITTING TO EQUAL STATUS BY THE PUBLIC . . . . .	875
1. An Inherent Role for Authoritative Community Representatives . . . . .	876
2. Beyond the Pool: Individual and Group Status in the Political Community . . . . .	879
B. COURTS: REAFFIRMING EQUAL STATUS IN PUBLIC . . . . .	883
III. OBJECTIONS AND EXISTING ARGUMENTS . . . . .	886
A. OBJECTIONS . . . . .	886
1. Two Objections to the Ideal of Equal Status . . . . .	886
2. Objections Grounded in Existing Antidiscrimination Law . . . . .	888
3. Objection: Is the Wrongdoing Distinctive? . . . . .	891
B. SHORTCOMINGS OF EXISTING ARGUMENTS . . . . .	893
1. Public Policy Arguments . . . . .	894
2. Consent Arguments . . . . .	895
3. Fairness Arguments . . . . .	896
IV. REFORM: WHY IT MATTERS THAT DISCRIMINATION IS DIFFERENT . . . . .	899
A. REVISITING THE “EFFECTIVE-VINDICATION-OF-RIGHTS” DOCTRINE . . . . .	899
B. REFORMING THE FEDERAL ARBITRATION ACT . . . . .	902
CONCLUSION . . . . .	904

## INTRODUCTION

Each time a woman stands up for herself, without knowing it possibly, without claiming it, she stands up for all women.

—Maya Angelou<sup>1</sup>

Like many employers, Munger, Tolles & Olson LLP—a West Coast law firm—wanted its employees to sign employment agreements that contained arbitration clauses.<sup>2</sup> And like many mandatory arbitration<sup>3</sup> agreements, this one required employees to arbitrate all “employment-related claims” that the employee might have against the firm.<sup>4</sup> But the agreements also expressly required employees to arbitrate discrimination<sup>5</sup> claims grounded in Title VII, which meant that sexual harassment claims would have to be arbitrated in secret as well.<sup>6</sup> Indeed, the very *existence* of any arbitration proceedings was itself subject to a binding confidentiality agreement.<sup>7</sup>

The clauses leaked.<sup>8</sup> Munger Tolles was subsequently subjected to withering criticism by legal commentators,<sup>9</sup> law school faculty members,<sup>10</sup> and student

1. MAYA ANGELOU, *RAINBOW IN THE CLOUD: THE WISDOM AND SPIRIT OF MAYA ANGELOU* 101 (2014).

2. See Ian Samuel (@isamuel), TWITTER (Mar. 24, 2018, 8:12 PM), <https://perma.cc/JB2X-RJ3V>; see also Vivia Chen, *Ian Samuel Is Shaming Big Law—And It’s Working*, AM. LAW. (Apr. 25, 2018, 4:43 PM), <https://www.law.com/americanlawyer/2018/04/25/ian-samuel-is-shaming-big-law-and-its-working/>; Stephanie Russell-Kraft, *Munger Tolles, Orrick to Scrap Employee Arbitration Agreements*, BLOOMBERG L. (Mar. 26, 2018), <https://biglawbusiness.com/munger-tolles-orrick-to-scrap-employee-arbitration-agreements/> [<https://perma.cc/EF6K-TTTR>].

3. “Mandatory” or “compulsory” arbitration refers to a situation “under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related disputes in a judicial forum.” *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1187 (9th Cir. 1998), *overruled by* *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc); see also Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619, 1621 (1999) (describing compulsory arbitration as “a situation where an employer requires an individual, as a condition of employment, to sign an agreement waiving the right to litigate future claims in a judicial forum in exchange for initial employment, or the opportunity to continue current employment”).

4. Samuel, *supra* note 2; see also Leah Litman, *Munger Tolles Proves Why We Still Need #MeToo*, TAKE CARE (Mar. 25, 2018), <https://takecareblog.com/blog/munger-tolles-proves-why-we-still-need-metoo> [<https://perma.cc/U6U9-6M6Y>].

5. The term “discrimination” will be used interchangeably with “wrongful discrimination,” even though nonpejorative uses of the former term exist. See BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* 14–15 (2015); DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 2–3, 13 (2008).

6. Litman, *supra* note 4.

7. *Id.* (“The agreement also contains a confidentiality provision that purports to prohibit signatories from disclosing the ‘fact or content of’ the arbitration proceeding, which includes, at a minimum, the evidence in the proceeding, and the existence of the proceeding.”).

8. See Samuel, *supra* note 2.

9. See, e.g., *id.*; Staci Zaretsky, *Biglaw Firm Tries to Force Summer Associates to Arbitrate Sexual Harassment Claims*, ABOVE THE LAW (Mar 26, 2018, 12:02 PM), <https://abovethelaw.com/2018/03/biglaw-firm-tries-to-force-summer-associates-to-arbitrate-sexual-harassment-claims/> [<https://perma.cc/4YH2-TWJ5>].

10. See Litman, *supra* note 4; Dan Epps (@danepps), TWITTER (Mar. 25, 2018, 9:18 AM), <https://twitter.com/danepps/status/977897633095340032> [<https://perma.cc/YR67-ZJWJ>]; Brian Wolfman

groups.<sup>11</sup> The firm's predispute arbitration agreement was lambasted as "super gross" and "plainly calculated to shield them from claims of harassment."<sup>12</sup> Reacting to the news, another commentator asked, "How many law students have been bound to suffer in silence in the face of sexual harassment?"<sup>13</sup> Less than twenty-four hours after the leak went public, Munger Tolles acknowledged via Twitter that it was "wrong" and announced that it had decided to change its policy.<sup>14</sup> Other law firms quickly followed suit, eliminating predispute, binding arbitration agreements as a condition of employment.<sup>15</sup>

Context is important to understand the outrage. Munger Tolles's mandatory arbitration clauses looked insensitive at best in light of the #MeToo movement,<sup>16</sup> which shined a light on the way that powerful people use nondisclosure agreements, non-disparagement clauses, and arbitration clauses to protect serial sexual harassers and abusers.<sup>17</sup> The Weinstein Company, for example, required employees to sign nondisclosure agreements as a condition of employment, which likely enabled it to keep quiet the sexual harassment allegations against its founder for three decades.<sup>18</sup> Harvey Weinstein also used nondisclosure agreements in settlements to silence accusers.<sup>19</sup> Against this background, Munger Tolles's behavior

---

(@brian\_wolfman), TWITTER (Mar. 25, 2018, 10:26 PM), [https://twitter.com/brian\\_wolfman/status/978095900236107776](https://twitter.com/brian_wolfman/status/978095900236107776) [<https://perma.cc/DXZ6-8UYT>].

11. See Meghan Tribe, *Top Law Schools Ask Firms to Disclose Summer Associate Arbitration Agreements*, AM. LAW. (May 14, 2018, 6:09 PM), <https://www.law.com/americanlawyer/2018/05/14/top-law-schools-ask-firms-to-disclose-summer-associate-arbitration-agreements/>.

12. Samuel, *supra* note 2. One year after publishing this Twitter feed, its author resigned from his position as a law professor following allegations of sexual assault filed against him.

13. Zaretsky, *supra* note 9.

14. Munger, Tolles & Olson (@mungertolles), TWITTER (Mar. 25, 2018, 3:32 PM), <https://twitter.com/mungertolles/status/977991692694384650> [<https://perma.cc/L4DC-DRTE>]; see also Tribe, *supra* note 11.

15. Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, A.B.A. J. (June 1, 2018, 12:15 AM), [http://www.abajournal.com/magazine/article/biglaw\\_mandatory\\_arbitration\\_clauses](http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses) [<https://perma.cc/35U9-A7CD>]; Meghan Tribe, *After Munger Tolles's #MeToo Snafu, Orrick Touts End of Arbitration Agreements*, AM. LAW. (Mar. 26, 2018, 6:52 PM), <https://www.law.com/americanlawyer/2018/03/26/after-metoo-snafu-orrick-touts-end-of-arbitration-agreements/> [<https://perma.cc/7YG2-WH2W>].

16. Tarana Burke founded what became the #MeToo movement more than a decade ago, but the #MeToo hashtag went viral in October of 2017. Aisha Harris, *She Founded Me Too. Now She Wants to Move Past the Trauma.*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html>.

17. See, e.g., Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/>; Sam Levin, *Uber Accused of Silencing Women Who Claim Sexual Assault by Drivers*, GUARDIAN (Mar. 15, 2018, 10:09 PM), <https://www.theguardian.com/technology/2018/mar/15/uber-class-action-lawsuit-sexual-assault-rape-arbitration> [<https://perma.cc/73CP-7RNM>].

18. See Julia Horowitz, *After Harvey Weinstein, Contracts that Keep Employees Quiet Are Under Scrutiny*, CNN MONEY (Oct. 24, 2017, 5:48 PM), <https://money.cnn.com/2017/10/24/news/harvey-weinstein-nondisclosure-law/index.html> [<https://perma.cc/8MRW-93MJ>].

19. Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>. Harvey Weinstein was later convicted of sexual assault and rape. Jan Ransom, *Harvey Weinstein is Found Guilty of Sex Crimes in #MeToo Watershed*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-trial-rape-verdict.html>.

fit within a broader pattern in which powerful firms and individuals shielded themselves against negative publicity at the expense of potential victims of sexual harassment and abuse. Munger Tolles looked like part of the problem.<sup>20</sup>

Although the #MeToo movement set the stage for the outrage, law-student groups did not object only to mandatory arbitration of sexual harassment claims; these groups also framed their objections more broadly. One student-created online petition, for example, demanded that Harvard Law School prohibit firms from recruiting on campus if they mandated arbitration for *all* discrimination claims, not just allegations of sexual harassment.<sup>21</sup> And more recently, Google employees executed a massive, international walkout to protest the company's handling of sexual harassment claims, demanding (among other things) "[a]n end to Forced Arbitration in cases of harassment *and discrimination* for all current and future employees."<sup>22</sup> The law students and Google employees echoed earlier but ultimately unsuccessful attempts by members of Congress in the 1990s to prohibit predispute, mandatory arbitration of *all* discrimination claims.<sup>23</sup>

These events suggest that arbitrating claims of discrimination presents a special problem, one that is neither confined to the unique facts of the Munger Tolles incident nor concerned with claims of sexual harassment alone. These incidents also suggest that, although judges and scholars have long argued against mandatory arbitration in general,<sup>24</sup> special problems exist with respect to arbitrating discrimination claims in particular.

---

20. Aidan F. Ryan, *Law Students Raise Concerns About Firms' Summer Agreements*, HARV. CRIMSON (Apr. 20, 2018), <https://www.thecrimson.com/article/2018/4/20/law-firms-nda-me-too/> [perma.cc/25XV-Y948] ("The fact that this happened right after #MeToo is a signal to us that this is a way that firms are trying to cover up sexual harassment, [law student Sejal] Singh said." (internal quotation marks omitted)).

21. See, e.g., Ryan Wheeler, *Harvard Law School Calls to End the Secrecy on Harassment and Discrimination*, COWORKER.ORG, <https://www.coworker.org/petitions/hls-stop-allowing-firms-to-sweep-sexual-harassment-and-other-abusive-practices-under-the-rug> [perma.cc/3F4S-9WD9] (last visited January 13, 2020).

22. Claire Stapleton, Tanuja Gupta, Meredith Whittaker, Celie O'Neil-Hart, Stephanie Parker, Erica Anderson & Amr Gaber, *We're the Organizers of the Google Walkout. Here Are Our Demands*, CUT (Nov. 1, 2018), <https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html> (emphasis added) ("We demand an end to the *sexual harassment, discrimination, and the systemic racism* that fuel this destructive [corporate] culture." (emphasis added)).

Arbitration is no longer a condition of employment at Google. Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html>.

23. See H.R. 4981, 103d Cong. (2d Sess. 1994); S. 2405, 103d Cong. (2d Sess. 1994).

24. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting) (arguing that certain arbitration clauses effectively permit firms to erect procedural barriers high enough to insulate themselves from liability, preventing the effective vindication of federal statutory rights); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015) (arguing that mandatory arbitration agreements including class action waivers will soon allow business to "eliminate virtually all class actions that are brought against them, including those brought by shareholders"); Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 425 (2005) (arguing that "class action exposure is largely optional" given the ability to include class action waivers in mandatory arbitration agreements); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3056-57 (2015)

There *is* a special problem with arbitrating discrimination claims. But we currently lack a convincing argument explaining why. Having such an argument matters. After all, certain proposals for legislative reform, as well as ongoing efforts to force employers to change their policies with respect to mandatory arbitration of discrimination claims, *presuppose* that forced arbitration of those claims is especially bad. We need an argument to justify these proposals and efforts.

This Article provides that argument. Part I begins by proposing that rights against wrongful discrimination—at least the rights that antidiscrimination law should be understood to protect—are paradigmatically complex rights with a two-part structure. These rights (i) protect an individual’s equal status in a political community against failures to respect that status,<sup>25</sup> where (ii) those failures are explained by reference to that individual’s actual or apparent membership in a legitimate social group.<sup>26</sup> Accordingly, wrongful discrimination involves a failure to respect a person’s equal status on the grounds that one belongs, or appears to belong, to another legitimate social group. These failures occur, in turn, when the discriminator behaves so as to communicate that a person’s equal status is incompatible with membership in a legitimate social group, especially by jeopardizing—on the basis of that membership—full access to certain activities that are vital for fully participating in one’s community. Such activities include employment, education, housing, and the like. State regulation of these “private” activities is

---

(arguing that the shift from dispute resolution in courts to private arbitration “undermined the transparency and mechanisms of adjudication” and now “also threatens both the transparency and mechanisms of lawmaking” (emphasis omitted)); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 *FORDHAM URB. L.J.* 803, 807 (2009) (“Privatizing the enforcement of statutory rights erodes those rights, as rights that are not enforced publicly vanish from the public’s eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the laws’ violations.”); Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 *HASTINGS L.J.* 407, 411 (2016) (arguing that remedial clauses in mandatory arbitration agreements “displace the public’s role in determining the content of an important area of law and objectionably displace the judiciary’s role in providing fair and impartial judgments about the public significance of legal wrongs”); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 *OHIO ST. J. ON DISP. RESOL.* 669, 676 (2001) (arguing that many mandatory arbitration agreements deprive parties of their Seventh Amendment right to a jury trial); *see also infra* note 27 (further discussing mandatory arbitration scholarship).

25. What does “equal status in a political community” mean? As discussed in detail below, there are many similarities between my use of “equal status” and the concept of equal citizenship as a constitutional and democratic ideal. *See infra* Part I. I nevertheless use the label “equal citizenship” as synonymous with equal status more broadly to avoid the implication that rights against wrongful discrimination do not protect lawful permanent residents, as well as to de-emphasize the role that formal legal status plays in (what I take to be) a more fundamental right not just of constitutional law but also of political morality. *See* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *GEO. L.J.* 567, 585–86 (2010) (“The term ‘citizenship’ can be used to connote belonging, participation, or membership in society more generally.”). Listing and defending the full normative criteria that must be satisfied for full membership in a relevant political community—at least beyond citizenship or lawful resident status—is a task that I cannot and need not undertake here.

26. As discussed later on, a “legitimate social group” is a placeholder term for a social group whose criteria for inclusion does not involve wrongdoing or illicit behavior. *See infra* note 35.

permissible in part because having full membership in the political community requires having meaningful access to them.

Identifying the wrongdoing at the heart of discrimination brings into focus the inherent problems with arbitrating discrimination claims. Part II argues that the problem with arbitration is that it cannot fully rectify this type of wrongdoing. This is because fully protecting rights against discrimination requires making authoritative and public institutions available to protect them, in two senses of the word “public.”

First, arbitrators are not “public” in the sense that they are not authoritative representatives of the political community. There are two reasons why the nonpublic nature of arbitration in this sense makes them unable to completely rectify wrongful discrimination, corresponding to the two-part structure of rights against discrimination. Individual rights against discrimination (i) protect a person’s equal *political* status. A person’s equal political status is inherently in the care of the public or political community and cannot be appropriately outsourced to institutions that are not representative of that community, at least not without devaluing that status and undermining the political community itself. And because wrongful discrimination often involves (ii) affronts grounded in membership in legitimate social groups, fully rectifying this aspect of the wrongdoing requires an authoritative institution to respond to the implicit message of discrimination: that membership in other legitimate groups compromises our equal status. A woman bringing a sexual harassment claim is not only hindered in her ability to demand reaffirmation of her equal status *as a person or citizen*; she may also demand reaffirmation that her status *as a woman* is fully compatible with that equal standing. In sum, fully rectifying both aspects of the wrongdoing requires an authoritative public institution not only to reaffirm a person’s equal status, but to do so by declaring that this status cannot be compromised by one’s membership in certain other legitimate groups. These points explain how private arbitration inherently fails to rectify wrongful discrimination fully.

