Note

TO REGULATE, OR NOT TO REGULATE? THE COURT'S EXPANSION OF THE FEDERAL EMPLOYERS LIABILITY ACT AND THE FEDERAL ARBITRATION ACT TO SUPPLANT EMPLOYMENT LAW

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I. INTRODUCTION

Although employment law originates heavily in state law and incorporates several common law concepts, it has been shaped in recent history by the judicial interpretation of federal labor and employment regulations. The Federal Employers Liability Act (FELA)[1] and the Federal Arbitration Act (FAA)[2] are two such acts that the judiciary has expanded greatly in two very different ways. The Supreme Court has expanded the scope of the FELA in a way that has directly benefited the railroad/common carrier worker.[3] By contrast, the Court has predominantly interpreted the FAA in a way that many argue favors employers over employees.[4] Moreover, the Court has approached and, accordingly, interpreted each of the Acts in opposing ways with respect to free-market theories of employment bargaining and contracting.

The FELA, a federal act that protects railroad workers, was enacted to prevent railroad companies from evading negligence liability in cases of railroad worker injury.[5] Over the course of the twentieth century, the Supreme Court interpreted this Act in a way that broadened its applicability.[6] This, in turn, both repeatedly supplanted state law—leaving regulatory power in the hands of the federal government—and regulated the employee and employer's employment relationship.[7] Alternatively, the FAA was enacted to curb nationwide judicial intolerance of arbitration.[8] From the end of the twentieth century into the twenty-first century, the Court has decided several FAA cases in the employment context.[9] In these decisions, the Court has elected to expand the FAA's power in a way that supplants state (and arguably, federal) law to honor the parties' employment contracts.[10] Consequently, this frequently results in a win for employers.[11]

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[1] Federal Employers Liability Act of 1908, 45 U.S.C. § 51 (2018) et seq.

[2] Federal Arbitration Act of 1925, 9 U.S.C. ch. 1–3 (1925).

[3] *See* discussion *infra* Section IIIA.

[4] *See*, *e.g.*, Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights* 414 ECON. POL'Y INST. 3 (2015) (examining the impact of mandatory arbitration clauses in employment contracts and their tendency to favor employers); *see also* discussion *infra* Section IIIB.

[5] H. D. Minor, *Federal Employers' Liability Act*, 1 VA. L. REV. 169, 169 (1913).

[6] *See* discussion *infra* Section IIIA.

[7] *See id*.

[8] *See* William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 610 (2006).

[9] *See* cases listed *infra* note 128.

[10] *Id.*

[11] *See* discussion *infra* Section IIIB.

What has led to the pointedly different interpretations of these two federal laws, both of which directly affect employment? This Note will explore the factors that may have contributed to the Acts' policy tensions, specifically considering the effects of judicial acceptance and promotion of arbitration over individual or class employees' interests in utilizing the court systems, as well as the outcomes of privatization and deregulation by the Court's interpretation of federal law.

II. BACKGROUND

A. *Deregulation and Privatization of Employment*

The extent of regulation or privatization in the business world largely dictates the relative positions of power from which employees and employers negotiate. Deregulation, or "[t]he reduction or elimination of governmental control of business, [especially] to permit free markets and competition,"[12] yields diminished government control over the employment sector.[13] Privatization, or "[t]he act or process of converting a business or industry from governmental ownership or control to private enterprise,"[14] is generally marked by "the deliberate sale by a government of state-owned enterprises"[15] or, in other words, the "shift from government provision of functions and services to provision by the private sector."[16] With respect to the employment sector, privatization emerges through the diversion of services from the public to the private sector.[17] The act of privatizing "removes the relationship of employer and employee from one sphere of regulation, consisting of civil service laws and constitutional restraints, and places it within another, governed by the rules of the marketplace."[18]

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[12] *Deregulation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[13] *See* Celine McNicholas et al., *Workers' Health, Safety, and Pay Are Among the Casualties of Trump's War on Regulations*, ECON. POL'Y INST. (Jan. 29, 2018), https://www.epi.org/publication/deregulation-year-in-review/ (arguing that deregulation equates to "repealing many existing regulations and making it more difficult for government agencies to effectively regulate industries.").

