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The FAA, the NLRA, and *Epic Systems*' Epic Fail

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I. Introduction

“Only a lunatic or a fanatic would undertake such an endeavor.”¹ So said the district court in *Sutherland v. Ernst & Young LLP*, a case involving Stephanie Sutherland’s claim that her employer owed her \$1,867.02 in unpaid overtime under the Fair Labor Standards Act of 1938 (FLSA).² Sutherland sued Ernst & Young in federal court alleging that she and other similarly situated workers were not properly compensated for the hours they had worked in excess of forty hours per week, and sought class and collective group certification of their claims.³

Invoking the Federal Arbitration Act of 1925 (FAA),⁴ Ernst & Young moved to dismiss or stay the court proceedings and to compel arbitration on an individual and not a class-wide basis in accordance with an agreement Sutherland had concededly consented to as a condition of working for the company. Sutherland estimated, and it was not contested, that in individualized arbitration she would have to spend more than \$200,000 in

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1. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (internal quotation marks omitted) (quoting *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)), *rev'd*, 726 F.3d 290 (2d Cir. 2013) (per curiam).

2. *See* 29 U.S.C. §§ 201–219. The FLSA establishes federal minimum wage and maximum-hour guarantees and requires employers to pay overtime compensation to employees who work more than forty hours in a week. *See id.* § 207(a).

3. *See* FED R. CIV. P. 23 (class actions); 29 U.S.C. § 207(a) (collective action provision).

4. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16, 201–208, 301–307 (2012).

attorney's and expert fees and costs to recover \$1,867.02. Those fees and costs relative to the possible recovery prompted the district court's "lunatic or fanatic" statement. Holding that granting the motion to compel arbitration would effectively ban Sutherland's claim and provide Ernst & Young with "de facto immunity from liability for alleged violations of the labor laws,"⁵ the district court held that the class action waiver was not enforceable. Sutherland's victory was short-lived, however; on appeal, the United States Court of Appeals for the Second Circuit reversed,⁶ placing Sutherland back in the perilous position she sought to avoid: alone in an expensive, if not cost-prohibitive, individual arbitration proceeding.

The real-world scenario faced by Stephanie Sutherland and other employees seeking to concertedly enforce and obtain remedies under the FLSA and other worker protection laws has been the subject of much discussion and litigation. In its recent and important decision in *Epic Systems Corporation v. Lewis*,⁷ a deeply divided United States Supreme Court entered the judicial conversation, holding that an agreement requiring an employee to arbitrate employment-related disputes on an individual and not class-wide basis was enforceable under the FAA and did not violate employees' right to engage in "concerted activities for . . . other mutual aid or protection" under Section 7 of the National Labor Relations Act of 1935 (NLRA).⁸

Epic Systems is in line with the Court's FAA-arbitration jurisprudence governing the enforceability of class and collective action waivers in consumer and employment law cases. Such waivers have been and, with the Court's blessing, will continue to be a significant hurdle to employees' efforts to seek remedies under the FLSA and other laws critically relying on lawsuits brought by private litigants for enforcement. For instance, the United States Department of Labor investigates less than one percent of employers covered by the FLSA each year, and private parties brought ninety-eight percent of workplace discrimination lawsuits filed over the last two decades.⁹ To the extent that class and collective action waivers preclude aggregate claims and make it difficult, if not practically impossible, for employees who must arbitrate individually against their employers, a number of employee claims (especially those of low-wage workers) will be knocked out¹⁰ with a consequent underenforcement of employee-rights laws.¹¹

5. 768 F. Supp. 2d at 554.

6. See 726 F.3d 290 (2d Cir. 2013) (per curiam).

7. 138 S. Ct. 1612 (2018).

8. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012); see *infra* notes 84, 139 and accompanying text.

9. See J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, 2019 J. DISP. RESOL. 129, 135.

10. See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 683, 700 (2018).

11. See *Epic Systems*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting) ("The inevitable result of

This essay discusses and critiques *Epic Systems*' validation of class and collective action waivers in arbitration agreements. Part II provides a brief overview of the background and enactment of the FAA and the Court's FAA-based jurisprudence. Part III turns to NLRA Section 7's protection of employees engaged in "concerted activities for . . . other mutual aid or protection,"¹² a key statutory provision relied on by employees bringing class or collective actions against employers. Part IV's examination of *Epic Systems* focuses on three aspects of and analytical deficiencies in the Court's decision, which collectively form a flawed and unstable foundation for the Court's holding. The essay concludes with brief closing remarks.

II. The FAA

A. *Background and Enactment*

Prior to 1925, courts in the United States, following rules laid down by English courts,¹³ "would allow two willing parties to submit a dispute to arbitration but generally refused to enforce a pre-dispute arbitration agreement ("PDAA") where one party had changed its mind and no longer wanted to arbitrate."¹⁴ That left the other party with no meaningful remedy, as damages for failure to comply with the agreement were limited to nominal compensation and courts would not order specific performance.¹⁵

Lawyers and merchants responding to judicial refusal to enforce pre-dispute arbitration agreements sought the enactment of a law addressing this issue. In 1922, a commercial arbitration bill drafted by the American Bar Association's Committee on Commerce, Trade and Commercial Law, modeled after a New York statute¹⁶ was introduced in the United States Congress.¹⁷ Appearing at a 1923 Congressional hearing on the legislation,

today's decision will be the underenforcement of federal and state laws designed to advance the well-being of vulnerable workers.").

12. 29 U.S.C. § 157.

13. See *Vynior's Case*, 77 Eng. Rep. 595 (K.B. 1609) (establishing the rule that arbitration agreements can be revoked by either party prior to an award because the arbitrator is an agent of both parties); see also JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 53–55 (1918) (discussing *Vynior's Case*).

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

15. See Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Assoc., Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1003 (1996).

16. See New York Arbitration Law, Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (current version as amended at N.Y. C.P.L.R. §§ 7501–7515 (McKinney 2012)); see also *Berkowitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288 (N.Y. 1921) (upholding the New York arbitration statute).

