Articles

The Future of Collective Employment Arbitration Part II: Apocalyptic Warnings, *Lochnerizing*, and the Right to Contract

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I. INTRODUCTION

As a potential harbinger of things to come, the dissent in *Epic Systems Corp. v. Lewis*[1] invoked the ghost of *Lochner*[2] and prophesized a bleak future of hostility toward labor relations and the return of "yellow-dog contracts."[3] But the majority characterized the dissent's views as a mere "apocalyptic warning" that will inevitably be "prove[d] a false alarm."[4] In a prior issue of this journal, we discussed a circuit split regarding whether and to what extent an employer may require individual arbitration—while prohibiting collective arbitration—of employment disputes as a condition of employment.[5] At the time of publication of the prior article, the Supreme Court had granted certiorari in the three consolidated cases of *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *National Labor Relations Board v. Murphy Oil USA, Inc.*, which all considered this issue.[6] But merits briefing was not yet completed at the time of that prior publication, nor had oral arguments occurred.[7] In the prior article, we hypothesized that the Supreme Court would adopt the reasoning of the Fifth Circuit in *Murphy Oil* and its predecessor *D.R. Horton v. National Labor Relations Board.*[8]

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1 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648–49 (2018) (Ginsburg, J., dissenting) ("[T]he edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called 'yellow dog,' and of the readiness of this Court to enforce those unbargained-for agreements.").

2 *Lochnerize*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term's meaning as "to scrutinize and strike down economic legislation under the guise of enforcing the Due Process Clause, esp. in the manner of the U.S. Supreme Court during the early 20th century" and noting that "[t]he term takes its name from the decision in [Lochner v. New York, 198 U.S. 45 (1905)], in which the Court invalidated New York's maximum-hours law for bakers"); *but see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1343–46 (3rd ed. 2000) (noting "[t]hat period is ordinarily described as 'the Lochner era,' but it should be so characterized on with the great caution—and with recognition that *'Lochnerizing'* has become so much an epithet that the very use of the label may obscure attempts at understanding"); *see also id.* at 1345 (noting that while "[m]any observers have contended that the Supreme Court's decisions during the *Lochner* era were motivated [in part] by the majority's . . . hostility toward labor regulations," that the era's jurisprudence was "concerned less with maintaining a distributive balance between labor and capital than with preserving a normative balance between individual autonomy and state micromanagement").

3 *Yellow-Dog Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining yellow-dog contracts as "[a]n employment contract forbidding membership in a labor union").

4 *Epic Sys.*, 138 S. Ct. at 1630.

5 *See generally* Matthew J. Kolodoski & Jay Forester, *The Future of Collective Employment Arbitration: Reconciling the FAA with the NLRA, FLSA, & Other Federal Rights*, 22 TEX. J. C.L. & C.R. 153 (2017).

6 *Id.* at 154; *Epic Sys.*, 138 S. Ct. 1612 (2018).

7 Kolodoski & Forester, *supra* note 5, at 154; *see also Epic Sys.*, 138 S. Ct. at 1612.

8 Kolodoski & Forester, *supra* note 5, at 178 ("Given the current composition of the Supreme Court, along with this recent precedent and trend in favor of arbitration rights, the Supreme Court is likely to adopt the reasoning of the Fifth Circuit in *D.R. Horton* and *Murphy Oil*, and expand its ruling in *Concepcion* to the employment context.").

We also predicted that, based on the current composition of the Supreme Court and the strong deference to the Federal Arbitration Act (FAA)[9] found in its recent jurisprudence, the Supreme Court would likely expand its seminal ruling from *AT&T Mobility LLC v. Concepcion*[10] (hereinafter referred to as *Concepcion*) to the employment context.[11] Both were proven correct in the recently issued *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648–49 (2018) (hereinafter referred to as *Epic Systems*).[12]

As noted, a fiercely divided court with conflicting views marked this opinion.[13] The truth of the diametrically opposed positions and the decision's long-term effect will not be known for some time.[14] However, large swaths of the American labor force are predicted to feel its initial effects soon, as more companies increasingly use class or collective action waivers in employment contracts.[15] This article will consider the basis of the Supreme Court's majority and dissenting opinions in *Epic Systems,* as well as their legal and practical considerations.[16] This article will then consider the consequences and impact of the Supreme Court's opinion and what comes next, including discussion of the return of *Lochner* and collective-arbitration alternatives.[17]

II. EPIC SYSTEMS CORP. V. LEWIS

A. Procedural Posture

In *Epic Systems Corp. v. Lewis*, the Supreme Court was asked to decide whether employers could require individual arbitration as a condition of employment.[18] The background of this dispute was discussed at length in our prior article, and we will only briefly

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[9] Federal Arbitration Act (FAA), 9 U.S.C. § 1–16 (2018).

[10] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[11] Kolodoski & Forester, *supra* note 5, at 178.

[12] *Epic Sys.*, 138 S. Ct. at 1648–49.

[13] *Id.* at 1632–33.

[14] *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/G4D5-GYGA] ("Under [mandatory-arbitration] agreements, workers whose rights are violated—for example, through employment discrimination or sexual harassment—can't pursue their claims in court but must submit to arbitration procedures that research shows overwhelmingly favor employers.").

[15] *Id.*

[16] *See infra* Part II.

[17] *See infra* Part III.

[18] *Epic Sys.*, 138 S. Ct. at 1619 ("Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?").

summarize it below.[19] *Epic Systems* and its companion consolidated cases all involved employer companies that had presented their employees with mandatory agreements that required individual arbitration for any wage-and-hour claims brought by an employee (as well as most other claims).[20] Employees who were presented with the agreement, such as Jacob Lewis (hereinafter "Lewis") in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017), could not decline it if they wanted to keep their jobs and were deemed to have accepted the terms if they continued to work for the company.[21] Employees in the consolidated cases later sued their employers, alleging that the companies had violated the Fair Labor Standards Act (FLSA)[22] and that the individual arbitration clause violated the National Labor Relations Act (NLRA)[23] by interfering with the employees' right to engage in concerted activities for mutual aid and protection under Section 7 of the NLRA.[24]

Several of the district courts, as well as the Seventh Circuit on appeal, found the plaintiffs' arguments persuasive.[25] Specifically, the Seventh Circuit held on appeal that engaging in class, collective, or representative proceedings were a "concerted activity" under Section 7 of the NLRA.[26] Under Section 8 of the NLRA, the Seventh Circuit therefore found that such concerted activity was protected from interference, restraint, or coercion by employers engaging in unfair labor practices.[27] In considering the FAA, however, the Seventh Circuit attempted to harmonize it with the NLRA.[28] The Seventh Circuit noted that the "saving clause" of the FAA states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," including illegality.[29] Moreover, the NLRA prohibited contractual provisions that stripped away employees' rights to engage in concerted activities, including the collective action issue involved in the arbitration in the

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[19] *See* Kolodoski & Forester, *supra* note 5.