[14] *Privatization*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[15] Krishnamurthy Subramanian & William Megginson, *Employment Protection Laws and Privatization*, 61 J.L. & ECON. 97, 98 (2018).

[16] George L. Priest, *Introduction: The Aims of Privatization*, 6 YALE L. & POL'Y REV. 1, 1 (1988).

[17] Craig Becker, *With Whose Hands: Privatization, Public Employment, and Democracy*, 6 YALE L. & POL'Y REV. 88, 88 (1988).

[18] *Id.* at 89. For the purpose of this Note, I will primarily focus on the periods of regulation versus the periods of "deregulation" in the employment market.

The United States has undergone fluctuating periods of regulation and privatization within employment, with some periods heavily prioritizing regulation over others.[19] In periods marked by substantial deregulation, the Court's decisions reflect disapproval of governmental regulation over employment and accord latitude to private employers; accordingly, the contracts developed by employers and employees and the contents therein are granted high degrees of deference.[20] Contrarily, in regulatory periods, courts have reinforced federal and state legislation that regulates the processes and effects of employment.[21] During these periods, federal and state legislation can be used, together, to successfully effectuate regulatory intent because some federal laws leave holes for state regulations to fill.[22]

The United States has also experienced periods in which the federal government has enacted regulations that have preempted state law.[23] Congress has the power to enact, and accordingly has enacted, federal legislation that supplants—effectively removing—regulatory power from the states and granting it to the federal government.[24] The Supreme Court has, likewise, broadened statutory schemes to largely supplant state regulatory authority.[25] In expanding centralized federal power and decreasing state autonomy within employment, such federal statutes effectively decrease regulation in the employment industry and, thus, permit a more free-market approach to the development of employment

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[19] *See* Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 468 (2020) ("[W]e oscillated, from primarily a laissez-faire regime during the *Lochner* era to a state welfarist regime [in] the mid-1930s to the mid-1970s . . . then back to a more libertarian resting point starting in the build-up to the Reagan Revolution and carrying forward into the early years of the twenty-first century."); *see also Lochner*-era discussion *infra* Section IIB.

[20] *See Lochner*-era discussion *infra* Section IIB.

[21] *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1442–43 (2003) ("In the post-*Lochner* era . . . courts became quite reluctant to [invalidate private delegations of power]. Reinforcing this reluctance is acceptance of the contention that almost every instance of economic and social legislation could be seen as a private delegation of power.").

[22] *See*, *e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 89 (2013) (discussing federal and state regulation of firearms).

[23] *See, e.g.,* Stone & Colvin, *supra* note 4, at 8 (explaining how the Supreme Court's decision in *Southland Corp v. Keating* determined that the FAA applied to both federal and state cases); *see also* discussion *infra* Section III A.

[24] Under the Supremacy Clause, the Constitution and federal law is the "supreme Law of the Land. . . ." U.S. Const. art. VI, cl. 2.

[25] *See* discussion *infra* Section III. Two Acts in particular that will be explored further in this Note, the FELA and the FAA, arguably have such an effect.

contracts.[26] These periods of expanding federal preemption can, but do not always, exhibit similar characteristics to periods typified by general deregulation.[27] While the Supreme Court has not understood all federal statutes to supplant state law,[28] the Court has interpreted some federal employment statutes in such a way that may suggest a resurgence of employment deregulation.