17. See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 1, 8 (1923) [hereinafter *1923 Hearings*] (introduction of bill that would eventually become the FAA); see also William F. Kolakowski III, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171,

ABA Committee chair W.H.H. Piatt testified that the bill was a response to judicial hostility to the arbitration of disputes between merchants.¹⁸ Interestingly, during that hearing Montana Senator Thomas J. Walsh expressed his concern about take-it-or-leave-it arbitration arrangements forcing unwilling parties into arbitration and out of courts:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . A man says “These are our terms. All right, take it or leave it.” Well, there is nothing for the man to do except sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.¹⁹

The ABA Committee revised the bill in 1923 and 1924. The following year Congress adopted the bill with little change and, by a unanimous vote in both the Senate and the House of Representatives, enacted the United States Arbitration Act,²⁰ renamed the Federal Arbitration Act in 1947.²¹ Section 2 of the statute provides that “an agreement in writing to submit to arbitration an existing controversy arising out of” a contract “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²² And Section 4 authorizes courts to issue orders compelling arbitration where a party fails, neglects, or refuses to comply with an arbitration agreement.²³

B. *The Court’s FAA Jurisprudence*

1. *Protecting The Plaintiff’s Choice Of The Judicial Forum.*—The issue of the enforceability of an agreement mandating the arbitration of an individual’s statutory claim was before the Supreme Court in its 1953 decision in *Wilko v. Swan*.²⁴ The Supreme Court agreed with a customer that an arbitration provision contained in his margin agreement with a securities firm²⁵ was a stipulation and waiver prohibited by Section 14 of the Securities

2183 (1995) (recounting how the bill was first introduced to Congress in 1922). The bill was prepared pursuant to the ABA’s 1920 instruction to its committee to consider and report on the “further extension of the principle of commercial arbitration.” *Proceedings of the American Bar Association*, 45 A.B.A. REP. 19, 75 (1920); see generally Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

18. See 1923 Hearings, *supra* note 17 (statement of W.H.H. Piatt).

19. *Id.* at 9 (statement of Sen. Walsh).

20. See 43 Stat. 883 (1925).

21. See 9 U.S.C. §§ 1–16.

22. 9 U.S.C. § 2.

23. *Id.* at § 4.

24. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

25. The margin agreement provided that “[a]ny controversy arising between us under this contract shall be determined by arbitration” *Id.* at 432 n.15 (internal quotations marks omitted).

Act of 1933 (Securities Act).²⁶ The “right to select the judicial forum is the kind of ‘provision’ that cannot be waived under [Section] 14,”²⁷ and the waiver was obtained from the customer at a time when he was “less able to judge the weight of the handicap the Securities Act places upon his adversary.”²⁸ The Court also remarked that the Securities Act’s effectiveness would be lessened in arbitral as compared to judicial proceedings as the statute would be “applied by the arbitrators without judicial instruction on the law” in awards rendered without explanation of the arbitrator’s reasoning and without a complete record of the arbitration proceedings.²⁹

Three years later, the Court in *Bernhardt v. Polygraphic Co. of America*,³⁰ citing *Wilko*, listed the deficiencies of arbitration as compared to judicial proceedings: no right to a jury trial, the rules of evidence do not apply, sworn testimony may not be mandated, arbitrators are not judicially instructed on the law and do not have to give reasons for their awards, and limited judicial review.³¹

2. *The Court Changes Its Mind.*—In the 1980s the Court, led by pro-arbitration Chief Justice Warren E. Burger,³² changed its jurisprudence and institutional position on FAA-based arbitration of statutory claims. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*³³ found in FAA Section 2 a “liberal federal policy favoring arbitration” and declaimed that doubts about “the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”³⁴

26. See 15 U.S.C. § 77n (1976); *id.* at § 77a (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities and Exchange] Commission shall be void.”).

27. 346 U.S. at 435.

28. *Id.*

29. *Id.* at 436.

30. 350 U.S. 198 (1956) (holding in diversity action that the at-issue arbitration agreement was governed by local law and remanding for consideration of a conflict-of-laws issue).

31. See *id.* at 203; see also *Alexander v. Gardner-Denver Co.*, 413 U.S. 36 (1974) (holding that an employee’s right to a trial *de novo* of his statutory race discrimination claim was not foreclosed by the prior submission of that claim to arbitration under a union-employer collective bargaining agreement; citing *Wilko*, the Court concluded that labor arbitration is an appropriate forum for a contractual discrimination claim but not for the resolution of statutory employment discrimination claims requiring the interpretation of Title VII of the Civil Rights Act of 1964 and that statute’s public law concepts).

32. Chief Justice Burger “saw arbitration as a palliative for the so-called ‘litigation explosion’” and “the Court backtracked from its view that arbitration was subordinate to the judicial system.” Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 12 (2019) (quoting Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 275 (1982)).

33. 460 U.S. 1 (1983).

34. *Id.* at 24–25.

Thereafter, in *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*,³⁵ a case involving antitrust law claims, the Court instructed that in determining whether parties to an arbitration agreement consented to the arbitration of a particular dispute the parties' "intentions control, but those intentions are generously construed as to issues of arbitrability."³⁶ The Court cautioned that it was not saying "all controversies implicating statutory rights are suitable for arbitration."³⁷ A party agreeing to arbitrate a statutory claim "does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."³⁸ Thus, the Court opined, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."³⁹ Furthermore, and assuming that Congressional intent to protect statutory rights from the waiver of a judicial forum "will be deducible from text or legislative history,"⁴⁰ the Court stated that a party should be held to the "bargain to arbitrate . . . unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate."⁴¹

In 1987, the Court questioned *Wilko's* mistrust of arbitration.⁴² Two years later the Justices announced *Wilko's* demise in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,⁴³ holding that an arbitration provision in a standard customer agreement between an individual and a securities broker was enforceable and required arbitration of the customer's claims of federal securities violations. In so holding, the Court interred *Wilko's* "outmoded presumption of disfavoring arbitration proceedings," remarking that the Court's 1953 decision "has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."⁴⁴ *Wilko* "was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."⁴⁵

3. Arbitration And Statutory Employment Discrimination Claims.—Did

35. 473 U.S. 614 (1985).

36. *Id.* at 626.

37. *Id.* at 627.

38. *Id.* at 628.

39. *Id.* at 637.

40. *Id.* at 628.

41. *Id.*

42. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231–32 (1987).

43. 490 U.S. 477 (1989).

44. *Id.* at 481.