This Article argues that confidential arbitration raises another moral problem. This second problem arises because arbitration is typically not “public” in a second sense: arbitration proceedings are typically conducted in secret, and the results are often kept secret as well. Although confidentiality raises many concerns, an overlooked problem is that confidentiality makes it more difficult to signal to others one’s equal status as such, as well as to express the judgment that one’s membership in other legitimate groups does not compromise that status. Individuals making an equality-based demand must be empowered to make that appeal in public, if they so choose, and to do so in solidarity with other members of their group.

That is where courts become important: they can do things that confidential arbitration proceedings cannot. Courts are “public” in each sense of the word. They are authoritative extensions of the broader political community and are thus able to perform the equal-status-reaffirming function that fully rectifying wrongful discrimination demands. Arbitration is not public in this sense and therefore

cannot fully rectify wrongful discrimination. Courts are also public in the sense that they are relatively transparent, and thus individuals who opt for public adjudication can try to reaffirm their equal status in public. Such reaffirmation—both *by* and *to* the public—is unavailable to individuals who opt for confidential arbitration. So it is a mistake to think that arbitration—even if it promises quicker and more financially satisfying payment to victims of discrimination—can fully substitute for public adjudication of discrimination claims, including claims of employment discrimination. Part II substantiates these arguments.

And these arguments matter. Focusing on rectifying wrongdoings not only allows us to explain why claims of wrongful discrimination are especially ill-suited for arbitration but also provides certain advantages in ongoing debates about arbitration. Existing arguments against mandatory arbitration in general or with respect to claims of discrimination in particular tend to emphasize the unfairness of arbitration, raise public policy concerns, or criticize the relative lack of “consent” involved when individuals agree to arbitrate.<sup>27</sup> But, as shown in Part III, many of these arguments are entirely beside the point. That is, this Article’s status-based argument holds wholly independently of these existing arguments. Some of these arguments, moreover, presuppose dubious factual

---

27. The scholarship in this area is voluminous. *See generally* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 190 (1997) (arguing that, because companies are repeat players in arbitration, they have an advantage over employees); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018) (arguing that “the great bulk of disputes that are subject to mandatory arbitration agreements . . . simply evaporate before they are even filed,” and describing mandatory arbitration as a “black hole into which matter collapses and no light escapes”); Gilles, *supra* note 24, at 418–20 (explaining how class action waivers and arbitration clauses allow firms to de-fang employee protections, including Title VII rights, against employment discrimination); Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 44 (1999) (discussing the advantage repeat players have in the arbitration arena); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 613 (2018) (describing the #MeToo movement as providing “[r]eminders of the utilities of public court procedures in the twenty-first century”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005) (“[W]hile informal private processes such as arbitration are not inherently unjust, mandatory arbitration is problematic for two fundamental reasons: lack of consent and lack of public scrutiny.”); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1316 (2015) (“[A]rbitration clauses deter employees from filing claims by making it more difficult for them to obtain attorneys, by failing to provide a good venue for pro se claimants, and by preventing employees from joining together in class, collective, or even mere group actions.”); ELIZABETH COLMAN, EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, FORCED ARBITRATION: A RACE TO THE BOTTOM 3–4, 6–8 (2018), [http://employeeightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report\\_Forced-Arbitration\\_A-Race-To-The-Bottom.pdf](http://employeeightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report_Forced-Arbitration_A-Race-To-The-Bottom.pdf) [https://perma.cc/7JMD-HQV8] (arguing that forced arbitration “[f]jails [w]orkers” and discussing policy reasons for ending the practice); IMRE S. SZALAI, EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA’S TOP 100 COMPANIES 3 (2018), <http://employeeightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf> [https://perma.cc/6BAD-MWLB] (“Employers should not be able to rig the game against workers and conceal wrongdoing through the use of harsh, one-sided arbitration clauses hidden in the fine print.”).



claims, at least given the widely acknowledged gaps in the empirical literature.<sup>28</sup> To illustrate these existing arguments and their shortcomings, Part III revisits *Gilmer v. Interstate/Johnson Lane Corp.*, in which the Supreme Court addressed the question of whether an employee's securities registration agreement required the employee to arbitrate a claim grounded in the Age Discrimination in Employment Act (ADEA).<sup>29</sup> This Article reexamines *Gilmer* because the case usefully anticipates some of the existing arguments against mandatory arbitration of discrimination claims—arguments that have neither prevailed in court nor materially changed over the years.

Part IV returns to practical issues. Because mandatory arbitration of discrimination claims cannot guarantee access to the public institutions capable of fully vindicating a person's status (courts), predispute arbitration clauses that require individuals to arbitrate discrimination claims should not be enforceable. Accordingly, the Supreme Court should revisit the so-called "effective-vindication-of-rights" doctrine, which permits enforcing arbitration clauses under the Federal Arbitration Act (FAA) even when the subject matter of the dispute involves claims of discrimination. In the alternative, the argument also matters because it justifies proposed reforms of the FAA. More specifically, absent broader reform of the FAA, Congress should amend the statute to prohibit courts from enforcing contract clauses that require arbitration of employment discrimination claims. This proposed reform is neither ad hoc nor merely a politically convenient compromise. There is a principled justification grounded in equal status for excluding discrimination claims from the FAA, even if broader arbitration reform is not forthcoming.

#### I. DISCRIMINATION AS A WRONG AND AS A STATE CONCERN

Munger Tolles abandoned its attempt to require its new associates to arbitrate claims of wrongful discrimination, calling its efforts "wrong."<sup>30</sup> This self-assessment should seem puzzling given the standard arguments in favor of arbitration. According to its defenders, arbitration promises considerable benefits over public adjudication. "By agreeing to arbitrate a statutory claim," the Supreme Court opined, parties merely "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."<sup>31</sup> The Court is not alone in its view; proponents add that arbitration is fair and relatively low-cost as compared with public adjudication, both in general and with respect to employment discrimination claims in particular.<sup>32</sup> But if mandatory arbitration offers so many benefits, how was Munger Tolles "wrong"?

---

28. See *infra* note 32.

29. 500 U.S. 20, 23 (1991).

30. Munger, Tolles & Olson, *supra* note 14.

31. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

32. See, e.g., Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (defending arbitration of statutory employment claims generally);

There is at least one sense in which it was plainly not wrong: The firm acted lawfully.<sup>33</sup> Munger Tolles had every reason to believe that its arbitration requirement would have survived a challenge in court. All U.S. courts of appeals currently recognize that the FAA requires courts to enforce valid arbitration clauses, even to the extent that they purport to obligate employees to arbitrate discrimination claims arising under federal antidiscrimination statutes.<sup>34</sup> In other words, federal courts now hold that arbitrating discrimination is not legally different from arbitrating any other employee disputes, at least for the purposes of enforcing the arbitration clauses contained in employment agreements.

But Munger Tolles did do something wrong. The firm should not have imposed mandatory arbitration as a condition of employment even though it was legally permitted to do so. There are many reasons why, but this Article focuses on an overlooked argument for the conclusion that mandatory arbitration of discrimination claims specifically presents a special problem from the perspective of political morality. As claimed below, arbitrating claims grounded in discrimination presents a distinctive problem stemming from the nature of those discriminatory wrongdoings. And fully rectifying these wrongdoings requires access to public courts because they involve failures to respect a person's equal status. More

---

Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 406 (2000) (“The absence of any true advantage for employers as a whole suggests that the massive criticism and tremendous focus on mandatory arbitration over the past decade may have resulted in a huge waste of time . . . .”); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1560 (2005) (“Replacing litigation with an arbitration system allows such employers and their employees to address issues in a relatively nonadversarial, low-cost forum.”); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99 (1999) [hereinafter Sherwyn et al., *In Defense*] (“Because it is faster and less expensive, arbitration is arguably more accessible to employees.”); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. MICH. J.L. REFORM 783, 810 (2008) (“The vast majority of ordinary, lower- and middle-income employees . . . cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration.”); Allen Smith, *Should Harassment Claims Be Subject to Arbitration?*, SOC'Y FOR HUM. RES. MGMT. (June 1, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/harassment-claims-arbitration.aspx> [<https://perma.cc/S9RK-W35L>] (quoting an employer-side attorney and arguing that “[w]ith arbitration, decisions might be issued in weeks—a process that is ‘immensely sped up, which can benefit everybody’”).

33. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–10, 119 (2001) (holding that an arbitration clause in an employment contract mandating arbitration for “claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort” was enforceable under the FAA and did not fall under the FAA’s exemption for transportation workers (alteration in original)); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) (holding that a clear and unmistakable clause requiring arbitration rather than adjudication of ADEA claims was enforceable).

34. MERRICK T. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 13:15, Westlaw (database updated November 2019) (“Every circuit courts [sic] of appeals . . . ruled that Title VII, ADA or ADEA claims are subject to compulsory arbitration under the Federal Arbitration Act (FAA).” (footnotes omitted)).

specifically, this Article proposes that private discrimination counts as wrongful when it manifests a failure to respect a person's status as an equal member of a political community, and when this failure is explained by one's (actual or imputed) membership in a legitimate social group.<sup>35</sup> Call this proposal an "equal status" conception of wrongful discrimination.

These ideas—that antidiscrimination law serves to protect and promote the ideal of equal status or equal citizenship and that the wrongdoings at the heart of wrongful discrimination are both interpersonal and political—are hardly novel. In *United States v. Virginia*, which invalidated under the Fourteenth Amendment the Virginia Military Institute's male-only admissions practices, Justice Ruth Bader Ginsburg famously declared that "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, *full citizenship stature*."<sup>36</sup> This means, Justice Ginsburg continued, the "equal opportunity to aspire, achieve, participate in and contribute to *society* based on their individual talents and capacities."<sup>37</sup>

Justice Ginsburg's language draws a straight line from an ideal political standing—full and equal citizenship—to one's ability to participate in society.<sup>38</sup> Courts have embraced Justice Ginsburg's vision, which recognizes equal citizenship as an actually existing constitutional demand and perhaps even a requirement of political morality.<sup>39</sup> Legal scholars have also endorsed the equal-

---

35. "Social group," as I use the term, refers to a set of individuals that share a trait or appear to share a trait. The term, as I use it, need not involve any constitutive set of norms or practices that set them apart. So even the set of people born on July 28, 1987, may comprise a social group on this thin definition. A social group is *legitimate* when there is simply nothing wrong with being a member of that group. Being black involves being in a legitimate social group because there is nothing wrong with belonging to that social group. Being a member of an international human trafficking ring may involve being a member of a social group, but there is something (many things) wrong with being a member of that group, so it is not legitimate in the relevant sense. Here I depart from other attempts to define social groups more narrowly. See, e.g., KASPER LIPPERT-RASMUSSEN, *BORN FREE AND EQUAL: A PHILOSOPHICAL INQUIRY INTO THE NATURE OF DISCRIMINATION* 3 (2014) (explaining the concept of discrimination in terms of differential treatment on the basis of membership in a "socially *salient*" group (emphasis added)). Little rides on this definition of legitimate social group because the analytical and normative work done by the equal-status principle, as a moral principle, is that the discrimination in question involves a failure to respect those members' equal status in the political community, and that failure is somehow explained by reference to actual or apparent membership in the social group.

36. 518 U.S. 515, 532 (1996) (emphasis added).

37. *Id.* (emphasis added).

38. For a detailed account of the origins of Justice Ginsburg's anti-stereotyping jurisprudence, as well as arguments showing how social-role-based stereotypes undermine equal status, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 120, 172 (2010).

39. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (justifying heightened scrutiny for racial classifications on the grounds that race is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others"); *Lacy v. Cook County*, 897 F.3d 847, 852 (7th Cir. 2018) (imputing the equal citizenship ideal to the ADA, an antidiscrimination statute, and writing: "The ADA was crafted 'to advance equal-

citizenship principle.<sup>40</sup> According to Kenneth L. Karst's formulation, equal citizenship means that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member," not "as a member of an inferior or dependent caste or as a nonparticipant."<sup>41</sup> The reference to "society" here—as in Justice Ginsburg's opinion—is significant, insofar as it illustrates that equal citizenship is not merely a type of formal legal equality. Political philosopher Elizabeth Anderson concurs with Karst, arguing that equal status does not involve merely "equality of legal rights" but is also a "cultural norm" critical for maintaining a democratic polity, a norm that presupposes each person's "public standing as fit for association with fellow citizens."<sup>42</sup>

According to the equal-status conception, the kind of discrimination that the law sees fit to proscribe involves not only an interpersonal wrong or harm but also a harm that flouts this democratic norm of equal status or equal citizenship.<sup>43</sup> Indeed, plaintiffs alleging unlawful discrimination often characterize their mistreatment in politically loaded terms, like being treated as a "second-class citizen" or as having second-class status.<sup>44</sup> We should take these characterizations seriously. A nexus frequently exists between norms of interpersonal conduct and one's standing in the broader political community, and is especially likely to exist when the equal-citizenship or equal-status goals of antidiscrimination law are in play. The notion of "second-class" treatment, in other words, expresses the idea that an individualized wrongdoing has occurred while simultaneously explaining that wrongdoing in terms of a concept—"status" or "citizenship"—that has a decidedly political dimension. The equal status account of wrongful discrimination likewise takes seriously the idea that antidiscrimination laws implicate both the interpersonal and the political.

And it should come as no surprise that the "private" or "personal" can have a political dimension. Equal status—insofar as it is a *status*—also concerns how individuals and groups are treated across a range of social and institutional

citizenship stature for persons with disabilities" (quoting *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring)).

40. Lawrence G. Sager, *In the Name of God: Structural Injustice and Religious Faith*, 60 ST. LOUIS U. L.J. 585, 585 (2016) ("Our modern constitutional tradition has been deeply concerned with the equal membership of all citizens.").

41. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989).

42. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 102 (2010).

43. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 9 (1996) (describing "the central evil that the [antidiscrimination] project seeks to remedy" as "[s]tigmatized social status and the concomitant withholding of respect").

44. *See, e.g.*, *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 469 (6th Cir. 2009) (describing the store manager's treatment of its black employees as consistent with treating them as though they were "second-class citizens"); *Polacco v. Curators of the Univ. of Mo.*, 37 F.3d 366, 369 (8th Cir. 1994) (describing the plaintiff as "being treated as a second-class citizen"); *Neubecker v. New York State*, No. 1:15-CV-00614 EAW, 2018 WL 4442266, at \*2 (W.D.N.Y. Sept. 17, 2018) (describing a conversation where the plaintiff stated she was being treated as a "second-class citizen"); *Stemple v. City of Dover*, 958 F. Supp. 335, 340 (N.D. Ohio 1997) (describing the plaintiff's complaint as containing allegations of "second-class" treatment (emphasis omitted)).

settings, both public *and* private. As Karst writes while discussing racial discrimination: “What happens in the marketplace and in the workplace . . . has vital consequences for the social status, *even the political status*, of black people as a group, and therefore the status of every individual black man and woman and child.”<sup>45</sup> Formal political equality will mean little if it allows powerful incumbent social groups to systematically exclude or dominate members of disfavored groups through the mechanisms of private exchange.<sup>46</sup> As Elizabeth Sepper and Deborah Dinner explain in their recent work describing the feminist movement’s role in securing state-level public accommodations laws, “[f]ull and equal access to the public meant the freedom to move through public space and participate in leisure and civic life.”<sup>47</sup> Elizabeth Anderson and Richard Pildes similarly observe that, “[i]n the context of racial discrimination, meaningful participation in the public, political sphere could not plausibly be available while such an obvious element of a caste system prevailed in the private sphere.”<sup>48</sup> We can generalize the point: as long as access to public space remain in private hands, fully participating as a member of a political community will require having full access to many *private* institutions and transactions including education, employment, housing, banking, and so on.<sup>49</sup> The state must therefore ensure that one’s membership in a legitimate social group does not compromise one’s ability to participate in these private institutions.<sup>50</sup> Being a political equal, in short, requires unencumbered access to a wide range of social institutions. And in a society where social institutions are predominately products of private ordering, having unencumbered access to a range of critical private institutions is vital to equal status.

The rest of this Part continues to explain wrongful discrimination, at least in instances recognized by antidiscrimination law, in terms of failures to respect a person’s equal status in a community.<sup>51</sup> This explanation is necessary because it

45. Kenneth L. Karst, *Private Discrimination and Public Responsibility*: Patterson in Context, 1989 SUP. CT. REV. 1, 11 (emphasis added); *see also infra* Section I.A.

46. Indeed, incumbency advantages created by racism can be self-perpetuating even in the absence of continued racial bias. *See generally* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

47. Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 110 (2019).

48. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2204–05 (1990).