[20] Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017); see also Morris v. Ernst & Young, LLP, 834 F.3d 975, 979 (9th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015), cert. granted, 137 S. Ct. 809 (2017).

[21] Lewis, 823 F.3d at 1151.

[22] Fair Labor Standards Act, 29 U.S.C. § 201–19 (2012).

[23] National Labor Relations Act, 29 U.S.C. § 151–69 (2012).

[24] Lewis, 823 F.3d at 1151; *see also* Morris, 834 F.3d at 979; Murphy Oil, 808 F.3d at 1015–16.

[25] *See, e.g.*, *Lewis*, 823 F.3d. at 1151; *Morris*, 834 F.3d at 979.

[26] *Lewis*, 823 F.3d. at 1154 (noting that Congress was aware of the existence of collective proceedings when enacting the National Labor Relations Act, that the "plain language of Section 7 [29 U.S.C. § 157] of the NRLA encompasses" these types of proceedings, that "there is no evidence that Congress intended them to be excluded," and that Section 7 with Section 8 [29 U.S.C. § 158] "renders unenforceable any contract provision purporting to waive employees' access to such remedies" (internal citations omitted)).

[27] *Id.* at 1155 (citing 29 U.S.C. § 158).

[28] *Id.* at 1158.

[29] *Id.* at 1157 (citing 29 U.S.C. § 152).

Lewis case.[30]

The Seventh Circuit therefore found that "[b]ecause the provision at issue [was] unlawful under Section 7 of the NLRA, it [was] illegal, and [met] the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work[ed] hand in glove."[31] Notably, the Seventh Circuit took the position that the right to engage in "concerted activity" through class or collective action was a substantive right under the NLRA, even though the class action device was procedural, noting "[t]he right to collective action in section 7 of the NLRA . . . lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute."[32] Accordingly, the Seventh Circuit held that because the waiver required employees to relinquish a right that the National Labor Relations Board (the Board) had declared to be substantive, the waiver was not enforceable under the FAA.[33]

On January 13, 2017, the Supreme Court granted certiorari on this issue and consolidated the appeals from decisions in the Fifth Circuit's *Murphy Oil* case, the Seventh Circuit's *Lewis* case, and the Ninth Circuit's *Morris* case.[34]

B. Majority Opinion

On the first day of the October 2017 term, the Supreme Court heard from four attorneys in the consolidated cases.[35] Notably, since the United States changed its position following the installation of the Trump Administration, the Solicitor General's office argued on behalf of the challengers to the Board's position.[36] Observations from the oral argument accurately reflected that the "four more liberal justices"—Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor—seemed to support the Board's position that the NLRA nullified the FAA in the context of waivers of collective action in arbitration, while Chief Justice John Roberts along with Justices Anthony Kennedy and Samuel Alito seemed more open to the employer's position.[37] Interestingly, neither Justices Clarence Thomas nor Neil

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 1160 ("The right to collective action in section 7 of the NLRA is not, however, merely a procedural one.").

[33] *Id.* at 1160–61.

[34] Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017) (noting consolidation of the three cases). The underlying facts of these cases were examined in detail in our prior article and will therefore not be addressed here.

[35] Transcript of Oral Argument at 1–5, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285, No. 16-300, No. 16-307).

[36] *Epic Sys.*, 138 S. Ct. at 1618, 1621.

[37] Amy Howe, *Argument analysis: An epic day for employers in arbitration case? (UPDATED)*, SCOTUSBLOG (Oct. 2, 2017, 2:50 PM),

Gorsuch asked any questions.[38] However, going into oral arguments, Justice Thomas had previously voted in favor of a broader reading of the FAA, so it seemed probable that the ultimate decision would be decided by Justice Gorsuch, or perhaps Chief Justice Roberts if he could be persuaded to join a narrow ruling with the more liberal members of the Supreme Court.[39]

After an approximately seven-month wait, the Supreme Court issued its decision in the consolidated cases on May 21, 2018.[40] Therein, it reversed the Seventh Circuit's decision, as well as a similar decision by the Ninth Circuit, and adopted the position espoused by the Fifth Circuit in *Murphy Oil USA, Inc. v. National Labor Relations Board*.[41] In a 5-4 decision authored by Justice Gorsuch and joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Alito, the Supreme Court held that the FAA required enforcement of arbitration agreements, even if they provide for individualized proceedings.[42]

In reaching this decision, the Supreme Court considered two questions.[43] First was whether the FAA's saving clause, which allows courts to hold arbitration agreements unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract," applied to the arbitration agreement entered into by Lewis.[44] Second was whether the NLRA's guarantee of the right to engage in concerted activity overrode the requirement that arbitration agreements be enforced under the FAA.[45] The majority answered both questions in the negative.[46] The Supreme Court also considered Lewis's argument that the Supreme Court should defer to the Board's interpretation under *Chevron* deference.[47]

In considering whether the FAA's saving clause applied to the arbitration agreement entered into by Lewis, the Supreme Court relied heavily on the seminal case of *AT&T Mobility LLC v. Concepcion*.[48] In *Concepcion*, the Supreme Court considered the enforceability of a class action waiver in a standard-form contract.[49] Specifically, California state law classified most arbitration waivers in consumer contracts as unconscionable and, therefore, unenforceable.[50] Accordingly, under

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http://www.scotusblog.com/2017/10/argument-analysis-epic-day-employers-arbitration-case/ [https://perma.cc/VB55-Y545].

38 *Id.* (noting that "Justices Clarence Thomas and Neil Gorsuch[ ]were silent today").

39 *Id.*

40 *Epic Sys.*, 138 S. Ct. at 1612.

41 *Id.* at 1632.

42 *Id.*

43 *Id.* at 1621, 1623–24.

44 *Id.* at 1621–22.

45 *Id.* at 1623–24.

46 *Id.* at 1621, 1630.

47 *Id.* at 1629–30.

48 *Id.* at 1621–23.

49 *Id.* at 1622; *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333–34 (2011).

50 *Concepcion*, 563 U.S. at 340.