45. *Id.* at 484.

the Court's FAA-based arbitration jurisprudence apply to and require the enforcement of agreements to arbitrate statutory employment discrimination claims? In *Gilmer v. Interstate/Johnson Lane Corp.*,⁴⁶ the plaintiff, a financial services manager, filed a court action under the Age Discrimination in Employment Act of 1967 (ADEA)⁴⁷ against his employer. The employer moved to compel arbitration on the basis of an arbitration agreement contained in the plaintiff's employer-mandated registration with several stock exchanges requiring the arbitration of "any dispute, claim, or controversy" arising out of his employment with the company.⁴⁸

Relying on its 1980s arbitration decisions,⁴⁹ the Court held that Gilmer's ADEA claim had to be submitted to arbitration. The Court placed on Gilmer the burden of showing that Congress intended to prohibit a waiver of judicial resolution of ADEA claims. Gilmer conceded that nothing in the statute's text or legislative history expressly excluded arbitration, and the Court saw no inherent inconsistency between the ADEA's antidiscrimination provisions and the enforcement of arbitration agreements. Rejecting Gilmer's arguments against mandatory arbitration,⁵⁰ the Court opined that arbitration is an adequate forum for resolving ADEA claims⁵¹ and is consistent with the statute's grant of concurrent jurisdiction to federal and state courts.⁵²

Gilmer also argued that the challenged arbitration agreement should not be enforced given the unequal bargaining power between employers and employees. The Court disagreed: "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."⁵³ The Court saw no indication "that

46. 500 U.S. 20 (1991).

47. See 29 U.S.C. §§ 621–634.

48. 500 U.S. at 23. A New York Stock Exchange rule required arbitration of "[a]ny controversy between a registered representative and any member or member organizations arising out of the employment or termination of employment of such registered representative." *Id.*

49. See *supra* Part II(B)(2).

50. On Gilmer's arguments and the Court's responses thereto, see Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1473–76 (1996).

51. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–32 (1991) (writing that it was not presumed that arbitration panels would be biased against employees; there was no showing that the New York Stock Exchange arbitration discovery provisions would be insufficient to allow Gilmer a fair opportunity to present his ADEA claim; written arbitration awards were available to the public and subject to limited judicial review; NYSE rules provided for collective proceedings; and the EEOC could bring class actions on behalf of employees).

52. See *id.* at 29; *but see* Ronald Turner, *When the Court Makes Law and Policy (With Special Reference to the Employment Arbitration Issue)*, 19 HOFSTRA LAB. & EMP. L.J. 287, 305 (2002) (explaining that concurrent jurisdiction allows plaintiffs to choose between federal and state judicial forums both providing discovery, jury trials, and other indicia of judicial process and administration; those features of court litigation are not available in arbitration).

53. *Gilmer*, 500 U.S. at 33; *but see* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 n.9 (1967) (stating that the FAA was not designed to govern agreements "in which one of the parties characteristically has little bargaining power").

Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. . . . [T]his claim of unequal bargaining power is best left for resolution in specific cases.”⁵⁴

Accordingly, the Court held that Gilmer did not meet his burden of showing that Congress intended to preclude arbitration of ADEA claims. That Congress had not expressed any such intent is correct but does not support the conclusion that Gilmer should not have been allowed to maintain his age discrimination court action. The ADEA was enacted more than a decade before the Court’s 1980s change in its FAA jurisprudence and its enforcement of agreements mandating the arbitration of individual’s statutory claims. In 1967, “it would have been almost unthinkable that any federal court would have enforced an agreement subjecting otherwise justiciable civil rights claims to arbitral jurisdiction.”⁵⁵ Gilmer thus understandably did not (because he could not) show a Congressional intent that did not exist.

FAA Section 1 provides that the statute does not “apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁵⁶ The Court considered the scope of this exception in *Circuit City Stores, Inc. v. Adams*.⁵⁷ The employer’s job application provided that applicants agreed to resolve disputes arising out of their application or subsequent employment by final and binding arbitration.⁵⁸ The plaintiff completed and signed the application and was hired.⁵⁹ Two years later, he filed a state-court employment discrimination lawsuit.⁶⁰ Circuit City filed suit in federal district court seeking to enjoin the state suit and compel arbitration of the plaintiff’s claims pursuant to the FAA.⁶¹ The Ninth Circuit, reversing the district court, held that the arbitration agreement was contained in an employment contract excluded from FAA coverage.⁶²

Justice Anthony M. Kennedy’s five-Justice majority opinion reversed the Ninth Circuit, holding that the exemption only applied to the employment contracts of transportation workers. Applying the *ejusdem generis* canon,⁶³

54. *Gilmer*, 500 U.S. at 33.

55. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 370 (1996).

56. 9 U.S.C. § 1 (2012).

57. 532 U.S. 105, 109 (2001). The *Gilmer* Court noted but did not construe the employment-contract exemption. *Gilmer*, 500 U.S. at 25 n.2.

58. *Adams*, 532 U.S. at 109–10.

59. *Id.* at 110.

60. *Id.*

61. *Id.*

62. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1070 (9th Cir. 1999) (per curiam), *rev’d*, 532 U.S. 105 (2001).

63. This canon “applies when a drafter has tacked on a catchall phrase at the end of an

he noted that the specific categories of workers listed in Section 1 (“seamen” and “railroad employees”) were followed by the residual phrase “any other class of workers engaged in . . . commerce.” Construing Section 1’s residual phrase as excluding all employment contracts would fail “to give independent effect to the statute’s enumeration of the specific categories of workers which precedes it”; there would have been no need for Congress to specify “seamen” and “railroad employees” if those classes of workers were subsumed within the “any other class of workers” phrase.⁶⁴

4. *The Consumer Class And Collective Action Arbitration Waiver Decisions.*—The Court’s more recent FAA-arbitration decisions have unswervingly enforced class and collective action waivers. In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*⁶⁵ the Court declared that as a “party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so,” an arbitration agreement “silent” on class arbitration does not authorize such arbitration.⁶⁶ “This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”⁶⁷

*AT&T Mobility LLC v. Concepcion*⁶⁸ involved a putative class action brought by plaintiffs alleging fraud and false advertising after purchasing cellphone service advertised as including free phones and being charged \$30.22 in sales tax on the phones.⁶⁹ The company moved to compel arbitration under an agreement for the sale and service of the phones that required the purchaser to arbitrate all disputes in her individual capacity and not as a plaintiff or class member in a class or representative proceeding.⁷⁰

enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals.*” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199 (2012); *see also* WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 408 (2016) (the canon interprets “a general term to reflect the class of objects reflected in more specific terms accompanying it (‘and other things’)”).

64. *Adams*, 532 U.S. at 114–15, 118; *see also* *New Prime v. Oliveira*, 139 S. Ct. 532 (2019) (holding that the FAA’s employment-contract exception applies to and exempts independent contractors).

65. 559 U.S. 662 (2010).

66. *Id.* at 666, 684, 687.