B. The Federal Employers Liability Act

The FELA, enacted on April 22, 1908, and codified as 45 U.S.C. § 51 et. seq., renders any common carrier by railroad engaged in interstate commerce liable to an employee who has suffered injury or death due at least in part to the common carrier's negligence.[29] The FELA mandates, "[e]very common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while . . . employed by such carrier in such commerce . . . ."[30] The term "common carrier" encompasses railroad corporations[31] and "receivers or other persons or corporations charged with the duty of the management and operation of the business of" common carriers by railroad.[32] The term "employees," conversely, includes all workers for railroad corporations who are engaged in interstate commerce at the time of injury.[33] In the case of the death of a railroad employee, the decedent's personal representative, parent, or next of kin may be qualified to bring suit "for such injury or death resulting in whole or in part from the negligence of any" of the common carrier's officers, agents, or employees, "or by reason of any defect or insufficiency" of equipment due to the common carrier's negligence.[34] "[T]he fact that the employee may have been guilty of contributory negligence" does not automatically bar recovery; conversely, the employee's damages will be "diminished . . . in proportion to the

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[26] *See id*.

[27] The *Lochner*-era, for instance, classifies as a "deregulation" period during which the Court struck down several statutes. For discussion, *see* Section IIB.

[28] *See generally* Blocher, *supra* note 22 (explaining how the Supreme Court has interpreted federal gun legislation to either apply to or remain independent from state law).

[29] Minor, *supra* note 5, at 169. *See also* 45 U.S.C. § 51 et. seq (2018).

[30] 45 U.S.C. § 51 (2018).

[31] W. W. THORNTON, A TREATISE ON THE FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS 25, 38 (3d ed. 1916).

[32] 45 U.S.C. § 57 (2018).

[33] *See* THORNTON, *supra* note 31, at 51, 57–60 (explaining situations where a railroad, and by extension its employees, is engaged in interstate commerce).

[34] 45 U.S.C. § 51 (2018).

amount of negligence attributable to [him]."[35] If the common carrier, however, violates a "statute enacted for the safety of employees" and if that violation "contribute[s] to the injury or death of such employee," contributory negligence cannot be used to diminish the employee's damages reward.[36]

In an action brought under the FELA, the employer-railroad common carrier cannot claim that the employee-railroad worker "assumed the risks of his employment" if the employer's officers, agents, or other employees acted negligently, causing the petitioner's injury or death.[37] Further, an employer-railroad common carrier cannot claim that an employee-railroad worker assumed the risks of his employment in situations where the common carrier violated "any statute enacted for the safety of employees," and that violation "contributed to the injury or death of [the] employee."[38]

The enactment of the FELA vitally interceded in an employment field that was marked by risk, danger, and violence.[39] The railroad work culture celebrated speed and dexterity and frequently disregarded safety.[40] This, in turn, created a hazardous day-to-day life for its employees.[41] A railroad brakeman in 1888 had only a one-in-five chance of dying a natural death, and the life expectancy of a railroad switchman in 1893 was seven years from the commencement of his employment.[42] In 1907, 4,534 railroad employees were killed and 87,634 railroad employees were injured within their course of work.[43] The Secretary of the Interstate Commerce Commission, Edward A. Moseley, emphasized that "more of the grand army of railway men of this country were cut and bruised and

[35] 45 U.S.C. § 53 (2018).

[36] *Id*.

[37] 45 U.S.C. § 54 (2018).

[38] *Id*.

[39] *See* Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) ("The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.")

[40] *See* John Williams-Searle, *Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers' Liability Act*, 28 DISABILITY STUD. Q. 3 (2008).

[41] *See id.* (suggesting that employees equated working fast and with skill with manhood, comparing their work to that of armies going to war, thus pushing safe practices to the wayside).

[42] T. J. Lewis, Jr., *Federal Employers Liability Act*, 14 S. C. L. Q. 447, 447 (1962); Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 81 (1992).