California state law, a court could either refuse to enforce any contract it found "to have been unconscionable at the time it was made" or "limit the application of any unconscionable clause."[51] Relying on the specific language of Section 2 of the FAA and the clear intent of the FAA as a whole, the Supreme Court held that the FAA preempted the California law and that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms."[52]

Likewise, the Supreme Court in *Epic Systems* reasoned that the saving clause only permitted invalidation of arbitration agreements on grounds that exist for the revocation of "any" contract.[53] Lewis had argued that it applied in his case because the NLRA rendered the class and collective action waiver utilized by his employer illegal.[54] As characterized by the Supreme Court, "[i]n [Lewis's] view, illegality under the NLRA is a ground that exists at law . . . for the revocation of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings."[55] But as recognized in *Concepcion*, the saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[56] Lewis, however, did not suggest that his arbitration agreement was extracted by means of fraud, duress, or unconscionability.[57] Rather, he objected to the agreement only because it required individualized arbitration proceedings—something to which he previously but no longer wished to agree.[58] The Supreme Court then held that by merely attacking the individualized nature of the arbitration proceedings, Lewis "[sought] to interfere with one of arbitration's fundamental attributes," i.e., the right to agree to the terms of the arbitration proceedings.[59] The majority then rejected Lewis's argument that his case was distinguishable from *Concepcion*, because "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the

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[51] CAL. CIV. CODE ANN. § 1670.5(a) (West 2016). Under California's rules, unconscionability finding required "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (citing *id.*); *accord* Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[52] *Concepcion*, 563 U.S. at 339 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) and Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)) (internal citations omitted).

[53] *Epic Sys.*, 138 S. Ct. at 1621.

[54] *Id.* at 1622.

[55] *Id.* (internal quotations and citations omitted).

[56] *Id.* (quoting Federal Arbitration Act (FAA), 9 U.S.C. § 2 (2018)); *see also Concepcion*, 563 U.S. at 340.

[57] *Epic Sys.*, 138 S. Ct. at 1621.

[58] *Id.* at 1622 ("And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.").

[59] *Id.*

parties' consent."[60] In sum, the Supreme Court held that Lewis and Epic Systems Corporation had the right to enter into an arbitration agreement that allowed for individualized arbitration and to have its terms enforced under the FAA.[61]

Further, the majority opinion rejected Lewis's argument that the NLRA overrides the normal application of the FAA.[62] Rather, the majority reasoned:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. The intention must be "clear and manifest." And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.[63]

The majority, however, found no congressional command within the NLRA, let alone one that was "clear and manifest."[64] Instead, it noted that "[Section 7] does not express approval or disapproval of arbitration."[65] Thus, it was silent and neutral.[66] Moreover, "[i]t does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand."[67] As stated by the majority, "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"[68] Accordingly, lacking clear and manifest intent, the NLRA does not displace the FAA nor outlaw class and collective action waivers.[69]

Finally, the majority noted, "[w]ith so much against them in the statute and our precedent, the employees end by seeking shelter in

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60 *Id.* at 1623.
61 *Id.*
62 *Id.* at 1617–18.
63 *Id.* (internal citations omitted).
64 *Id.*
65 *Id.* at 1624
66 *Id.*
67 *Id.* (citing Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468 (2001)).
68 *Id.* at 1627 (internal citations omitted).
69 *Id.*

Chevron."[70] *Chevron* deference is a tool of statutory construction whereby "a court will uphold a federal agency's construction of a federal statute if (1) the statute is ambiguous or does not address the question at issue, and (2) the agency's interpretation of the statute is reasonable."[71] It posits that "[i]f the court finds that the legislature's intent is clearly expressed in the statute, then that intent is upheld."[72] In *Epic Systems*, however, the Supreme Court concluded, "under *Chevron*'s terms, no deference [was] due."[73] Specifically, the majority noted that *Chevron* deference was justified on grounds that "a statutory ambiguity represents an 'implicit' delegation to an agency to interpret a 'statute which it administers.'"[74] However, in *Epic Systems* the Board did not seek to interpret the NLRA alone.[75] Instead, the Board sought to interpret the NLRA in a manner that would limit and impair the FAA—a wholly separate congressionally enacted statute—and do so in a manner that would have narrowed the clear purpose of the latter statute.[76] Thus, they concluded that "[o]ne of *Chevron*'s essential premises [was] simply missing here."[77] Likewise, the Supreme Court noted that *Chevron* deference was a tool of statutory construction that is used to resolve statutory ambiguity.[78] But here they did not have an ambiguity to resolve.[79]

Moreover, the Court found that the Board's argument was, in effect, an argument about policy choices, which should be left to the officials of the Executive Branch, who are accountable to the American people.[80] But the Court noted that "the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA."[81] Thus, "whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable . . . . In these circumstances, we will not defer."[82] Although the Supreme Court found that *Chevron* deference was not applicable to

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[70] *Id.* at 1629.

[71] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see also Chevron Deference*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[72] *Chevron Deference*, *supra* note 71.

[73] *Epic Sys.*, 138 S. Ct. at 1629.

[74] *Id.* (citing *Chevron*, 467 U.S. at 841, 844).

[75] *Id.*

[76] *Id.* (noting that "on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here").

[77] *Id.* at 1630.

[78] *Id.* at 1629.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

the case at hand, it noted that none of the parties challenged the doctrine either.[83] Although the Supreme Court did not defer to the Board's interpretation, it also did not repudiate *Chevron*.[84]

C. Dissenting Opinion

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, wrote a stalwart and unabashed dissent in *Epic Systems*.[85] The dissent's argument centered on public policy and historical arguments, concluding that waiver of class and collective actions in arbitration would be contrary to the intent of the drafters of the FLSA and FAA.[86] The dissent began with an overview of the history of the NLRA and its predecessor, the Norris-LaGuardia Act (NLGA), including the outlawing of yellow-dog contracts.[87] The dissent went on to describe the plain language of the NLRA concerning employees' rights "to engage in other concerted activities for the purpose of . . . mutual aid or protection."[88] Furthermore, the dissent highlighted the historic viewpoint of the Board, which has supported the rights of employees to engage in a "myriad" of ways of joining together to advance their shared interests.[89]

The dissent then attacked the majority's use of the *ejusdem generis* canon to narrow the protections of the NLRA.[90] The dissent argued instead that the NLRA must be read broadly to encompass a number of activities, including collective arbitration.[91] The dissent also derided the majority for the effect of its decision, arguing that the majority would limit concerted activities to those activities available in 1935.[92] The dissent contended that not only were waivers of collective action in arbitration invalid, but so were any contractual provisions that frustrated or banned collective litigation.[93]

Justice Ginsburg finished her dissent with a description of the FAA and its history.[94] Central to the dissent's argument was that early

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[83] *Id.*

[84] *Id.* at 1629 (noting that "[n]o party to these cases has asked us to reconsider *Chevron* deference.").

[85] *Id.* at 1633 (Ginsburg, J., dissenting).

[86] *Id.* at 1646.

[87] *Id.* at 1634.

[88] *Id.* at 1636.

[89] *Id.*

[90] *Id.* at 1639; *see Ejusdem Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that *ejusdem generis* is "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed").

[91] *Epic Sys.*, 138 S. Ct. at 1639 (Ginsburg, J., dissenting).

[92] *Id.* at 1640.

[93] *Id.* at 1643.

