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### Looking South: Toward Principled Protection of U.S. Workers

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# **LOOKING SOUTH: TOWARD PRINCIPLED PROTECTION OF U.S. WORKERS**

*Ann C. McGinley\**

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## I. INTRODUCTION: INEQUALITY: A COMPELLING TIME TO ADOPT LATIN AMERICAN PRINCIPLES

COVID-19 has disproportionately affected the health and finances of America’s most vulnerable workers who labored in hospitals, grocery stores, meat factories, and public transportation systems throughout the deadliest months of the virus.<sup>1</sup> Disproportionately Black and Latinx, “essential” workers and their families have borne the brunt of COVID-19’s adverse health effects.<sup>2</sup>

While COVID-19 has worsened the situation of vulnerable workers and their families, race- and class-based inequalities have simmered beneath the surface for a long time.<sup>3</sup> U.S. blue-collar workers have lost significant ground for decades relative to their upper-middle-class counterparts, fueling unsettling political divisions.<sup>4</sup> Moreover, predictions abound that post-

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<sup>1</sup> *The Plight of Essential Workers During the COVID-19 Pandemic*, THE LANCET (May 23, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7241973/>.

<sup>2</sup> *Id.* Moreover, during the pandemic’s rage in the U.S., there was an uprising of persons of all races and classes in response to police abuse of citizens of color, in particular the deaths of Breonna Taylor and George Floyd at the hands of the police. *See Protests Erupt in US After the Deaths of George Floyd and Breonna Taylor—in Pictures*, THE GUARDIAN (May 30, 2020), <https://www.theguardian.com/us-news/gallery/2020/may/29/george-floyd-breonna-taylor-protests-photos>.

<sup>3</sup> Delphine Strauss, *Male Blue-Collar Workers ‘Twice as Likely to Die from COVID-19,’* FIN. TIMES (May 11, 2020), <https://www.ft.com/content/fb8f0902-c36b-4ae6-85ad-1adc5ea197bb>.

<sup>4</sup> *See* Ann C. McGinley & David McClure, *We Are All Contingent: Fighting Vulnerability in the US Workforce*, in *VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK* 259 (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018).

COVID-19 the gap between blue-collar and white-collar workers' incomes and wealth will be even wider.<sup>5</sup>

Although law alone cannot remedy economic inequalities in the U.S. that have resulted from years of decline in the quality of American jobs,<sup>6</sup> labor and employment law<sup>7</sup> should play an important role in protecting vulnerable workers from abuse and, simultaneously, allow a flourishing U.S. economy to benefit all members of society. Such protection would require a rebalancing of the rights accorded to employees vis a vis those enjoyed by employers as a matter of right.

In *Principled Labor Law: U.S. Labor Law Through a Latin American Method*,<sup>8</sup> published before the outbreak of the pandemic, authors Sergio Gamonal Contreras & Cesar F. Rosado Marzán argue that U.S. courts should follow the Latin American method of applying long-held jurisprudential principles to interpret labor and employment law. The authors' baseline is clear: applying these principles to U.S. employment law will better the employment opportunities and stability of workers who suffer from unequal bargaining power and the ever-present employer-oriented employment-at-will doctrine.<sup>9</sup>

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<sup>5</sup> Bharat Ramamurti, *The Shift Toward Remote Work Could Leave Blue-Collar Workers Behind*, CNN (last updated Sept. 16, 2020), <https://www.cnn.com/2020/09/16/perspectives/remote-work-blue-collar/index.html> (predicting that after the pandemic a larger percentage of white collar workers will continue to work at least part of the time from home while blue-collar workers, who are disproportionately of color and female, will continue to work at the worksite; this change will increase disparities in both incomes and wealth); see also Warren Slams \$5.2 Million Bonus After Nursing-Home COVID Deaths, BLOOMBERG L. (Jan. 28, 2021, 12:01 PM), [https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQ1ZOVyIsImkljoiMDAwMDAxNzctNDlhMi1kYzIxLWFMZjctNjhhNzJhNTgwMDAxIiwic2lnIjoiaHdTSTV6dVJzSGt3THUyd1UremNpbG9xSjJJPSIsInRpbWUiOiIxNjExODY4MzE4IiwidXVpZCI6ImYwV1h3bmFZbXBFNHdrT3czZ25nMVE9PXIzeGM0T0tibC8zVzV3c0c5WGtwc3c9PSIsInYiOiIxIn0=?usertype=External&bwid=00000177-49a2-dc91-aff7-69a72a580001&qid=7049989&cti=LSCH&uc=1320028205&et=NEWSLETTER&emc=bcvbw\\_nl%3A3&source=newsletter&item=body-link&region=text-section](https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQ1ZOVyIsImkljoiMDAwMDAxNzctNDlhMi1kYzIxLWFMZjctNjhhNzJhNTgwMDAxIiwic2lnIjoiaHdTSTV6dVJzSGt3THUyd1UremNpbG9xSjJJPSIsInRpbWUiOiIxNjExODY4MzE4IiwidXVpZCI6ImYwV1h3bmFZbXBFNHdrT3czZ25nMVE9PXIzeGM0T0tibC8zVzV3c0c5WGtwc3c9PSIsInYiOiIxIn0=?usertype=External&bwid=00000177-49a2-dc91-aff7-69a72a580001&qid=7049989&cti=LSCH&uc=1320028205&et=NEWSLETTER&emc=bcvbw_nl%3A3&source=newsletter&item=body-link&region=text-section) (explaining that Senator Elizabeth Warren was furious when she found out that Cares Act funding was used by Genesis, a company that runs nursing homes, in part to pay a \$5.2 million bonus to its CEO who resigned within two months of the payment). The differential between what nursing aides and assistants and the CEO of the health care company earn is significant and increased, it appears, because of COVID-19.

<sup>6</sup> See McGinley & McClure, *supra* note 4, at 259–60.

<sup>7</sup> When I use the terms “labor law” and “employment law,” I refer, as North American legal scholars normally do, to “labor law” as the law that governs unionization, concerted action, and collective bargaining. “Employment law” refers to the broader group of laws and doctrines that apply to the employment relationship.

<sup>8</sup> SERGIO GAMONAL CONTRERAS & CÉSAR F. ROSADO MARZÁN, *PRINCIPLED LABOR LAW: U.S. LABOR LAW THROUGH A LATIN AMERICAN METHOD* (2019).

<sup>9</sup> The employment-at-will doctrine is a judicial doctrine prevalent in U.S. law. It holds that absent a contractual limitation or a public policy or statutory exception, it is permissible to fire employees for a good reason, no reason, or even a bad reason (that is not made illegal such as illegal discrimination). Only Montana, Puerto Rico and the Virgin Islands have abrogated the doctrine through enactment of statutes. See MONT. CODE ANN. §§ 39-2-901–15 (1987); P.R. LAWS ANN. tit. 29 §§ 185a–m (2010); U.S. Virgin

This is not a radical book; it merely recognizes reality—the unequal positions of individual non-unionized employees and their employers—and offers a partial solution that would improve the plight of vulnerable workers. The authors explain that European law has already accepted many of the ideas supporting these principles but that U.S. employment law has lagged behind in recognizing employee vulnerability and protecting employee rights. Thus, they argue, applying Latin American principles to U.S. law, if successful, would demonstrate that even the most labor-unfriendly countries (e.g., the U.S.) can benefit their employees simply by adopting these jurisprudential principles.<sup>10</sup>

Labor law principles, as defined by the authors, are “guidelines that inform some norms and directly or indirectly inspire a series of solutions [to cases], so that they promote and channel the adoption of new norms, guide the interpretation of existing ones, and resolve unforeseen cases and controversies.”<sup>11</sup> In essence, these principles operate as a set of interpretive tools similar to the canons of construction for statutory interpretation in American jurisprudence, except that they apply to the interpretation of contractual relationships as well as to statutes, and also relate specifically to labor and employment relations and law.<sup>12</sup> The authors emphasize that although these principles are admittedly pro-employee, application of the principles does not guarantee that the employee wins a dispute with the employer. Rather, the “principles exist only to aid the adjudicator when he or she confronts an interpretation quandary” with respect to employee status, right to certain wages, waiver of rights to a class action, etc.<sup>13</sup>

While *Principled Labor Law* was published before the outbreak of the global pandemic, and its topic was important and timely when it came out in 2019, it is even more crucial today to consider the proposed reforms offered by the book’s authors because the pandemic has not only revealed deep

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Islands Wrongful Discharge Act, 24 V.I. Code Ann. tit. 24, § 76. For an analysis of the difference between the Puerto Rican law and that of Montana, see Jorge M. Farinacci-Férens, *The Search for a Wrongful Dismissal Statute: A Look at Puerto Rico’s Act No. 80 as a Potential Starting Point*, 17 EMP. RTS. & EMP. POL’Y J. 125 (2013) (describing the Puerto Rican law, which includes not only just cause protections but also presumptions that are protective of employees).

<sup>10</sup> GAMONAL & ROSADO, *supra* note 8, at 5–6.

<sup>11</sup> *Id.* at 9, quoting AMÉRICO PLÁ RODRÍGUEZ, *LOS PRINCIPIOS DEL DERECHO DEL TRABAJO* 14 (3d. ed. 1998).

<sup>12</sup> GAMONAL & ROSADO, *supra* note 8, at 9; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (explaining that each canon of construction has a counter that would point in the opposite direction). The canons of construction have experienced something of a revival since the late 20th Century. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992) (arguing that Karl Llewellyn’s “interesting” critique unfortunately led to the derailment of discussion of the canons of construction).

<sup>13</sup> GAMONAL & ROSADO, *supra* note 8, at 17.

fissures in our system of pre-existing inequalities, both financial and racial, but it has also exacerbated those inequalities.

Gamonal and Rosado focus on the Thirteenth Amendment,<sup>14</sup> the National Labor Relations Act,<sup>15</sup> and the Fair Labor Standards Act<sup>16</sup> to demonstrate that the Latin American principles they advocate already have a sound basis in U.S. law, but they also argue that these principles should go further in their application to U.S. labor and employment law. Some of the principles they support underlie the passage of the Thirteenth Amendment's ban on slavery and involuntary servitude and the enactment of 20th Century labor-related statutory provisions. However, the *continuity of employment* principle, which protects employees from discharge absent employer proof of just cause, directly contradicts U.S. common law.

This article discusses the book's arguments with reference to interpretation of U.S. statutory and common law and goes a step further. It imagines how consciously applying the principles described by Gamonal and Rosado to U.S. anti-discrimination law could provide further protection to U.S. employees covered by civil rights law. This analysis focuses on Title VII of the 1964 Civil Rights Act,<sup>17</sup> but also refers to other civil rights laws such as Title I of the Americans with Disabilities Act,<sup>18</sup> and the Age Discrimination in Employment Act.<sup>19</sup> These laws openly create exceptions to the common law employment-at-will doctrine, and therefore, there is a strong argument that in addition to the National Labor Relations Act, which permits unionization and collective bargaining agreements that require an employer to prove "just cause" to discharge an employee, American anti-discrimination law would appropriately benefit from the principles identified in Gamonal and Rosado's book.

Nonetheless, even though U.S. anti-discrimination law is apparently grounded in all of the principles Gamonal and Rosado identify, the intrusion of the employment-at-will doctrine, combined with the concept of employers' freedom to protect their businesses and an overblown sense of a

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<sup>14</sup> The Thirteenth Amendment bans slavery and involuntary servitude and has been interpreted by labor scholars as a potential source of rights for paid labor relationships. *See, e.g.*, Rebecca E. Zietlow, *The Maryland Constitutional Law Schmooze: Conclusion: The Political Thirteenth Amendment*, 71 MD. L. REV. 283, 290 (2011) (arguing that Congress has the power to enforce the Thirteenth Amendment through Article 2 to protect the rights of workers and racial minorities but has refused to do so); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438–40 (1989) (arguing that the Thirteenth Amendment went well beyond abolishing slavery; the debates over the amendment demonstrate that ratifiers envisioned a much broader interpretation of free labor).