49. A number of scholars have pursued this theme, especially constitutional law scholars who locate antisubordination or anticaste principles in the Fourteenth Amendment. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–70 (1976); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994); *see also* Karst, *supra* note 45, at 11.

50. This view is sometimes characterized in terms of private institutions that serve “public” functions, like places of public accommodation or institutions that have a quasi-public nature. *See, e.g.*, TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 201–08 (2015) (arguing that the duty not to discriminate is, and should be, imposed on those with a sufficiently “public character”); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 46–48 (1977).

51. The relevant mode of explanation here is not causal or historical but, rather, normative—whereby certain acts or practices are wrong because they manifest failures of respect of a certain kind. It is, therefore, simply assumed that failing to respect someone’s equal status is normally a wrong-making

serves as a premise in the broader argument for the claim that mandatory arbitration of discrimination claims presents a distinctive problem. To facilitate understanding, section I.A will situate the equal-status conception among other theories of wrongful discrimination. The sections thereafter elaborate on this idea, with section I.B explaining in greater detail the meaning of “equal status” as used here, and section I.C spelling out what it means to fail to respect that status. My modest goal is to fill in the details needed to make the argument, while showing that the broad contours of the equal-status account adopted here are already widely taken for granted in thinking about discrimination.

#### A. SITUATING THE EQUAL-STATUS CONCEPTION

What makes wrongful discrimination morally wrong and subject to state prohibition? Again, according to the equal-status conception, where legally actionable wrongful discrimination exists, part of what makes that discrimination wrongful is that it involves failures to respect a person’s equal status within a political community, where those failures are somehow explained by reference to a person’s actual or apparent membership in a particular social group. What each of these elements means—“social group,” “equal status,” “failing to respect,” and “political community”—will be addressed in greater detail in sections I.B and I.C. Before doing so, it is useful to situate the equal-status conception between two different ways of thinking about wrongful discrimination: “bottom up” and “top down.”<sup>52</sup>

Bottom-up theories focus on the question of what makes discrimination morally wrong, where “moral” is construed primarily in terms of *interpersonal* wrongdoings rather than in terms of *political* morality.<sup>53</sup> Larry Alexander, for example, has famously argued that discrimination is wrong because it links back to certain mental states that deny the equal moral worth of individuals.<sup>54</sup> Alexander’s study explicitly de-emphasizes the question of when the law may permissibly prohibit discrimination,<sup>55</sup> which is characteristic of bottom-up approaches.<sup>56</sup>

---

feature of an act or practice. Although deeper metaethical debates continue about how normative explanation works, including whether normative explanations must bottom out in nonnormative truths, these debates do not affect the argument in this Article. For recent discussions of normative explanation, see generally Selim Berker, *The Explanatory Ambitions of Moral Principles*, NOÛS 904 (2019), David Enoch, *How Principles Ground*, in 14 OXFORD STUDIES IN METAETHICS 1 (Russ Shafer-Landau ed., 2019), and Mark Schroeder, *Cudworth and Normative Explanations*, 1 J. ETHICS & SOC. PHIL. 1 (2005).

52. I borrow this distinction from EIDELSON, *supra* note 5, at 4.

53. See generally Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992) (suggesting the “line between wrongful and acceptable discrimination is . . . difficult to precisely locate with precision because it is historically and culturally variable”).

54. *Id.* at 192.

55. See *id.* at 157. For other works in the bottom-up genre, see generally EIDELSON, *supra* note 5, and HELLMAN, *supra* note 5.

56. Although the central focus of their inquiry is not law or the demands of political morality, bottom-up theorists still hope to justify, explain, or reform the law’s regulation of wrongful discrimination using insights drawn from interpersonal morality. See, e.g., Alexander, *supra* note 54, at 157 (“A moral analysis of discrimination . . . might inform the interpretation of both statutory and

“Top down” approaches, by contrast, zoom out and take an institutional rather than interpersonal perspective, focusing on explaining and justifying the institutional rules governing the regulation of discrimination.<sup>57</sup> Both courts and legislatures operate within institutional constraints—principally constitutional constraints, but also those imposed by political morality. Antisubordination and anticlassification theories, for example, step in to provide courts and legislators with limiting principles and institutional goals capable filling in the vague mandates of the Fourteenth Amendment.<sup>58</sup>

Situated between these poles, the equal-status conception takes a “middle-out” perspective on wrongful discrimination.<sup>59</sup> Like bottom-up approaches, the equal-status conception studies what makes discrimination wrong at an interpersonal level as between wrongdoer and victim. Taking the interpersonal dimension of the wrongdoing seriously is vital when studying antidiscrimination law, given that legal claims of wrongful discrimination are presented in the form of a tort-like cause of action, with an alleged discriminator situated like a tortfeasor facing a lawsuit by a putative victim of discrimination.<sup>60</sup> But unlike bottom-up approaches, the equal-status conception focuses squarely on a specific subset of wrongful discrimination between private actors: where that discrimination is already prohibited by law.

This focus is not arbitrary. This subset of claims is precisely the one susceptible to being redirected from public courts to arbitration via mandatory arbitration clauses. And as detailed below and already previewed in the prefatory remarks

---

constitutional law and should inform proposals for or against legal change. Although I am not primarily engaging in legal analysis, my inquiry is surely of major importance to the law.”).

57. See EIDELSON, *supra* note 5, at 4 (characterizing the top-down perspective as one concerned with “explaining or justifying institutional rules”).

58. Antisubordination theories, also called anticaste theories, emphasize the goal of uprooting patterns of distribution of goods—employment, housing, education, and so on—that emerged as a direct result of the unjust marginalization of certain social groups. See, e.g., FISS, *supra* note 49, at 147–70; SUNSTEIN, *supra* note 49, at 2429–30. Under this theory, antidiscrimination laws are permissible to the extent that they aim to correct these patterns. See, e.g., FISS, *supra* note 49, at 147–70; SUNSTEIN, *supra* note 49, at 2411, 2443, 2450–51. Anticlassification theory, by contrast, holds that antidiscrimination law is legitimate only when it serves to root out pernicious reliance on certain traits—such as race, sex, religion, and nationality—by certain actors. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) (“Scholars debate what our constitutional understanding of equality ought to be, but most would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.”).

59. For other approaches that begin from the middle out, insofar as they also take existing antidiscrimination law as theoretical points of departure, see generally KHAITAN, *supra* note 50, and IYIOLA SOLANKE, *DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW* (2017).

60. Sandra Sperino points out in her work how the Supreme Court has increasingly construed discrimination claims as tort claims, yet she cautions against pressing the analogy too strongly. See generally Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1; Sandra F. Sperino, *Let’s Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107 (2014); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014). My point in the text compares discrimination claims to a tort’s broadest structural features—an action is filed with the aim of rectifying the wrong to the individual. It does not deny that other more subtle structural dissimilarities between discrimination claims and the common law of torts exist.

above, the normative character of this subset of wrongs—the private, discriminatory wrongs that the law recognizes—reflects the broader public concerns motivating legislative or judicial recognition of actionable wrongs in the first place. That is, wrongful discrimination that the law recognizes as such is not just about disrespect, material costs, or hurt feelings. Something else is at stake as well.

The additional-stakes concern, according to the equal-status view, is one's overall standing as an equal member of the broader political community. In this respect, the equal-status conception of wrongful discrimination joins forces with top-down understandings, which interpret ideals of equality embedded in the Constitution or otherwise demanded by political morality. Antidiscrimination law and the evils it attempts to root out make sense only in light of these broader goals. By the same token, top-down approaches do not always dictate particular means by which to pursue these ideals of equal membership.<sup>61</sup> In particular, nothing about the demand for equal citizenship necessarily requires a tort-like model of regulation, which allocates to victims of discrimination the legal power to sue their discriminators under certain conditions.<sup>62</sup>

The equal-status conception thus focuses not only on the interpersonal nature of discriminatory wrongdoings, but also takes seriously the idea that these interpersonal wrongdoings have a decidedly political dimension—grounded in the broader project of securing equal membership—regarding one's standing in the broader community. That is, “private” antidiscrimination law recognizes that certain putatively interpersonal wrongdoings rise to the level of state concerns given the threat that they pose to the integrity of the broader political community, constituted by its equal members. So the equal-status principle attempts to explain wrongful discrimination by focusing on a particular subset of private discrimination that the state already recognizes as rising to the level of state concern. But this still leaves a lot to explain, including the meaning of the constituent elements of the equal-status conception.

#### B. THE “STATUS” IN EQUAL STATUS

Making sense of the equal-status conception of discrimination requires saying more about the “status” to which it refers. Recall the principle: discrimination counts as wrongful not only when it manifests a failure to respect a person's status as an equal member of a political community, but further specifies that this failure is explained by one's (actual or imputed) membership in a legitimate social group.

As used here, equal status is partly a function of legal status, which in turn refers to a position one holds within a political community. That position is constituted in part—but only in part—by legal rights and responsibilities conferred

---

61. Lawrence Sager, *The Unacknowledged Constitution* 15 (unpublished manuscript) (on file with author) (comparing the constitutional mandate for “equal membership” with imperfect duties that “stipulate ‘a required end and not a requirement on action’”).

62. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 3 (2010).



on individuals by that community.<sup>63</sup> One's marital "status," for example, is constituted in part by a set of legal rights and responsibilities, including responsibilities that spouses have to each other and to their children reared during marriage, rights and responsibilities that spouses have in the event of divorce, and so on. But a person's status cannot be explained completely in terms of rights and responsibilities.<sup>64</sup> To illustrate, recall that defenders of gay marriage are not concerned merely with having a certain cluster of rights and responsibilities associated with legal marriage. Marital status has social meaning and intangible benefits beyond those rights.<sup>65</sup> This is why civil unions were not a satisfactory substitute for fully recognized marriages between gay spouses, even if the formal legal rights and responsibilities constituting civil unions were identical to marriage.<sup>66</sup> The "civil union" label signaled a less-than-full public recognition of the commitments that gay spouses made to each other.<sup>67</sup> That is, the label "civil union" expressed or communicated that certain legally recognized monogamous relationships were inferior to others, even if the same legal rights and responsibilities attached to both statuses.

---

63. Cf. KARST, *supra* note 41, at 51 (describing citizenship as a status involving not merely holding rights but also involving "stand[ing] with other citizens in a relation of mutual responsibilities"); Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT'L L. & COM. REG. 497, 500 (2002) ("Equal citizenship is understood to entail enjoyment of various kinds of rights—civil rights, political rights, social rights, and cultural rights—but all of these rights are described in the language of citizenship. Enjoyment of these rights is viewed as a necessary condition for the enjoyment of equal citizenship in our society."). Contrast attempts to explicate status in terms of a person's attractiveness as cooperative partner. The more attractive one is as a cooperative partner, the higher a person's status. *E.g.*, ERIC A. POSNER, *LAW AND SOCIAL NORMS* 56 (2000). This idea, elegant in its simplicity, presupposes that social life is almost exclusively transactional, consisting of a series of decisions about whether to cooperate with other rational individuals for mutually beneficial gains. A person's status is something that can be ranked by comparison with other persons in accordance with their ability and likely success in cooperative endeavors. But there is a conceptual misstep here. Someone who is maximally cooperative may also be servile. But servility is also an indicator of low status. And conceptually, cooperative attractiveness is not quite what we are looking for—status, in the relevant sense, is partially constituted by legal rights and responsibilities. Nothing in the economic conception requires this. More importantly, the ideal of *equal status* is normative, whereas the economic conception is not.

64. Jeremy Waldron, *Reply*, in JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 133, 139 (Meir Dan-Cohen ed., 2012) ("[A] status term is never just reducible to a list of rights and duties; it also conveys the *point* of clustering those particular rights and duties together in a certain way. . . . [I]t is a matter of fleshing out and responding to a certain sort of standing or considerability that an entity or agent is supposed to have among us . . .").

65. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death."); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (describing social and other intangible benefits of marriage). For a discussion of the social meaning of marriage, *see*, for example, Ralph Wedgwood, *The Meaning of Same-Sex Marriage*, N.Y. TIMES (May 24, 2012, 9:30 PM), <https://opinionator.blogs.nytimes.com/2012/05/24/marriage-meaning-and-equality/>.

66. *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (holding that a proposed bill providing for civil unions that contained identical rights and responsibilities as marriage nonetheless violated the state constitution's due process and equal protection clauses because it functioned to stigmatize gay couples as having second-class relationships).

67. *See id.*

The civil-union-versus-marriage controversy suggests that having a certain status implies having a certain standing in a community that is more than the sum of its constituent rights and responsibilities. That something extra involves, for lack of a better term, systematic social significance. That is, a person's status orients how she is treated across a broad range of institutional and social settings within a larger community and, in turn, sets a person's expectations about how she should be treated.<sup>68</sup> Consider again marital status. Certain special legal rights and responsibilities constitute that status. But a person's marital status also influences how others treat that person, formally and informally, across a broad range of social and institutional settings. Marital status also influences the range of opportunities that the person has or the opportunities are foreclosed to that person. Conventional indicators of marriage—a person's wedding ring, for example—signal romantic ineligibility to others, and in turn, render certain behavior towards that person inappropriate. Less formally, other social relationships and institutions are often expected to accommodate the needs of spouses but not, say, paramours or mere friends. Leaving work early to attend to a sick spouse, for example, may seem socially more acceptable than leaving work early to attend to the needs of a paramour or friend. Status, for present purposes, does not merely concern formal rights and responsibilities, legal or otherwise; our statuses also influence how we are treated in a wide range of informal social settings in which we live most of our lives.

*Equal status*, as opposed to mere status, is a normative ideal.<sup>69</sup> Roughly speaking, the ideal of equal status holds that, within a defined *political* community, no adult person holds—or ought to hold—a predictably and systematically lower status than any other adult person across a wide range of institutional or social settings.<sup>70</sup> Like other statuses, equal political status is partially constituted by certain rights and responsibilities. Equal political status is in part secured through formally ensuring equal rights of political participation, such as the right to vote, run for office, engage in political speech, serve on a jury, and so on, as well as through removing certain obstacles. As Kenneth Karst writes, ensuring equal status “presumptively demands the removal of legal obstacles to a wide range of types of participation as a member of society.”<sup>71</sup> And equal status also requires respecting one another in certain ways, as discussed in more detail below.

---

68. For an exploration of similar ideas about equal status, see generally WALDRON, DIGNITY, RANK, AND RIGHTS, *supra* note 64, and JEREMY WALDRON, ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY (2017).

69. There are strong continuities between the following discussion and the principle of “equal citizenship” defended in Karst, *supra* note 50, at 5–11 (“In its most typical application, the principle of equal citizenship will operate to prohibit the society from inflicting a ‘status-harm’ on members of a group because of their group membership.”).

70. The ideal of equal status is thus a form of relational equality. For a landmark treatment, see generally Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999).

71. Karst, *supra* note 50, at 25.

## C. FAILURES TO RESPECT EQUAL STATUS, TWICE OVER

To the extent that antidiscrimination law confers private rights of action to file discrimination lawsuits, these rights should paradigmatically empower individuals to rectify certain types of wrongs: failures to respect a person's equal status on the basis of membership in a legitimate social group. These failures occur, moreover, when behavior reflects or expresses judgments that equal status is incompatible with that membership.

To begin, notice that private actors might challenge a person's equal political status in many ways—for example, by intimidating voters, denying their ability to serve in the military or run for office, and so on. Threats to equal status deriving from wrongful *discrimination*, however, often fail to respect equal status in a particular way: they express or reflect the judgment that one's membership in a legitimate social group compromises or is incompatible with equal status.<sup>72</sup> The nature of discriminatory wrongdoings involves threats to status, twice over. First, there is a challenge to an *individual's* status. Again, wrongful discrimination shares this aspect in common with any number of wrongdoings. But implicit in this equal-status account is also the idea that wrongful discrimination represents a challenge to the status of an entire *group*. An individual's equal status is compromised by their membership in a group, suggesting that not only is an individual's equal status somehow compromised, but that the entire group's status is compromised. Individualized wrongs can count as wrongs to groups as well.

To illustrate, consider a range of examples of straightforwardly wrongful discrimination. Consider three cases: a woman is denied a promotion because she is a woman, a black person is refused entry into a store because she is black, and a gay couple is denied a mortgage because they are gay. All of these examples simultaneously threaten the individuals involved, as well as the broader social groups to which these victims of discrimination belong. Their equal status as *individuals* is threatened to the extent that part of full membership of the political community requires fair access to promotions unencumbered by one's sex, the ability to enter commercial establishments unencumbered by one's color, and the ability to get housing unencumbered by one's sexual orientation. But discriminatory behavior visited upon individuals also tends to set back the interests of all members of the groups, insofar as those discriminatory acts and practices entrench stigmas associated with membership in that group.<sup>73</sup>

---

72. The wrongdoing here is expressive, not stigmatic. Stigma might be a *consequence* of these expressions when left unchecked, but it is not the wrongdoing in question. Robin Lenhardt explains, in a useful formulation, that racial stigma “involves becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community.” R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004); cf. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963) (describing a stigma as an attribute that renders a person “reduced in our minds from a whole and usual person to a tainted, discounted one,” and which is “deeply discrediting”).