[43] Lewis, *supra* note 42, at 447.

maimed and mangled" in one year "than all the Union wounded and missing on the bloody field of Gettysburg."[44]

Prior to the FELA's enactment, railroad employees did not have many options to hold their employers liable for injuries sustained at work.[45] On the other hand, vast common law defenses were readily available to the employer, including contributory negligence,[46] assumption of risk,[47] and the fellow-servant rule,[48] making employee

[44] JAMES MORGAN, THE LIFE WORK OF EDWARD A. MOSELEY IN THE SERVICE OF HUMANITY 60 (1913). President Benjamin Harrison reflected such sentiment to Congress in 1889, stating, "[i]t is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." Lewis, *supra* note 42, at 447.

[45] Baker, *supra* note 42, at 82; *see also* Robert A. Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK L. REV. 1, 2 (1946).

[46] Leflar, *supra* note 45 at 2. In invoking a defense of contributory negligence, a defendant alleges that a "plaintiff's later negligence [has] superven[ed]" and thus "broke[n] the chain of causation between the defendant's negligent act and the plaintiff's injury." *Id.* Prior to 1908, many courts permitted railroad employers to invoke contributory negligence as a defense to charges of negligence. *See, e.g.,* Devitt v. Pac. R.R., 50 Mo. 302, 303, 305–06 (1872) (reversing a judgment against a defendant railroad company under the theory of contributory negligence where an employee was killed looking over the train car when the train ran under a low bridge); Lake Shore & M. S. R.R. Co. v. Miller, 25 Mich. 274, 302–03 (1872), *overruled by* Bricker v. Green, 21 N.W.2d 105, 111 (Mich. 1946) (reversing a verdict in favor of a wagon passenger injured in a train collision where the passenger was contributorily negligent).

[47] In invoking an assumption of risk defense, a defendant alleges that the plaintiff assumed the risk of injury or death when he "deliberately cho[se] to encounter that risk" where a reasonable person would have, in the employment context, refused to work. Fleming James, Jr., *Assumption of Risk*, 61 YALE L. J. 141, 141 (1952). Prior to 1908, many courts permitted railroad employers to invoke assumption of risk as a defense to charges of negligence. *See, e.g.,* Skidmore v. W. Va. & Pittsburgh R.R. Co., 41 W. Va. 293, 306–08 (1895) (holding that a railroad employee assumed the risk of danger of which his employer lacked knowledge and, thus, could not recover for injury sustained while on the job); Peirce v. Clavin, 82 F. 550, 552 (7th Cir. 1897) (holding that whether an employee knew or should have known the danger of using a defective railroad switch, thus assuming the risk of injury, was a question for the jury). In his 1984 article reflecting on the history of employment law, Charles W. McCurdy points out that the Pennsylvania Railroad Company required all employees to sign clauses that read, "the regular compensation will cover all risk or liability, from any cause whatever, in the service of the company." Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 Y.B. 20, 30 (1984).

[48] Under the fellow-servant rule, an employer is not held liable for injuries to an employee caused by the negligence of a coworker. *Fellow-Servant Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019). Prior to 1908, many courts permitted railroad employers to invoke the fellow-servant rule to evade negligence liability. *See, e.g.,* Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 387–88, 390 (1893) (holding that the railroad was not liable for injuries sustained by an employee as a result of his co-employee's negligence, as the co-employee lacked the requisite authority to be the railroad's agent); Schaible v. Lake Shore & Mich. S. R.R. Co., 56 N.W. 565, 566 (Mich. 1893) (barring an employee from recovery from injuries sustained when struck by a negligently shunted railroad car because he assumed the risk of a fellow servant's negligence in taking employment within a railyard position).

success in lawsuits uncommon.[49] The FELA was necessary both to rid the railroad industry of common law principles that greatly disenfranchised workers,[50] and to establish a culture of work standards that prioritized safety.[51]

Changes in state law tracked the widespread transition in the railroad system before, around, and after the enactment of the FELA. Prior to the Civil War, the federal government did not own railroads, unlike state governments which profited greatly off of such ownership.[52] As the United States welcomed the twentieth century, "central, national power grew and grew and grew"—and the state-centered railroad industry changed.[53] The federal government's newfound power yielded the possibility of central control of industries, such as the railroad industry.[54]