<sup>15</sup> 29 U.S.C. §§ 151–169 (1947).

<sup>16</sup> 29 U.S.C. § 203 (2018).

<sup>17</sup> 42 U.S.C. § 2000e-1, *et seq.* (1991).

<sup>18</sup> 42 U.S.C. § 12101, *et seq.* (2008).

<sup>19</sup> 29 U.S.C. §§ 621–634 (2008).

publicly-owned entity's responsibility to maximize profits for its stockholders, has done serious harm to the courts' interpretations of the anti-discrimination statutes.<sup>20</sup>

Part II analyzes the recommendations of Gamonal and Rosado for applying the Latin American principles to U.S. labor and employment law. Part III builds upon Gamonal and Rosado's theory, using the Latin American principles they identify to interpret U.S. employment discrimination law. It demonstrates that these principles, as a theoretical matter, should apply to U.S. employment discrimination law to protect employees further from illegal discrimination. It also identifies structural and political problems related to the adoption of the Latin American principles to U.S. jurisprudence and offers solutions to the barriers created by these problems.

Finally, the article concludes that U.S. labor and employment law should protect workers from potential abuse caused by power differentials between workers and employers, and that, adapted to U.S. law, especially to statutes whose purpose is to protect workers' rights, Latin American principles could effectively give judges interpretive tools that would make application of the law more consistent with and protective of individual rights. Even if federal courts and Congress do not act to protect employees' rights, many state legislatures and courts should adopt these principles.

## II. LATIN AMERICAN PRINCIPLES EXPLAINED

Gamonal and Rosado explain that many Latin American countries have established principles whose purpose is to protect workers from abuse and to govern interpretation of labor and employment laws. They specifically focus on Argentina and Brazil, two of the largest countries in the area, and Chile and Uruguay, much smaller countries but among the better performing economies of the region.<sup>21</sup> The well-established principles the authors identify are: (1) The *protective principle*;<sup>22</sup> (2) The *primacy of reality principle*;<sup>23</sup> (3) The *non-waiver principle*;<sup>24</sup> and (4) The *continuity principle*.<sup>25</sup> As the authors note, these principles are interrelated; they work

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<sup>20</sup> See Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1447 (1996) (arguing for a federal law that would eliminate the employment-at-will doctrine).

<sup>21</sup> GAMONAL & ROSADO, *supra* note 8, at 27.

<sup>22</sup> *Id.* at ch. 2, 31–62.

<sup>23</sup> *Id.* at ch. 3, 63–92.

<sup>24</sup> *Id.* at ch. 4, 93–118.

<sup>25</sup> *Id.* at ch. 5, 119–44.

together and reinforce one another: “protection logically requires primacy of reality, nonwaiver, and continuity.”<sup>26</sup>

#### A. *The Protective Principle*

Gamonal and Rosado quote Uruguayan legal scholar Óscar Ermida who stated that the *raison d’être* of labor law is to protect the worker.<sup>27</sup> They explain that employers who have absolute power to set the terms and conditions of employment can subordinate employees, depriving them of autonomy and dignity and making them “close to involuntary servants.”<sup>28</sup> Thus, Gamonal and Rosado argue, the law needs to rebalance the asymmetry of power to safeguard the employees’ human dignity and society’s moral interests.<sup>29</sup>

The *protective principle* assumes that the purpose of labor law is to equalize the power differential between employee and employer. This principle emerges from the documents of the International Labor Organization (ILO) and other international human rights agreements that were negotiated internationally post-World Wars I and II.<sup>30</sup> The universal protective principle has led to the legal rule in Latin America *in dubio pro operario*,<sup>31</sup> which means that when the meaning of the law is ambiguous, the judge should interpret *the law* in favor of the worker. As Gamonal and Rosado explain, this legal rule does not mean that the employee always wins. Nor is it ordinarily used as the decisive criterion in determining how to apply the law, but it serves as a supporting argument that calls for labor courts and other adjudicators to take a labor-protective role.<sup>32</sup>

Gamonal and Rosado argue that the concepts underlying the protective principle are not limited to European and Latin American Labor Law. Rather, they note, both the Thirteenth Amendment to the U.S. Constitution and New Deal laws—particularly the National Labor Relations Act<sup>33</sup> and the Fair Labor Standards Act<sup>34</sup>—are grounded in the concept of labor protection.<sup>35</sup> The Thirteenth Amendment itself is not limited to abolishing slavery,<sup>36</sup> but

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<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 31.

<sup>28</sup> *Id.* at 31–32.

<sup>29</sup> *Id.* at 32.

<sup>30</sup> *Id.* at 34.

<sup>31</sup> *Id.* at 33.

<sup>32</sup> *Id.* at 41.

<sup>33</sup> 29 U.S.C. §§ 151–169 (1947).

<sup>34</sup> 29 U.S.C. § 203 (2018).

<sup>35</sup> GAMONAL & ROSADO, *supra* note 8, at 41–52.

<sup>36</sup> *See* Vandervelde, *supra* note 14, at 438–40.



also protects labor rights beyond elimination of slavery and gives Congress the power to enforce those rights.<sup>37</sup> And, at least when the NLRA was first enacted, one of its underlying principles was to protect workers. Gamonal and Rosado acknowledge that the passage of the Taft Hartley Act of 1947<sup>38</sup> amended the NLRA to grant more power to employers and limit workers' rights, but they argue that even after the amendments, the underlying protective principles of the NLRA remained. Many scholars argue, and Gamonal and Rosado tend to agree, that the NLRA had tremendous potential in creating labor rights, and that courts have deradicalized the NLRA in their interpretation of the Act.<sup>39</sup> Moreover, Gamonal and Rosado argue that the NLRA "has the potential to be more protective if constitutionalized through the Thirteenth Amendment of the U.S. Constitution."<sup>40</sup> As to the FLSA, the authors argue that Congress sought to protect workers by regulating minimum wage standards and maximum hours, and by creating bars to child labor.<sup>41</sup> And, they note that for nearly seventy years after the FLSA's passage, it was interpreted with the remedial purposes of the statute in mind—similar to the *in dubio pro operario* principle in Latin America.<sup>42</sup> Unfortunately, the authors argue, the U.S. Supreme Court recently "almost summarily ended the doctrine of giving the FLSA a broad reading" in *Encino Motorcars, LLC v. Navarro*.<sup>43</sup> This case, which contradicts the liberal interpretation of the remedial statute to protect workers' rights, undermines the protective nature of the statute, and if the legal rule *in dubio pro operario* were in operation, it would be considered improper.

### B. The Primacy of Reality Principle

The *primacy of reality principle* posits that when there is a conflict between an employer and a worker concerning the terms of an employment relationship, it is the *facts* on the ground that matter. Facts take precedence over language in the texts, documents, and agreements. Underlying this principle is the acknowledgment that employment contracts are not typical

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<sup>37</sup> GAMONAL & ROSADO, *supra* note 8, at 42 n.48 (citing Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 448 (2012)).

<sup>38</sup> GAMONAL & ROSADO, *supra* note 8, at 52–53.

<sup>39</sup> See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265 (1978) (arguing that when enacted the Wagner Act was a radical statute but subsequent judicial interpretation deradicalized the statute).

<sup>40</sup> GAMONAL & ROSADO, *supra* note 8, at 56.

<sup>41</sup> *Id.* at 57–58.

<sup>42</sup> *Id.* at 59.

<sup>43</sup> *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) (noting that the statute did not explicitly call for a broad reading of the law and stating that the law deserved a "fair" reading, rather than a "liberal" reading).

contracts. Instead, they create relationships, and the contract terms are in “constant flux and negotiation by the parties thorough principal requests or demands and agent performances.”<sup>44</sup> Thus, adjudicators determining the terms of the contract between an employer and a worker must consider the parties’ post-formation conduct and should grant preference to parties’ conduct during the employment relationship over what they may have agreed to in writing or verbally.<sup>45</sup> Like the protective principle, the primacy of reality principle relies on the *in dubio pro operario* preference which, in this context, means that terms in the agreement that are favorable to the worker will be given weight if there is doubt about the meaning of the agreement.

This principle is often invoked when there is a debate as to whether the worker is an employee or an independent contractor.<sup>46</sup> In essence, this principle rejects formalist definitions and interpretations of the parties’ relationship. Instead, reality and facts matter and should take precedence when interpreting the law. Combined with the protective and the continuity principles, this principle favors employment over independent contractor relationships and presumes that the relationships are for an indefinite period of time unless proven otherwise.

Gamonal and Rosado explain that U.S. law often recognizes the primacy of reality over formality as well. For example, an employer may not incorrectly identify an employee as an independent contractor in a written contract in order to avoid the obligations employers have to employees.<sup>47</sup> The authors go through a complicated explanation of the FLSA, NLRA, and U.S. common law definitions of “employee” versus “independent contractor,” demonstrating that a mere label of “employee” or “independent contractor” does not govern relationships in the U.S. However, they note that even the most worker-friendly definition may be interpreted variously depending on the underlying politics of the adjudicators (e.g., executive agencies) who must determine whether an individual is an employee or an independent contractor. This means that as the President’s party changes, the determination by executive agencies may also change. If, however, the primacy of reality principle were joined with the protective principle, the agencies would likely reach more consistent, worker-protective results.<sup>48</sup>

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<sup>44</sup> GAMONAL & ROSADO, *supra* note 8, at 66.

<sup>45</sup> *Id.* at 67 n.18.

<sup>46</sup> *Id.* at 68.

<sup>47</sup> *Id.* at 67–68.

<sup>48</sup> In fact, in addition to the definitions of “employee” under different federal laws, state laws may have even different definitions. For example, the California Supreme Court has created the “ABC” rule, which presumes that a worker is an employee. A worker is not an independent contractor under California law unless the employer proves that the worker is free of employer control, engaged in a separate line of work, and has his own business. *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018). The California legislature enacted this decision into statute. In 2021, the California Supreme Court held that

### C. *The Non-Waiver Principle*

The *non-waiver principle* makes rights granted to workers by the law non-waivable by contract with an employer. The law establishes a “floor of rights that workers cannot waive.”<sup>49</sup> This principle derives from the inequality of bargaining power of employers and workers and the public need to enforce protective labor legislation. If an individual worker were able to waive his or her legal rights, employers would pressure applicants and workers to do so, using their superior bargaining power. Clearly, as in Latin America, where there is protective legislation in the U.S., the employer may not require an employee to waive the protection, but as Gamonal and Rosado explain, there is a glaring problem in the U.S. The Supreme Court interprets the Federal Arbitration Act<sup>50</sup> to permit employers to enforce pre-dispute arbitration clauses, which often deprives employees of crucial procedural rights that affect their substantive employment rights. As the authors explain, a simple “principle” would not overcome the Supreme Court’s interpretation of the FAA. Nonetheless, the question remains: Had the principle existed at the time of the first FAA arbitration in employment case, would the Supreme Court have reconsidered its broad interpretation of the FAA as it constricted employee rights? In essence, a principle whose purpose is to rebalance the inequalities of bargaining power would most likely not permit the enforcement of arbitration clauses negotiated with employers or, more commonly, imposed by the employer before the dispute arises with an employee.