73. See, e.g., Benjamin Eidelson, Book Review, 128 ETHICS 678, 682 (2018) (reviewing SOLANKE, *supra* note 59) (“[I]t bears noting that one could agree with Solanke that stigmatized traits should be

Notice something else. The wrongdoing involves a “failure of respect” of a particular kind. The wrongdoing involves a judgment that is expressed by or reflected in certain conduct. This judgment is easy to recognize in certain anticonstitutional cases. One of the main problems with *Plessy v. Ferguson*,<sup>74</sup> for example, was not simply that “separate” is “inherently unequal,”<sup>75</sup> but that racially segregating a range of public institutions expressed, or was motivated by, the judgment that black Americans were second-class citizens such that their belonging to this racial group was incompatible with their full membership in the broader political community.<sup>76</sup> In other words, Jim Crow laws *made* full political membership incompatible with membership in the group of African Americans. Because the state partially *constitutes* the political community, the state should not recognize or maintain second-class citizenship. All *de jure* institutions designed to recognize or maintain the incidents of second-class status are inherently at odds with the normative ideal of equal status.<sup>77</sup>

So wrongful discrimination potentially implicates status twice over: the status of the individual and the status of the group to which the individual belongs. Antidiscrimination law, to the extent that it empowers individuals to sue other private actors (employers, for example), empowers individuals to protect their status as equal members in the community against threats posed by exclusion. But these private rights of action also have an unusual status-protecting aspect that extends beyond protecting the *individual's* status in the community; rights against private discrimination effectively empower individuals to protect the status of the legitimate *group* to which they belong or appear to belong—a status that discriminatory conduct challenges as well. We can articulate this point in terms of remedies. In addition to damages awards and injunctive relief, private rights of action grounded in discrimination law permit plaintiffs to obtain from courts public reaffirmation of plaintiffs’ equal status, as well as the equal status of the broader class of persons populating the social group implicitly or explicitly challenged by the defendant.

To recap, this Article is premised on the understanding that wrongful discrimination involves a person’s failure to respect another’s equal status, where that failure is explained by reference to a person’s social group. Centrally important to the argument to come is that equal status is to be understood as equal *political* status in a democratic political community, where one’s political status is assumed to be a function of both one’s legal rights and responsibilities, as well as one’s basic social standing across a wide range of social and institutional settings.

---

protected by discrimination law (at least when the stigma is unjustified) and still reject her claim that only those traits should be.”)

74. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

75. *See Brown*, 347 U.S. at 495.

76. Versions of this point have long been recognized in the scholarly commentary on the segregation decisions. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 430 (1960) (commenting that segregation “is actually conceived and does actually function as a means of keeping the Negro in a status of inferiority”).

77. *See id.* at 424.

Wrongful discrimination often implicates status twice over: the status of the individual and the status of a social group. This dual effect on equal status is vitally important in the argument to come. Because courts play a special role in vindicating equal status, pushing discrimination claims out of court and into arbitration prevents litigants from fully rectifying wrongs twice over: on their own behalf, and on behalf of the social groups to which they belong.

## II. HOW COURTS, NOT ARBITRATORS, VINDICATE EQUAL STATUS

It is time to bring the argumentative pieces together by showing why mandatory arbitration of discrimination claims is especially worrisome. Again, wrongful discrimination involves the wrongdoer's failure to respect a person's equal status, a failure explained by reference to that person's membership in a social group. Fully rectifying that wrongdoing requires permitting victims to access authoritative public institutions like courts. This is because equal status—both of the individual and the social group—must be safeguarded by the public to be fully protected. And because status has normative significance across a range of institutional and social settings, this status potentially requires vindication in the public sphere. Confidential, binding arbitration cannot vindicate either public dimension of equal status.<sup>78</sup>

### A. COURTS: RECOMMITTING TO EQUAL STATUS BY THE PUBLIC

Fully rectifying wrongful discrimination requires an authoritative public institution to recognize that a wrongdoing has occurred. That is, the identity of the dispute-resolution body matters inherently. Because arbitration is private, it cannot fully rectify this type of wrongdoing. Courts play an essential role in fully rectifying certain classes of wrongdoings pertaining to status or belonging. In building toward this conclusion, this section first discusses, in general terms, why the identity of an adjudicator matters in resolving certain disputes, especially when those disputes concern whether a person in fact belongs to a particular community. The relevant “community” discussed will be small—an imagined community pool—where it is assumed that membership entails certain privileges reserved only for members.

This section then expands on this hypothetical, explaining how *legally actionable* wrongful discrimination potentially implicates a person's membership not just in a small community, like a neighborhood pool or a workplace, but also in the broader *political* community. When one's good standing in this broader community is at stake, the identity of the adjudicator matters—and it matters that public adjudicators like courts are available to resolve those disputes.

---

78. Cf. Judith Resnik, *The Norman Shachoy Lecture—Courts: In and out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 808 (2008) (discussing the value of open courts and the public dimension of adjudication).

### 1. An Inherent Role for Authoritative Community Representatives

Before turning to courts as public actors and representatives of the political community, consider first why the identity of adjudicators matters in settling disputes regarding membership in a smaller, insular community. Consider an example contrived to abstract away distracting details.<sup>79</sup> Suppose that a member of a community swimming pool fails to respect or recognize my membership in the same pool. He does this by accusing me of not belonging to the pool. Ignore for now what explains this false accusation. Also set aside whether the accuser is engaged in wrongful discrimination. Instead note that the member takes it upon himself to deny my access to certain privileges, including my child's access to the pool or my ability to order coffee from the snack bar. Now notice that every available witness, including fellow pool members, might be willing to vouch for the validity of my membership. I could have valid documents proving that I belong. But unless and until an authoritative representative *of the pool itself* vouches for me and rebuts the other member's claim, his challenge goes un rebutted in an important sense.

Why should it matter whether an authoritative representative of the swimming pool is available to reaffirm my membership or my family's membership in that pool? Put differently, why should the *identity* of the adjudicator that resolves the dispute matter?<sup>80</sup> Consider the accusing pool member. By denying that I belong, he has in a certain sense arrogated to himself the authority to determine whether my family and I belong as members. It is true that any pool member might in a sense arrogate to himself the authority to enforce the pool's rules in the event of a transgression. But saying I do not belong, and that my family does not belong, is not simply a matter of chiding me for failing to abide by the rules of the pool. The accusation is not like criticizing me for running on wet pavement. Correcting mere misbehavior does not necessarily carry the implicit threat of expulsion. No,

---

79. Recent events and historical practices both bolster these points and show that this hypothetical is not as contrived as I initially suggested. See, e.g., Alex Horton & Keith McMillan, *#IDAdam, the White Man Who Called Police on a Woman at Their Neighborhood Pool, Loses His Job*, WASH. POST (July 8, 2018, 12:22 PM), <https://www.washingtonpost.com/news/post-nation/wp/2018/07/06/idadam-the-white-man-who-called-police-on-a-woman-at-their-neighborhood-pool-loses-his-job/>; Cleve R. Wootson Jr., *Police Say Woman Screamed Racial Slurs and Smacked a Black Teen at a Pool. She Lost Her Job.*, WASH. POST (July 2, 2018, 2:29 PM) <https://www.washingtonpost.com/news/post-nation/wp/2018/07/02/police-say-woman-screamed-racial-slurs-and-smacked-a-black-teen-at-a-pool-she-lost-her-job/> (“DJ RocQuemore Simmons and his friend hadn’t even managed to dip their toes in the pool before a screaming Stephanie Seby-Strempel was out of the water and in their faces, shoving DJ in the chest, telling the boys they ‘didn’t belong’ and ordering them to leave.”); Mihir Zaveri, *A Manager Asked a Black Man to Leave the Pool at His Own Apartment Complex*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/black-man-asked-pool-incident.html>. For an overall assessment of these incidents, see Megan R. Underhill, *Police Calls for #LivingWhileBlack Have Gotten out of Hand. Here’s What We Can Do About It.*, WASH. POST (July 20, 2018, 6:00 AM), <https://www.washingtonpost.com/news/post-nation/wp/2018/07/20/po-the-criminalization-of-blackness-and-what-we-can-do-about-it/>.

80. Cf. Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 174 (2010) (responding to a similar concern while defending the view that private prisons are incompatible with the public function of punishment, specifically the public's expression of condemnation).

instead, my very presence in the pool is the transgression, with my removal and the removal of my family the primary remedy.

Because the pool member challenges the validity of my membership, thereby arrogating to himself the authority to decide whether I belong, the only way to fully rebuff this accusation is to have an actual authority—representative of the community—vouch for my family and me. Two aspects of the adjudicator’s identity matter: he is both *authoritative* and *representative* of the pool. Authoritative institutions within a group, in the relevant sense, have power over members of that group.<sup>81</sup> They can determine authoritatively that we do belong. And if the recalcitrant pool member continues to harass us, the pool may use that same power to sanction him for treating us inconsistently with our standing as full members of the pool. This power may be enlisted to protect our membership—our sense of secure belonging—in the relevant community when others challenge it. Our membership is “secure” when it is not fragile or readily imperiled by others. Secure membership in certain associations counts among the most valuable things we as people have.<sup>82</sup> And authoritative institutions can secure belonging by using their power.

But fully reaffirming my membership requires more than simply an authoritative finding in our favor that my family and I belong to the pool. Institutional identity also matters because my status has been challenged as a member of a community—even if the challenge comes from a private party. Fully protecting that status requires the community *itself* to vouch for and recommit to that status. To see why, notice that the message communicated to my family and me when the community itself investigates and vouches for us—the credible message that we matter and are valued as equal members—becomes muddied and seems less credible when the messenger is some unrelated third party with no interest in whether we have a secure relationship with the community that hired him. The relationship between the community pool and the third party is too attenuated; the third party is akin to a private investigator. In fact, if the pool told our family to take our dispute to this third party to determine whether we were in fact members, this request itself would call into question the pool’s commitment to its members, my family included.<sup>83</sup> More generally, when disputes about a person’s

---

81. I use “authoritative institutions” to describe institutions with the authority to impose obligations or otherwise change a person’s normative situation—that is, they have normative power. See Tom Christiano, *Authority*, STAN. ENCYC. OF PHIL. (Jan. 11, 2012), <https://plato.stanford.edu/archives/spr2013/entries/authority/> [<https://perma.cc/367N-XUDR>]. But I also want to exploit the connotation of “authoritative” that suggests an institution commanding respect and reliability.

82. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 155–56, 386–87 (rev. ed. 1999) (describing self-respect as the most important primary good, dependent on the respect of others, and made possible by membership in valuable associations). Now, pointing to one’s sense of belonging might be—and has been—ridiculed as too vague to be taken seriously. Indeed, in the preface to his book *Belonging to America*, Karst recounts a discussion with a colleague who described the idea of “belonging” as a “soupy” idea unworthy of a book title. KARST, *supra* note 41, at ix. We can see what Karst thought of this criticism. See *id.*

83. The message that this outsourcing sends is not that the pool’s members are valued, but instead comes close to telling members to “get out of our hair.”

good standing, status, membership, or belonging more generally are at issue—as opposed to mere disputes over rights claims—the institution that is charged with resolving the membership-related disputes plays a crucial role in fully and successfully reaffirming that membership. Vindicating one’s status as a member of a community requires that same community to do the reaffirming in order to counter the threat posed to the membership.

The community can “counter” the threat in two ways. First, the community can insist that a representative must counter the message sent by these challenges to belonging. The message says that certain members of the community are not full participants in virtue of the group to which they belong. Fully rectifying this kind of wrongdoing requires responding to this message with a contrary one, one that reaffirms the victim’s belonging in that community. This way of putting things focuses on the message communicated implicitly by the wrongdoing, seeking to counteract that message. That the institution—the community swimming pool, in the present case—is representative of the community is important here primarily to ensure that the message of secure belonging does not get muddied and appears credible.<sup>84</sup> Once we see remedies for wrongful discrimination as, in part, a function of trying to “correct the record”—by reaffirming a particular message of belonging and by recommitting to the belonging of individuals and groups—we can see why the identity of the adjudicator matters. The credibility of the message depends on the messenger.

But challenges to status or belonging not only communicate a message—that is, express certain content—but also tend to accomplish a certain result: the weakening of one’s ties to the community in question. Fully rectifying this wrongdoing thus requires strengthening those strained ties.<sup>85</sup>

Thus, we come to the second way the community can counter the threat: by meaningfully recommitting itself to the threatened party. Viewing remedies for wrongful membership challenges as acts of recommitment helps to explain why the identity of the adjudicator is significant. Recommitment—like any other commitment—is a normative phenomenon that ties together in a special relationship the committing party and the subject of the commitment, such as a promisor and a promisee. Promisors owe special obligations to promisees. And the identities of the promisor and promisee matter because they share a normative bond

---

84. Mary Sigler similarly argues that the message of criminal punishment—the condemnation by the community of one of its own as a part of an extended dialogue—can “easily be scrambled,” and privatizing prisons muddies that message by commodifying the means and methods of punishment. *See* Sigler, *supra* note 80, at 176.

85. A growing number of scholars have interpreted remedies to require more than simply undoing harms or reallocating costs, focusing instead on repairing relationships or making amends between the wrongdoer and the victim. *See, e.g.*, Erik Encarnacion, *Corrective Justice as Making Amends*, 62 *BUFF. L. REV.* 451, 454 (2014) (emphasizing making amends as a remedy); Linda Radzik, *Tort Processes and Relational Repair*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 231, 248 (John Oberdiek ed., 2014) (focusing on repairing relationships). For at least a subset of private wrongdoings, full remedies require enlisting the courts to recommit to individuals and groups potentially marginalized by the misconduct of other private actors.



that allows the promisee to make certain demands on the promisor that the promisee lacks with respect to others. A more complex normative relationship subsists between communities and their members than between promisor and promisee, who need not have any relationship other than the obligations created by the promise itself. Still, just as promisees are entitled to demand assurances from promisors when reasonable doubts arise about the ability of promisors to keep those promises,<sup>86</sup> members should be entitled to demand reassurance from their communities about their belonging when that membership comes under threat. Anything short of a representative institution going on the record leaves something to be desired—an open question of sorts about the validity of a person’s membership.

## 2. Beyond the Pool: Individual and Group Status in the Political Community

So far I have written in terms of wrongful challenges to a person’s status as a member of a community. Wrongful discrimination is just one species of this genus of wrongdoing, though perhaps the most salient.<sup>87</sup> Returning to the pool hypothetical, suppose that not only did the pool member challenge my family’s membership, he did so on the basis of my Mexican heritage, a paradigmatic case of wrongful discrimination.<sup>88</sup> And suppose further that this kind of treatment rises to the level of legally actionability. How would this legally actionable wrongful discrimination differ from wrongful exclusions, as previously discussed, that are not legally actionable?

The differences are partly a matter of the wrongdoing at issue and partly a matter of the scope of the relevant community.

---

86. I have in mind here the right to adequate assurance, triggered by a promisee’s reasonable belief that the promisor cannot fulfill the terms of her contractual obligations. See U.C.C. § 2-609(1) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017) (“When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 251(1) (AM. LAW INST. 1981).

87. Indeed, I have argued that individual dignity is challenged whenever citizens lack access to courts for wrongdoings besides wrongful discrimination. See Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1308 (2019).

88. Or suppose he does not like hearing foreign languages spoken in public. See, e.g., *Sayed-Aly v. Tommy Gun, Inc.*, 170 F. Supp. 3d 771, 773 (E.D. Pa. 2016) (describing how defendant allegedly told the plaintiffs “‘you are probably middle eastern,’ and told them to ‘speak English or get the f \_ \_ \_ out’ and to ‘get the f \_ \_ \_ out and never come back’”); see also René Galindo & Jami Vigil, *Language Restrictionism Revisited: The Case Against Colorado’s 2000 Anti-Bilingual Education Initiative*, 7 HARV. LATINO L. REV. 27, 38 (2004) (“The ‘Latino-as-foreigner’ attitude manifests itself through verbal insults such as ‘This is America, so speak English’ or ‘Go back to where you came from,’ which have been directed even at political elites like Congressman Luis Gutierrez, who was born and raised in the United States.”); Dana Hedgpeth, *‘Go Back to Your Country’: Woman Yells Obscenities at Family Speaking Spanish at Virginia Restaurant*, WASH. POST (Oct. 23, 2018, 9:45 AM), <https://www.washingtonpost.com/dc-md-va/2018/10/23/go-back-your-country-woman-yells-obscenities-family-speaking-spanish-virginia-restaurant/>.