Before 1906, many states had enacted individual legislation that codified common law and permitted railroad employees to seek damages after being injured at work; yet, there was no such federal law.[55] In response to the alarming mortality rates and these sometimes dissimilar state laws, Congress initially passed the FELA in 1906.[56] The Supreme Court shortly thereafter struck down the FELA on the ground that it exceeded Congress's enumerated constitutional powers.[57] Upon review, Congress retained merely those clauses that related to interstate

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[49] *See* MORGAN, *supra* note 44, at 54–55, 57, 62; Baker, *supra* note 42, at 82.

[50] *See* Baker, *supra* note 42, at 82.

[51] *See* Williams-Searle, *supra* note 41.

[52] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 121 (3d ed. 2005) (describing states' railroad ownership activities as "feverish").

[53] *See id*. at 504. The uniformity across state lines with respect to goods, people, and ideas as trade boomed aided in decreasing state autonomy. *Id*. at 506.

[54] *See id*. at 507–08.

[55] THORNTON, *supra* note 31, at 29 ("Before the passage of . . . the [FELA] . . . many states had enacted statutes which applied in terms . . . to carriers . . . engaged in the business of interstate commerce . . . ."); *see*, *e.g.*, CAL. CIV. CODE § 2168 (1872) (defining a "common carrier"); *see also* Kain v. Smith, 80 N.Y. 458, 467–68 (1880) (permitting a volunteer railroad receiver, injured while working, to sue the railroad).

[56] THORNTON, *supra* note 31, at 17–19.

[57] *Id*. at 19. The Supreme Court, in *Howard v. Ill. Cent. R.R.*, colloquially referred to as the *Employers' Liability Cases*, held that Congress had attempted to "regulate all the commerce of a common carrier whether interstate or intrastate" in its first attempt at the FELA. 207 U.S. 463, 486 (1908). Thus, the Court held that the Act unconstitutionally regulated intrastate commerce. Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49, 50 n.5 (1988). The Court, however, acknowledged that "[C]ongress had the power to enact a statute relating to employers and employe[e]s engaged in interstate commerce, where the statute was enacted for the protection of the employe[e]." THORNTON, *supra* note 31, at 20.

commerce,[58] and successfully passed the FELA again in 1908 under the Commerce Clause.[59]

The second iteration of the FELA took effect during the beginning of the "*Lochner*-era"; a time frame during which the Supreme Court held that "freedom of contract is a basic right protected as liberty and property rights under the due process clause of the Fourteenth Amendment."[60] During this era, which stretched from approximately 1905–1937,[61] the Court repeatedly struck down state and some federal laws that restricted parties' freedom to define the terms of their employment relationship.[62] At the turn of the twentieth century, and with the emergence of large corporations, the country faced challenges balancing state and federal regulation of industry.[63] The era's name is derived from *Lochner v. New York*,[64] a seminal case in which the Supreme Court considered whether a state statute that limited an employee's maximum hours of work each week constituted a legitimate exercise of state police power.[65] A baker argued that a New York state statute, which set mandatory maximum hours of labor in bakeries,[66] violated the constitutional rights to freedom of contract and property protected by the Due Process Clause of the Fourteenth Amendment of those in the bakery industry.[67] Conversely, the state of New York argued that state legislature possessed the power to enact this law to protect public health and welfare.[68] The Court held that

[58] THORNTON, *supra* note 31, at 19.

[59] *Id*. at 37–38. After the passing of the FELA, states with preexisting compensation acts and workmen's compensation schemes for railroad injuries slowly interpreted and molded their legislation to comport with federal law, defining preemption lines. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 184–86 (2004). Work-accident liability for railroad workers "was split between the Federal Employers' Liability Act for employees in interstate commerce and state workmen's compensation acts for all other employees." *Id*. at 187. By the end of the 1920s, forty-four states, plus the District of Columbia, Hawaii, Alaska, Puerto Rico, and the Philippines, had established statewide work-accident laws to protect intrastate employees in cases of railroad negligence. *Id*. at 194.