[94] *Id.* at 1642.

arbitration agreements were "voluntary, negotiated agreements" and that court cannot enforce "illegal promises," even if set forth in case law.[95] The dissent completed its argument by reiterating the detrimental and widespread effect that the majority's decision would have for employees, suggesting that the downfall of collective actions will result in "underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[96]

III. IMPLICATIONS

Having discussed the decision in *Epic Systems* itself, we now turn to an examination of the decision's implications, including (A) the Obvious Results and Further Questions; (B) the Future of the *Chevron* Deference; (C) Employee Alternatives; and (D) Employers' Considerations.

A. Obvious Results and Further Questions

At its heart, *Epic Systems* was a clear win for arbitration and the employers who favor it.[97] Unsurprisingly, the *Epic Systems* decision reflected the logical continuation of the Supreme Court's recent decisions favoring arbitration, which were examined in greater detail in our prior article.[98] Indeed, the majority opinion clearly outlined the logical progression of those cases, citing *AT&T Mobility LLC v. Concepcion*, *CompuCredit Corp. v. Greenwood*, *American Express Co. v. Italian Colors Restaurant*, *DIRECTV, Inc. v. Imburgia*, and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[99] Given the holdings of those cases, it would be difficult to see how the Supreme Court could rationalize those prior cases with a divergent result in *Epic Systems*. Further, the majority arguably did not break with a long line of authority regarding the NLRA, since it was not until 2012 that the Board embraced the notion that the NLRA banned arbitration agreements requiring

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[95] *Id.* at 1641–42.

[96] *Id.* at 1646–47.

[97] *See, e.g.*, *An "Epic" Win for Employers on Arbitration Agreements*, WINSTON & STRAWN LLP (May 22, 2018), https://www.winston.com/en/thought-leadership/an-epic-win-for-employers-on-arbitration-agreements.html [https://perma.cc/S4LT-GYLQ] (noting that the "Supreme Court delivered yet another important victory for employers relying on arbitration agreements").

[98] Kolodoski & Forester, *supra* note 5, at 154–55.

[99] *Epic Sys.*, 138 S. Ct. at 1621–24, 1627 (citing DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015), Am. Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013), CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and Stolt-Nielsen S.A. v. AnimalFeeds Int. Corp., 559 U.S. 662 (2010)).

individual, rather than collective, action for wage claims.[100] In sum, the majority's opinion was clearly grounded in the Supreme Court's recent decisions, as well as the text of the FAA and NLRA.[101] Therefore, the result was not surprising. Nor is it a harbinger of an activist court, but one grounded in the text and law.

Since the Supreme Court issued its decision, various lower courts have begun to rule that waivers requiring individual, as opposed to collective, arbitration are enforceable.[102] And there are indications that more employers will seek to incorporate similar waivers into more of their employment agreements.[103] On a practical level, some have posited that this will make it more difficult for certain lower-dollar-value claims to be brought.[104] In fact, this was the basis of Justice Ginsburg's public policy-laden dissent, which argued, "[i]f employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen."[105] Justice Ginsburg continued, "[e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries."[106]

But still other attorneys have hypothesized that any resulting chilling effect in employees' claims will not, in fact, be apocalyptic; indeed, they argue it may not even be significant. For example, plaintiffs' lawyers can continue to sign up large numbers of clients with similar claims against the same employer while forcing employers to arbitrate each case individually.[107] Filing large numbers of individual arbitrations

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[100] *Epic Sys.*, 138 S. Ct. at 1620; *but see* Editorial, *'Epic Systems' is Based on Policy, Not Precedent*, N.J. L. J. (July 2, 2018), https://www.law.com/njlawjournal/2018/07/02/epic-systems-is-based-on-policy-not-precedent/?slreturn=20180712143338 [https://perma.cc/QBB9-KUNL] (disagreeing with the majority's characterization that about the Board's "recent about-face" because "the majority focused on a nonbinding opinion of its general counsel rather than on the board's actual decision").

[101] 9 U.S.C. § 2 (2018); 29 U.S.C. § 157 (2018); *DIRECTV, Inc.*, 136 S. Ct. 463; *Am. Exp. Co.*, 570 U.S. 228; *CompuCredit*, 565 U.S. 95; *Stolt-Nielsen S.A.*, 559 U.S. 662; *AT&T Mobility LLC*, 563 U.S. 333; Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[102] *See, e.g.*, Franks v. NLRB, No. 16-10644, 2018 WL 3640818 (11th Cir. 2018); Guerro v. Halliburton Energy Servs., Inc., No. 1:16-cv-01300-LJO-JLT, 2018 WL 3615840 (E.D. Cal. July 26, 2018); Da Silva v. Darden Restaurants, Inc., No. 2:17-CV-05663-ODW (E), 2018 WL 3533364 (C.D. Cal. July 20, 2018); Heidrich v. PennyMac Financial Services, Inc., No. 2:16-cv-02821-TLN-EFB, 2018 WL 3388458 (E.D. Cal. July 11, 2018); Sifuentes v. Brema Investments, LLC, No. H-17-142, 2018 WL 3421386 (S.D. Tex. June 27, 2018); Curatola v. TitleMax of Tennessee, Inc., No. 1:16-cv-01263-JDB-egb, 2018 WL 2728037 (W.D. Tenn. June 6, 2018); Williams v. FCA US LLC, No. 17-10097, 2018 WL 2364068 (E.D. Mich. May 24, 2018); Williams v. Dearborn Motors 1, LLC, No. 17-12724, 2018 WL 2364051 (E.D. Mich. May 24, 2018).

[103] *See* Mary-Christine Sungaila, et. al., *Arbitration After 'Epic Systems v. Lewis': Implications for California Employers,* RECORDER (May 30, 2018), https://www.law.com/therecorder/2018/05/30/arbitration-after-epic-systems-v-lewis-implications-for-california-employers/ [https://perma.cc/PZX5-RHNF] (noting that "employers across the country now have more certainty that when they agree to bilateral arbitration, courts will enforce that agreement").

[104] *Epic Sys.*, 138 S. Ct. at 1647–49 (Ginsburg, J., dissenting).

[105] *Id.* at 1647.