Wrongful discrimination implicates not just the individual but the social group as well.<sup>89</sup> Stated in terms of status, not only is the status of an individual challenged by wrongful discrimination, the status of a social group is likewise challenged.<sup>90</sup> Wrongful discrimination paradigmatically brings to bear, on a particular person, behavior that tends to exclude or marginalize an entire group of people. An individual's ability to respond to wrongful discrimination thus implicates not only that individual's ability to respond for herself but also her ability to stand as representative, responding on behalf of a broader social group in a particularly salient way. And obtaining relief from an authoritative and representative institution not only provides some measure of personal security by obtaining recommitment from the relevant community, but the relief also reflects a community practice of protecting members of an entire group whose belonging might otherwise be jeopardized.

Legally actionable wrongful discrimination, and private rights of action in particular, involves a much broader political community. Set aside the world of community pools and whether one-off discriminatory transgressions should count as legally actionable. Legally actionable private discrimination presupposes that higher stakes are involved. At stake is not just pool membership or access to a particular employer, as if the harm extended only to isolated lost opportunities wholly independent from the broader social context in which those particular pools or employers exist.<sup>91</sup> Antidiscrimination law recognizes that allowing our standing to be jeopardized in certain private contexts jeopardizes our standing everywhere. Private rights of action against wrongful discrimination protect our equal status by protecting our membership or potential membership across a range of private settings, thereby helping to secure our status as full participants in the broader political community.<sup>92</sup> Secure membership in these communities is a prerequisite for enjoying liberty and security in our bodily integrity and property—values that are deeply entrenched in liberal political morality—high stakes indeed.<sup>93</sup> We cannot enjoy these values unless our membership as equals in liberal communities is secure.<sup>94</sup>

---

89. This theme is prominent in discrimination law scholarship. *See, e.g.*, SOLANKE, *supra* note 59.

90. I thank Franita Tolson and Jennifer Laurin for independently encouraging me to separate the individual from the group aspects of this discussion.

91. As explained above, discrimination in some of these writ small social settings threatens our standing in the broader political community, which is what justifies the state's involvement in otherwise private transactions and relationships. *See supra* Section I.B.

92. For more on participation as a value undergirding equal status, see Karst, *supra* note 50, at 9.

93. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7 (1981) ("It is a first principle of liberal political morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world.").

94. This point about secure membership in a polity as a prerequisite to exercising any other rights and privileges or realizing other values bears a resemblance to Hannah Arendt's notion of a "right to have rights." *See* HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296–98 (new ed. 1973). I thank Greg Keating for pointing out the similarities.

When wrongful discrimination occurs, fully rectifying it requires protection by the public, where “public” in the relevant sense refers to an institution that represents or is an extension of the political community. This is because equal status is a fundamental component of the community; it partially constitutes that community and is fittingly protected by that community. Like the right to vote, equal status is, as Margaret Jane Radin argues with respect to inalienable rights, “inherently within the care of the polity.”<sup>95</sup> And states seem to see things this way, too. According to Elizabeth Sepper, “A number of statutes connect freedom from discrimination in public accommodations to citizenship . . . describ[ing] discrimination as not only inflicting harm on individuals, but also ‘menac[ing] the institutions of a free democratic state.’”<sup>96</sup> That states see things this way is no surprise. Because equal status partially constitutes our larger political community—that is, it determines the baseline rights, responsibilities, and meaning (symbolic or otherwise) of membership in that community—public institutions have a duty to uphold that equal status, and in turn, work continually against the emergence of second-class citizenship.<sup>97</sup> So at a minimum, public institutions like courts must be available and permitted to protect that status, not only as a matter of individual rights against discrimination but also in part as an act of self-preservation.<sup>98</sup>

---

95. See Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, in PRIVATE LAW AND THE RULE OF LAW 288, 288 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

96. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 664 (2016) (quoting KAN. STAT. ANN. § 44-1001 (1991); MINN. STAT. § 363A.02(1)(b) (1993); N.H. REV. STAT. ANN. § 354-A:1 (1998); N.J. REV. STAT. § 10:5-3 (2006); OR. REV. STAT. § 659A.006 (1) (2007); WASH. REV. CODE 49.60.010 § (2007)).

97. See Kimberly A. Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857, 858 (2006) (“On a most basic level, antidiscrimination law is about which groups are deemed worthy of social admission and protection and which are not.”).

98. Of course there are a number of ways that the polity may seek to protect equal status besides allocating private rights of action to victims of wrongful discrimination: qui tam actions, whistleblower protections, and actions pursued by the Equal Employment Opportunity Commission (EEOC) and state law analogues, for example. Nothing about the goal of mitigating the harms of discrimination necessarily *requires* the mechanism of private rights of action. See FARHANG, *supra* note 62, at 3 (observing that in pursuing antidiscrimination goals “[i]t is a legislative choice to rely upon private litigation in statutory implementation,” and emphasizing that other statutes that sought to protect workers provided for no private rights of action). Still, given that the law *does* protect equal status by vesting individuals with private rights of action, we should respect the ways in which private rights of action are structured to empower victims to force wrongdoers to rectify their wrongdoings. See Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 624 (Jules Coleman et al. eds., 2004) (observing that private actions do not represent state impositions of liability but rather “[t]he law empowers private parties to have other private parties held liable to them, if they choose”). Rights against wrongful discrimination, I submit, include rights to access authoritative public institutions to reaffirm our status as equal members of the broader political community. This is a consequence of the wrongdoing at the heart of wrongful discrimination that has already been discussed. If the distinctive wrongdoing of wrongful discrimination involves the failure to respect a person’s status as an equal member of the broader political community, then that same community should be accessible and stand ready to reaffirm the victim’s membership if the victim demands it.

And for the reasons already canvassed,<sup>99</sup> having authoritative institutions of that community reaffirm our membership as equals is valuable, and, therefore, having the prerequisite access to those authoritative, membership-validating institutions, like courts, is valuable. Courts help individuals reaffirm their membership by not only exercising the power to award remedies but also by functioning as stand-ins for the political community, thereby making them capable of recommitting to the belonging of individuals as equal members of that community. As the Supreme Court of California recently recognized, declaratory judgment in the context of antidiscrimination litigation takes on special significance. The court remarked that even when damages are unavailable as a form of relief, a finding of unlawful discrimination remains significant because it reaffirms the equal status of the victim:

[T]he unavailability of damages . . . does not make a finding of unlawful discrimination an empty gesture. . . . [P]roof that an adverse employment decision was substantially motivated by discrimination may warrant a judicial declaration of employer wrongdoing. Declaratory relief, where appropriate, *may serve to reaffirm the plaintiff's equal standing* among her coworkers *and community*, and to condemn discriminatory employment policies or practices.<sup>100</sup>

This opinion explains the significance of declaratory relief not simply in terms of reaffirming a party's equal standing with respect to fellow coworkers but more broadly in terms of that party's standing in the *community*. Although not often remarked upon so explicitly, remedying discrimination involves, in part, remedying a potentially frayed relationship between the victim and the political community. Such a remedy demonstrates the full compatibility of the community with the particular social group to which the victim belongs. Accordingly, full relief requires that same political community—and hence its public institutions—to reaffirm and recommit to both the equal status of individuals and the groups to which they belong.

Declaratory relief by a court is the concrete form of this reaffirmation that, by definition, is wholly unavailable in arbitration. Arbitration is private and a creature of contract. It cannot reaffirm equal status or recommit to individuals and their groups in these ways as an authoritative representative of the broader political community. But courts and juries can.<sup>101</sup> Through courts, the public plays a vital role in both declaring certain conduct to be wrongfully discriminatory and in reaffirming the equal status of the victim the groups to which the victim belongs. A decisive finding of wrongful discrimination *by the public*, independent of whether that wrongdoing gives rise to compensable losses, is tantamount to repudiating the challenge to the person's equal status. In turn, such a finding reaffirms

---

99. See *supra* Section II.A.1.

100. *Harris v. City of Santa Monica*, 294 P.3d 49, 67 (Cal. 2013) (emphasis added).

101. R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 186 (2001) (“The law and the courts speak and act in the name of the political community.”).

the equality of the victim. Again, private arbitration cannot do this. It cannot speak for the public.<sup>102</sup>

B. COURTS: REAFFIRMING EQUAL STATUS IN PUBLIC

Not only is it important for representatives of the public to vouch for, and recommit to, the equal status of individuals who bring valid claims of wrongful discrimination (for themselves and on behalf of groups), but it is also important that this reaffirmation happen *in public*. That is, there is a second sense of the word “public” that stands opposed to the typical confidentiality of private arbitration. This is the sense of “public” that connotes transparency and accessibility, the sense in which even private arbitration proceedings might be open to public viewing if parties and arbitrators allowed it. It is also the sense in which courts of law would cease to be “public” if their proceedings were conducted entirely in secret. Courts of law tend to be public in this sense whereas private arbitration tends to be conducted in confidential proceedings.<sup>103</sup>

Because courts are public in this sense they are also uniquely suited to adjudicate claims of discrimination. Focusing again on claims of employment discrimination, these claims allege that the employer failed to respect a person’s equal status. And although equal status is aspirational, it is still an aspirational *status*; that is, a person’s status is determined by the rights and responsibilities that come with having that status, but it also determines (loosely speaking) how one moves through the world.<sup>104</sup> More precisely, and as noted above, one’s status determines how a person can expect to be treated across a range of social and institutional settings, which amounts to normative significance described earlier as “systematic.”<sup>105</sup>

But precisely because a person’s status has normative implications for how that person will be treated—or how that person should be treated—across a wide range of social and institutional settings, in some cases courts might be better

---

102. Why courts? Why not periodically have the EEOC print out postcards and send them to each American, telling each one that he or she matters as an equal? Actions speak louder than words, and without corrective action by public institutions against wrongful discrimination, these words will ring hollow and may justify a sense of alienation. More seriously, the EEOC is empowered to take up and pursue allegations of wrongful discrimination notwithstanding arbitration clauses. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297–98 (2002) (holding that an agreement between an employee and employer requiring arbitration of claims grounded in the Americans with Disabilities Act did not preclude the EEOC from pursuing relief on behalf of the victim). Might the EEOC’s decision count as a public institution “vouching” for an individual? In part, but the EEOC is not sufficiently authoritative given that its findings and determinations are not final.

103. These features are not essential to either arbitration or courts. Certain public courts conduct part or all of their proceedings in secret, whereas aspects of arbitration can and have been publicly accessible in this sense. For a discussion of these complications, see Resnik, *supra* note 27, at 640 (“[A]lthough today’s purveyors of arbitration aim to make confidentiality its hallmark, arbitration has a history that includes some publicly accessible proceedings.”).

104. *See Don Herzog, Aristocratic Dignity?*, in WALDRON, *DIGNITY, RANK, AND RIGHTS*, *supra* note 64, at 99, 108 (pointing out that status, for example aristocratic status, “follows you across the whole social landscape”).

105. For a characterization of status as having this wide-ranging normative significance, see the discussion *supra* Section I.B.

situated to mitigate a threat posed to a person's equal status.<sup>106</sup> Allegations made in court are a matter of public record. Proceedings are usually open to the public. Class actions in particular have been described as "engines of publicity."<sup>107</sup> But those engines can be shut down by mandatory, single-file arbitration proceedings. Precisely for this reason, proponents of mandatory arbitration use mandatory arbitration to prevent class actions as well.<sup>108</sup>

Formal, public proceedings also have a special claim to epistemic authority.<sup>109</sup> When fact finders determine, in public, that an employer has wrongfully discriminated against an employee, few other institutions within a jurisdiction are in a position to question that finding rationally. This is because formal court procedures play an epistemic role, albeit an imperfect one, in ferreting out the truth. The truth that emerges at trial has a special claim to authority as a result of formal fact-finding procedures.<sup>110</sup> Courts also have the ability to force other powerful institutions to confront an individual's equal status in ways that arbitrators cannot. This is because courts have the power to make law by setting publicly available precedent, binding not only on the parties but also future litigants.

For these reasons, courts not only reaffirm an individual's equal status in the face of a particular employer's challenge to it, but their transparent nature also makes it easier to help broadcast authoritatively an employee's equality *across a broad range of social institutions and settings*. Having these legal powers—to order other powerful institutions to do things, to make law, and so on—makes courts uniquely situated to repudiate an employer's challenge to a person's equal status. Confidential, non-precedential arbitration proceedings cannot do any of these things.

Everything said so far applies not just to claims of discrimination but also to any legal claim grounded in a defendant's alleged failure to respect equal status. But broadcasting a person's equal status is especially important with regard to claims of wrongful discrimination. Recall my earlier claim that wrongful discrimination involves not just a failure to respect a person's equal status, but also the further notion that this failure must somehow be grounded in that person's (actual or imputed) belonging to another social group.<sup>111</sup> Having the ability to reaffirm a person's equal status to the public—in the face of wrongful discrimination—also empowers individuals to try to reaffirm the equal status of the broader social group whose status is also challenged. Indeed, although plaintiffs frequently comment that their lawsuits are "not about the money,"<sup>112</sup> plaintiffs that allege

---

106. See *supra* Section I.A.

107. Resnik, *supra* note 27, at 609.

108. *Id.*

109. *Id.* at 615 ("[E]ven given a world replete with multiple sources of information, courts are distinctive in producing a unique form of knowledge.").

110. *Id.*

111. See *supra* Section I.A.

112. Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 702 (2007).

discrimination sometimes add that they aim to champion the rights of others who share their traits, not just their own rights.<sup>113</sup>

Now whether a particular plaintiff will desire public vindication of equal status, in the sense of vindication *in public*, will depend heavily on context. Consider Taylor Swift's recent case. After a radio DJ sued Swift for allegedly having him fired, Swift filed a counterclaim of battery, alleging that he had groped her while the two posed for pictures together.<sup>114</sup> Swift prevailed, in no small part due to her forceful and unequivocal testimony.<sup>115</sup> And she was widely praised for that testimony, which commentators interpreted as a symbolic win on behalf of all women.<sup>116</sup> But her testimony would have been far less powerful, and would not have resonated so broadly, if it had not been accessible to the press and available for public consumption.

Not every potential plaintiff will desire that kind of attention, much of it unwelcome. Even Swift described the ordeal as a "lonely and draining experience, even when you win."<sup>117</sup> Worse, public adjudication of discrimination disputes might sometimes be counterproductive if the aim is to vindicate, in public, one's standing as an equal. David Sherwyn, J. Bruce Tracey, and Zev Eigen summarize the concerns:

The public aspect of litigation is potentially detrimental to employees and employers alike. Employer-defendants tear voraciously at the character and integrity of employee-plaintiffs during long, arduous trials. Litigation leaves ample public record not only of the employee's accusations but also of the employer's. Following the trial, employees may be blacklisted, disrespected, and distrusted when they attempt to return to work. Employers face the possibility of baseless accusations shattering their reputations that may have taken years to develop.<sup>118</sup>

---

113. See, e.g., Shirleen Holt, *Company to Pay, Change Practices to End Gender Case*, SEATTLE TIMES (July 17, 2004), [https://web.archive.org/web/20190104002615/http://old.seattletimes.com/html/business/technology/2001982052\\_boeingsettle17.html](https://web.archive.org/web/20190104002615/http://old.seattletimes.com/html/business/technology/2001982052_boeingsettle17.html) [<https://perma.cc/G93Z-KPSL>] ("It's not about the money," [Plaintiff Mary] Beck said. "It's about the injustice that all the women have gone through.").

114. Emily Yahr, *Taylor Swift Explains Her Blunt Testimony During Her Sexual Assault Trial*, WASH. POST (Dec. 6, 2017, 1:19 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/12/06/taylor-swift-explains-her-blunt-testimony-during-her-sexual-assault-trial>.

115. See Andrew Flanagan, *Taylor Swift Wins Sexual Assault Lawsuit Against Former Radio Host*, NPR (Aug. 14, 2017, 7:02 PM), <https://www.npr.org/sections/therecord/2017/08/14/543473684/taylor-swift-wins-sexual-assault-lawsuit-against-former-radio-host> [<https://perma.cc/2JFN-9ANV>].

116. Lavanya Ramanathan, *On the Stand in Her Groping Case, Taylor Swift Was Every Woman. And That's What's So Sad.*, WASH. POST (Aug. 11, 2017, 10:00 AM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/08/11/on-the-stand-in-her-groping-case-taylor-swift-was-everywoman-and-thats-whats-so-sad/> ("It was as if she really was speaking for every woman. And that's profoundly sad."); *Taylor Swift Sexual Assault Case: Why Is It Significant?*, BBC NEWS (Aug. 15, 2017), <https://www.bbc.com/news/entertainment-arts-40937429> [<https://perma.cc/QV4Q-HCWN>].