Countless legal academics in the U.S. have criticized the Court’s interpretation of the FAA as applying to these contracts and have demonstrated that rights of employees are distinctly disadvantaged by application of these contracts.<sup>51</sup> While the Court distinguishes between

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this test will be applied retroactively. But in 2020, voters in California had overturned this rule with reference to ride-hailing and delivery workers, preserving their independent contractor status and setting up a wage schedule for them. See Jon Steingart, *Calif. High Court Says Dynamex ABC Test Is Retroactive*, LAW360 (Jan. 14, 2021, 6:51 PM), <https://www.law360.com/articles/1345191/calif-high-court-says-dynamex-abc-test-is-retroactive>; *Vazquez v. Jan-Pro Franchising Int’l, Inc.*, 478 P.3d 1207 (Cal. 2021).

<sup>49</sup> GAMONAL & ROSADO, *supra* note 8, at 95.

<sup>50</sup> 9 U.S.C. § 1.

<sup>51</sup> See, e.g., Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259 (1991) (arguing that Section 1 of the FAA should be interpreted broadly to protect all employees); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIA. L. REV. 831, 832 (2002) (explaining that the U.S. stands alone in enforcing pre-dispute mandatory arbitration in the employment context and arguing that such practices should be banned); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310–14 (2015) (demonstrating that mandatory pre-dispute arbitration clauses are depriving workers of substantive rights); Mark D. Gough, *The High Costs of an*

waivers of substantive rights and waivers of procedural safeguards provided by a federal court forum, these academics have convincingly demonstrated that mandatory enforcement of pre-dispute arbitration clauses does harm and even deprives employees' of their substantive civil rights.<sup>52</sup> Thus, a clear non-waiver in U.S. law, applied to pre-dispute arbitration provisions should be enacted into law to protect employees.

#### D. *The Continuity Principle*

The *continuity principle*, which is also referred to as employment "stability" or "permanence," means that jurists in Latin America presume that employment contracts have an indefinite duration.<sup>53</sup> The authors explain that this principle, which is at odds with the U.S. employment-at-will doctrine, means three things in Latin American jurisprudence: (A) The employer has the burden to prove that it had just cause to discharge an employee; (B) Despite changes to contractual terms or to the parties to a contract (e.g., successor corporations acquiring the business), judges have the power to subsequently bind employers to the contract terms; and (C) Judges have the power to reform precarious contracts, under certain conditions, to form more stable, permanent contracts.<sup>54</sup> These reformatations, however, are not to produce equity between the parties but rather to assure that the contract is legally sound.

Of the principles identified by Gamonal and Rosado, continuity is the least embedded in U.S. law. As Gamonal and Rosado point out, the employment-at-will doctrine is not labor law.<sup>55</sup> It emerges from master-servant law, not from the concept of worker protection that is at the core of labor law.<sup>56</sup> The employment-at-will doctrine, which permits employers to fire employees, absent a contract to the contrary, for a good reason, a bad reason, or no reason at all, governs the employment of most U.S. workers. Only one state—Montana—and two U.S. territories—Puerto Rico and the

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*Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 112 (2014) (using an empirical analysis and controlling for type of case, size of employer, procedural mechanisms, etc. the author finds that "outcomes in arbitration are starkly inferior to outcomes in litigation"); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5, 8–9 (2011); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 47–51 (2003) (finding disparities between award amounts and win rates in arbitration and litigation for lower-pay employees).

<sup>52</sup> See, e.g., Jean Sternlight, *Disarming Employees*, *supra* note 51, at 1314.

<sup>53</sup> GAMONAL & ROSADO, *supra* note 8, at 119.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 138.

<sup>56</sup> *Id.*

Virgin Islands—require an employer to demonstrate just cause before firing an employee.<sup>57</sup> The NLRA permits unionized employees to enter into collective bargaining agreements, which commonly contain just cause requirements with labor arbitrators determining in individual cases whether the employer has proved just cause. But unionization in private industries represents only 7.1 percent of the working population in the U.S.<sup>58</sup> Public employees often have just cause protections and represent the bulk of U.S. workers who are not employed at will, but even in the public section only 37.2 percent of the workers are unionized.<sup>59</sup> The lack of workplace stability in the U.S., then, differs sharply from that found in the Latin American countries that Gamonal and Rosado discuss.

Even more, a new corporation's successor liability to abide by the previous employer's collective bargaining obligations with the union is limited in U.S. law to the situation where the new employer is a "clear successor," a test that has varied over the years depending on the executive in power and the composition of the National Labor Relations Board. Moreover, in the vast majority of U.S. cases, although judges may conclude that individuals who are termed "independent contractors" are actually employees under the labor laws and thus have certain rights reserved for employees, they do not rewrite contracts between companies and workers who are true independent contractors. Although the other principles discussed would help protect workers, without a continuity principle, U.S. workers are still at a significant disadvantage.

#### *E. Translating Latin American Principles to U.S. Law*

One difficulty with Gamonal and Rosado's approach is that the U.S. and Latin America have different legal histories and systems. While the Latin American countries are more similar to Continental Europe in that they have country-wide, code-based legal systems, the U.S., with the exception of the

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<sup>57</sup> MONT. CODE ANN. §§ 39-2-901 to 915; P.R. LAWS ANN. tit. 29, §§ 185a–m (2010); U.S. Virgin Islands Wrongful Discharge Act, V.I. CODE ANN. tit. 24, § 76.

<sup>58</sup> In 2019, 7.1% of private sector employees and 37.2% of public sector employees were represented by a union. In total, employees represented by a union equaled 11.2% of employees in the combined public and private sectors. Percentages of employees who were members of a union are even lower. See Heidi Shierholz, *The Number of Workers Represented by a Union Held Steady in 2019, While Union Membership Fell*, ECON. POL'Y INST. (Jan. 22, 2020), <https://www.epi.org/publication/2019-union-membership-data/#:~:text=Union%20coverage%20by%20sector%2C%20demographic,from%207.2%25%20to%207.1%25>.

<sup>59</sup> *Id.*

State of Louisiana, inherited its legal system from English common law.<sup>60</sup> Moreover, unlike in Latin America where the federal governments have labor codes that dictate the rights of workers and employers, U.S. labor and employment law is governed in large part by state common and statutory law and also by federal statutes that guarantee minimum wages, maximum hours, collective bargaining rights, and health and safety standards as well as federal civil rights anti-discrimination statutes.

Some public employees (but not private employees) in the U.S. have employment rights secured by the U.S. Constitution, whereas in Chile, for example, employees have rights based in the Chilean constitution not to suffer certain forms of discrimination even in privately-owned workplaces.<sup>61</sup> This divergence of systems complicates the translation of Latin American principles to U.S. labor and employment law. This is especially true given the U.S. employment-at-will doctrine that is the governing norm to which all the statutory law (federal and state) is only a partial exception.

The question then becomes: What U.S. law should be subject to the principles articulated by Gamonal and Rosado: common law, state statutes, federal statutes? All of the above? Moreover, Gamonal and Rosado argue that the U.S. should “constitutionalize” some of the principles by using the Thirteenth Amendment. Would doing so require Congress to pass legislation pursuant to the Thirteenth Amendment? If so, what form should this legislation take?

Furthermore, although Gamonal and Rosado discuss the U.S. equivalents (and lack thereof) in American labor law to the principles that apply in Latin America, there are other significant similarities between the labor law principles in Latin American law and U.S. law generally that the authors do not discuss. Although these similarities do not appear in U.S. labor law, they exist, at least in theory, in other areas of U.S. law and suggest that the labor law principles for judicial interpretation have precedent in U.S. law.

Like courts in Latin America, U.S. courts use interpretive rules, presumptions, or procedural tools to break ties when in doubt of how a case should be resolved. Examples include: (1) statutory canons of construction; (2) construction of ambiguous contract provisions against the drafter; (3) the rule of lenity, a canon of construction in criminal law that requires courts to construe any ambiguity in favor of the defendant;<sup>62</sup> (4) a rule that remedial statutes, such as civil rights statutes, should be construed liberally in favor of those protected by the laws; (5) a number of rules of deference to

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<sup>60</sup> See *The Common Law and Civil Law Traditions*, BERKELEY L. 1–4 (2017), <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf>.

<sup>61</sup> Ann C. McGinley, *Gender, Law, and Culture in the Legal Workplace: A Chilean Case Study*, 60 ARIZ. L. REV. 675, 687–89 (2018).

<sup>62</sup> See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

administrative agencies; and (6) shifting of burdens of production and persuasion. These tools may provide appropriate comparisons with the principles articulated in Latin American labor law and support the concept that it is not a long stretch to argue that at least some of the Latin American principles should apply to U.S. labor and employment law.

## 1. Statutory Canons of Construction

### *a. In General*<sup>63</sup>

American courts have a number of tiebreaking rules and maxims that aid in statutory interpretation. The Canons of Statutory Construction are perhaps the most important of these tools and the most similar to the principles that Latin American judges consult when interpreting labor and employment statutes. One important difference, as we shall see, is that the Latin American principles derive from an interest in protecting employee rights, whereas the U.S. canons apply more generally to statutory interpretation and have as their stated purpose the neutral construction of statutes. The irony is that while there is debate<sup>64</sup> among U.S. academics about the value of the canons of construction in statutory interpretation, there is no question that U.S. courts rely heavily on them.<sup>65</sup> Such heavy use of the canons of construction among U.S. judges would likely make the judges comfortable with adopting the judicial principles identified by Gamonal and Rosado.

Legal scholars in the U.S. have launched a number of critiques and defenses of the canons. Karl Llewellyn was one of the first academics to criticize the canons, demonstrating that many canons of construction contradict one another.<sup>66</sup> Other legal realists and critical theorists followed.<sup>67</sup> Some legal academics have defended the canons as providing legal stability and allowing for the dynamic evolution of statutes.<sup>68</sup> At the very least, one defender argues, the canons provide a sort of checklist for judges engaging

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<sup>63</sup> For this section of the article, I am indebted to WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 700–09 (6th ed. 2014).

<sup>64</sup> *Id.* at 704–08.

<sup>65</sup> *Statutory Interpretation: Theories, Tools, and Trends*, EVERYCRSREPORT.COM (Apr. 5, 2018), [https://www.everycrsreport.com/reports/R45153.html#\\_Toc510711652](https://www.everycrsreport.com/reports/R45153.html#_Toc510711652).

<sup>66</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (noting, for example, that the canon advocating the liberal construction of remedial statutes contradicts the canon that states that statutes in derogation of common law should not be extended by construction).

<sup>67</sup> ESKRIDGE, *supra* note 63, at 704–06.

<sup>68</sup> *Id.* at 707.

in statutory interpretation.<sup>69</sup> An interesting empirical study by James Brudney and Corey Ditslear<sup>70</sup> found that: (1) the more conservative Rehnquist Court used the canons more frequently than the Burger Court; (2) both liberals and conservatives use the canons to justify ideological results; and (3) since 1988, however, the canons have been used to justify conservative results much more frequently whereas the dissents in a subset of these cases refer to legislative history to justify their more liberal arguments.<sup>71</sup> The authors concluded that although the canons are useful to encourage consistency in areas where judges have little expertise, their evidence suggests that the malleability of the canons allow judges to manipulate them to reach results they desire.<sup>72</sup>

Given that the Latin American principles have the clear purpose of reducing the effects of the power differential between employers and employees, their use to reach fairer results is less problematic than the manipulation that some U.S. jurists engage in when using the canons, which are supposed to be applied neutrally, to interpret statutes. As described by Gamonal and Rosado, the Latin American principles are used only as tiebreakers when a statute's meaning is difficult to decipher.<sup>73</sup>

*b. The Rule of Lenity*

The rule of lenity is a statutory canon that encourages strict construction of penal laws. It applies most frequently to criminal statutes, but it also applies to some civil statutes, such as civil forfeiture, that punish the defendant. The rationales for the rule of lenity are to provide fair notice to the defendant who may lose liberty or property and the view that only Congress, a body that is more representative of the population, and not the courts, whose judges are nominated by the President and confirmed by the Senate, should have the power to dictate the criminal law.<sup>74</sup>

*c. Liberal Construction of Remedial Statutes*

A statutory canon that applies to employment and labor law is the rule that remedial statutes should be liberally construed. As we shall see below, this canon has been used in interpreting Title VII and other employment

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<sup>69</sup> *Id.* at 704–07.