67. *Id.* at 685. In *Lamps Plus v. Varela*, 139 S. Ct. 1407, 1416 (2019), the Court determined that *Stolt-Nielsen* controlled in a case involving an arbitration agreement’s ambiguity concerning the availability of class arbitration. “Silence” on the issue of class arbitration “is not enough; the FAA requires more. . . . Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage of arbitration”—its informality. *Id.* (internal quotation marks and citations omitted); *see also id.* at 1430 (Kagan, J., dissenting) (arguing that under California law and the laws of every state in this country the default rule construes an ambiguity in a contract against the drafter of the agreement (here, *Lamps Plus*) and permits class arbitration).

68. 563 U.S. 333 (2011).

69. *Id.* at 337.

70. *Id.* at 336–37.

The Ninth Circuit, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*,⁷¹ held that the arbitration provision was unconscionable and was not preempted by the FAA because the *Discover Bank* rule was merely "a refinement of the unconscionability analysis applicable to contracts generally in California."⁷²

The Supreme Court reversed, holding that *Discover Bank* interfered with arbitration by allowing a party to a consumer contract to demand class arbitration *ex post*. Justice Antonin Scalia's opinion for the Court concluded for three reasons that non-consensual class arbitration is inconsistent with the FAA. First, such arbitration sacrifices bilateral arbitration's principal advantage—informality—"and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."⁷³ "Second, class arbitration *requires* procedural formality. The [American Arbitration Association]'s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation."⁷⁴ Third, a defendant's risk is greatly increased in class arbitration, as it is more likely that errors will not be corrected given the lack of multilayered review, and a defendant willing to accept the costs of error in individual arbitration will not find costs acceptable in cases involving damages allegedly owed to tens of thousands of claimants.⁷⁵ "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."⁷⁶

Another recent decision, *American Express Co. v. Italian Colors Restaurant*,⁷⁷ enforced an arbitration agreement's class-action waiver to plaintiffs' antitrust law claims.⁷⁸ Responding to the defendant's motion to compel arbitration, the merchants argued, and the Second Circuit agreed, that they would incur prohibitive costs if compelled to arbitrate individually and not as a class.⁷⁹ Reversing the appeals court, the Supreme Court, with Justice

71. 113 P.3d 1100 (Cal. 2005). The court in *Discover Bank* held that a class-action waiver is unconscionable and therefore unenforceable when found "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . ." *Id.* at 1110.

72. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009), *rev'd*, *Concepcion*, 563 U.S. 333 (quotation marks and citations omitted).

73. *Concepcion*, 563 U.S. at 348.

74. *Id.* at 349.

75. *Id.* at 350.

76. *Id.*

77. 133 S. Ct 2304 (2013).

78. *Id.* at 2310–11. The plaintiffs alleged that American Express used its market monopoly power to force them to accept credit cards with rates approximately thirty percent higher than the fees merchants were charged for competing cards. *Id.* at 2308.

79. *In re American Express Merchs.' Litig.*, 667 F.3d 204, 217 (2d Cir. 2012), *rev'd*, *Italian Colors*, 570 U.S. 228.

Scalia again writing for the majority, found no Congressional command requiring rejection of the waiver and rejected the prohibitive costs argument: the antitrust laws “do not guarantee an affordable procedural path to the vindication of every claim.”⁸⁰ Nor was he persuaded by the merchants’ contention that they would not be able to effectively vindicate their claims in individual arbitration as they had no economic incentive to pursue such arbitration. Justice Scalia noted that dictum in the Court’s *Mitsubishi Motors* decision referred to an “effective vindication” exception to FAA arbitration,⁸¹ and reasoned that the exception seeks to prevent certain waivers of a party’s right to pursue a statutory remedy. “But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”⁸²

In a time span beginning in 1953 and ending in 1989, the Court journeyed from *Wilko*’s mistrust of arbitration of plaintiff’s statutory claims to the Court’s declaration of the FAA’s liberal policy favoring arbitration to *Rodriguez de Quijas*’ official interment of *Wilko*. Thereafter, *Gilmer* held that a statutory age discrimination claim was subject to the FAA’s arbitration mandate and *Circuit City* ruled that the FAA’s employment-contract exemption did not apply to all employment contracts. These important employment arbitration decisions were followed by the Court’s enforcement of aggregated claims waivers limiting arbitration to the plaintiff’s individual claim.

It is manifest that what has changed over the past six-plus decades is not the text of the FAA but the interpretive and policy choices made by a Court that, consistent with its pro-arbitration trajectory, has not only favored but has given primacy of place to “agreements”⁸³ mandating private arbitral adjudication of public-law claims, including claims alleging violations of worker protection statutes. As discussed in the next two Parts, questions soon emerged concerning the application of the Court’s FAA-based waiver decisions to employees exercising their right under the National Labor Relations Act to concertedly engage in activity for their mutual aid or protection.

80. *Italian Colors*, 133 S. Ct at 2309.

81. See *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (“[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function”); *supra* notes 35–41 and accompanying text.

82. *Italian Colors*, 133 S. Ct at 2311.

83. See *infra* notes 50–52 and accompanying text.

III. The NLRA

A. *Enactment and Purpose and Section 7*

In 1935 Congress passed and President Franklin D. Roosevelt signed into law the NLRA.⁸⁴ The statute declared that inequality of bargaining power between employers and employees “who do not possess full freedom of association or actual liberty of contract . . . substantially burdens and affects the flow of commerce[] and tends to aggravate recurrent business depressions”⁸⁵ The NLRA was enacted to:

[E]liminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁸⁶

NLRA Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the statute.⁸⁷ Section 7, the Magna Carta of the nation’s workers,⁸⁸ provides that:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining *or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities.⁸⁹

84. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

85. 29 U.S.C. § 151.

86. *Id.* A previously enacted federal law, the Norris-LaGuardia Act of 1932, proclaimed full freedom of association for the “individual unorganized worker [who] is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.” 29 U.S.C. § 102 (2012). The statute also authorized federal court injunctions against “yellow-dog” contracts prohibiting employees’ memberships in labor unions. *Id.*

87. 29 U.S.C. § 158(a)(1) (2012).

88. Theodore St. Antoine, *Prevention of Antiunion Discrimination in the United States*, 9 COMP. LAB. L.J. 384, 385 (1988).