[106] *Id.*

[107] *See, e.g.*, Branden Campbell, *Class Waiver Ruling Could Backfire On Businesses: Panel*, LAW360 (May 23, 2018), https://www.law360.com/articles/1046851/class-waiver-ruling-could-

can be wielded as an exceptionally potent weapon against employers since they often pay the cost of arbitration.[108] And the increased demand generated by individual arbitration cases post-*Epic Systems* may enable arbitrators in large cities to exponentially raise their hourly rates.[109] Thus, these rate changes may make large-scale individual arbitration unpractical and cost-prohibitive for most employers and, therefore, limit its use.[110] Accordingly, *Epic Systems* may not have as profound of an effect on employment claims as the dissent prophesied; indeed, it may make them more expensive to defend for an employer overall.[111]

In addition to increased costs, companies that avail themselves of individual arbitration (as well as arbitration in general) will face additional risks since they will be unable to rely on one of the biggest benefits of winning a class action, i.e., foreclosing future claims from other workers.[112] As noted by one attorney, "[i]n the context of arbitration, that means an employer can hypothetically win the first few arbitration cases brought by workers over a particular issue but still face the prospect of losing one of the proceedings."[113] Then, "[w]orkers who subsequently file an arbitration demand with a similar claim can potentially try to use that adverse ruling to their advantage and argue to the arbitrator that the issue was already litigated and decided against the employer."[114] Additionally, greater unionization is a possible side effect of *Epic Systems* since a union could work to limit or even rollback the continued use of class waivers for employees in a specific company.[115] In sum, companies will need to weigh the considerable risks and financial costs of adopting collective action waivers against the benefits of avoiding employee litigation and class actions.[116] Only time will tell whether the Supreme Court's decision will ultimately benefit employers and usher America into the bleak future of hostility toward labor regulations and *Lochnerizing* contemplated by Justice Ginsburg's

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backfire-on-businesses-panel [https://perma.cc/R878-HX8U]; Vin Gurrieri, *Class Waivers Declared Legal: What's Next For Plaintiffs?*, LAW360 (May 23, 2018), https://www.law360.com/articles/1046693 [https://perma.cc/3G32-3H7N].

[108] Gurrieri, *supra* note 107 (noting that "once [employers] start experiencing what an expensive pain it is for the employer to arbitrate and pay for each one separately with basically no right to appeal to a court, employers usually decide that arbitration isn't as much fun as they thought.").

[109] *Id.* (noting that new demand could permit arbitrators in large cities to raise their rates to upward of $1,500 per hour).

[110] *Id.*

[111] *Id.*; *see also* Alison Frankel, *From the 11th Circuit, a cautionary tale for employers imposing arbitration on workers*, REUTERS (Aug. 9, 2018), https://www.reuters.com/article/us-otc-epic/from-the-11th-circuit-a-cautionary-tale-for-employers-imposing-arbitration-on-workers-idUSKBN1KU2GF [https://perma.cc/F8AQ-ENAW] (discussing the expense of arbitration costs for employers).

[112] Gurrieri, *supra* note 107.

[113] *Id.*

[114] *Id.*

[115] *See id* (noting that unionization may be one employee-side response to the growth of class waivers).

[116] *See id* (noting that arbitration may be expensive and time-consuming for employers).

dissent,[117] or if the system will merely rebalance itself, with employees' counsels employing novel and new tactics in these disputes.

B. The Future of *Chevron* Deference

In the lead up to Justice Neil Gorsuch's confirmation, much was written about the possible impact Justice Gorsuch's elevation to the Supreme Court would have on *Chevron* deference.[118] Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[119] where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[120] Thus, under *Chevron* deference, courts must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'"[121] And, as examined above, Lewis attempted to invoke *Chevron* deference to support the Board's interpretation of the NLRA and its interaction with the FAA.[122] But despite concerns, *Epic Systems* was not used to curtail *Chevron* deference, let alone replace it.[123] And the Supreme Court sidestepped any fundamental changes to the doctrine, noting "[n]o party to these cases has asked us to reconsider *Chevron* deference."[124] Instead, the majority systematically explained why the doctrine was not applicable to the consolidated cases.[125] Thus, *Epic Systems* was not a watershed moment in administrative law.[126] However, it did not indicate that Justice Gorsuch's opinions regarding *Chevron* deference have changed.[127]

Notably, since the opinion was released in *Epic Systems*, Justice

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[117] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1648–49 (2018) (Ginsburg, J., dissenting); *see also supra*, note 2.

[118] *See, e.g.*, Eric Posner, *Gorsuch on Chevron Deference*, ERIC POSNER (Mar. 23, 2017), http://ericposner.com/gorsuch-on-chevron-deference/ [https://perma.cc/2GFA-54A2]; Chris Walker, *Gorsuch on Chevron Deference, Round II*, 36 YALE J. ON REG.: NOTICE & COMMENT (Mar. 23, 2017), *available at* http://yalejreg.com/nc/gorsuch-on-chevron-deference-round-ii/ [https://perma.cc/9RTX-AKKE]; Trevor W. Ezell & Lloyd Marshall, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. ONLINE 171 (2017), *available at* https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/03/69-Stan.-L.-Rev.-Online-171-IfGoliathFalls.pdf.

[119] Chevron U.S.A., Inc v. NRDC, Inc., 467 U.S. 837 (1984).

[120] *Id.* at 843; *see also Chevron Deference*, *supra* note 71 (defining *Chevron* deference similarly).

[121] Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99 (1996) (citation omitted).

[122] *See* discussion *infra* Part III.B.

[123] Epic Sys. Corp v. Lewis, 138 S. Ct 1612, 1629 (2018).

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1629 (noting that *Chevron* deference is still applicable in appropriate cases, but that this is not one such appropriate case).

[127] *Id.*

Anthony Kennedy announced his retirement from the Supreme Court and Judge Brett Kavanaugh was nominated and confirmed to succeed him.[128] As with Justice Gorsuch, Justice Kavanaugh's views regarding *Chevron* were central to certain criticism of his nomination.[129] Based on his writings, it appears that Justice Kavanaugh does not support a broad use of *Chevron* deference.[130] To categorically say he disfavors it, however, would be to caricature his views.[131] Rather, his writings indicate that he disfavors an expansive reliance on the doctrine by aggressive agencies seeking to expand their portfolio under the appearance of ambiguity and Congressional silence.[132] For example, when speaking on statutory ambiguity at Notre Dame School of Law, then-Judge Kavanaugh cautioned that "the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."[133] Then, he outlined the troubling result that *Chevron* brings "in real cases in courts."[134] An example of a troubling result he referenced was when a panel of three judges decide to defer to an agency's rule under an implementing statute on grounds of ambiguity, though one judge on the panel stated the statute was clear and the agency's reading was not the best.[135] In that example, the two other judges on the panel "defer to the agency even though they may agree with the first judge on what is the best reading of the statute."[136] Accordingly, "the agency wins, even though none of the three judges thought that the agency had the better reading of the statute."[137] Moreover, "[t]he legality of a major agency rule may . . . turn not on whether the judges think the agency's interpretation of the statute is the

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[128] *President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States*, WHITE HOUSE (July 9, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/ [https://perma.cc/K46E-4YPN].