<sup>70</sup> James Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

<sup>71</sup> *Id.* at 5–6.

<sup>72</sup> See ESKRIDGE, *supra* note 63, at 708.

<sup>73</sup> See Gamonal & Rosado, *supra* note 8, at 32.

<sup>74</sup> ESKRIDGE, *supra* note 63, at 651–54.



discrimination statutes, but it has also been avoided or disregarded, especially more recently.

*d. Construction of Ambiguous Contracts*

Contract law incorporates a principle that when in doubt, “if language supplied by one party is reasonably susceptible to two different interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred.”<sup>75</sup> In other words, when all other interpretive methods have been exhausted and ambiguity of terms of the agreement remains, the interpreter of a contract should construe the meaning of the terms against the drafter of the agreement. This rule creates a rebuttable presumption, *contra proferentem* in Latin,<sup>76</sup> and is used most frequently when there is an inequality in bargaining power between the parties and/or the language is drafted by an attorney.<sup>77</sup>

The Restatement (Second) of Contracts states: “In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”<sup>78</sup> The rationale for this rule is that the parties drafting a contract will more likely protect their own interests over those of the other parties. Moreover, a party drafting a contract may leave a provision intentionally vague in order to select its own interpretation later.<sup>79</sup> While the rule is applicable in all situations that fit this description, in reality, it is used more frequently to protect the party with less bargaining power and when a more powerful party attempts to enforce form contracts on a less powerful party.<sup>80</sup>

This general rule used to interpret U.S. contracts resembles the Latin American *in dubio pro operario* preference which, when applied to the interpretation of an employment contract, generally means that terms in the agreement that are favorable to the worker will be given weight if there is doubt about the meaning of the agreement. Ironically, however, in the U.S., courts have long accepted the employment-at-will doctrine, which literally in the employment context does the opposite. This doctrine creates a strong presumption that the employment relationship between the employer and employee is at will, which, as noted above, means that the employer is free

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<sup>75</sup> E. ALLEN FARNSWORTH, CONTRACTS 459 (Erwin Chemerinsky et al. eds., 4th ed. 2004).

<sup>76</sup> *Id.* at 459.

<sup>77</sup> See *CACI No. 320 Interpretation – Construction Against Drafter*, JUSTIA, <https://www.justia.com/trials-litigation/docs/caci/300/320/> (last updated Oct. 2021).

<sup>78</sup> RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. L. INST. 1981).

<sup>79</sup> *Id.* at § 206 cmt. a.

<sup>80</sup> See *id.*

to fire the employee for a good reason, a bad reason, or even for no reason. And, perhaps even more ironic, the presumption works against nearly all employees, even those with equal or greater bargaining power than that of the employer and those who can afford their own attorneys to negotiate their contracts. In essence, this turns the concept of interpreting the contract against the drafter on its head.

*e. Rules of Deference to Administrative Agencies*

U.S. law also includes rules concerning the deference due to the interpretation of statutes by administrative agencies that are empowered by Congress to enact rules interpreting the statutes and/or to issue guidance concerning statutory interpretation. Under certain conditions, Congress gives power in its legislation to executive agencies to interpret the law and to enact rules and regulations. Other agencies that do not have rulemaking power may issue guidance. Deference to these agencies in statutory interpretation is justified by the expertise held in the agency in the subject matter covered by the statute.

While significantly different from some of the principles discussed by Gamonal and Rosado because judicial deference to an administrative agency is linked to the proper roles that Congress, Administrative Agencies of the Executive branch, and the courts play, considering deference to agency interpretations is somewhat similar to the Latin American concept of using principles to decide marginal cases. Moreover, studying how deference to agencies operates in U.S. courts, especially as I explain below, with reference to the deference accorded (or not) to the Equal Employment Opportunity Commission sheds some light on how U.S. courts interpret and enforce U.S. statutes. These rules of deference, as we shall see in the next Part, do vary in the Court's interpretation and enforcement and can lead to results that differ significantly from the purpose of the legislation.

*f. Burdens of Persuasion and Production*

U.S. law at times places burdens of production and/or persuasion and creates presumptions in an effort to guarantee fairness to less powerful parties in a number of different settings.<sup>81</sup> In the ordinary civil case, the plaintiff has the burden to prove her case by a preponderance of the evidence. But different areas of civil law have shifted the burdens of production or persuasion to the defendant in order to compensate for the plaintiff's failure to have evidence to which the defendant has easier access.

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<sup>81</sup> See *infra* notes 82–84.

For example, in Tort law, where there are two negligent defendants only one of whose actions caused the plaintiff's injury, the burden of proving that their actions did not cause the plaintiff's injury falls on each defendant.<sup>82</sup> In the employment law setting at times the burden of production or persuasion shifts to the defendant after some initial proof by the plaintiff. For example, in public employment cases where there is a showing that the constitutionally protected speech of the defendant was a substantial factor in the adverse employment decision, the burden of persuasion shifts to the defendant to prove that it would have made the same decision even absent the plaintiff's protected speech.<sup>83</sup> And, in Title VII employment discrimination cases, there are a number of shifts of burdens of production and persuasion that are intended to serve the purpose of equalizing the power of plaintiffs and defendants and assuring the availability of evidence.<sup>84</sup>

While Gamonal and Rosado do not mention this type of procedural move in Latin America, it is possible that these shifts, if used properly, could serve the same purpose as some of the principles enunciated by the authors. Moreover, their presence in our jurisprudence may make judges more comfortable with the principles enunciated by Gamonal and Rosado.

### III. APPLYING LATIN AMERICAN PRINCIPLES TO U.S. EMPLOYMENT DISCRIMINATION STATUTES

#### A. *COVID Vulnerabilities and the Employment Discrimination Statutes*

COVID-19 has had a particularly disparate effect on people of color, a disproportionate number of whom are essential workers.<sup>85</sup> Moreover, women, particularly women of color, have been forced to leave their jobs at a disproportionately high rate because of their responsibility for caring for

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<sup>82</sup> *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948).

<sup>83</sup> *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

<sup>84</sup> See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (introducing shifting burdens of production to ensure plaintiffs have the opportunity to narrow the inquiry and prove the employer's alleged reason for the adverse action was pretextual); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that once the plaintiff proves that the neutral employment practice has a disparate effect on a protected class, the burden of persuasion shifts to the defendant to prove the neutral practice is a business necessity); 42 U.S.C. § 2000e-2(m), and 42 U.S.C. § 2000e-5(g)(2)(B), which provide respectively that liability is established once the plaintiff proves that a protected characteristic is a motivating factor in the adverse employment action and the defendant may reduce the plaintiff's remedies by proving that it would have taken the same action for legitimate reasons. For further discussion of this issue in employment discrimination law, see *infra* Part III (B)(2).

<sup>85</sup> See *supra* notes 1 and 2.

children at a time when most children are not in school.<sup>86</sup> Many persons with disabilities have underlying conditions that make them more vulnerable to the virus or to a more serious outcome if they contract the virus.<sup>87</sup> And, older individuals have experienced a much higher death rate from COVID-19 than younger ones.<sup>88</sup> Pregnant women are extremely vulnerable if they catch COVID-19, but the studies of the vaccines have not included pregnant women, placing them in a very difficult situation when it comes to making a decision whether to get the vaccination if required by their employers, who may or may not be required to accommodate their pregnant employees' decisions.<sup>89</sup>

All of these groups were victims of employment discrimination even before the pandemic, and, recognizing this vulnerability, Congress enacted civil rights acts whose purpose is to protect these individuals from discrimination. But these groups are even more likely to suffer employment discrimination than they were pre-pandemic. Given this fact, it is clear that American employment discrimination law that is grounded in many of the principles identified in Gamonal and Rosado's book and is consistent with others should consciously be applied with reference to these principles.

This is true because there is no question that civil rights in employment acts were enacted to protect applicants and employees who are members of protected classes. For Title VII of the 1964 Civil Rights Act, Title I of the Americans with Disabilities Act, and the Age Discrimination in Employment Act, combined, this means that race, color, sex, religion, sexual orientation, gender identity, national origin, disability, and age of forty years or older are

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<sup>86</sup> Heather Long, *Virtual Schooling Has Largely Forced Moms, Not Dads, to Quit Work. It Will Hurt the Economy for Years*, WASH. POST (Nov. 6, 2020), <https://www.washingtonpost.com/road-to-recovery/2020/11/06/women-workforce-jobs-report/> (noting that women's employment lowest since 1988, and more than two million women have left the workforce).

<sup>87</sup> See *People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html#:~:text=Most%20people%20with%20disabilities%20are,of%20their%20underlying%20medical%20conditions> (last updated Jun. 21, 2021) (noting that having a disability does not necessarily make a person more vulnerable to COVID, but certain underlying conditions—disabilities—might make persons more likely to get the virus such as people with limited mobility, those who have trouble communicating symptoms, and those who have trouble understanding the risk and adopting safe practices); *COVID-19 Outbreak and Persons with Disabilities*, UNITED NATIONS, <https://www.un.org/development/desa/disabilities/covid-19.html> (last updated Sept. 8, 2021) (many persons with disabilities have specific underlying conditions that make COVID more dangerous to them).

<sup>88</sup> *WHO Delivers Advice and Support for Older People During COVID-19*, WORLD HEALTH ORG. (Apr. 3, 2020), <https://www.who.int/news-room/feature-stories/detail/who-delivers-advice-and-support-for-older-people-during-covid-19#:~:text=Although%20all%20age%20groups%20are,potential%20underlying%20health%20conditions> (explaining that older people have more severe symptoms than their younger counterparts).

<sup>89</sup> *The Covid-19 Vaccine in Pregnancy and Breastfeeding*, TOMMY'S (Dec. 17, 2021), <https://www.tommys.org/pregnancyhub/blogs-stories/covid-19-vaccine-pregnancy-and-breastfeeding>.

not legitimate reasons for failures to hire or promote, for discharging, segregating or engaging in other types of discrimination against individuals (such as creating a hostile work environment) in their terms or conditions of employment. Unfortunately, however, U.S. courts have often de-radicalized these statutes by interpreting them and the underlying factual circumstances contrary to the principles presented by Gamonal and Rosado, and contrary to the original purpose of the U.S. laws.<sup>90</sup>

*B. The Protective Principle, the Primacy of Reality, and U.S. Anti-Discrimination Law*

1. The Protective Principle

There is no question that anti-discrimination law's purpose is to protect employees from discrimination based on their protected traits. For this reason, when interpreting the anti-discrimination laws, it is fully consistent with the purpose of the laws to apply the principles identified by Gamonal and Rosado. And, to some extent, lower courts and the Supreme Court have considered the goal of protecting workers from discrimination in their interpretation of the statutes. But while the legislature passed these acts with an interest in protecting workers from employment discrimination, and the Supreme Court has, at times generously interpreted the original law,<sup>91</sup> at other times, the Supreme Court has restricted the protection of the anti-discrimination laws to the detriment of working men and women.<sup>92</sup> Moreover, even when the Supreme Court has liberally interpreted the law to protect employees, lower courts have consistently applied the law in non-protective ways.<sup>93</sup>

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<sup>90</sup> See generally Klare, *supra* note 39; see *infra* Part III (B)(2).