89. 29 U.S.C. § 157 (2012) (emphasis added). Pre-NLRA Congressional enactments also protected workers’ right to concertedly engage in activities for their mutual aid or protection. *See* Norris-LaGuardia Act of 1932 § 2, 29 U.S.C. § 102 (protecting workers’ right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”); National Industrial Recovery Act of 1933 § 7(a), 15 U.S.C. § 707(a) (employees shall have the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”) *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (repealed 1935).

B. Supreme Court Interpretations of Section 7

The Supreme Court interpreted and applied Section 7's "other mutual aid or protection" clause in its 1962 decision in *NLRB v. Washington Aluminum Company*.⁹⁰ In that case, the employer fired seven employees who spontaneously walked off the job in protest over cold working conditions.⁹¹ The Court held that the discharges violated Sections 7 and 8(a)(1) and ordered the employees reinstated with back pay.⁹² The employees were "wholly unorganized" and were not seeking to form or join a labor union or engage in collective bargaining.⁹³ They "had to speak for themselves as best they could" and "took the most direct course to let the company know that they wanted a warmer place in which to work."⁹⁴ Section 7 protected their activity even though they did "not present a specific demand upon their employer to remedy a condition they [found] objectionable."⁹⁵

Another decision, *Eastex, Inc. v. NLRB*,⁹⁶ held that Section 7's mutual aid or protection clause protects employees engaged in proper concerted activities in support of employees employed by other employers.⁹⁷ Congress knew "that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context" when it chose "to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'"⁹⁸ That "broader purpose" has been effectuated by Board decisions protecting employees who concertedly resorted to administrative and judicial forums in seeking improved working conditions.⁹⁹ The Court also instructed that while some employee conduct may become "so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause," the precise boundaries of that clause must first be defined by the Board and not by the Court.¹⁰⁰

C. D. R. Horton: The FAA Meets The NLRA

FAA-based enforcement of class and collective action waivers and

90. 370 U.S. 9 (1962).

91. *Id.* at 10.

92. *Id.* at 13, 18.

93. *Id.* at 14.

94. *Id.* at 14, 15.

95. *Id.* at 14.

96. 437 U.S. 556 (1978).

97. *Id.* at 570.

98. *Id.* at 565.

99. *Id.* at 565–66, 566 n.15.

100. *Id.* at 568; *see also* *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (reaffirming that the Board defines the scope of § 7 and "a reasonable construction by the Board is entitled to considerable deference").

NLRA Section 7's protection of employees' right to engage in concerted activity for mutual aid or protection were on a collision course and crashed in 2012 in the Board's decision in *D. R. Horton, Inc.*¹⁰¹ At issue was a Mutual Arbitration Agreement (MAA) that employees were required to sign as a condition of their employment with the company that provided, in relevant part, that employee–employer disputes “will be determined exclusively by final and binding arbitration.”¹⁰² The arbitrator “may hear only Employee’s individual claims” and had no authority to consolidate claims of other employees or to “fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.”¹⁰³

In 2008, an attorney representing former employee Michael Cuda notified the employer that his firm represented Cuda and a nationwide class of similarly situated superintendents who alleged that they were misclassified as exempt from the protections of the FLSA and provided notice of intent to initiate arbitration. When the employer’s counsel responded that the MAA barred arbitration of collective claims, Cuda filed an unfair labor practice charge alleging that the MAA’s requirement of individual arbitration violated the NLRA Sections 7 and 8(a)(1). An Administrative Law Judge disagreed with that contention and dismissed Cuda’s challenge to the waiver.¹⁰⁴

Deciding a case of first impression, the Board held that, notwithstanding the FAA, requiring employees to sign an agreement precluding them from filing joint, class, or collective claims against the employer as a condition of employment illegally restricted their Section 7 right to engage in concerted activity for mutual aid or protection. In the agency’s view, the MAA interfered with employees’ substantive and judicially approved Section 7 right “to join together to pursue workplace grievances, including through litigation” of FLSA claims in the judicial forum.¹⁰⁵ The Board reasoned, moreover, that while class and collective action waivers like those at issue in *AT&T Mobility LLC v. Concepcion*¹⁰⁶ furthered the FAA’s purpose and policy of streamlining arbitration proceedings, the use of class-wide arbitration in the employment context was “far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in *AT&T Mobility*—speed, cost, informality, and

101. 357 N.L.R.B. 2277 (2012), *petition granted in part and enforced in part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). For an excellent discussion and analysis of the Board’s decision, see Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013).

102. *Horton*, 357 N.L.R.B. at 2277.

103. *Id.*

104. *Id.* at 2278.

105. *Id.* at 2278 and cases cited therein.

106. Discussed *supra* notes 68–70 and accompanying text.

risk—when the class is so limited in size.”¹⁰⁷

When the Board’s decision came before the Fifth Circuit for review, the appeals court rejected the Board’s waiver analysis, holding that the agency did not give proper weight to the FAA and that the MAA had to be enforced according to its terms.¹⁰⁸ In subsequent cases the Second and Eighth Circuits also disagreed with the Board’s *D. R. Horton* waiver analysis and enforced class and collective action waivers,¹⁰⁹ while the Sixth and Ninth Circuits applied *D. R. Horton* in refusing to enforce such provisions.¹¹⁰ The Supreme Court resolved this circuit split in *Epic Systems*.

IV. EPIC SYSTEMS

A. *The Cases Before the Court*

In *Epic Systems*, the Court consolidated three cases in which employees challenged the enforceability of class and collective action waivers. In the first case, *Morris v. Ernst & Young LLP*,¹¹¹ a “concerted action waiver” that employees were required to sign as a condition of their employment mandated that they pursue legal claims against the employer (including FLSA claims) exclusively through arbitration and as individuals in “separate proceedings.”¹¹² Plaintiffs filed a federal court action alleging that the employer violated federal and state overtime pay laws and the employer moved to dismiss the suit or, in the alternative, to compel individual arbitration. The Ninth Circuit, reversing the district court and approvingly citing *D. R. Horton*, held that the waiver violated the NLRA by interfering with the employees’ right to concertedly pursue work-related claims. That pursuit “clearly falls within the literal wording of § 7 that employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection. . . . The intent of Congress in § 7 is clear and comports with the Board’s interpretation of the statute.”¹¹³

In the second case, *Murphy Oil USA, Incorporated v. NLRB*,¹¹⁴ Sheila Hobson signed a “Binding Arbitration Agreement and Waiver of Jury Trial” when she began working for the employer.¹¹⁵ The agreement provided that Hobson and the employer agreed “to resolve any and all disputes or

107. *Horton*, 357 N.L.R.B. at 2287.

108. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

109. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013).