[129] Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL STREET J. (July 9, 2018), https://www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402 [https://perma.cc/V7JN-FTWN]; Pema Levy, *How Brett Kavanaugh Could Cripple the Next Democratic President –Two words: Chevron Deference*, MOTHER JONES (July 24, 2018), https://www.motherjones.com/politics/2018/07/brett-kavanaugh-supreme-court-chevron-deference/ [https://perma.cc/L3KY-E84Z]; Christopher Walker, *Judge Kavanaugh on administrative law and separation of powers (Corrected)*, SCOTUSBLOG (Jul. 26, 2018), http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/ [https://perma.cc/ZE22-AW6H].

[130] Gershman, *supra* note 129; Levy, *supra* note 129; Walker, *supra* note 129.

[131] *See* Walker, *supra* note 129 (noting that Kavanaugh will not attempt to "deconstruct . . . the administrative state").

[132] Gershman, *supra* note 129; Levy, *supra* note 129; Walker, *supra* note 129.

[133] Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

best interpretation, but rather on whether the statute is ambiguous."[138]

Judge Kavanaugh further developed this concept in a Harvard Law Review article, explaining:

> *Chevron* has been criticized for many reasons. To begin with, it has no basis in the Administrative Procedure Act. So *Chevron* itself is an atextual invention by courts. In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch. Moreover, the question of when to apply *Chevron* has become its own separate difficulty . . . . All of that said, *Chevron* makes a lot of sense in certain circumstances. It affords agencies discretion over how to exercise authority delegated to them by Congress. For example, Congress might assign an agency to issue rules to prevent companies from dumping "unreasonable" levels of certain pollutants. In such a case, what rises to the level of "unreasonable" is a policy decision. So courts should be leery of second-guessing that decision. The theory is that Congress delegates the decision to an executive branch agency that makes the policy decision, and that the courts should stay out of it for the most part. That all makes a great deal of sense and, in some ways, represents the proper conjunction of the *Chevron* and *State Farm* doctrines.
>
> But *Chevron* has not been limited to those kinds of cases. It can also apply whenever a statute is ambiguous. In a case where a statute is deemed ambiguous, a court will defer to an agency's authoritative reading, at least so long as the agency's reading is reasonable.[139]

Accordingly, based on the foregoing, it appears that Justice Kavanaugh's concerns regarding *Chevron* deference are similar to Justice Gorsuch's concerns.[140] Although the Court dodged the issue in *Epic Systems*, the time is ripe for future cases to place the *Chevron* deference front and center again.

C. Employee Alternatives

In the aftermath of the *Epic Systems* decision, discussion among worker advocates has turned to alternatives to collective arbitration and

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[138] *Id.*

[139] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–52 (2016).

[140] *See* Gutierrez-Brizuela v. Lynch, 834 F.34 1142, 1143 (10th Cir. 2016) (Gorsuch, J.).

strategies to make individual arbitration more efficient.[141] This section discusses some of the early options proposed.

Robust discussion in this area centers on California's private attorneys general statute, the California Private Attorneys General Act (PAGA).[142] PAGA allows for private parties to enforce certain California labor laws on behalf of the state and similarly situated employees.[143] The statute also requires that certain notices be given to the State of California pre-suit.[144] Because claims under PAGA are brought on behalf of the State of California, which is not a party to the employee's arbitration agreement, it is argued that PAGA claims cannot be forced into arbitration under a mandatory arbitration agreement contained in an employment agreement.[145] However, the enforceability of state-based private attorneys general statutes might be in question given the Supreme Court's decisions in *Epic Systems* and *Concepcion*, the latter of which invalidated another California state law restricting arbitration.[146] But, for now, several other states, including Vermont, are considering implementing similar statutes.[147] Only time will tell how courts will interpret PAGA and other similar statutes in light of the Supreme Court's ruling in *Epic Systems*.[148] However, based on its recent jurisprudence, it is probable that the Supreme Court will still favor the use of arbitration, should any of these initiatives eventually percolate up to the justices.[149]

Other legal practitioners have proposed that state and local governments (or even the federal government) can limit the application of *Epic Systems* by mandating that government contractors not use arbitration agreements in their employment contracts.[150] But these government proposals touch only a limited subset of the total companies in the United States that use arbitration agreements, specifically those large enough to bid for and receive large government contracts.[151] Nevertheless, such actions would be a power tool to effect change

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[141] *See, e.g.*, Daniel Hemel, *The Arbitration Fight Isn't Over*, SLATE (May 22, 2018), https://slate.com/news-and-politics/2018/05/the-epic-systems-v-lewis-mandatory-arbitration-ruling-was-awful-heres-how-states-can-counteract-it.html [https://perma.cc/NLS8-QGV6] (discussing potential state and local efforts to mitigate the effects of mandatory arbitration).

[142] Sungaila, *supra* note 103.

[143] Private Attorneys General Act of 2004, CAL. LAB. CODE §§ 2698–2699.5 (West 2018).

[144] *Id.*

[145] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1639 (2018).

[146] *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); *see also Epic Sys.*, 138 S. Ct. at 1639.

[147] *See* Ceilidh Gao, *What's Next for Forced Arbitration? Where We Go After SCOTUS Decision in Epic Systems*, NAT'L EMP. L. PROJECT (June 5, 2018), https://www.nelp.org/blog/whats-next-forced-arbitration-go-scotus-decision-epic-systems/ [https://perma.cc/56W9-GDYL] (discussing other state statutes similar to PAGA).

[148] *Epic Sys.*, 138 S. Ct. at 1639.

[149] *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), Stolt-Nielsen S.A. v. AnimalFeeds Int. Corp., 559 U.S. 662 (2010); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[150] Hemel, *supra* note 141.

[151] *Id.*

through targeted policy decisions, rather than by judicial fiat.

Still, others in the legal and business community are hopeful that Congress may choose to amend the FAA to limit its application and protect workers.[152] As examined in depth in our prior article, the FAA was passed to address widespread judicial antagonism to arbitration and arbitration clauses.[153] Thus, Congress can reverse this trend if it disagrees with the majority's decision.[154] In fact, Justice Gorsuch noted as much in the majority opinion, stating it is not the Supreme Court's job to "substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin."[155] Thus, Congress, which passed both the FAA and the NLRA, is best positioned to respond to concerns regarding the *Epic Systems* and its forerunners if, in fact, the dissent is correct.[156]

While the Supreme Court was ruling on *Epic Systems*, legislation was again introduced in Congress to place this issue (and more broadly the recent decisions from the Supreme Court regarding the FAA) before Congress for a vote.[157] The Arbitration Fairness Act of 2018 was introduced into the 115th Congress.[158] As proposed in the Senate, the bill included the following findings, which would (if adopted) support the dissenting justices' view of the FAA:

> (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
>
> (2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.
>
> (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to

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[152] *Id.*

[153] Kolodoski & Forester, *supra* note 5, at 153.