<sup>91</sup> For example, see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (prohibiting sexual harassment under Title VII); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (prohibiting harassment by members of the same sex under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (concluding that discrimination based on sex stereotyping is illegal under Title VII); *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020) (concluding that the prohibition of sex discrimination under Title VII also prohibits discrimination based on sexual orientation and gender identity).

<sup>92</sup> For example, the Supreme Court limited the coverage of Title VII in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *Ricci v. DeStefano*, 557 U.S. 557 (2009); it limited the coverage of the ADA in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); it made ADEA and Title VII retaliation claims harder to prove in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); and it made it difficult for women to bring pay discrimination claims in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In all of these cases, the Supreme Court took a strict interpretation of the law and ignored the protective purpose of the laws in question.

<sup>93</sup> See *infra* Part III (B)(2).

In a number of situations when the Supreme Court's restrictive interpretation has limited employees' rights, Congress has reacted in recognition of the importance of protecting employees by overturning Supreme Court decisions.<sup>94</sup> For example, by passing the Pregnancy Discrimination Act in 1978, Congress overturned the Supreme Court's view that Title VII's prohibition of sex discrimination did not include discrimination based on pregnancy.<sup>95</sup> Through the 1991 Civil Rights Act, Congress overturned a number of Supreme Court decisions handed down in 1989 that either limited coverage of a number of acts or made the plaintiff's proof more difficult. The 1991 Civil Rights Act broadened the coverage of the disparate impact cause of action,<sup>96</sup> expanded the protection of 42 U.S.C. § 1981, the civil war era statute that protects against race discrimination in contracting,<sup>97</sup> granted the right to a jury trial and damages under Title VII,<sup>98</sup> and overturned in part the decision in *Price Waterhouse v. Hopkins*, by permitting liability upon a showing that a protected characteristic is a "motivating factor" in an adverse employment action.<sup>99</sup> In subsequent amendments, Congress also overturned *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>100</sup> and a number of key Supreme Court cases decided under the Americans with Disabilities Act that limited the coverage of the ADA by defining "disability" narrowly.<sup>101</sup>

But we cannot expect that every time the Supreme Court gets it wrong Congress will correct the error.<sup>102</sup> Given the political atmosphere and recent crisis in Congress, reaching bipartisan support for any legislation, much less

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<sup>94</sup> See *infra* notes 95–101.

<sup>95</sup> See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (concluding that discrimination because of pregnancy is not sex discrimination); Pregnancy Discrimination Act of 1978, 42 U.S.C.A. 2000e-(k) (overturning *Gilbert* and stating that discrimination based on pregnancy is illegal sex discrimination under Title VII).

<sup>96</sup> 42 U.S.C. § 2000e-2(k)(1) (overturning the 1989 decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

<sup>97</sup> 42 U.S.C. § 1981 (The 1991 Act added sections (b) and (c)).

<sup>98</sup> 42 U.S.C. § 1981a(a)(1), (b)–(c).

<sup>99</sup> 42 U.S.C. § 2000e-2(m).

<sup>100</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that a woman alleging pay discrimination must file her charge within 300 days of the announcement of the employer's decision to set her pay) (overturned by The Ledbetter Act, 29 U.S.C. § 626(d)(3)).

<sup>101</sup> See LAURA ROTHSTEIN & ANN C. MCGINLEY, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* 26–27 (5th ed. 2010).

<sup>102</sup> William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (presenting empirical data of congressional overrides of Supreme Court cases that demonstrate that Congress overrode the decisions frequently, especially where there was a divided court that made textualist decisions); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1317–18 (2014) (finding that congressional overrides declined from the late-1990s on, but still continue to occur).

to overturn a Supreme Court conservative interpretation of the civil rights laws, has become extremely difficult. Assuming a Congressional failure to act, it is even more important that the courts interpret the law liberally in the first instance to further the purposes of the laws to protect employee rights. The possibility of a Congressional check on the Supreme Court's failure to protect employees is, at least for now, unlikely.

In addition to the erroneous Supreme Court interpretations noted above, lower courts have adopted a number of substantive legal doctrines regarding the anti-discrimination laws that have limited the laws' effectiveness and have also improvidently granted summary judgment and motions to dismiss in ways that have significantly reduced the protections granted by the laws. The vast majority of these cases have not been reviewed by the Supreme Court.<sup>103</sup>

While acknowledging the important advances a number of Supreme Court interpretations of the civil rights law have made, this Part discusses interpretations of both the Supreme Court and the lower courts that have done the opposite—deprived individual employees of a liberal interpretation of the civil rights laws.

## 2. The Primacy of Reality

While the protective principle is the most important Latin American legal principle applied to employment and labor law, other principles, such as primacy of reality reinforce the protective principle. According to the primacy of reality principle, facts matter and language in texts or documents should not prevail over the facts in the real world. While primacy of reality is a substantive doctrine, and not one about proof, ordinarily applied in Latin America to interpret contractual terms between business owners and workers, and often relates to the question of whether the worker is an employee or an independent contractor, facts are key in U.S. anti-discrimination law as well. As in Latin America, U.S. courts refuse to conclude that a textual definition in an employment contract about the worker's status governs the legal relationship.<sup>104</sup> Instead, the court will evaluate whether the individual is truly

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<sup>103</sup> See *infra* Part III (B)(2); see also Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 434–42 (2012) (noting that lower courts, especially state courts, use different interpretive methods from those used by the Supreme Court; the difference is grounded in the courts' place in the hierarchical structure of appellate review, the resources available to the court, and whether the judges are appointed or elected).

<sup>104</sup> See generally *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).

an employee or an independent contractor by looking at the facts of the relationship.<sup>105</sup>

But there is another area of U.S. law where the primacy of reality doctrine and the “*in dubio pro operario*” rule (which in this context means that terms in the agreement that are favorable to the worker will be given weight if there is doubt about the meaning of the agreement) may aide in interpreting facts as they relate to legal rights. In the U.S., ordinarily jurors are the arbiters of facts, and there is a right to a jury trial in civil actions with legal (rather than equitable) relief. Because most cases brought under the anti-discrimination laws involve juries, the court must assure that it is not overstepping its power to deprive the parties of their rights to have juries adjudicate the facts of the matters before them. Civil procedure protects the litigants’ rights to a jury trial by assuring that the jury, rather than the judge, retains the power to decide fact questions in the cases that are filed. This means that when there are genuine issues of material fact in a case, the case should go to the jury and not be decided by the court. Despite this guarantee, the courts regularly grant summary judgment to defendants in cases where there appear to be fact questions that should be decided by juries at trial.

In sum, the protective principle and the rule *in dubio pro operario* (when applying the protective principle) mean that courts should interpret civil rights laws, when their meaning and scope are ambiguous, to further the purpose of the laws and to favor protection of workers. Moreover, the primacy of reality principle recognizes the importance of facts on the ground in judicial decision making in employment law cases. While it is true that in Latin America the *in dubio pro operario* concept is a substantive doctrine and does not apply to methods of proof, U.S. courts use burden shifting and procedural rules to protect a plaintiff’s right to a jury trial. These rules require judges, when deciding, for example, a defense motion for summary judgment to interpret the facts in favor of the non-moving party when there is ambiguity. This rule reinforces the jury trial rights of American litigants. As we shall see below, other similar concepts to those in Latin America have governed U.S. anti-discrimination law, but the courts have not been consistent in their application. This Part discusses the approaches the U.S. courts have taken and could have taken had they applied the protective and the primacy of reality principles and the *in dubio pro operario* rule consistently to further their analysis in anti-discrimination law cases.

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<sup>105</sup> See *id.* at 1012–13 (holding that the contract declaring workers to be independent contractors did not prevail where facts demonstrated they were employees under the law).



### 3. Liberal Interpretation of Remedial Statutes and Deference to EEOC Interpretations

Early on after passage of Title VII, the courts considered Title VII and other anti-discrimination laws to be broad remedial statutes that should be construed liberally.<sup>106</sup> That has changed. More recently, the Court has refused to liberally construe Title VII law. As to the ADA, the strict construction of the statute began soon after the law was passed, culminating in a number of Supreme Court decisions that limited the definition of “disability.” The lower courts followed, concluding that even persons with cirrhosis of the liver and intellectual disabilities did not have disabilities.<sup>107</sup> Liberal interpretations in these situations would have furthered the protective purpose of the EEO statutes.

Early Supreme Court cases such as *McDonald v. Santa Fe Trail Transportation Co.*,<sup>108</sup> state that EEOC interpretations are entitled to great deference. Moreover, the courts deferred early on to EEOC guidelines, even though they are not promulgated as regulations. As the Court stated in *Albermarle Paper Co. v. Moody*, “[t]he EEOC Guidelines are not administrative regulations promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute ‘(t)he administrative interpretation of the Act by the enforcing agency,’ and consequently they are ‘entitled to great deference.’”<sup>109</sup>

Neither of these doctrines continues to be voiced by the Supreme Court and other federal courts.<sup>110</sup> So, we have virtually lost the concepts of broad

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<sup>106</sup> See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (“Title VII is a broad remedial measure, designed ‘to assure equality of employment opportunities,’” (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973))) (“The Act was designed to bar not only overt employment discrimination, ‘but also practices that are fair in form, but discriminatory in operation.’” (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971))) (“Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.” (quoting *Teamsters v. United States*, 431 U.S. 324, 349 (1977))).

<sup>107</sup> See *Furnish v. SVI Sys., Inc.*, 270 F.3d 445 (7th Cir. 2001) (holding that cirrhosis of the liver did not constitute a disability under the ADA); *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App’x. 874 (11th Cir. 2007) (holding that plaintiff who had an intellectual disability was not a person with a disability under the ADA).

<sup>108</sup> *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

<sup>109</sup> *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (giving deference to EEOC guidelines).

<sup>110</sup> See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, n.11 (2007) (refusing to give deference to EEOC Compliance Manual and administrative adjudications); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (refusing to defer to EEOC in an ADEA case “because the agency is clearly wrong”); *Vance v. Ball State Univ.*, 570 U.S. 421, 442–45 (2013) (refusing to defer to EEOC guidelines because they were ambiguous and would be confusing to the jury); see also Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1962

construction and of deference to the EEOC in Title VII cases. Even when interpreting the ADA in which Congress explicitly granted the power to the EEOC to write regulations under the Administrative Procedure Act, the Supreme Court has on a number of occasions, concluded that the regulations are not reasonable interpretations of the Act or has avoided interpreting the regulations.<sup>111</sup> This is the case even though the Court could have resorted to the clear legislative history to ascertain Congressional purpose.<sup>112</sup>

#### 4. Substantive Doctrines and Procedural Moves: Expanding and Limiting the Protective Principle and Raising Questions about the Primacy of Reality

A rule that furthers the protective and the primacy of reality principles in Latin America is *in dubio pro operario*,<sup>113</sup> which means that judges should interpret *the law* when there is a doubt, in favor of the employee, and in the case of interpreting documents and facts, that ambiguities should be resolved in favor of the worker. Early on after Title VII was enacted, the Supreme Court interpreted the law to create procedural and substantive mechanisms that would grant some advantages to the employees; while there continue to

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(2006) (concluding that the Supreme Court gives little deference to the EEOC because of a particularly “crabbed” view of anti-discrimination law, resulting in “subtle but significant hobbling of anti-discrimination law”); Burton J. Fishman, *EEOC Dealt Another Loss: Is Less Deference the New Normal?*, 11 No. 2 FED. EMP. L. INSIDER 3 (2013); Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA and the ADEA: Is the EEOC a Second-Class Agency?*, 60 OHIO ST. L.J. 1533, 1533 (1999) (concluding that the EEOC is a “second-class agency” when it comes to Supreme Court deference).