[60] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 642 (5th ed. 2015).

[61] *See id*. at 642, 644.

[62] *See* M. A. Langager, *The House the Court Built: A Tour of Mandatory Employment Arbitration with an International Comparison*, 19 LEWIS & CLARK L. REV. 497, 511 n.77 (2015).

[63] *See* Larry Zacharias, *Justice Brandeis and Railroad Accidents: Fairness, Uniformity and Consistency*, 33 TOURO L. REV. 51, 61 (2017).

[64] Lochner v. N.Y., 198 U.S. 45 (1905).

[65] *See id*. at 54–55.

[66] *See id*. at 46 n.1.

[67] *Id*. at 53–54.

[68] *Lochner*, 198 U.S. at 53.

the New York statute, in interfering with the "right of contract between the employer and employe[e]s," violated the bakery employers' and workers' "general right[s] to make a contract in relation to . . . business . . . protected by the Fourteenth Amendment of the . . . Constitution."[69] The Court stated that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker,"[70] regardless of purported legislative intent to protect "public health" or the "health" of those in the bakery industry.[71] In short, the employee's and employer's freedom to contract with one another trumped the New York law.[72]

Following *Lochner*, the Court found unconstitutional various other pieces of state, as well as some federal, legislation that regulated, among other things, unionization, minimum and maximum hours, minimum wages, consumer protection, and business entry.[73] During this period, the Court struck down over 175 state statutes involving the Due Process, Equal Protection, and Commerce Clauses.[74] Thus, the Court's willingness to invalidate laws to preserve freedom of contract as a subset of liberty typified the *Lochner*-era.[75] The *Lochner* Court generally "prioritized

[69] *Id*.

[70] *Id*. at 57.

[71] *Id*. at 58.

[72] *Lochner*, 198 U.S. at 61, 64; *see also* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 460 (1995) (citing *Lochner*, 198 U.S. at 64).

[73] *See* CHEMERINSKY, *supra* note 60, at 644–47; *see also* Adair v. U.S., 208 U.S. 161, 172 (1908) (declaring unconstitutional a federal law that regulated unionization); Adams v. Tanner, 244 U.S. 590, 591, 596–97 (1917) (declaring unconstitutional a state law that prohibited private employment agencies from charging their employees fees); Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (declaring unconstitutional a federal law that regulated minimum wage standards for women); Tyson & Bro. v. Banton, 273 U.S. 418, 427 (1927) (declaring unconstitutional a state law that regulated maximum prices for theater tickets); Williams v. Standard Oil Co., 278 U.S. 235, 245 (1928) (declaring unconstitutional a state law that regulated gas prices); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1018 (2000) (listing other state laws the Court struck down as unconstitutional).

[74] *See* BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942) ("[T]here were 159 decisions under the [D]ue [P]rocess and [E]qual [P]rotection [C]lauses in which state statutes were held to be unconstitutional, plus 16 in which both the [D]ue [P]rocess and [C]ommerce [C]lauses were involved, plus 9 more involving due process and some other clause or clauses."); CHEMERINSKY, *supra* note 60, at 644 n.48 ("[T]he Court's commitment to laissez-faire economics . . . caused it to invalidate federal economic regulations as exceeding the scope of the [C]ommerce [C]lause or as violating the Tenth Amendment.").