110. *NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393, 408 (6th Cir. 2017); *Morris v. Ernst & Young LLP*, 834 F.3d 975, 983 (9th Cir. 2016), *rev’d*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

111. 834 F.3d 975, 983 (9th Cir. 2016).

112. *Id.* at 979.

113. *Id.* at 982 (quotation marks, brackets, and citation omitted).

114. 808 F.3d 1013 (5th Cir. 2015), *aff’d*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

115. *Id.* at 1015.

claims . . . which relate . . . to Individual's employment . . . by binding arbitration," and required her to waive the right to pursue a class or collective action claim in an arbitral or judicial forum.¹¹⁶ Hobson and three other employees later filed an FLSA collective action against Murphy Oil on behalf of themselves and other similarly situated employees seeking compensation for unpaid overtime and other work-related activities. When Murphy Oil moved to compel individual arbitration of the claims and dismissal of the lawsuit in its entirety, Hobson filed an unfair labor practice charge with the Board. Reaffirming *D. R. Horton*, the agency found that the waiver violated Section 7.¹¹⁷ Murphy Oil, aware that the Fifth Circuit had previously rejected *D. R. Horton*'s waiver analysis,¹¹⁸ filed a petition for review in that circuit.¹¹⁹ Adhering to its 2013 decision, the appeals court concluded that Murphy Oil's waiver did not violate Section 7.¹²⁰

In the third case, *Lewis v. Epic Systems Corp.*,¹²¹ the employer emailed to employees an arbitration agreement mandating the pursuit of wage-and-hour claims through individual arbitration and the waiver of employees' "right to participate in or receive money or any other relief from any class, collective, or representative proceeding."¹²² Employees were "deemed to have accepted this Agreement" by continuing to work at the company and were instructed to click two buttons acknowledging the emailed agreement.¹²³ Jacob Lewis, employed by the company as a technical writer, acknowledged the agreement. He later filed a lawsuit against the company in federal court contending that the agreement violated the FLSA and Wisconsin law by misclassifying him and other technical writers and depriving them of overtime pay. The employer's motion to dismiss the suit

116. *Id.*

117. See 361 N.L.R.B. 774, 778 (2014), *petition for review granted in part and denied in part*, 808 F.3d 1013 (5th Cir. 2015), *aff'd*, 138 S. Ct. 1612 (2018).

118. Pursuant to its nonacquiescence policy, the Board does not accept a particular court of appeals's interpretation of the NLRA and awaits a definitive Supreme Court decision resolving any circuit-court disagreement on an issue. "To that end, nonacquiescence allows for an issue's 'percolation' among the circuits; generating a circuit split that can improve the likelihood of *certiorari* being granted." *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 21 (D.C. Cir. 2016). This longstanding Board policy is discussed in Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706 (1989), and Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 640 (1991).

119. See 808 F.3d at 1015.

120. See *id.* at 1018, 1018 n.3.

121. 823 F.3d 1147 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

122. *Id.* at 1151.

123. *Id.*; see Ann C. Hodges, *Employee Voice in Arbitration*, 22 EMP. RTS. & EMP. POL'Y J. 235, 240 (2018) (highlighting how arbitration agreements are emailed to employees, placed in employee handbooks or on employment applications, or given to employees in hard copy, and employees are told that "continued employment constitutes acceptance").

and compel individual arbitration was denied by the district court; the Seventh Circuit affirmed on appeal, holding that the agreement violated employees' substantive Section 7 right to concertedly seek collective or class remedies.¹²⁴

B. *The Court's Decision*

The Supreme Court, by a vote of 5–4, held that the class and collective action waivers in the aforementioned cases did not conflict with Section 7 of the NLRA and were therefore enforceable. This Part critiques three aspects of the Court's decision and analysis.

1. *The Arbitration "Agreements."*—Justice Neil M. Gorsuch's majority opinion asked two questions: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"¹²⁵

Justice Gorsuch, noting the FAA's "liberal federal policy favoring arbitration agreements,"¹²⁶ stated that the statute requires rigorous enforcement of arbitration agreements according to their terms, "including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted."¹²⁷ The "parties before us contracted for arbitration," he wrote, and "indicate[d] their intention to use individualized rather than class or collective action procedures."¹²⁸

Conspicuously not mentioned by Justice Gorsuch, however, are material facts relating to the formation of the "parties'" "contracts" and their purported "intention" to not utilize class or collective action procedures. In each of the cases before the Court, employees were presented with take-it-or-leave-it, "agree"-or-leave-your-job arbitration arrangements and waiver provisions conditioning their employment on acceptance of the employer's—and only the employer's—terms. A waiver requirement contained in such an adhesive contract¹²⁹ is a forced, nonnegotiable, and therefore oxymoronic "agreement." The employees' "choice" to arbitrate is a "Hobson's choice: accept arbitration on their employer's terms or give up their jobs[;]"¹³⁰ it is a

124. 823 F.3d at 1151, 1155–56.

125. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

126. *Id.* at 1621 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

127. *Id.* (quoting *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)).

128. *Id.*

129. On contracts of adhesion, see generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

130. 138 S. Ct. at 1636 n.2 (Ginsburg, J., dissenting).

“choice” not prescribed by Congress, an “unbargained-for” arrangement, and an employer command in a “labor contract[] harking back to the type called ‘yellow dog’”¹³¹ Seen in this light, Justice Gorsuch’s account elides the reality of the actual provenance of the legally fictional “agreements” challenged by the employees.

2. *The FAA’s Savings Clause.*—Turning to the FAA’s savings clause, Justice Gorsuch noted that employees did not suggest that the arbitration agreements were rendered unenforceable because they were obtained through fraud or duress or in an unconscionable manner.¹³² Relying on *Concepcion*, he determined that the employees’ attacks on individualized arbitration sought to interfere with a fundamental attribute of arbitration—its informality—and would “make the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹³³ Nor did the savings clause salvage the employees’ contention that the agreements could not be enforced because they were “illegal.”¹³⁴ Again citing *Concepcion*, the Justice stated: “Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature.”¹³⁵ The illegality defense disfavors arbitration, he concluded, and respect for the law of precedent (“like cases should generally be treated alike”) places the illegality and unconscionability defenses outside the scope of the savings clause.¹³⁶

Justice Ginsburg did not agree with Justice Gorsuch’s savings clause analysis. In her view, a rule prohibiting the enforcement of illegal promises does not facially or covertly discriminate against arbitration, for that defense “requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees’ § 7 rights.”¹³⁷ And the employees did not make a “just because” argument. They argued, more precisely, that the contract was unenforceable because it required bilateral arbitration pursuant to an employer-mandated scheme requiring them to surrender their rights under Section 7 of the NLRA, as well as their explicit statutory right to bring collective action claims under the FLSA.¹³⁸

Furthermore, is Justice Gorsuch right that unconscionability and illegality defenses are generally the same? The seemingly evident proposition that like cases should generally be treated alike loses its persuasive force when it is applied too broadly and without consideration of the specifics of a

131. *Id.* at 1649.