[154] Michael S. Greve, *An* Epic *Case, Its Not-So-Immaculate Conception, and a Few Thoughts on Conservative Jurisprudence*, LAW & LIBERTY (May 31, 2018), https://www.lawliberty.org/2018/05/31/an-epic-case-its-not-so-immaculate-concepcion-and-a-few-thoughts-on-conservative-jurisprudence/ [https://perma.cc/X68E-BC3T] (noting that "the divine RBG urged Congress to overrule the decision by statute").

[155] *See Epic Sys.*, 138 S. Ct. at 1632 (emphasis in original).

[156] Greve, *supra* note 154 (noting that after *Epic* "[t]here can't be any federal substantive rule of decision unless Congress ordains it").

[157] Shane T. Roeber, *Supreme Court Upholds Individual Proceedings in Arbitration Agreements—Hindering Class Actions*, NAT. L. REV. (June 19, 2018), https://www.natlawreview.com/article/supreme-court-upholds-individual-proceedings-arbitration-agreements-hindering-class [https://perma.cc/HP9H-CSZU].

[158] Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); *see also* Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

> arbitration. Often, consumers and employees are not even aware that they have given up their rights.
>
> (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.
>
> (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary and occurs after the dispute arises.[159]

Relevant here, the draft legislation further provides that in general, "[n]otwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."[160]

Neither the House nor Senate has yet passed or considered this bill, however.[161] In fact, to date, the Senate's bill has only been referred to the Committee on the Judiciary,[162] and the House's bill has been referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law.[163] Although there is support by a number of members of Congress, there is, fortunately or unfortunately, no indication that the bill will be adopted by Congress in the near future.[164] In addition to the Arbitration Fairness Act of 2018, a bill was also introduced in Congress that would ban sexual harassment suits by employees from being subject to mandatory arbitration.[165] Much like its companion, this bill has yet to be

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[159] *See, e.g.*, Arbitration Fairness Act of 2018, *supra* note 158, § 2.

[160] *Id.* at § 402(a).

[161] *See* S.2591 - Arbitration Fairness Act of 2018 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/2591/all-actions?overview=closed#tabs (last visited Jan. 11, 2019) [hereinafter Actions taken on S. 2591] (noting the only action was on March 22, 2018, when it was "[r]ead twice and referred to the Committee on the Judiciary"); H.R.1374 - Arbitration Fairness Act of 2017 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/1374/all-actions?overview=closed#tabs (last visited Jan. 11, 2019) [hereinafter Actions taken on H.R. 1374] (noting only three actions and that the latest was on March 17, 2017, when it was "[r]eferred to the Subcommittee on Regulatory Reform, Commercial [a]nd Antitrust Law").

[162] Actions taken on S. 2591, *supra* note 161.

[163] Actions taken on H.R. 1374, *supra* note 161.

[164] Craig Becker, *Supreme Court won't have the last word on worker rights*, CNN (June 27, 2018), https://www.cnn.com/2018/06/27/opinions/supreme-court-deals-blow-to-unions-becker/index.html [https://perma.cc/9V33-L9D5] (noting that "these bills probably won't pass the current Congress").

[165] Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); *see also* H.R. 4734 - Ending Forced Arbitration of Sexual Harassment Act of 2017 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/4734 (last visited Jan. 11, 2019) (noting that " [t]he prohibition does not apply to an arbitration provision in a contract between an employer and a labor organization or between labor organizations, subject to limitations"); S. 2203 - Ending Forced Arbitration of Sexual Harassment Act of 2017 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-

brought before either Congressional chamber for a vote.[166] PAGA, the Arbitration Fairness Act of 2018, and similar statutes, as well as state and local government action, offer a path for limiting or rolling back some of the effects of *Epic Systems*.[167] But without a groundswell of support in Congress for rolling back the current understanding of the FAA advanced by the Supreme Court, which seems unlikely, systemic change may be a long way off.[168]

D. Employers' Considerations

A large part of this paper has been devoted to the immediate legal effects of *Epic Systems* and Justice Ginsburg's dire prediction of devastation and powerlessness for American workers ensnared by class action and collective arbitration waivers, mandatory arbitration agreements, and the return of *Lochnerization* and yellow-dog contracts.[169] Yet, on a deeper level, there are questions about the practical, long-term effects that *Epic Systems* will have on employment arbitration. This is particularly the case among small businesses, defined here as those with fewer than 500 employees, which make up 99.7% of employers in the U.S.[170] Even before the *Epic Systems* decision, the conversation around arbitration agreements, both employment-based and consumer-based, centered on agreements used by large companies like Goldman Sachs and Applebee's. These companies, unlike the average small business, have tens of thousands of employees nationwide.[171]

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bill/2203 (last visited Jan. 11, 2019) (same).

[166] H.R. 4734 - Ending Forced Arbitration of Sexual Harassment Act of 2017 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/4734/all-actions?overview=closed#tabs (last visited Jan. 11, 2019); S. 2203 - Ending Forced Arbitration of Sexual Harassment Act of 2017 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/2203/all-actions?overview=closed#tabs (last visited Jan. 11, 2019).

[167] Paul Weber & Dustin Chase-Woods, *Supreme Court Rescues the Collective Action Waiver in Employee Arbitration Agreements - Epic Systems v. Lewis Resolves a Circuit Split*, JD SUPRA (June 6, 2018), https://www.jdsupra.com/legalnews/supreme-court-rescues-the-collective-36044/ [https://perma.cc/YJ68-CLQG] (discussing PAGA's effect on statewide collective employee actions.).

[168] Hemel, *supra* note 141 (noting that anti-arbitration advocates could face judicial barriers in creating approaches to attacking *Epic*).

[169] *See generally* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631–49 (2018); *supra* note 1 and accompanying text (discussing *Lochner* and *Lochnerization*).

[170] *Facts & Data on Small Business and Entrepreneurship*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL, http://sbecouncil.org/about-us/facts-and-data/ [https://perma.cc/A7H9-8WGU] (last visited Oct. 19, 2018) (reflecting U.S. census data from 2014 concerning small businesses).

[171] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (October 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?module=ArrowsNav&contentCollection=DealBook&action=keypress&region=FixedLeft&pgtype=articl [https://perma.cc/X6SJ-NFJS] (discussing pre-*Epic Systems* arbitration clauses involving both low-wage employers like Applebees' and high-wage employers like Goldman Sachs).