[75] *See* CHEMERINSKY, *supra* note 60, at 644, 648.

private enterprise over government regulation."[76] By the mid-1930s, in light of the Great Depression, the public applied immense pressure upon the Court to "abandon the laissez-faire philosophy of the *Lochner*[-]era" and permit government regulation to remedy low wages and high unemployment rates.[77] Eventually, as exemplified in the Court's decision in *West Coast Hotel Co. v. Parrish*, the *Lochner*-era came to a rest.[78] Prior to its conclusion, however, the *Lochner* Court had determined that the second iteration of the FELA was, in fact, constitutional, even though it regulated employment and, consequently, employment contracts.[79]

Following the *Lochner*-era, through the mid-twentieth century, the Court struck down several state tort law defenses[80] and, in turn, protected railroad workers under the FELA.[81] In the "new" FELA's proposal and enactment, Congress rejected several common-law principles, including contributory negligence and assumption of risk.[82] Senator Jonathan P. Dolliver explained that the legislative intent behind the FELA rested in modifying antiquated common-law negligence concepts in order to permit a railroad "workman [to] sue[] for injury for which he is entitled to

[76] Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 642 (2014).

[77] CHEMERINSKY, *supra* note 60, at 649; *see also* Reuben, *supra* note 73, at 1018 ("Economic and political pressure led to the demise . . . of the *Lochnner* era . . . .").

[78] *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 390, 393 (1937). "[F]reedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity . . . or deny to government the power to provide restrictive safeguards . . . [or] reasonable regulations and prohibitions imposed in the interests of the community." *Id.* at 392 (quoting Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911) (internal quotation marks omitted)). Following this era came the "New Deal era," in which legislatures passed several new federal and state statutes that regulated employment conditions. *See* Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2321 (2018). The Court continued to afford "wide latitude" to Congress throughout the middle of the twentieth century. *See* Rahall, *supra* note 76, at 649.

[79] *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 456 n.123 (1993) (citing *Second Employers' Liability Cases*, 223 U.S. 1 (1912)).

[80] *See* Tiller v. Atl. C. L. R. Co., 318 U.S. 54, 58 (1943) ("[E]very vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and . . . Congress[] . . . did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.'"); Aaron Maples, *Comment: Muddy Waters: The End of Proximate Causation in FELA and Jones Act Claims*, 10 LOY. MAR. L.J. 399, 409 (2012) ("Looking to early FELA case law it is clear that the Act renounced any defenses of contributory negligence and assumption of risk."). *See also id.* at 410 ("The Court [has] noted that the statute's purpose to rid railroad employers of the defense of contributory negligence is 'crystal clear' from the language that employers should be responsible for all injuries resulting 'in whole or in part" from their negligence.'") (citing Coray v. S. Pac. Co., 69 S. Ct. 275, 525 (1949)).

[81] *See* CHEMERINSKY, *supra* note 60, at 652.

[82] *See* Consol. Rail. Corp. v. Gottshall, 512 U.S. 532, 542–43 (1994).

recover" without fear of unfair defeat.[83] The FELA, however, retained some classic tort characteristics, such as fault-based liability and compensatory damages determined by the actual damages suffered as opposed to a no-fault, scaled-recovery, workers' compensation-type system.[84] In 1910, Congress amended the FELA "to provide concurrent state and federal jurisdiction [as well as] nonremovable venue in any jurisdiction where the defendant resided or did business."[85] Congress once again amended the FELA in 1939 to eliminate the then-existent assumption of risk defense,[86] and to "establish[] a three-year statute of limitations" on claims, as reflected in the FELA today.[87]

The FELA, as University of Tennessee Professor of Law Jerry Phillips suggests, continues to "serve[] as a real and valuable incentive to promote employee safety in the railroad industry, which remains one of the most hazardous in this country."[88] Whereas another piece of federal legislation, the Federal Railroad Safety Act,[89] "does not provide incentives for compliance with safety [standards]," the FELA incentivizes employers' compliance.[90] Further, the generally higher standard of safety under the FELA could empower all employers to comport with established safety standards.[91]

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83 THORNTON, *supra* note 31, at 1–3. Consequently, the number of railway injuries to workers decreased. *See* WITT, *supra* note 59, at 187 ("On the railroads, . . . accident rates fell from a post-1900 high of 2.8 fatalities for every thousand employees in 1904, to 1.2 fatalities for every thousand employees in 1920.").