132. *Id.* at 1622.

133. *Id.* at 1623 (brackets omitted) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 (2011)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1646 (Ginsburg, J., dissenting).

138. *See* 29 U.S.C. § 216(b).

particular case. It is at least arguable that an unconscionability defense to enforceability in a consumer arbitration case is not like an illegality defense raised in an employment arbitration case in which employees are required to waive statutory rights. On that view, treating the illegality defense in *Epic Systems* as if it is like the unconscionability defense made in *Concepcion* on the basis of a conclusory law-of-precedent rationale leaves much to be desired.

3. *Misinterpreting Section 7.*—Recall that Section 7 provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection.*”¹³⁹ For Justice Gorsuch, this section focuses on the right to organize unions and bargain collectively.

It may permit unions to bargain to prohibit arbitration. . . . But it does not express approval or disapproval of arbitration. It 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.¹⁴⁰

This understanding of Section 7, reflecting what Dean Michael Yelnosky calls “labor law illiteracy,”¹⁴¹ problematically invisibilizes Section 7’s mutual aid or protection clause. It is hornbook labor law that Section 7 protects not two but three main rights: (1) self-organization, (2) collective bargaining, and (3) concerted activities for other mutual aid or protection.¹⁴²

139. 29 U.S.C. § 157 (emphasis added), discussed *supra* note 8 and accompanying text.

140. 138 S. Ct. at 1624.

141. Michael J. Yelnosky, *Labor Law Illiteracy: Epic Systems Corp. v. Lewis and Janus v. AFSCME*, 24 ROGER WILLIAMS U. L. REV. 104, 106, 108 (2019).

142. See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 397 (2d ed. 2004) (Section 7’s protection of other concerted activities for mutual aid or protection “extends beyond . . . efforts to form a union and engage in collective bargaining.”); see also 138 S. Ct. at 1636–37 (Ginsburg, J., dissenting) (“Although the NLRA safeguards, first and foremost, workers’ rights to join unions and to engage in collective bargaining, the statute speaks more embracively” and also “protects employees’ rights ‘to engage in *other* concerted activities for the purpose of . . . mutual aid or protection.”) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14–15 (1962)) (ellipsis original); 1 JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 209 (6th ed. 2012) (“Section 7 protects not only union-related activity but also ‘other concerted activities . . . for mutual aid or protection.’”); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 16 (2016) (“Section 7 was particularly revolutionary, as it protected not only the right of unionized workers to bargain, but also the right of all workers to engage in concerted action for mutual aid or protection.”); Sullivan & Glynn, *supra* note 101, at 1031 (“[T]he pursuit of such claims in concert for mutual aid or protection *outside of collective bargaining* is often critical to the claims’ success.”); James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 954 n.43 (1996) (noting that Section 7 protects “[t]hree central rights” of employees).

As noted by the Court more than forty years ago in *Eastex, Inc. v. NLRB*,¹⁴³ Section 7's language protects concerted activities for the broader purpose of mutual aid or protection and the narrower purposes of self-organization and collective bargaining.¹⁴⁴ Thus, and contrary to Justice Gorsuch's view, Section 7's text goes beyond protecting only union organization and collective bargaining.

Justice Gorsuch's misapprehension of Court decisions construing Section 7 is also concerning. He cites *NLRB v. Washington Aluminum Co.*¹⁴⁵ as support for his statement that the Court's Section 7 cases usually involved "efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings."¹⁴⁶ However, as previously noted, the workers in *Washington Aluminum* were not members of a union and were not seeking union representation or collective bargaining. They were nonunion, unorganized workers who banded together and walked off the job in protest of freezing working conditions and were unlawfully discharged for doing so.¹⁴⁷ It is true that the Court's 1962 decision said nothing about class or collective actions in court or arbitration proceedings—true for the simple reason that those subjects had nothing to do with the specific issue before the Court. If judicial or arbitral class or collective actions had somehow been an issue, a requirement that employees considering walking off the job because of substandard working conditions submit that dispute to FAA-based arbitration "would effectively end the labor laws" and "directly interfere with the employees' undisputed right to walk out together or engage in other forms of collective protest."¹⁴⁸

Justice Gorsuch also cited another Section 7 Court decision, *NLRB v. City Disposal Systems, Inc.*,¹⁴⁹ stating that the Court held only that an employee's assertion of a collectively bargained right was "protected."¹⁵⁰ *City Disposal* did not and had no reason to address the Section 7 issue as applied to an employee not covered by or subject to a collective bargaining agreement or an arbitration agreement waiving employees' right to bring aggregate claims. And *City Disposal* did *not* conclude that the right asserted by the employee in that case was "protected." In holding that the employee's invocation of the labor agreement was concerted activity, the Court made it clear that the question of whether the activity was protected "is not before

143. 437 U.S. 556 (1978); discussed *supra* notes 96–99 and accompanying text.

144. *Id.* at 565.

145. 370 U.S. 9 (1962).

146. 138 S. Ct. at 1628.

147. *See supra* notes 90–92 and accompanying text.

148. Sullivan & Glynn, *supra* note 101, at 1054.

149. 465 U.S. 822 (1984).

150. *Epic Sys. Corp v. Lewis*, 138 S. Ct. 1612, 1628 (2018).

us” and remanded the case for inquiry into whether the conduct “was unprotected, even if concerted.”¹⁵¹

Why does this matter? Justice Gorsuch opined that “[a]s a matter of policy” the question before the Court in *Epic Systems* is “surely debatable” but “as a matter of law the answer is clear.”¹⁵² That posited clarity is in no way obvious, for his misinterpretation of Section 7’s text and misreading of the Court’s Section 7 precedent form a flawed and unstable foundation for the Court’s holding. Lack of confidence in analysis undermines confidence in result.