117. Yahr, *supra* note 114.

118. Sherwyn et al., *In Defense*, *supra* note 32, at 98 (footnote omitted).

These are real concerns, which are certainly not limited to employment-based claims.<sup>119</sup> But it does not follow that the choice whether to arbitrate must be made predispute and using boilerplate language drafted by the employer alone. As arduous, risky, and inefficient as public adjudication may be, vindicating a person's equal status requires the claimant to at least have the *option* to broadcast and reaffirm their equality to those beyond the wrongdoer, arbitrator, and a small group of attorneys behind closed doors.<sup>120</sup> Properly assessing the best mode of dispute resolution requires knowing what the nature of the dispute is. For some disputes, protecting one's status across a range of social settings requires having the opportunity to take one's grievances public in this way and to reaffirm one's status *to* the public. Mandatory arbitration of discrimination claims robs individuals of that option.

In sum, fully rectifying wrongful discrimination requires allowing victims to obtain a reaffirmation of their equal status *in* public and *by* the public. Failing to allow a victim a public reaffirmation (by forcing private dispute resolution) risks failing to vouch for her equal status across a broad range of social and institutional settings, which is particularly worrisome given that status concerns one's ability to demand certain treatment across a wide range of these settings.

### III. OBJECTIONS AND EXISTING ARGUMENTS

After responding to certain objections in section III.A, section III.B will explain my argument's advantages by contrasting it with a few existing arguments that also contend that arbitrating discrimination claims is especially problematic. As we will see, the most prominent existing arguments are either inconclusive or unpersuasive.

#### A. OBJECTIONS

##### 1. Two Objections to the Ideal of Equal Status

The first objection argues that status—which is inherently hierarchical—makes no sense when coupled with equality. This objection can be disposed of quickly. Yes, status implies hierarchy. But the notion of equal status within a political community does not dispense with hierarchy. The equality emphasized is equality among *adults*. Implicitly, children occupy a different, lower status—at least from the perspective of certain rights of political and economic participation,<sup>121</sup> though in other respects they obtain privileges that adults lack.<sup>122</sup> By the same

---

119. For a provocative argument that humiliation may itself be a rational and deliberate goal of plaintiffs, see generally Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3369624](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369624) [<https://perma.cc/6G7X-NM7S>].

120. I discuss this point at length in Encarnacion, *supra* note 87.

121. For example, children may not vote or serve on juries. See U.S. CONST. amend. XXVI, § 1; 28 U.S.C. § 1865(b)(1) (2012).

122. For example, children have the right to void contracts they enter into. *E.g.*, *Comm'r of Internal Revenue v. Allen*, 108 F.2d 961, 962 (3d Cir. 1939); see also RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981).



token, children also receive special protections from the state.<sup>123</sup> So to the extent that the concept of status presupposes hierarchy, equal status can formally accommodate this feature of the concept.

The second objection holds that we can explain the wrongness of discrimination without the concept of equal status. Because my argument leans heavily on a robust notion of equal status, the ability to explain wrongful discrimination without the notion of equal status might initially seem like a flaw in the argument. Notice that philosophers have tried to explain wrongful discrimination in terms of equal moral worth.<sup>124</sup> Ronald Dworkin distinguishes between equal treatment and treatment as an equal, arguing that the latter is fundamental and is explained by a basic right to be treated with equal concern and respect.<sup>125</sup> Elizabeth Anderson's work on relational equality articulates a form of sociopolitical equality, apparently without relying on the notion of status articulated here.<sup>126</sup> Underlying these views is the idea that each person has equal moral worth that must be respected, regardless of whether this value is realized as a *status* in contingent social institutions.

But equal status and equal moral worth do not have the same content. Perhaps equal moral worth is necessary but not sufficient to ground<sup>127</sup> or justify equal status.<sup>128</sup> Within a political community, there should be no second-class citizens. But noncitizens living within that community do not have—nor should they expect to have—precisely the same privileges of citizenship. This status difference is attributable to differences in legal privileges, some of which are reserved especially for adult citizens.<sup>129</sup> Yet citizens and noncitizens alike have equal moral worth. This shows that not every failure to respect a person's equal moral worth entails a failure to respect a person's equal status: they may not have had

123. For example, certain state agencies protect children against abuse and neglect. *See, e.g., Child Protective Services*, MD. DEP'T OF HUMAN SERVS., <http://dhs.maryland.gov/child-protective-services/> [https://perma.cc/9DWP-TNMZ] (last visited Jan. 25, 2020).

124. For a theory of wrongful discrimination grounded in equal moral worth, see generally HELLMAN, *supra* note 5. The idea of equal moral worth is associated with Immanuel Kant and is discussed in IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 42–43 (Mary Gregor ed. & trans., 1998).

125. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (1977).

126. *See generally* Anderson, *supra* note 70.

127. For a detailed discussion of the grounding relation, see generally Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in *MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY* 109 (Bob Hale & Aviv Hoffman eds., 2010).

128. Gregory Vlastos has argued in the same spirit that a “single-status political community” makes sense only if we assume that each person has equal “human worth,” suggesting that justifying public protection of equal political status depends on a deeper account of the equal moral worth of each person. Gregory Vlastos, *Justice and Equality*, in *THEORIES OF RIGHTS* 41, 55 (Jeremy Waldron ed., 1984); *see also* WALDRON, *DIGNITY, RANK, AND RIGHTS*, *supra* note 64, at 139.

129. For example, only adult citizens have the right to vote. *See* U.S. CONST. amend. XXVI, § 1. This discussion brackets important questions about the moral justifications for restricting citizenship while assuming that at least some restrictions are morally permissible. This is of course not an uncontroversial position in political philosophy. For important discussions, see generally JOSEPH H. CARENS, *THE ETHICS OF IMMIGRATION* (2013), and DAVID MILLER, *STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION* (2016).

that status to begin with. For the same reason, the converse is not necessarily true: failing to respect a person's equal status does not necessarily entail a failure to respect a person's equal moral worth. Employers that prefer to hire lawful residents do not necessarily fail to respect undocumented applicants' equal moral worth.

That said, among full members of a political community—among adult citizens—equal moral worth and equal status are more likely to walk in lockstep. Suppose this is true; suppose that that equal moral worth is coextensive with equal status after all, at least among full members of a political community. Within this community, having equal moral worth would thereby entail a basic set of political or legal rights and responsibilities. Equal moral worth would also imply that a person should be treated with a certain level of what we have called “systematic respect” across a wide range of social and institutional settings.<sup>130</sup> Taken together, these observations would appear to vindicate the claim that we do not need to rely on the concept of equal status after all.

At this point the objection seems merely verbal, objecting more to the use of the word “status” than to anything substantive. To see why, notice that the objection, first, essentially re-describes the constitutive features of status—that it is constituted by rights and responsibilities and also has normative implications for how individuals are treated across a wide range of social settings and institutions—and, second, asserts that having these things indicates a being's “equal worth” rather than “equal status.” The objection concludes that “equal worth” is coextensive with “equal status.” But the labeling does not and should not make a difference. So although I disagree with the idea that these terms refer to the same things, the reader who prefers “worth” should feel free to substitute the term where appropriate in what follows, though I will continue to use the word “status.”<sup>131</sup>

## 2. Objections Grounded in Existing Antidiscrimination Law

One might object that the equal-status principle fails to explain all wrongful discrimination recognized by antidiscrimination law. Consider legal claims involving disparate impact or indirect discrimination.<sup>132</sup> Establishing these claims requires plaintiffs to show that a facially neutral employment practice that, as applied, has had an adverse impact on members of a protected class—that is, people with a protected trait.<sup>133</sup> Nothing about these neutral practices, one might

---

130. See discussion *supra* Section I.B.

131. On this point, it is worth noting that at least one prominent interpreter of Kant has expressed sympathy for the position that Kant's reference to equal “worth” is perhaps better expressed in terms of equal moral *status* rather than *high value*. See THOMAS E. HILL, JR., *HUMAN WELFARE AND MORAL WORTH: KANTIAN PERSPECTIVES* 233 (2002).

132. “Indirect discrimination” is the term favored in Australia and other common law jurisdictions, whereas “disparate impact” is the term used in the United States. For the touchstone disparate impact case, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For additional commentary on indirect discrimination, see ROSEMARY HUNTER, *INDIRECT DISCRIMINATION IN THE WORKPLACE* (1992).

133. *E.g.*, *Lewis v. City of Chicago*, 560 U.S. 205, 211–12 (2010). The defendant may defeat such a claim by showing the challenged practice is a business necessity. *Id.* at 212–13.

object, fails to respect a person's equal status. A similar point might be stated in terms of wrongdoing—that facially neutral and unintentionally discriminatory practices do not wrong any given individual. Wrongdoing requires some mental state like negligence, whereas employers might impose practices that are in effect discriminatory without doing so negligently (or knowingly or intentionally). Employers may genuinely accept that all of their present and prospective employees have equal sociopolitical status. They just commit an oversight to the extent their neutral policies have a disparate impact. Accordingly, the equal-status principle fails to explain why we do—or should—recognize claims of disparate impact discrimination in the employment context.

Distinguish between the general objection that there is a lack of fit between the equal-status principle presented here and antidiscrimination statutes, and the specific objection about disparate impact as a type of wrongful discrimination under this principle. On the general objection, there indeed remains an imperfect fit between the equal-status principle and antidiscrimination statutes like Title VII, insofar as they are under- and perhaps even over-inclusive. The statutes are under-inclusive because plausible moral claims of wrongful discrimination may ultimately fail to give rise to a cause of action under these statutes. That is, an employee might suffer from wrongful employment discrimination even if the discrimination fails to qualify as discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>134</sup> As Kimberly Yuracko observes: “The overweight and unattractive face systemic and often irrational discrimination but receive no federal antidiscrimination protection.”<sup>135</sup> Sexual orientation discrimination might similarly go unprotected by federal statutes.<sup>136</sup> Yet, arguably, these statutes are over-inclusive as well. Some plaintiffs may file legally sound employment discrimination claims under Title VII even though their claims may not count as wrongful discrimination, at least under the equal-status principle. For example, reverse-discrimination claims are highly controversial at least in part because

---

134. 42 U.S.C. § 2000e-2(a) (2012).

135. Yuracko, *supra* note 97, at 858.

136. A circuit split exists among the U.S. Courts of Appeals over whether discrimination on the basis of sexual orientation is prohibited by Title VII. Compare *O'Daniel v. Indus. Serv. Sols.*, 922 F.3d 299, 305 (5th Cir. 2019) (“Title VII in plain terms does not cover ‘sexual orientation.’” (quoting *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015))), and *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017) (holding that discrimination based on sexual orientation is not prohibited by Title VII and listing decisions from other circuits holding the same), with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (holding that “Title VII prohibits discrimination on the basis of sexual orientation as discrimination ‘because of . . . sex.’” (alteration in original)), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.), and *argued*, (U.S. Oct. 8, 2019), and *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (same). The Supreme Court is slated to resolve the split. See Adam Liptak & Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html>. For a detailed argument on why discrimination based on sexual orientation should be considered sex discrimination, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 203 (1994).

(arguably) the so-called discrimination does not in any obvious way fail to respect a plaintiff's status as an equal.<sup>137</sup>

But over- or under-inclusiveness is not a problem for present purposes. My narrow goal is to explain why there is a distinctive problem, rooted in the formal nature of the claim of wrongful discrimination, when plaintiffs lack access to courts. Whether a particular claim or set of claims has merit, legally or morally speaking, is an independent inquiry.

There is also the specific objection noted above that raises the issue of whether disparate impact claims qualify as claims of wrongful discrimination. Although I cannot address them fully here, two kinds of responses are available. The first simply concedes the point that disparate impact claims do not qualify as claims of wrongful discrimination under the equal-status principle. Whether this counts as a strike against the equal-status principle depends on one's prior theoretical commitments. If one is committed to the view that disparate impact discrimination, when it happens, counts as a paradigm case of wrongful discrimination to individuals and, moreover, that it shares something important in common with disparate treatment discrimination,<sup>138</sup> then a theory that fails to account for disparate impact claims in either of these ways counts as a limitation of that theory.

But one's pre-theoretical commitments might be different.<sup>139</sup> It might be an open question whether practices resulting in a disparate impact against groups of people actually wrong any given individual within that group, and if so, whether that wrongdoing shares something in common with disparate treatment claims. In other words, disparate impact claims may not be paradigm cases of discrimination. And if it turns out that the best available theory that explains the wrongness of paradigm instances of wrongful disparate treatment cannot also explain the wrongness of disparate impact discrimination against individuals, then perhaps we should doubt whether disparate impact claims present genuine claims of wrongful discrimination. Legal recognition of disparate impact claims may be justified on other grounds,<sup>140</sup> but not because disparate impact discrimination wrongfully discriminates against individuals.

---

137. See *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009), for a reverse-discrimination case where white and Hispanic firefighters sued their employer because they were denied the opportunity for a promotion when the employer threw out the results of a promotion exam because no black candidates scored high enough to qualify for a promotion.

138. Disparate treatment, as contrasted with disparate impact, occurs when “an employer has ‘treated [a] particular person less favorably than others because of’ a protected trait.” *Id.* at 577 (alteration in original) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985–86 (1988)). To prevail on a disparate treatment claim, the “plaintiff must establish ‘that the defendant had a discriminatory intent or motive.’” *Id.* (quoting *Fort Worth Bank & Trust*, 487 U.S. at 986).

139. See, e.g., Larry Alexander, *Introduction to the 2006 Editors' Symposium: The Rights and Wrongs of Discrimination*, 43 SAN DIEGO L. REV. 733, 733–34 (2006) (calling disparate impact claims “non-paradigm cases” of discrimination).

140. See Yuracko, *supra* note 97, at 858–59 (arguing that a “commitment[] to status blindness” might justify disparate treatment claims while suggesting that antisubordination objectives might explain disparate impact claims).

A different response is also available. Instead of conceding that the equal-status principle cannot accommodate disparate impact claims, perhaps the equal-status principle is stated broadly enough to allow that many disparate impact claims constitute wrongdoings. Recall that the principle holds that a failure to respect a person's equal status is what makes wrongful discrimination wrongful. But to the extent that disparate impact claims are really negligence claims in disguise, perhaps a discriminator's negligent inattention to the discriminatory impact of unnecessary employment practices counts as a wrong.<sup>141</sup> Fully elaborating on this point would pull us far afield, but this response would exploit the broad formulation of the equal-status principle to show that it is consistent with, and perhaps can account for, at least some disparate impact claims.

### 3. Objection: Is the Wrongdoing Distinctive?

One might object that these observations about what courts and juries do—publicly affirm individual rights against challenges to those rights—fail to identify a *distinctive* role for courts vis-à-vis claims of wrongful discrimination. After all, the same could be said for many legal rights: courts publicly and authoritatively vindicate rights in ways that arbitrators cannot, and to the extent there is some value in the public vindication of rights over and above the value of obtaining compensatory or injunctive relief, arbitration cannot provide a perfect substitute for courts.<sup>142</sup> But this is old news, and the Supreme Court has long abandoned this unfavorable attitude towards arbitration.<sup>143</sup>

In response, notice first that not every failure to respect a person's rights entails a failure to respect their status as a rights holder. Being a victim of a negligent driver does not per se have any bearing on my equal status across a range of institutions.<sup>144</sup> But rights against discrimination are rights to equal status directly and non-derivatively; they are rights to equal status *simpliciter*. It is the nature of

---

141. Sophia Moreau, *Discrimination as Negligence*, 36 CAN. J. PHIL., supp. 1, 2010, at 123, 130; see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899–900 (1993).

142. See Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405, 445 (2018) (arguing that public judgment in courts against tortfeasors is important to “vindicate the social standing of victims”); Shiffrin, *supra* note 24, at 411 (arguing against the growing enforceability of remedial clauses because enforcing these clauses “objectionably displace[s] the judiciary’s role in providing fair and impartial judgments about the public significance of legal wrongs”).

143. See discussion *infra* Section III.B. Another way of putting the point: although not *all* rights demand public vindication, other rights besides rights against discrimination demand recognition of social equality. For example, perhaps employment law aims to protect and reinforce relational equality, which in turn can be articulated in terms of equal status. See generally Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013) (discussing the connections between individual employment law and social equality theory).

144. See Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 465 (2015) (“Tort liability in a negligence case, for example, centers on an act that has harmed another but its unintentional nature does not stand for the proposition that the victim occupies a lower standing or is due less regard than the tortfeasor.”).

wrongful discrimination as a failure to respect a person's equal status that distinguishes this type of wrongdoing from other types.