<sup>111</sup> See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475–80, 482–87 (1999). The Court refused to defer to regulations and interpretive guidelines that went through the notice and comment process in determining that the EEOC interpretation was contrary to the plain meaning of the statute. 29 C.F.R. § 1630.2(j) (2012). Instead, the Court literally extrapolated about the definition of “disability” (whether to consider mitigating effects of eyeglasses in this case in determining when an individual has a disability) by looking at the Congressional finding of fact at the time of passage that 43 million individuals have disabilities. The Court concluded from this finding that Congress did not intend courts to include within the definition of disability those persons who had mitigating factors that substantially cured the disability. This was a very roundabout method of statutory interpretation, given that both the legislative history and the regulations and interpretive guidelines clearly stated that mitigating effects should not be taken into account in determining whether an individual meets the definition of “disability.” See also Hart, *supra* note 110, at 1944 (stating that “an extraordinary number of ADA cases turn on [the] threshold definitional question [of whether a person has a disability], and the EEOC has issued regulations interpreting and offering detail as to the statutory definition. These regulations have been central to several of the Court’s recent ADA opinions, but in each opinion the Court has ‘assume[d], without deciding, that such regulations are valid’ and declared that it had ‘no occasion to decide what level of deference, if any, they are due.’”).

<sup>112</sup> *Sutton*, 527 U.S. at 499–502 (Stevens, J., dissenting).

<sup>113</sup> GAMONAL & ROSADO, *supra* note 8, at 33.

be key Supreme Court cases that do the same, others have interpreted the law to favor employers. Moreover, even where the Supreme Court takes a favorable view of employees, a large percentage of lower courts do not. As we shall see, these interpretations deal with law as well as facts and law.

*a. Disparate Impact*

In *Griggs v. Duke Power Co.*<sup>114</sup> the Court held that plaintiffs may prevail in a Title VII disparate impact case if they prove that the employer's neutral policy has a disparate effect on a protected group and the employer fails to prove that its policy or practice is necessary to the business and job related. Although the statutory text was unclear as to whether proving a disparate effect of a facially neutral policy or practice could sustain a cause of action under Title VII, the Court, in essence, adopted not only the protective principle but also *in dubio pro operario* when it interpreted ambiguous terms of the statute to grant rights to the African American plaintiffs who could not get an "inside" job at the defendant's plant because they either lacked a high school degree or performed below the median of those taking an aptitude test. This was an opinion that applied the protective principle.

Years later, the Supreme Court drastically cut back on its protective purpose when it decided *Wards Cove Packing Co. v. Atonio*,<sup>115</sup> whose employer-friendly description of the burdens contradicted earlier Supreme Court opinions. This decision was overturned in part by Congress when it enacted the 1991 Civil Rights Act. Once again, a plaintiff's proof that the defendant's neutral business practice has a disparate effect on members of a protected group shifts the burden of persuasion to the defendant to establish that the policy in question is "job related and consistent with business necessity."<sup>116</sup> Moreover, even assuming that the employer has legitimately proved that a job requirement is a business necessity, the statute permits the plaintiff to prevail if it can demonstrate a less discriminatory alternative exists and that the defendant refused to adopt it.<sup>117</sup>

Unfortunately, even though the 1991 Act was lauded initially for overturning the pro-defendant *Wards Cove v. Atonio*, the damage done by *Wards Cove* continues to haunt plaintiffs who seek to prove disparate impact causes of action. In 1991, Congress compromised on the language overturning *Wards Cove*, and, as a result, in most cases, the plaintiffs must

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<sup>114</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>115</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

<sup>116</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>117</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

show that a particular employment practice caused the disparate impact.<sup>118</sup> This requirement, as well as other ambiguous language of the 1991 Act, have made disparate impact causes of action very difficult to prove and have permitted judges to use the ambiguity to interpret the law according to their ideologies.<sup>119</sup> In fact, an empirical study that examined cases decided before *Wards Cove* and those decided after *Wards Cove* and the 1991 Act produced startling results. Although overall plaintiffs enjoy a success rate of approximately twenty percent in disparate impact cases, the vast majority of the cases won by plaintiffs occurred *before Wards Cove* was decided.

Before *Wards Cove*, plaintiffs won 32.7% of cases brought alleging a disparate impact, whereas after *Wards Cove* and passage of the 1991 Act, plaintiffs won only 6.7% of their disparate impact cases.<sup>120</sup> This example demonstrates the difficulty in assuming that Congress can always successfully overturn a bad Supreme Court decision. Moreover, after the 1991 Act, there is a significant variation between cases decided by appellate panels dominated by judges appointed by democratic presidents versus those panels dominated by judges appointed by republican presidents. Whereas twenty percent of cases decided by democratic appointees won post-1991, not one of the cases coming before a panel dominated by republican appointees won.<sup>121</sup> The author of the study concluded that the ambiguity of the language of the 1991 Act allows judges to interpret the law in accordance with their ideologies.<sup>122</sup>

In essence, in interpreting Title VII, at times the Supreme Court, and even more frequently the lower federal courts, have ignored the protective principle that underlies the original purpose of the statute; instead of applying *in dubio pro operario*, the federal courts have interpreted the law by giving significant deference to employers to operate their businesses as they see fit. And, the lower courts have used procedural mechanisms to reinforce these questionable substantive decisions, denying employees the substantive rights protected by the civil rights statutes. In effect, the concept of employment at will, which is the base of our entire labor law system, seems to affect the lower court judges' interpretations.

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<sup>118</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i). There is an exception to this rule if the plaintiff proves that the elements of the employer's decisionmaking process are incapable of separation. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

<sup>119</sup> Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 259, 264 (2005).

<sup>120</sup> *Id.* at 256–57.

<sup>121</sup> *Id.* at 259.

<sup>122</sup> *Id.* at 259, 264.

*b. McDonnell Douglas Construct*

Although the Supreme Court refused to apply *Griggs* to an individual case where the job applicant had broken the law to oppose the employer's practices, the Court refused to approve dismissal of the case based on the former employee's illegal act and instead created the *McDonnell Douglas* construct, which made it slightly easier for an employee to resist motions to dismiss, for summary judgment, or for a directed verdict. *McDonnell Douglas* created an inference of discrimination based on a showing that the individual was a member of the protected class, was qualified for an open position, and was not hired or promoted, and the job remained open or was given to a person who was not a member of the protected class.

While this proof construct did not shift the burden of persuasion to the defendant, it did shift the burden of production, requiring the employer to produce evidence of a reason for refusing to rehire the employee. This articulated "legitimate non-discriminatory reason" for the adverse employment action notifies the employee of the employer's defense. That defense narrows the possible reasons that the employee has to rebut in order to prove that the employer unlawfully discriminated against him. Once the employer articulates its "legitimate non-discriminatory reason," the employee then has the burden to prove that the employer's articulated reason is a pretext for illegal discrimination. Upon demonstrating that the employer's reason is a pretext for discrimination, the employee may then prevail. That is, the employee has now created in the very least, a question of fact for the factfinder. And, generally, with this proof, summary judgment for the defendant should not be available.<sup>123</sup>

The *McDonnell Douglas* methodology when first developed by the Supreme Court had the effect of furthering the protective principle by using the *in dubio pro operario*<sup>124</sup> rule as a guide to protect employees who alleged employment discrimination. And, more recently, in an ADEA case, *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>125</sup> the Supreme Court reversed a Fifth Circuit judgment as a matter of law that overturned a jury verdict in the plaintiff's favor. The Supreme Court decision clarifies that the jury should consider all the evidence to determine whether the defendant discriminated against the plaintiff and that proof that the defendant's avowed reason for the adverse employment decision is pretextual is usually sufficient for a jury

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<sup>123</sup> *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (ADEA case whose holding also applies to Title VII and ADA cases).

<sup>124</sup> GAMONAL & ROSADO, *supra* note 8, at 33.

<sup>125</sup> *Reeves*, 530 U.S. at 154.

reasonably to conclude that the defendant discriminated against the plaintiff.<sup>126</sup>

Even so, the *McDonnell Douglas* construct, as interpreted in *Reeves*, has been undermined by the lower courts' more recent interpretations. Many courts have approached this proof mechanism in a formalistic way that makes it more difficult for plaintiffs to prevail; lower courts have used the construct or a plaintiff's failure to prove a case using the construct as an excuse to dismiss the case. This questionable methodology, when combined with a number of ancillary doctrines that create inferences in favor of the defendant, is, as noted by Professor Sandra Sperino, inconsistent with deciding cases on motions for summary judgment, a procedure that requires judges to draw all reasonable inferences in favor of the non-moving party—the plaintiff in most cases.<sup>127</sup> While the *McDonnell Douglas* construct was originally generally protective of individual employees alleging illegal discrimination, scholars have recently demonstrated that the construct is being misused by lower courts, resulting in the denial of protection to the plaintiffs.<sup>128</sup>

### c. *Same Actor Inference*

The same actor inference has not reached the Supreme Court, but a number of lower courts have held that if the individual who hired the plaintiff in a civil rights action is the same person who discharged or failed to promote the individual, an inference arises that illegal discrimination did not cause the adverse employment action.<sup>129</sup> This inference, which is accepted by a number of the courts of appeals and whose effect differs depending on the court, appears to contradict social science research on human behavior.<sup>130</sup> Moreover, in some courts, the inference makes it more likely that a defendant's motion for summary judgment will be granted, a totally anomalous result at this procedural stage.<sup>131</sup>

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<sup>126</sup> *Id.* at 146–49.

<sup>127</sup> SANDRA SPERINO, *MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW* 227 (2018).

<sup>128</sup> *See id.* at 317–27.

<sup>129</sup> For an excellent description of the same actor defense, the different courts' holdings concerning the defense and the social science demonstrating that the same actor inference is “deeply flawed,” see CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 87–89 (9th ed. 2017).

<sup>130</sup> *Id.* at 88.

<sup>131</sup> *Id.*; see also Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 357 (2010) (arguing that “despite the superficial plausibility of the doctrine’s underlying assumption . . . the same-actor doctrine . . . allows the judge to usurp the role of the jury, contravenes substantive and procedural law, and damages notions of acceptability and inclusion in the American workplace.”). See also SPERINO, *supra* note 127, at 225–26.