Furthermore, the ripple effects of Justice Gorsuch’s Section 7 analysis are already apparent. In its pre-*Epic Systems* decision in *Tarlton and Son, Inc.*,¹⁵³ the Board held (1) that the employer’s class and collective action waiver violated Section 8(a)(1), and (2) that the waiver policy also violated Section 8(a)(1) because it was promulgated in response to employees’ protected concerted activity in the form of a state-court class action alleging violations of state wage and hour laws.¹⁵⁴ The Board’s decision was pending before the Ninth Circuit at the time of the Supreme Court’s *Epic Systems* ruling. Following the Court’s decision, the Board successfully moved the court to summarily grant *Tarlton and Son*’s petition for review of the Board’s first holding, and for severance and remand of the policy-promulgation issue.¹⁵⁵

On remand, the Board’s General Counsel now argues that *Epic Systems* “casts severe doubt on the Board’s decisions previously finding joint or individual filing of a class or collective action to be protected.”¹⁵⁶ The General Counsel has asked the Board to clarify that a class or collective legal action filed by an individual “amount[s] to a personal complaint over employment terms that fall outside the protections of Section 7” where “there is no evidence that [the] individual filer sought to either initiate and induce group action or bring a group complaint to management’s attention, discussed the filing of the lawsuit with any coworker, or represented a commonly held workplace complaint”¹⁵⁷

The General Counsel further argues that *Epic Systems* implicitly held

151. *City Disposal Sys.*, 465 U.S. at 837, 841.

152. 138 S. Ct. at 1619.

153. 363 N.L.R.B. No. 175 (Apr. 29, 2016).

154. *Id.* at *1–2.

155. See Motion of the National Labor Relations Board to Lift Abeyance, Summarily Grant *Tarlton & Son*’s Petition for Review in Part and Deny the Board’s Cross-Application for Enforcement in Part, Sever and Remand to the Board the Remaining Portions of the Board’s Order, and Summarily Deny *Munoz*’s Petition for Review, *Tarlton & Son, Inc. v. NLRB* (9th Cir. Jun. 4, 2018) (No. 16-71915); Order, *Tarlton & Son, Inc. v. NLRB* (Jul. 19, 2018) (No. 16-71915).

156. General Counsel’s Answering Brief at 2, *Tarlton and Son, Inc.*, (NLRB Feb. 26, 2019) (32-CA-119054, 32-CA-126896).

157. *Id.* at 7.

that Section 7's protection does not include the filing of a legal proceeding filed by an individual or by a group of employees.¹⁵⁸ In other words, "the 'activity' of filing a class or collective legal action, even concertedly, is not among the enumerated or catchall protected activities described in Section 7."¹⁵⁹ Employee activities furthering collective organizing and bargaining are protected; "the filing of legal claims" are not.¹⁶⁰ Moreover, and assuming that *Epic Systems* leaves the Board with discretion to extend Section 7 protection to employees' joint filings of non-NLRA civil actions, the General Counsel urges the Board to decline to exercise such discretion.¹⁶¹ The General Counsel contends that an NLRA remedy for non-NLRA claims, which are also subject to anti-retaliation provisions and independent rules and procedures external to the NLRA, would be duplicative and would require the Board to interpret statutes other than the law the agency administers.¹⁶² Board adoption of these positions would deprive employees of resort to the NLRA as an avenue of relief for allegedly retaliatory conduct.

V. Conclusion

Epic Systems' validation and enforcement of aggregated-claims waiver provisions in employer–employee arbitration agreements are significant developments in the Court's FAA-arbitration jurisprudence. As argued in the preceding Part, aspects of the Court's opinion and analysis call into question the correctness of its holding. But the Court has spoken and the focus now shifts to two important questions for consideration in the wake of its decision: Will the Court's decision make it even more difficult for employees like Stephanie Sutherland¹⁶³ and other employees joining together to seek enforcement of wage-and-hour and other worker-protections laws to overcome the obstacles raised by private individualized arbitration, with a consequent under-enforcement of those public law enactments?¹⁶⁴ Or will the

158. *See id.*

159. *Id.*

160. *Id.* at 7–8.

161. *Id.* at 8. The Board has made clear that the NLRA prohibits agreements that restrict employees' access to the Board or Board processes. Thus, "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful. Such an agreement constitutes an explicit prohibition on the exercise of employees rights under the Act." *Prime Healthcare Paradise Valley, LLC*, 368 N.L.R.B. 10 (2019).

162. *See* General Counsel's Answering Brief, *supra* note 156, at 8. With regard to state law wage-and-hour claims, it should be noted that six states do not prohibit retaliation and another six states only prohibit retaliation in cases in which employees allege criminal wage violations. *See* Robert Iafolla, *Labor Law Safeguards for Worker Lawsuits Imperiled at NLRB*, BLOOMBERG: DAILY LABOR REPORT (May 14, 2019), <https://news.bloomberglaw.com/daily-labor-report/labor-law-safeguards-for-worker-lawsuits-imperiled-at-nlr> [<https://perma.cc/WP54-72LV>].

163. *See supra* notes 1–6 and accompanying text.

164. It has been reported that plaintiffs' attorneys are filing individual arbitration claims on behalf of multiple individuals with the same claim, resulting in an increase in an employer's arbitration and expert fees. *See* Lise Gelernter, *The Impact of Epic Systems in the Labor and*

Court's ruling be "a qualified blessing in disguise" and "prove beneficial to workers" provided with the "cheaper, more informal mechanism" of an arbitral forum within which they can litigate their claims?¹⁶⁵ These and other queries and answers thereto warrant continued reflection and discussion in the wake of *Epic Systems*' constructions of the FAA and the NLRA.

Employment Context, J. DISP. RESOL., no. 1, 2019, at 115, 118; *see also* Chandrasekher & Horton, *supra* note 32, at 54 (after *Concepcion* "plaintiffs' lawyers have driven the uptick in arbitrations[;]" "a single plaintiffs' firm initiated roughly 1,094 consumer arbitrations on the same day against AT&T").

165. Samuel Estreicher, *The Supreme Court Did Workers A Favor: Class Action Lawsuits are the Wrong Way to Settle Employment Disputes*, BLOOMBERG (May 24, 2018, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2018-05-24/how-neil-gorsuch-s-ruling-on-class-actions-does-workers-a-favor> [<https://perma.cc/V3TP-KEKD>]; Samuel Estreicher, *Workers may gain by court decision*, THE JOURNAL GAZETTE: JGCOLUMN (May 28, 2019, 1:00 am), <http://www.journalgazette.net/opinion/columns/20180528/workers-may-gain-by-court-decision> [<https://perma.cc/7NGA-69MT>].