Once we accept that not every wrongdoing necessarily disrespects a person's equal status, this opens the door to the argument that arbitration may suffice to rectify some wrongdoings. This is particularly likely, I submit, when the disputes are primarily commercial in nature. A subcontractor alleging a breach of contract may therefore allege wrongdoing that concerns nothing over and above the wrongful withholding of money to which the subcontractor is entitled under the contract's terms. Her equal status beyond the confines of that dispute is not inherently implicated by the breach and is not plausibly at issue. Put differently, even if a particular commercial dispute *does* happen to disrespect a person's equal status derivatively on a particular occasion, this disrespect is not inherent in the nature of the wrongdoing. Cases like this no doubt involve attempts by plaintiffs to vindicate their legal rights. But such cases do not necessarily fail to respect plaintiffs' sociopolitical standing beyond the confines of the dispute.

Even if these observations are correct, they do not establish that *only* wrongful discrimination fails to respect equal status. The class of rights that inherently implicates status, one might argue, is broader than simply rights against discrimination. Certain torts like offensive battery, false imprisonment, defamation, and privacy-based claims protect dignitary interests,<sup>145</sup> protecting equal status as a result.<sup>146</sup> Or perhaps violations of fundamental human rights rise to the level of a failure to respect a person's sociopolitical status. After all, violations of fundamental human rights plausibly communicate to the victim that she does not matter or that she is lesser in a way that manifests disrespect toward her sociopolitical equality.

Nevertheless, even among rights plausibly grounded in equal status, wrongful discrimination is different. Recall that status is implicated twice over in such cases. Not only is an individual's status challenged, that challenge is itself grounded in an implicit challenge to the status of a *group*. Attempting to rebuke the challenge, in turn, involves attempting to secure not only one's own standing but by implication the standing of the same group to which one belongs. So even if claims challenging *an individual's* equal status, taken alone, do not provide sufficient reason to reject arbitrating status-based claims, the additional concern for the group's status may do the trick.

A final point of clarification on the distinctiveness issue. To the extent that wrongdoings *other than* discrimination involve a failure to respect equal status, fully rectifying these wrongdoings also requires that authoritative public institutions stand ready to reaffirm the victims' equal membership in the political community. Indeed, I have argued as much elsewhere.<sup>147</sup> But failing to respect equal

---

145. See Kenneth S. Abraham & G. Edward White, *The Puzzle of Dignitary Torts*, 104 CORNELL L. REV. 317, 335–40 (2019).

146. For an explanation of the relation between equal status and dignity, see Encarnacion, *supra* note 87, at 1325–28.

147. See Encarnacion, *supra* note 87, at 1333–36.

status remains the distinctive feature of wrongful discrimination, which distinguishes it from the array of possible wrongdoings that do not fundamentally disrespect equal status, even if that feature may not be wholly unique to wrongful discrimination.<sup>148</sup> The key point is to carefully distinguish the distinctive characteristics of a wrongdoing from the unique ones.<sup>149</sup> Doing so goes a long way to mitigate the objection at issue.

#### B. SHORTCOMINGS OF EXISTING ARGUMENTS

Others have tried to argue that arbitrating discrimination claims presents special moral problems. The most prominent arguments are for the most part variations on those addressed in the bellwether case, *Gilmer v. Interstate/Johnson Lane Corp.*<sup>150</sup> *Gilmer* involved an employer that fired its sixty-two-year-old employee (Robert Gilmer), who subsequently sued in federal court alleging age discrimination under the ADEA.<sup>151</sup> The employer then filed a motion to compel arbitration on the basis of an arbitration clause contained in Gilmer's securities registration application (which he filed as a requirement of his employment).<sup>152</sup> The district court denied the motion and the Fourth Circuit reversed.<sup>153</sup>

The Supreme Court affirmed the Fourth Circuit.<sup>154</sup> It concluded that nothing in the ADEA's text, legislative history, or statutory structure showed that compulsory arbitration of ADEA claims was inconsistent with the FAA or its putative underlying purpose: requiring courts to enforce arbitration clauses.<sup>155</sup> As a result, the Court held, individuals with age discrimination claims arising under the ADEA must arbitrate if they are bound by contracts containing arbitration clauses.<sup>156</sup> Subsequent cases expanded the reach of *Gilmer*, holding that claims arising under Title VII and other federal statutes barring discrimination are also subject to binding arbitration where required by a valid arbitration clause.<sup>157</sup>

We revisit *Gilmer* now because the majority's decision usefully catalogues existing defenses of the argument that mandatory arbitration of discrimination claims presents special normative problems. *Gilmer*, in other words, squarely addresses arguments purporting to show what makes arbitrating discrimination

---

148. I thank Mark Greenberg for a constructive discussion on this point.

149. In an analogous argument, Leslie Kendrick points out that showing that free speech rights are "distinctive" does not require showing that they are "singular," in the sense that no other rights share the same features. See Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87, 100–02 (2017).

150. 500 U.S. 20 (1991).

151. *Id.* at 23–24.

152. *Id.* at 24.

153. *Id.*

154. *Id.* at 35.

155. See *id.* at 24–27, 35.

156. *Id.* at 35.

157. See, e.g., 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265–66, 269, 274 (2009) (reaffirming *Gilmer* and rejecting the *Gardner-Denver* line of precedent which criticized mandatory arbitration of Title VII claims); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109–10, 119 (2001) (holding that under the FAA, clauses in employment contracts mandating arbitration of federal statutory discrimination claims are enforceable subject to limited exceptions); ROSSEIN, *supra* note 34, § 13:15.

claims distinctively worrisome. For the purposes of motivating my rights-based argument, it will suffice to highlight two of the most prominent objections to arbitrating these claims.

### 1. Public Policy Arguments

Several arguments raised by the plaintiff in *Gilmer* speak directly to the question of whether mandatory arbitration of discrimination claims presents unique normative difficulties. *Gilmer*'s first argument in this vein was that the ADEA seeks to promote important public policies—specifically, “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”<sup>158</sup> Forcing these claims into arbitration, *Gilmer* argued, undermined these goals.<sup>159</sup> We might add that keeping discrimination out of the public's eye risks underdeterrence because employers do not run the risk of “negative publicity” or a “blemished business reputation.”<sup>160</sup> Furthermore, individuals are more likely to come forward with stories of discrimination, some argue, if they can build on the allegations of others, which means arbitration can impede victims from reporting discrimination.<sup>161</sup>

One problem with public policy arguments is that they rest on factual assertions about the consequences of a regime of widespread mandatory arbitration. This is a problem because empirical studies relating to these assertions are often inconclusive.<sup>162</sup> Scholars routinely point out that sound empirical studies of arbitration have been limited given the secrecy of arbitration.<sup>163</sup> As David Horton and Andrea Cann Chandrasekher emphasize: “The dearth of data about arbitration has long been a major impediment to crafting sound policy.”<sup>164</sup> Recommending reform based solely on inconclusive and incomplete empirical work risks shooting in the dark. For this reason, the power of public policy arguments against the arbitration of discrimination claims is quite limited.<sup>165</sup>

---

158. *Gilmer*, 500 U.S. at 27 (alteration in original) (quoting 29 U.S.C. § 621(b) (1988)).

159. *Id.* at 26–27.

160. EEOC, NOTICE NO. 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT 8, 10 (1997).

161. See Litman, *supra* note 4.

162. See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283 (2009) (“Ten years of empirical research into the fairness of mandatory arbitration have produced only a handful of empirical studies, and these have told us very little.”).

163. See, e.g., *id.* at 1284–85.

164. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 62 n.34 (2015). On the basis of their original research, Horton and Chandrasekher have more recently argued in favor of providing incentives to promote plaintiff-side arbitration in order to mitigate the defense-side repeat-player effect. See Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 8–10 (2019).

165. *Gilmer* made another argument that focused on the EEOC, which is specifically empowered to investigate allegations of employment discrimination and file suit in court when it determines that discrimination exists. See 29 C.F.R. § 1626.15(a), (d) (2018). *Gilmer* tried to argue that arbitration



More importantly, the argument I articulated in Part I is wholly independent of these public policy concerns. Fully rectifying wrongful discrimination and the messages it sends requires allowing discrimination plaintiffs to have access to authoritative public institutions—not private ones like arbitration—to authoritatively rebuke those messages in the name of the political community. This is so even if mandatory arbitration turns out to have somewhat favorable consequences with respect to deterring discrimination or compensating its victims.<sup>166</sup>

## 2. Consent Arguments

Other arguments assert that arbitration clauses are coercively imposed, or are otherwise imposed under conditions that call into question the validity of the consent to those clauses.<sup>167</sup> Gilmer argued, for example, that predispute, mandatory arbitration clauses were nothing more than concessions extracted as a result of massively unequal bargaining power.<sup>168</sup> Or consider the Munger Tolles summer associates. After accepting summer associate positions, they were asked to sign employment contracts as a condition of employment.<sup>169</sup> These contracts contained take-it-or-leave-it arbitration clauses that required arbitrating discrimination claims.<sup>170</sup> This put the would-be summer associates in the position of giving up their valuable offer, which they had worked for weeks the previous summer to secure, or signing away their rights to litigate any potential future discrimination claims in court. Other employees are placed in an even more precarious position. Some employers impose arbitration requirements on their employees once they are already working on the job, informing those employees that by continuing to work for the employer—that is, by not resigning—the employees thereby agree

---

prevents the EEOC from discharging its responsibilities properly because claims would be heard in arbitration proceedings instead of being turned over to the EEOC. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29 (1991). The problem with the argument, for present purposes, is that it is far from obvious how the EEOC would play any role in explaining why arbitrating discrimination claims is distinctively worrisome. Even if making Gilmer arbitrate would have made the EEOC's responsibilities harder to discharge, the EEOC is in a similar position to third-party employees who are considering whether to file a discrimination claim against the same employer. That is, other litigants might have decided to pursue their own claims once Gilmer's allegations were made a matter of public record. So arbitrating rather than publicly adjudicating discrimination claims may effectively deter other valid claims or at least fail to properly create incentives for those claims. But at bottom, this argument comes down to the claim that arbitration fails to adequately protect the rights of employees and inadequately deters future discriminators. And this argument, despite the appearance of the EEOC in its premise, also fails to show why arbitrating discrimination claims is distinctively bad. *See id.* (rejecting Gilmer's argument).

166. This may seem paradoxical but it simply reflects the deontic structure of rights: they cannot be overridden merely by establishing that better consequences would follow from doing so. For a recent discussion of the paradoxical nature of deontic commitments, see, for example, Rebecca Stone, *Unconscionability, Exploitation, and Hypocrisy*, 22 J. POL. PHIL. 27, 29, 41 (2014).

167. *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 (1996) (“Like the yellow dog contracts of the past, the new mandatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent.”).

168. *See Gilmer*, 500 U.S. at 32–33.

169. *See Samuel, supra* note 2.

170. *Id.*

to arbitrate future claims.<sup>171</sup> These and other arm-twisting tactics have been criticized as coercive, illegitimate, and at odds with labor protections.<sup>172</sup> If this is true, clauses mandating arbitration of discrimination claims should not be enforceable.

The main problem with this argument is that it proves too much; it applies with equal force not only to arbitration clauses but also to virtually every condition of employment imposed on a take-it-or-leave-it basis. In other words, the argument has no limiting principle, implying that *all* conditions of employment should be presumptively invalid or unenforceable. This implication is implausible. After all, employers should have the ability to impose *some* conditions on employment and should be empowered to make some of those conditions nonnegotiable, simply as a matter of setting clear expectations and coordinating behavior among employees and between employees and management.<sup>173</sup> And if, say, the mere inequality of bargaining power sufficed to invalidate the underlying agreement, then many more terms beyond mandatory arbitration clauses—including potentially wholly legitimate ones—might be jeopardized because of ubiquity of unequal bargaining power between employers and would-be employees. So although the argument's main insight—that accepting nonnegotiable terms or conditions seems far from a paradigm example of voluntary assent and thus is worthy of moral scrutiny—seems important, it does not follow that clauses mandating arbitration should not be enforced.

### 3. Fairness Arguments

Fairness-based criticisms offer reasons to believe that the *process* of arbitration treats individuals unfairly. Returning to *Gilmer*, for example, notice that the plaintiff claimed that arbitration is biased against employees,<sup>174</sup> an oft-repeated

---

171. See, e.g., *Lagatree v. Luce*, Forward, Hamilton & Scripps LLP, 88 Cal. Rptr. 2d 664, 667 (Cal. Ct. App. 1999) (involving an employee's take-it-or-leave-it arbitration agreement imposed three years after employment began).

172. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642 n.9 (2018) (Ginsburg, J., dissenting) (arguing that “the arm-twisted [class-action] waivers collide with the NLGA’s [Norris-LaGuardia Act’s] stated policy; thus, no federal court should enforce them”); see also Adams, *supra* note 3, at 1639 (“Rather than presenting a voluntary option for resolving a dispute, a compulsory arbitration agreement provides a take-it or leave-it offer for an applicant or employee, and forces the individual to either agree to arbitrate any future employment disputes or seek another job.”); Heidi M. Hellekson, Note, *Taking the “Alternative” out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts*, 70 N.D. L. REV. 435, 456–57 (1994) (“These largely nonnegotiable contracts are often offered on a ‘take it or leave it’ basis and therefore do not qualify as being voluntary.”); F. Denise Rios, *Mandatory Arbitration Agreements: Do They Protect Employers from Adjudicating Title VII Claims?*, 31 ST. MARY’S L.J. 199, 216 (1999) (“[M]andatory arbitration[] raises questions concerning voluntariness. These questions include whether both parties agreed to arbitration with full knowledge of the effects of the arbitration provision and whether the applicant voluntarily accepted the provision as a condition of employment.”).

173. Although he ultimately concludes that boilerplate clauses frequently should not be enforced, Todd Rakoff has explained the role of boilerplate clauses in coordinating behavior in hierarchical firm structures. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1220–24 (1983).

174. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

claim in the legal literature by scholars who worry about repeat-player firms securing systematic advantages in arbitration.<sup>175</sup> These now-familiar objections to arbitration failed to persuade the majority in *Gilmer*.<sup>176</sup> More importantly for our purposes, a better argument against mandatory arbitration would succeed *regardless* of whether arbitration happened to be fair to individuals subjected to it. I have provided that argument in Parts I and II, pointing out courts' role in vindicating equal status because they are inherent extensions *of* the public and because their pronouncements are ordinarily open *to* the public.

Furthermore, claims about unfairness, for the same reasons discussed above with regard to claims about public policy, are difficult to assess empirically. Some have suggested that the repeat-player effect—typically assumed to benefit corporations rather than employees or consumers—also potentially benefits employees to the extent that their attorneys are repeat players in arbitration markets.<sup>177</sup> The status-based argument offered above applies regardless of whether arbitration happens to be procedurally fair and need not await the results of further empirical research.

These arguments are not the only ones concluding that arbitrating discrimination claims presents special problems.<sup>178</sup> Many of these arguments emerged in

---

175. See, e.g., Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 714 (1993) (“It is argued that since employers rather than individual employees are more likely to have repeat participation in the employment dispute arbitration process, arbitrators are more likely to rule in their favor in order to increase their chances of being selected to arbitrate future claims.”); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 239 (1998) (“The repeat player effect is a cause for concern because in dispute resolution, sometimes the perception of fairness is as important as the reality. There is undeniably a repeat player effect in employment arbitration.”); Colin P. Johnson, *Has Arbitration Become a Wolf in Sheep’s Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 HAMLINE L. REV. 511, 530 (2000) (“This phenomenon, in which the employer uses his past experience with arbitration in general and even past dealings with individual arbitrators to attempt to manipulate the situation to his advantage, has been coined by one court as the ‘repeat player’ scenario.”). For the seminal work on the advantages of repeat players, see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

176. See *Gilmer*, 500 U.S. at 30–31.

177. See, e.g., Chandrasekher & Horton, *supra* note 164, at 58 (“[T]here is a plaintiffs’ firm repeat-player effect in AAA employment cases with low-level, mid-level, high-level, and super repeaters . . . .”); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 751 (“Plaintiffs’ attorneys may represent numerous employees, franchisees, or consumers against corporate defendants, effectively becoming repeat players. Their better information will discourage arbitrators who might otherwise show favoritism toward corporations.” (footnote omitted)); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001) (arguing that the emergence of an organized plaintiffs’ bar for plaintiff-side attorneys minimizes any systematic advantage for employers).