This inference, which is not supported by the research according to social scientists, fails to honor the protective principle and achieves the opposite of using the *in dubio pro operario* rule, which would resolve ambiguous legal and factual issues in favor of the employee. In essence, the same actor inference is a legal doctrine that resolves ambiguous factual issues against the employee and in favor of the employer, often without allowing the case to go to the jury.

d. “Piecemeal” Approaches: “Slicing and Dicing,”  
“Stray Comments,” and “Disbelief Doctrines”

A number of scholars have explained that the federal courts have invented legal doctrines and have responded to motions for summary judgment by favoring employers and depriving employees of their jury trial rights. Using a “piecemeal” approach rather than looking at the evidence as a whole, the courts “slice and dice” the evidence and exclude evidence that they characterize as “stray comments” from their consideration of the evidence.<sup>132</sup> They also have created doctrines that Professor Sandra Sperino calls “disbelief doctrines” that favor the employer’s side of the tale and draw inferences in favor of the employer.<sup>133</sup> This approach, which has remained remarkably consistent for the past twenty-five years, has meant that courts have improvidently granted summary judgment to defendants in numerous cases, tightening the noose around the plaintiff to produce only the most probative and direct evidence instead of accepting all evidence, considering it as a whole, piece by piece, mosaic by mosaic, to gain a complete

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<sup>132</sup> See e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 233–36 (1993) (explaining that the courts use a “piecemeal” approach, which results in depriving circumstantial evidence of its power when viewed in combination); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 592–601 (2001) (explaining that the Supreme Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), demonstrated that all circumstantial evidence should be treated as a whole, but that lower courts subsequently improperly continued to “slice and dice” the evidence, eliminating some of the circumstantial evidence, and thus depriving cases of their evidentiary power after *Reeves*); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 150–51 (2012) (arguing that the doctrine was taken from a remark by Justice O’Connor, but it was misshapen and distorted by the lower courts to exclude as evidence what they called “stray remarks” even though Justice O’Connor may not have intended to attack the probative value or admissibility into evidence of stray remarks).

<sup>133</sup> Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231, 231–34 (2018) (explaining that disbelief doctrines, which include “stray comments,” protection of employers who take an adverse employment action because of an honest but mistaken belief, the “same actor” defense, among others, operate to encourage summary judgment against plaintiffs and allow the courts to believe the employers over employees even though doing so violates the Federal Rules of Civil Procedure; also arguing that these disbelief doctrines have no basis in the statutory text and that judges do not have the power to decide cases using these doctrines).

understanding of whether there is sufficient evidence to survive the defendant's motion and to present the evidence to the jury. These doctrines and methodologies clearly favor employers, often deny plaintiffs their jury trial rights, and definitely do not operate to protect employees.

Summary judgment law in theory requires that all reasonable inferences be drawn in favor of the non-moving party and that the motion be denied unless there is insufficient evidence to support a conclusion that the defendant intentionally discriminated against the plaintiff because of her membership in the protected class.<sup>134</sup> While this is the law, the lower courts have created substantive and procedural doctrines out of whole cloth in an effort to dismiss the cases. In fact, the situation is so problematic that a Sixth Circuit judge has published a law review article encouraging only one simple change in the approach to employment discrimination cases: the drawing of all reasonable inferences in favor of the plaintiff, the non-moving party, in deciding a defense motion for summary judgment.<sup>135</sup> This is a shocking development given that Judge Donald finds it necessary to advocate merely that judges follow the law.

Another good example of how the lower courts use procedure in a way that is not only inconsistent with the rules of procedure but also restrictive of employees' substantive rights occurs in cases alleging hostile work environments based on sex. One requirement in proving that an illegal hostile work environment occurred is that the behavior be severe or pervasive.<sup>136</sup> Lower courts regularly grant summary judgment in cases where a jury could find the behavior not only unacceptable at work but also sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's work.<sup>137</sup> Neither highly sexualized comments by a supervisor nor forcibly trapping a co-worker and touching her stomach and her breast under her bra were sufficient to create a jury question about severity or pervasiveness.<sup>138</sup> Recently, a group of female academics criticized the courts' approach to the severity or

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<sup>134</sup> *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–52 (2000).

<sup>135</sup> *See* Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 763 (2012-2013).

<sup>136</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>137</sup> *See, e.g., Chesier v. On Q Finan. Inc.*, 382 F. Supp. 3d 918 (D. Az. 2019) (granting summary judgment to defendant because one night of supervisor's sending highly sexualized instant messages to his subordinate over a three-hour period including comments about her body parts and what he wanted to do with her was insufficient as a matter of law to be severe or pervasive); *Brooks v. City of San Mateo*, 229 F.3d 917, 921 (9th Cir. 2000) (holding that a male employee's behavior was not sufficiently severe or pervasive to create a hostile work environment based on her sex where he "placed his hand on her stomach and commented on its softness and sexiness." After she forcefully pushed him away, he boxed her "in against the communications console. . . . He forced his hand underneath her sweater and bra to fondle her bare breast.").

<sup>138</sup> *See* cases cited *supra* note 137.



pervasiveness requirement, arguing that courts should take into account changing attitudes toward sexually harassing behaviors when deciding whether a jury question exists.<sup>139</sup>

A second issue that may be even more egregious is the courts' treatment of employer liability in harassment cases. The Supreme Court in *Faragher v. City of Boca Raton*,<sup>140</sup> and its companion case, *Burlington Industries, Inc. v. Ellerth*,<sup>141</sup> held that employers are subject to vicarious liability to an employee for an actionable hostile work environment created by a supervisor. If there is no tangible employment action, the Court held, an employer has an affirmative defense if it proves: (a) that the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>142</sup>

Even though the defendant has the burden of proof on the issue of whether the plaintiff acted unreasonably—which in most cases should create a jury question—by granting summary judgment to employers on the affirmative defense, courts frequently *sub silentio* eliminate the "reasonableness" requirement and refuse to send the issue to the jury.<sup>143</sup> In essence, given the procedural posture of the cases, it should be a heavy lift for employers to make this proof, but in many situations in which women fail to report the harassment, the courts conclude as a matter of law that the employers carried their burden of proving the unreasonableness of the women's failure to report.

Many courts conclude *as a matter of law* that plaintiffs who testify that they were afraid of reporting the events for fear of retaliation did not act reasonably when they failed to report.<sup>144</sup> This is true despite social science

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<sup>139</sup> Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 145 (2019).

<sup>140</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>141</sup> *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

<sup>142</sup> *Id.* at 765.

<sup>143</sup> See, e.g., *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288–90 (11th Cir. 2003) (affirming summary judgment and concluding that employee was unreasonable for her failure to report the harassment for over two months); *Helm v. Kansas*, 656 F.3d 1277, 1290–91 (10th Cir. 2011) (even though judicial assistant told the Chief Judge that her judge made inappropriate advances toward her, the Chief Judge violated the policy by failing to report the harassment, the Court held that the Chief Judge acted reasonably and the assistant acted unreasonably, and affirmed the grant of the defense motion for summary judgment).

<sup>144</sup> See Joan T.A. Gabel & Nancy R. Mansfield, *Sexual Harassment in the Eye of the Beholder: On the Dissolution of Predictability in the Ellerth/Faragher Matrix Created by Suders for Cases Involving Employee Perception*, 12 DUKE J. GENDER L. & POL'Y 81, 98–99, 102 (2005) (describing cases where the courts concluded that a plaintiff's fear of retaliation and subsequent failure to report were unreasonable even though retaliation for reporting is common).

evidence that demonstrates that between sixty-five percent and seventy-five percent of women who report and/or file a charge with the EEOC suffer retaliation.<sup>145</sup> It is contrary to both procedural law and civil rights law to not afford these plaintiffs their rights to a jury trial on this issue. Based on these statistics of how common retaliation is, in most cases it is not unreasonable for a plaintiff to fail to report the harassment. Moreover, in this situation the employer has the burden of persuasion and is the movant on a motion for summary judgment. If the courts applied the law correctly, it would be extremely rare for an employer to prevail on this issue on summary judgment. The facts should matter. Instead, the courts hold, in formalistic fashion, that there was a policy and the plaintiff signed a sheet saying she knew about it, so therefore it was unreasonable not to report.<sup>146</sup>

### C. Non-waiver Principle

The non-waiver principle of labor rights under the anti-discrimination law in the U.S. is well-established when it comes to *substantive* rights. That is, an individual cannot agree to a contract with the employer (or prospective employer) that the worker will not bring a claim for discrimination. Unfortunately, as Professors Gamonal and Rosado explain, the non-waiver principle is not at all ensconced in U.S. federal law when it comes to *procedural* rights. That is, an employer may not require a prospective employee to waive rights to not be discriminated against based on race, gender, disability, etc. because these are considered substantive rights, but the Court has held that a pre-dispute arbitration clause is enforceable because it is merely a waiver of procedural rights to a trial.

The research shows, however, that the waiver of the procedural rights to a jury trial can seriously undermine substantive rights.<sup>147</sup> In most commercial

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<sup>145</sup> See Carly McCann & Donald T. Tomaskovic-Dewey, *Nearly All Sexual Harassment at Work Goes Unreported – and Those Who Do Report Often See Zero Benefit*, THE CONVERSATION (Dec. 14, 2018, 6:45 AM), <https://theconversation.com/nearly-all-sexual-harassment-at-work-goes-unreported-and-those-who-do-report-often-see-zero-benefit-108378>; Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017, 9:00 AM), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts>; see also Agata Boxe, *Women Still Face Retaliation for Reporting Sexual Harassment at Work*, SCI. AM. (Aug. 1, 2019), <https://www.scientificamerican.com/article/women-still-face-retaliation-for-reporting-sexual-harassment-at-work/>.

<sup>146</sup> To be fair to the lower federal courts, the U.S. Supreme Court in *Ellerth* appeared to countenance the grant of summary judgment in these cases based on the employers' affirmative defense. See *Burlington Indus.*, 524 U.S. at 765 (stating "[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.").

<sup>147</sup> For discussions of the problems with mandatory pre-dispute arbitration for employees trying to vindicate their civil rights, see Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards*

arbitrations dealing with the alleged violation of an employee's civil rights, employees have limited rights to discovery (even though the employer has open access to its own documentation), have no right to a jury of their peers, have no right to bring a class action, and will have no right to appeal the arbitrators' decision, even in cases when the arbitrators get the law wrong.<sup>148</sup>

Although the waived rights may be procedural, their waiver (often unknowing) will be as damaging to the plaintiff as would be a waiver of substantive rights. One distinction that is important to make with reference to arbitration of an employee's civil rights claim is whether the rights' waiver takes place before the dispute occurs (pre-dispute) or after the dispute occurs (post-dispute). Most lawyers who oppose pre-dispute arbitration clauses in employment contracts do so because the waiver is not knowing or voluntary in most cases. In the case of post-dispute arbitration, in contrast, an employee, after a dispute with the employer arises, can see a lawyer for advice concerning whether to sign a waiver of his rights to a jury trial. This waiver, then, is knowing and voluntary.

There is nothing inherently unequal about arbitration if an employee decides, after the dispute arises, and upon advice of counsel, to agree to arbitrate the dispute with the employer. In that situation, presumably, counsel for both sides can negotiate the terms of the agreement and the process to be used to select arbitrators. But mandatory, pre-dispute arbitration requires employees and applicants as a condition of employment to waive their procedural rights even before any dispute arises and often without knowing that they are doing so.

Unfortunately, the U.S. Supreme Court has allowed employers to require employees to condition employment on a waiver of their procedural rights before a dispute with an employer arises based on a dubious interpretation of the Federal Arbitration Act ("FAA"),<sup>149</sup> whose purpose is to encourage arbitration of commercial disputes, not arbitration of civil rights actions. In fact, as many scholars have pointed out, Section 1 of the FAA appears to exclude employment disputes from the coverage of the Act.<sup>150</sup>

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*Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 170–83 (2019); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–53 (2005) (detailing the problems of mandatory arbitration).

<sup>148</sup> Michael S. Oberman, *'The Other Shoe': Are Agreements Narrowing Judicial Review Enforceable?*, 31 ALTS. TO HIGH COST LITIG. 65 (2013); Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 Y.B. ON ARB. & MEDIATION 1, 6 (2013) (explaining that the statute severely limits judicial review in arbitration to extreme situations such as bias and corruption of the arbitrator); see 9 U.S.C. § 10 (2006) (governing vacating of arbitration awards); 9 U.S.C. § 11 (2006) (governing confirmation of arbitration awards).