Everything from cell phone contracts to banking and music-subscription service agreements typically require arbitration and waiver of collective actions.[172]

But what gets forgotten is the millions of small-business workers—about 59 million (47.5%) of 124 million in 2015.[173] For these employers, mandatory arbitration is not a forgone conclusion; indeed, it may be just the opposite. For the typical small employer, employment disputes are usually few and far between, and arbitration (as well as litigation) is cost prohibitive.[174] These are the types of employers who are likely to try tooth and nail to keep a dispute from going to either arbitration or litigation.[175] For them, business reputation can be more important than enforcing a non-compete against a former employee or losing one customer.[176] Although *Epic Systems* was a significant case, it is less influential for the many companies who seek to avoid litigation, arbitration, or both altogether.[177] Indeed, as noted earlier in this article, *Epic Systems* may have the unintended effect of making arbitration more expensive (rather than less) for an employer, further driving small employers to settle or seek alternative methods to settle disputes without turning to individual arbitration.[178]

We would also be remiss if we did not touch briefly on the effects that the "me too" movement has had on employment arbitration. In the era of "me too," the general public has pushed back against agreements that prohibit disclosure of acts of sexual harassment,[179] allowing movie stars, corporate executives, law firm partners, and even prominent judges to be revealed as repeat offenders. But additional discussions have surrounded the arbitration agreements that keep the harassment claims themselves out of the public eye and behind closed doors.[180] As previously mentioned, among the bills being considered by Congress is one that would make mandatory arbitration of sexual harassment claims

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[172] *Id.* (discussing the proliferation of arbitration in different consumer contracts).

[173] SBA OFFICE OF ADVOCACY, 2018 SMALL BUSINESS PROFILE 1 (2018), www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf ("Small businesses are defined for this profile as firms employing fewer than 500 employees.")

[174] *See* Kate Leismer, *Are Arbitration Clauses Good for Small Businesses?*, LOGICAL ENTREPRENEUR (Feb. 23, 2018), http://www.thelogicalentrepreneur.com/small-business/arbitration-clauses-good-small-businesses/ [https://perma.cc/96V8-9PYM] (noting that arbitration clauses are "not cheap" for the business).

[175] *See* SBA OFFICE OF ADVOCACY, *supra* note 173, at 1 (highlighting the heavy reliance on financing by small businesses).

[176] *See* Leismer, *supra* note 170 (noting business reputation as a major in factor of resolving employee claims through arbitration).

[177] *See supra* notes 107–08 and accompanying text.

[178] *See supra* Part III.A.

[179] *See* Ilyse Schuman and Betsy Cammarata, *Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?*, LITTLER MENDELSON P.C. (Jan. 9, 2018), https://www.littler.com/publication-press/publication/lawmakers-take-aim-will-metoo-curb-nondisclosure-or-arbitration [https://perma.cc/Q83J-8WXM] (exploring proposed legislation in response to the "me too" movement).

[180] *See id.*

illegal.[181] But, as with many stories in the public eye, it remains to be seen if public outrage will translate into action or simply fizzle and die once the story becomes old news.[182] But, the power of "me too" does highlight the high value that businesses large and small place on reputation.[183] A business's good name and character may be a factor driving the inertia that derails the advance of employment-based arbitration if public outrage continues.[184]

IV. CONCLUSIONS

As described in detail herein, the Supreme Court in *Epic Systems* did exactly what many commentators, including the authors, expected of them: they adopted the Fifth Circuit's opinion in *Murphy Oil* and upheld the collective action waiver and arbitration agreement as enforceable.[185] Despite all of the rhetoric and hyperbole espoused by pundits, commentators, amici, and even the dissent, the majority opinion was clearly grounded in the text of the FAA and NLRA, as well as recent Supreme Court jurisprudence related to arbitration.[186] In contrast, however, the dissent prioritized what they divined to be consequences of the majority's decision and appeared to base its views on preferred public policy considerations.[187]

At a general level, the results of the *Epic Systems* decision are easy to discern: more employment arbitration agreements, class action and collective action waivers, and cases playing out and settling behind closed doors.[188] There are also signs that the Supreme Court, in the near future, is likely to revisit the use of *Chevron* deference and curtail its

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[181] Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

[182] *See, e.g.*, Melissa Jeltsen, *Public Outrage Over Mass Shootings Is Running on Empty*, HUFFINGTON POST (Jan. 31, 2018), https://www.huffingtonpost.com/entry/public-outrage-mass-shootings_us_5a70dbf6e4b0a6aa487424be [https://perma.cc/E9UH-2A7K] (noting after mass shootings that legislative action has not followed outrage, and that outrage has weakened).

[183] *See* Davia Temin, *How the Reputation Risk of #MeToo Is Forcing Businesses to Reevaluate Their Corporate Culture*, FORBES (May 14, 2018), https://www.forbes.com/sites/daviatemin/2018/05/14/how-the-reputation-risk-of-metoo-is-forcing-businesses-to-re-evaluate-their-corporate-culture/ [https://perma.cc/3MTW-3KFC] (noting that "the reputational risks of #MeToo . . . are sparking a whole new examination of corporate and organizational culture").

[184] *See* Michael Brown, *Pros and Cons of Mandatory Arbitration*, OHRENSTEIN & BROWN LLP (June 26, 2018), http://www.oandb.com/pros-and-cons-of-mandatory-arbitration/ [https://perma.cc/9JTC-J8GS] (noting that private arbitration proceedings reduce "damage to the company's brand and reputation").

[185] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018); Kolodoski & Forester, *supra* note 5, at 153.

[186] *See supra* Part III.A.

[187] *Epic Sys.*, 138 S. Ct. at 1648–49 (Ginsburg, J., dissenting).

[188] *See supra* Part III.A.

use.[189] However, on a broader level, *Epic Systems* highlights the growing questions regarding how traditional labor values should fit into an increasingly fast and mobile economy that is markedly different from when both the FAA and NLRA were enacted. It also focuses attention on the Supreme Court's viewpoint that such answers must come, not from the Supreme Court, but from the Legislature.[190] The stage is set, the trumpets have sounded, the die has been cast, and the players are ready to make their next move. But we are not at Armageddon or the apocalypse. And the specters of *Lochner* and yellow-dog contracts have not yet reared their ugly heads.[191] Ultimately, however, it is just another day in corporate America. Employers may require individual arbitration—while prohibiting collective arbitration—of employment disputes as a condition of employment, but ultimately the underlying tensions still remain to be resolved another day.[192]

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[189] *See supra* Part III.B.

[190] *See supra* Part III.C.

[191] *Accord* Editorial, *Arbitration Wins at the High Court*, WALL STREET J. (May 21, 2018), https://www.wsj.com/articles/arbitration-wins-at-the-high-court-1526945132 [https://perma.cc/XRF6-4ULG] (arguing that liberals warning about *Lochner* wished to "impose their policy preferences").

[192] *See* Benjamin Robbins, *Symposium: The Federal Arbitration Act and the National Labor Relations Act are two ships that pass in the night, SCOTUSblog* (May. 21, 2018, 10:17 PM), http://www.scotusblog.com/2018/05/symposium-the-federal-arbitration-act-and-the-national-labor-relations-act-are-two-ships-that-pass-in-the-night/ [https://perma.cc/X2VJ-N7XS] (noting that "the legislature has the final word on this issue").