178. Jean Sternlight, for example, recently argued that mandatory arbitration in the employment context impedes the development of employment law. See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 156–57 (2019). The same could be said for consumer law, and there is much to be said about needing courts to play a role in developing the law in general. But I am less confident that we have sufficient reason to believe that the law would develop in a desirable direction.

the 1990s, when scholarly interest in questions about arbitrating discrimination claims peaked, mostly because the question of whether courts must grant motions to compel arbitration of Title VII and other discrimination claims was still unsettled.<sup>179</sup> Some of these arguments were doctrinal, plumbing legislative history for evidence that the Supreme Court got it wrong.<sup>180</sup> The others were more straightforwardly normative, representing variations on the themes already discussed, arguing that arbitration is unfair or emphasizing the public policies that arbitration allegedly thwarts.<sup>181</sup>

The difficulties these existing arguments face show the necessity for a new argument, one that ties together the public-facing goals of antidiscrimination statutes and the individual rights of litigants recognized in these same statutes. So

179. See Adams, *supra* note 3; John-Edward Alley & Angela S. Oehler, *The Arbitration of Age Discrimination Cases: Will Clauses in Employment Contracts Be Enforced?*, FLA. B.J., Dec. 1991, at 29; Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Berger, *supra* note 175; Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 678; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445 (1999); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); Sherwyn et al., *In Defense*, *supra* note 32; R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533 (1994); Stone, *supra* note 167; Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A’s—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996); Brian K. Van Engen, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391, 410 (1996); Penelope Hopper, Note, *Mandatory Arbitration and Title VII: Can Employees Ever See Their Rights Vindicated Through Statutory Causes of Action?*, 1995 J. DISP. RESOL. 315; Adriaan Lanni, Note, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157 (1998); Rios, *supra* note 172; Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993).

180. See, e.g., Adams, *supra* note 3, at 1622–23; John-Paul Motley, Note, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employer Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 690 (1998).

181. See Moohr, *supra* note 179, at 396 (arguing that “arbitration is not an effective forum in which to satisfy the public policy goals of the employment discrimination statutes, even when employees are accorded a fair hearing”); see also Theresa M. Beiner, *The Many Lanes out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 841 (2014) (arguing that “trials in this area provide an important public function in setting norms of appropriate workplace behavior and practices as well as setting monetary values for the harm employment discrimination causes its victims”); Sternlight, *supra* note 178, at 156–57 (emphasizing that mandatory arbitration of employee claims stultifies the development of employment law). A variation on this theme argues that mandatory arbitration tends to disadvantage those groups most likely to have valid claims of discrimination. See, e.g., Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 295–310 (Richard L. Abel ed., 1982); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1321–26 (1997); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391–1404; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555–99 (1991). But see Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 663–68 (2017) (praising a protocol developed between a union and an employer association for handling the mediation and arbitration of statutory claims).

even though the doctrinal question about the scope of the FAA has been effectively settled, the normative question remains open and pressing for lawmakers receptive to reform.

#### IV. REFORM: WHY IT MATTERS THAT DISCRIMINATION IS DIFFERENT

The preceding analysis supports at least two types of legal reform. The first calls for the Supreme Court to reinterpret its now-settled FAA case law requiring courts to enforce contract clauses requiring employees to arbitrate discrimination claims. The second is a call for legislative reform. The FAA should be amended to prohibit courts from enforcing mandatory predispute arbitration clauses to the extent that they require arbitration of discrimination claims and other claims that similarly involve failing to respect equal status, however one draws the line. Failing this, the preceding analysis supports narrower, existing proposals that recommend exempting sexual harassment claims from the FAA. Legislative reform of this narrower variety already has some bipartisan support so it is perhaps the most likely of all to yield real progress against overly broad interpretations of the FAA.

##### A. REVISITING THE “EFFECTIVE-VINDICATION-OF-RIGHTS” DOCTRINE

As is well known, the Supreme Court now reads the FAA quite broadly, requiring courts to enforce virtually all predispute arbitration agreements, unless they have been secured, say, through coercion or fraud.<sup>182</sup> But the Court has also fashioned its own exception to this rule, requiring that the arbitration proceedings suffice to ensure an effective vindication of the plaintiff’s rights.<sup>183</sup> The doctrine itself appears to presuppose a sharp distinction between the substance of claims, on the one hand, and the procedures and forums used to resolve disputes couched in terms of those claims, on the other. Certain “procedural” rights, such as the presumptive right to form or join a class, receive practically no protection under the effective-vindication doctrine.<sup>184</sup> For example, employers can impose arbitration clauses on employees, effectively requiring them to waive any right to form a class, by forcing them to arbitrate single file rather than sue in court.<sup>185</sup>

Mandatory arbitration of discrimination claims is incompatible with the effective-vindication-of-rights doctrine—at least if the Supreme Court is to take the doctrine seriously.<sup>186</sup> As already elaborated, claims of wrongful discrimination

---

182. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236–39 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

183. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (permitting mandatory arbitration of statutory claims “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum”); see also *Italian Colors*, 570 U.S. at 235 (affirming the use of the “‘effective vindication’ exception”).

184. See, e.g., *Epic Sys.*, 138 S. Ct. 1622–23; *Concepcion*, 563 U.S. at 351.

185. See, e.g., *Epic Sys.*, 138 S. Ct. 1622–23; *Concepcion*, 563 U.S. at 351–52.

186. For a related critique of the doctrine’s assumption that civil rights claims protect values commensurable with money, see David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 KAN. L. REV. 723, 751 (2012).

implicate a person's equal status; vindicating one's rights against discrimination requires vindication of that status in public and by the public.<sup>187</sup> Because one cannot fully vindicate her rights against employment discrimination in arbitration (because, in turn, these rights implicate equal status), mandatory arbitration of discrimination claims is incompatible with the effective vindication of these rights.<sup>188</sup>

Notice how this argument differs from existing arguments couched in terms of public policy. Previous objections to the arbitration of discrimination claims have focused on the role of the plaintiff as a private attorney general.<sup>189</sup> These arguments rightly point out that Title VII and other statutes seek to deter invidious discrimination.<sup>190</sup> But emphasizing public policy fails to distinguish rooting out discrimination from other important public policy goals that are thwarted when relegated to arbitration. This emphasis also sidelines how *individuals* are wronged in a distinctive way, and the ways in which fully rectifying those wrongs require access to courts.

Like public policy arguments, my equal-status argument also underscores public aspects of claims of wrongful employment discrimination. But the aspects differ. For reasons already discussed, rather than emphasizing the forward-looking public policy goal of deterring discrimination, my approach focuses on the backward-looking role of public courts in rectifying wrongdoings by reaffirming and broadcasting a person's equal status.<sup>191</sup> In short, effectively vindicating a person's rights against discrimination requires access to courts.

But suppose that someone argues that it is still possible to vindicate a person's rights—even rights against employment discrimination—through arbitration. Consider cases in which plaintiffs prevail on the merits of their wrongful discrimination claims but fail to obtain any relief beyond nominal damages.<sup>192</sup> Many of these plaintiffs, presumably, would gladly trade the public vindication of their equal status in exchange for more robust payments capable of making them

---

187. See discussion *supra* Part II.

188. This argument thus resists the common assumption that substantive rights and the rights to a particular forum are entirely separable. For an example of that assumption, see Estreicher, *supra* note 32, at 1352–53.

189. See, e.g., *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (stating that Congress intended plaintiffs to recover attorney's fees because "individuals injured by racial discrimination act as 'private attorney[s] general, vindicating a policy that Congress considered of the highest priority'" (alteration in original) (internal quotation marks omitted) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968))); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) ("[The Supreme Court] determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances."); Moohr, *supra* note 179, at 426 (stating that the Supreme Court "characterizes individual litigants in employment discrimination cases as 'private attorneys general'" (quoting *Indep. Fed'n of Flight Attendants*, 491 U.S. at 759)).

190. See, e.g., Moohr, *supra* note 179, at 426 ("Individual plaintiffs are Congress's chosen instrument 'to vindicate a policy that Congress considered the highest priority.'" (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978))).

191. See *supra* Part II.

192. See, e.g., *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 475 (6th Cir. 2009).

whole. If, and to the extent that, private arbitration *does* make discrimination claimants better off financially as compared to public adjudication, it seems mistaken to suggest that arbitration cannot effectively vindicate an employee's rights.

Three points. First, the argument about the putative benefits of trading money for the right to public adjudication of disputes proves too much. Employers are prohibited from inserting clauses into their employment agreements that waive employees' substantive and remedial rights against wrongful discrimination, even though current Supreme Court rulings deny that courts must be available to vindicate those rights.<sup>193</sup> The inability to waive antidiscrimination rights and remedies is not optional; even if an employer manages to locate an employee willing to trade away these rights in exchange for, say, higher compensation, the employee will not legally be allowed to waive them. But under the terms of this objection, if a person is willing to trade away rights to a substantive claim, she should be free to do so provided adequate compensation is offered.

Second, once this much is conceded—that there are certain substantive and remedial rights that cannot be alienated *ex ante* by contract—it is an open question whether arbitration clauses effectuate a waiver of these substantive rights in the prohibited way. As I have argued, effective vindication of *substantive* rights against discrimination are distinctively related to access to the *remedial* powers that courts have but arbitration lacks. This is because the substance of those rights implicates one's equal social standing, and courts have features that make them crucial to reaffirm that standing.<sup>194</sup> So predispute waivers of access to courts, even if not worrisome for all substantive rights, *are* worrisome for substantive rights *against discrimination* given how courts are specially situated to vindicate a person's equal status.

Third and finally, even if an employee decides, for whatever reason, that she would rather forego her right to access courts and would prefer arbitration, this option should still be available *after* the dispute arises. There is no inconsistency here. Predispute waivers of rights to access courts, on my view, effectuate a partial and impermissible *ex ante* waiver of the *substantive* rights against discrimination. These waivers are wholesale, meaning that one cannot reaffirm one's equal status *in* the community by an authoritative public institution *of* that community under *any* set of facts that give rise to a dispute. But *ex post* waivers needed to reach settlements are *not* accurately characterized as wholesale waivers.

There are several ways to characterize the asymmetry between *ex ante* and *ex post* waivers. One is to point out that settlement involves an *exercise* of one's rights in response to wrongdoing rather than their wholesale abandonment before wrongdoing arises. Another way to characterize the asymmetry is to point out

---

193. EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCED STATUTES 1 (1997) (“These employee rights [against discrimination] are non-waivable under the federal civil rights laws.”); Estreicher, *supra* note 32, at 1354.

194. *See supra* Part II.

that private rights of action would not serve their empowerment function if individuals were required to pursue their valid claims all the way in order to press them at all. Quite the contrary: prohibiting settlement might well make individuals far less likely to pursue claims, valid and invalid alike. And notice that, during settlement, one waives only the rights with respect to a particular set of allegations. One still retains the substantive right to sue under different sets of factual allegations. So it is misleading to suggest that *ex ante* and *ex post* waivers are symmetrical when they are not.

A final point about the *expressive* asymmetry of *ex ante* versus *ex post* waivers. Recall the Munger Tolles incident. A Munger Tolles employee who insists on arbitrating her sexual harassment claim *after* the harassment occurs accomplishes something different than does an employee required, as a condition of employment, to waive access to courts before any dispute arises. The difference is not merely a matter of the different bargaining positions of the employee *ex post* versus *ex ante* (though that surely matters). The difference is that a mandatory arbitration clause agreed to *ex ante* effectively refuses to acknowledge the public aspects of a person's status as an equal—that is, one's presence and import as a member of a broader political community that extends beyond the walls of the employer. The wholesale, *ex ante* waiver manifests disrespect; this is different from allowing an individual to voluntarily elect to arbitrate in light of a known, actually existing dispute under a specific set of facts, and under conditions when the victim preserves the same substantive and remedial rights going forward.

#### B. REFORMING THE FEDERAL ARBITRATION ACT

Short of a dramatic change of Supreme Court personnel, it is unlikely that the Court will revisit its application of the effective-vindication-of-rights doctrine. Legislative reform seems more likely than doctrinal reform.

Attempts to reform the FAA are not new. Indeed, in the 1990s—in the wake of *Gilmer* and subsequent cases that opened the door to mandatory arbitration of employment discrimination claims—members of the House of Representatives and the Senate proposed bills to amend the FAA and other civil rights statutes. The most prominent effort, introduced in the House and the Senate in 1994, was called the Civil Rights Procedures Protection Act of 1994.<sup>195</sup> This bill and its later versions would have amended the FAA by stipulating that it would not apply “with respect to a claim of unlawful discrimination in employment if such claim arises from discrimination based on race, color, religion, sex, national origin, age, or disability.”<sup>196</sup> The bills also would have amended various federal antidiscrimination statutes to make plain that arbitration would remain available *after* a dispute arose, but that *pre-dispute* waivers of a right to a jury trial could not be a

---

195. H.R. 4981, 103d Cong. (2d Sess. 1994); S. 2405, 103d Cong. (2d Sess. 1994).

196. See Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong. § 9 (1st Sess. 1995).



condition of employment.<sup>197</sup> These bills died in committee, perhaps in part because the Democratic sponsors of the bill failed to persuade any Republicans to cosponsor them.<sup>198</sup> Nevertheless my argument would support renewed efforts to pass legislation along these lines.

More recent bills are far more likely to gain traction due to their bipartisan support and, not unrelatedly, their narrower scope: they focus on claims of sexual harassment. For example, Senator Kirsten Gillibrand has proposed the Ending Forced Arbitration of Sexual Harassment Act of 2017, which stipulates, notwithstanding the FAA, that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.”<sup>199</sup> Along with Gillibrand and other Democrats, cosponsors include Republican Senators Lindsey Graham, Lisa Murkowski, and John Kennedy.<sup>200</sup> To the extent that existing bipartisanship can be leveraged to reform the FAA, this piecemeal legislative reform looks more promising in the near term than encouraging the Supreme Court to revisit its interpretation of federal law.

More extensive modifications to the FAA, of the kind that emerged in the 1990s, remain most justifiable given the arguments pressed in this Article.<sup>201</sup> Carving out sexual harassment claims from the statute is a step in the right direction—though not enough.<sup>202</sup> Sexual harassment claims, to the extent that they represent an affront to a person’s equal status, count as paradigm examples of wrongful discrimination. Indeed, to the extent that claims *beyond* allegations of wrongful discrimination involve, by their nature, an inherent failure to respect a person’s equal status, these claims should also be exempted from the FAA; courts should not be required to enforce clauses mandating arbitration of these claims as though they were like any other contract clauses. Indeed, *ex ante* waiver of these kinds of claims should probably be prohibited across the board. But given political realities, this narrower piece of legislation may be more likely to succeed than broader reform. Sometimes half a loaf is better than none at all.

---

197. See, e.g., H.R. 4981 § 3(c) (amending the ADEA in this way); S. 2405 § 5(c) (ADA); see also Van Engen, *supra* note 179, at 410 (explaining congressional proposals to limit mandatory arbitration imposed by employers).

198. See *Cosponsors: H.R.3748—104th Congress (1995-1996)*, CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/house-bill/3748/cosponsors> [<https://perma.cc/3KF9-GHR8>] (last visited Jan. 28, 2020).

199. S. 2203, 115th Cong. § 2 (1st Sess. 2017).

200. See *Cosponsors: S.2203—115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/2203/cosponsors> [<https://perma.cc/Q2J5-UF6D>] (last visited Jan. 28, 2020).

201. One such modification currently before Congress, the Forced Arbitration Injustice Repeal Act, would, if passed, amend the FAA to broadly “prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes.” H.R. 1423, 116th Cong. § 2 (1st Sess. 2019).

202. E. Tammy Kim, *Uber Should ‘Do the Right Thing’ for All of Its Workers*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/opinion/uber-arbitration-sexual-harassment.html> (arguing that “the Senate bill solely exempting sexual harassment cases from forced arbitration is inadequate”).

## CONCLUSION

This Article has tried to offer a new, status-based argument against mandatory arbitration of wrongful discrimination claims, grounded in a view about the philosophical nature of these claims. Wrongful discrimination distinctively fails to respect a person's status as an equal within a broader political community because of one's membership in a protected group. Protecting a person's equal status has a special claim to protection by the community, so fully vindicating that status requires its public reaffirmation by an authoritative *public* institution. Private arbitration cannot play this status-affirming role. And the secrecy of arbitration prevents a litigant from broadcasting this reaffirmation across a broad range of social and institutional settings.

This argument matters. Existing arguments against mandatory arbitration of claims of discrimination are inconclusive at best, partly because they either rest on contestable and difficult-to-substantiate empirical assessments, and partly because they are unpersuasive on their own terms. But the status-based argument here is wholly independent of these prior criticisms. And it not only justifies the Supreme Court's revisiting of its FAA jurisprudence, it also justifies legislative reform of the FAA that seeks to carve out certain substantive claims from under its purview. Specifically, claims that are grounded in respect for a person's equal status—of which claims of wrongful discrimination are particularly salient—should not be subjected to mandatory arbitration under the FAA. Indeed, if the foregoing analysis is correct, then access to courts for this type of equal-status-based claim should probably not be *ex ante* waivable at all.