<sup>149</sup> 9 U.S.C. §§ 1–14.

<sup>150</sup> See, e.g., Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 263–79.

Moreover, when state legislatures passed employee-friendly rules to regulate arbitrations, in a number of circumstances, the U.S. Supreme Court struck down those laws as violative of the FAA.<sup>151</sup>

The Supreme Court's interpretation of the FAA, which due to the Supremacy Clause, also severely limits states from banning or limiting pre-dispute mandatory employment arbitration clauses, not only violates the non-waiver principle but also violates the protective principle. As is commonly understood, mandatory commercial arbitration of employment disputes heavily favors employers and operates to limit both procedural and substantive civil rights of employees. Once again, the Supreme Court has interpreted the law in a way that operates directly in opposition to the *in dubio pro operario* rule. In essence, the U.S. Supreme Court has repeatedly interpreted the Federal Arbitration Act in a manner that benefits employers over employees and has resolved ambiguous language in the statute to favor employers.

#### D. Continuity Principle

Professors Gamonal and Rosado explain clearly how the U.S. stands alone with its employment-at-will doctrine, which clearly violates the principle of continuity. Their position is that the employment-at-will doctrine is not even a labor law and should be jettisoned. Anti-discrimination laws in the U.S. are a limited exception to the employment-at-will doctrine. If the plaintiff can prove that the employer fired, demoted, or otherwise discriminated against the employee because of the employee's membership in a protected class, the plaintiff will prevail. Unfortunately, because of the strength of the employment-at-will doctrine, courts deciding employment discrimination claims frequently limit the rights protected by the anti-discrimination claims by requiring a showing that the employer consciously intended to discriminate based on the individual's age, race, gender, disability, etc.

The intent requirement seriously limits plaintiffs' cases given that employers have gotten very savvy about not making any comments about their racial, misogynist, etc. views. In most individual cases, even if the effect is discriminatory, that is not sufficient. The actor making the decision must have intended to discriminate based on the illegal reason.<sup>152</sup> Moreover, courts

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<sup>151</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011) (holding California's unconscionability exception to enforceability of arbitration clause is preempted by the Federal Arbitration Act).

<sup>152</sup> See Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 416–17 (2000) (arguing that the Court's definition of intent varies from the social science's view of the way our minds work).

often distinguish between illegal harassment and discrimination and bullying or incivility, claiming that the federal courts should not act as “super personnel departments.”<sup>153</sup>

But it is important to remember that on the more positive side, the anti-discrimination laws have placed pressure on employers to assure that they are not perceived to be acting in an illegal way. That is, at least large employers and many small ones (employers of 15 or more employees are covered) tend to devote substantial human resources to policies and procedures to assure that they do not discriminate. And, often before deciding to fire an employee, large corporations discuss with their lawyers whether doing so would be permissible. American businesses are very concerned about the possibility of lawsuits and of losing suits and often act cautiously in their employment relations in order to avoid a suit.

Even though few Title VII cases are successful in the U.S. courts,<sup>154</sup> employers seem to be influenced by the small potential of a very large jury verdict against the employer, combined with the reputational damage the employer faces if such a jury verdict occurs. This may be different from what happens in Latin American countries where the possible damages are quite low relatively. Nonetheless, employers in U.S. anti-discrimination suits frequently win the cases, often because of the courts’ deference to employers—both in interpreting the substantive law and in making procedural decisions.

#### IV. PROPOSED SOLUTIONS

In Professors Gamonal and Rosado’s recommendation to create the continuity principle in the US, they sagely recognize that federal law will likely not be the best location to encourage the abolition of the employment-at-will doctrine. Unless that doctrine is destroyed as the basis for all of U.S. labor law, chances are good that none of the other principles will be strong enough to change the application of U.S. law. They recommend that the states (like Montana, Puerto Rico, and the Virgin Islands have already done) abolish the employment-at-will doctrine by statute and adopt the continuity principle that is recognized in Latin America.

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<sup>153</sup> See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151 (2008) (arguing that much behavior categorized as “bullying” and “incivility” occurs because of sex and if severe or pervasive and unwelcome, it constitutes illegal sex-based harassment under U.S. law); see SPERINO, *supra* note 127.

<sup>154</sup> See Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865, 866–68 (2012-2013) (explaining that empirical studies demonstrate that plaintiffs in anti-discrimination suits are at a disadvantage in both the federal district courts and the federal courts of appeals when compared to defendants and when compared to plaintiffs in other types of cases).

In *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*,<sup>155</sup> I made a similar argument, but I directed it at federal law. I argued that a federal statute should be enacted that would abrogate the employment-at-will doctrine throughout the country. That was in different times. Now, it would be nearly impossible to enact such a federal statute, and even if it were enacted, the Act would likely be deradicalized by the federal courts. Former President Trump's effort to stack the federal courts with conservative appointees who will decide cases based on pro-business principles has likely prejudiced the federal district, appellate, and Supreme Courts for the next generation of labor cases. Even if very progressive federal legislation is passed, it is extremely likely that these courts will deradicalize the legislation through conservative, pro-business interpretations. It is because of this situation that it is crucial that we work with progressive state legislatures to promulgate state laws that grant rights to workers that go beyond those in federal law.

I agree with Professors Gamonal and Rosado that if state legislatures were to abolish the employment-at-will doctrine and adopt a just cause requirement for discharging employees, that would likely improve the lot of workers. But I would like to see some empirical proof comparing how our anti-discrimination model works indirectly to assure just cause decisions (although they are not required) with the European and Latin American model. I would also like to see an analysis (including empirical studies) of how Montana's, Puerto Rico's, and the Virgin Islands' abolition of the employment-at-will doctrine has changed behaviors on the ground, if it has done so.

My sense is that these jurisdictions may not interpret their law as favorably to employees as do the Latin American countries, perhaps because of the pro-business ethic in the rest of the country. For one, I suspect that they have not interpreted successor liability and responsibility in the same way as the Latin American courts have done. I also wonder whether the abolition of the employment-at-will doctrine in those jurisdictions has given way to courts to rewrite contracts to be more favorable to employees as the Latin American courts have done.

Moreover, I wonder whether employers in Montana act differently than those in other states where the employment-at-will doctrine continues to be the law. Most large employers seem to believe that they have to prove a just cause (if not as a legal matter, as a practical one). Would the abolition of the employment-at-will doctrine across the states make a difference? I would

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<sup>155</sup> See Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996).

also like to see whether it affects the hiring practices of employers in these jurisdictions. Empirical work in this area would be fascinating.

But when it comes to anti-discrimination law, which is in essence an exception to the employment-at-will doctrine, what can be done to give it its full power—to interpret it in light of its guiding principles? I would suggest that generally we do not want to bring employment discrimination claims in federal court. The federal courts have been hostile to these claims over the past 30 years or so, and the addition of Trump judges with lifetime appointments will only make the interpretation of the laws worse. For this reason, I believe we should focus on enacting laws in the states that have progressive legislatures, governors, and state court judges.

The goal would be that lawyers representing anti-discrimination plaintiffs would bring their claims exclusively in state court and would avoid bringing federal claims that would subject their cases to removal to federal court. This means that there must be robust state anti-discrimination laws as well as procedures that permit clients to get fairly quick justice and to get a fair hearing. If there is a state human rights or equal employment opportunity agency, employees should have a right to remove their claims fairly quickly from the jurisdiction of the agency and to bring their suits in state court for adequate compensation.

Examples from my home state of Nevada may be illustrative. Nevada has been a red,<sup>156</sup> then purple,<sup>157</sup> and, just recently, a blue<sup>158</sup> state over the past twenty years. Literally, it is the first state legislature with a majority of female legislators. And, for the first time in years, there are democratic majorities in the state assembly and the state senate and a democratic governor. The state court judges are elected, and therefore responsible to the public. The state, which is more conservative in rural areas and the northern part of the state, has voted increasingly for federal officials who are members of the democratic party. Of the four members of the U.S. house of representatives from Nevada, three are democrats and one is a republican. Both U.S. senators are women and democrats. The Nevada Attorney General is a democrat. This

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<sup>156</sup> A “red state” is a state in the U.S. where the citizens vote republican in presidential elections. A “blue state” is a state where the citizens vote democratic in presidential elections. See *Why Do We Have “Red States” and “Blue States”?*, DICTIONARY.COM (Aug. 27, 2020), <https://www.dictionary.com/e/red-states-blue-states-democrat-republican/>.

<sup>157</sup> A “purple state” is a state in the U.S. where Democrats and Republicans have similar amount of support: a swing state. See *Purple State*, LEXICO, [https://www.lexico.com/en/definition/purple\\_state](https://www.lexico.com/en/definition/purple_state) (last visited Feb. 7, 2022).

<sup>158</sup> See Susan Milligan, *The Battleground States: Nevada*, U.S. NEWS (Oct. 1, 2020, 4:51 PM), <https://www.usnews.com/news/elections/articles/the-2020-swing-states-nevada-who-votes-past-results-and-why-it-matters> (explaining that Nevada was once a conservative Western Republican state, but has consistently been moving to the left as it grows in population and noting that the legislative leaders are mostly democrats with an African American, a Latina, and a White woman in charge).

is a perfect situation for passing protective labor legislation in the state that is not pre-empted by federal law.<sup>159</sup> In the anti-discrimination context, there is no concern with preemption (except when it comes to bans on pre-dispute arbitration clauses which are preempted, according to the Supreme Court, by the Federal Arbitration Act).<sup>160</sup>

One concern, of course, is that state judges who have had little or no experience deciding discrimination cases will look to federal cases decided by federal judges for guidance in how to interpret the substantive provisions of Title VII and also when to grant motions to dismiss and for summary judgment. While there is nothing wrong with looking at federal court opinions for guidance, state court judges should be educated to assure that they do not do so in an unthinking manner. California, for example, has enacted progressive, pro-worker legislation, and its courts have taken an independent eye to that legislation, recognizing that it grants greater rights than the federal law.

## V. CONCLUSION

Professors Gamonal and Rosado have written a powerful book that explains the pro-employee principles that Latin American courts apply when deciding cases before them. They have argued that these principles should also apply to employment and labor law in the U.S. These principles are particularly applicable to U.S. anti-discrimination laws because of the clear underlying purposes of these laws to protect employees. Today, given not only the history of the rising inequality in the U.S. between workers and the wealthy, but also the more immediate stark and real differences of how the pandemic has affected Americans of different races, classes, and ages, it is more important now than it has ever been to pay attention to vulnerable workers and to assure that our laws protect them. Returning to the original purpose of these laws, judges should consider using the principles that our southern neighbors apply to labor and employment law and should assure

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<sup>159</sup> See *Political Values and Democratic Candidate Support*, PEW RSCH. CTR. (Jan. 30, 2020), <https://www.pewresearch.org/politics/2020/01/30/political-values-and-democratic-candidate-support/> (finding that 80% of democrats and far fewer republicans (between 24% and 34%) see government regulation as necessary to solve problems and protect the public).

<sup>160</sup> Recently, Congress passed the The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act on a bipartisan basis. See Deirdre Walsh, *Congress Approves Bill to End Forced Arbitration in Sexual Assault Cases*, NPR (Feb. 10, 2022, 12:16 PM), <https://www.npr.org/2022/02/10/1079843645/congress-approves-bill-to-end-forced-arbitration-in-sexual-assault-cases>. The Act prohibits mandatory pre-dispute arbitration in sexual assault and sexual harassment cases. This Act is crucial to the rights of victims of sexual assault and harassment, but in the future Congress should pass a broader bill that applies to all types of employment discrimination cases.



that both procedural and substantive rights granted by our laws are carefully enforced.