84 Phillips, *supra* note 57, at 50.

85 *Id*. at 50–51.

86 45 U.S.C. §§ 54, 56 (2018) (sections added by amendment on Aug. 11, 1939).

87 Phillips, *supra* note 57, at 51.

88 *Id*. at 49.

89 The Federal Railroad Safety Act (FRSA) covers and protects the rail system and implements technical operations standards in place of the Occupational Safety and Health Administration's coverage of other industries. *See* Joseph Mark Miller, *Federal Preemption and Preclusion: Why the Federal Railroad Safety Act Should Not Preclude the Federal Employer's Liability Act*, 51 LOY. L. REV. 947, 957 (2005)*; see also* Phillips, *supra* note 57, at 52 ("Railway safety 'is not covered by OSHA [Occupational Safety and Health Act]' but instead is covered by the Rail Safety Act . . . .").

90 Phillips, *supra* note 57, at 52–54 (internal quotations omitted); *see* TRANSP. RESEARCH BD., NAT'L RESEARCH COUNCIL, SPECIAL REPORT 241: COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 8–9 (1994) (discussing the FELA's deterring injury compensation systems, return-to-work and workers' compensation incentives, and dispute resolution systems).

91 Phillips, *supra* note 57, at 52–54 (discussing general safety standards within the railroad industry); *see* TRANSP. RESEARCH BD., *supra* note 90, at 22 ("[I]ndustry safety has improved dramatically since [the] FELA was enacted . . . .").

C. The Federal Arbitration Act

Unlike the FELA, which primarily affects a specific subset of employment law, the Federal Arbitration Act touches a plethora of legal fields. The FAA, passed on February 12, 1925 and codified as 9 U.S.C. ch. 1 in 1947,[92] dictates that a provision in a "contract . . . involving commerce" or a "maritime transaction" to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable" unless revocable by law or in equity.[93] In enacting the FAA, Congress intended that it would "enforce agreements reached through arms' length negotiations."[94] The FAA's reach includes agreements to arbitrate controversies arising or preexisting from a contract, including refusal to perform parts or all of the contract.[95] Congress has defined "contracts of employment" under this Act to specifically exclude contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce; thus, unlike the FELA, the FAA's grasp does not reach the railroad industry or its employees.[96]

A court with proper jurisdiction "may direct that arbitration be held in accordance with the agreement at any place therein provided for."[97] Arbitration hearings are conducted under the advice and supervision of an arbitrator, who is appointed in accordance with the parties' agreement.[98] If no agreement exists or one party fails to follow the prescribed appointment method, the court "shall designate and appoint a[] [single] arbitrator . . . who shall act under the said agreement with the same force

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[92] 9 U.S.C. ch. 1. (2018).

[93] 9 U.S.C. § 2 (2018).

[94] Marissa Dawn Lawson, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 REV. LITIG. 463, 474 (2004).

[95] Nicholas J. Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223, 224 (1982).

[96] *See id*. ("Commerce is defined as meaning commerce among the states of the United States, or with foreign nations, but contracts of employment of seamen, employees of railroads, and other workers employed in interstate or foreign commerce are specifically excluded.") (internal quotations omitted); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437, 207 F.2d 450, 452–53 (3d Cir. 1953) ("The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers."); *see also id*. at 453 (noting that Congress "must have had [the FELA] in mind" when drafting the residual clause in § 1 of the FAA, given that Congress "incorporat[ed] almost exactly the same phraseology" into the FAA); Waithaka v. Amazon.com Inc., 966 F.3d 10, 13, 19–22 (1st Cir. 2020) (comparing the FELA's language to the FAA's § 1 language).

[97] 9 U.S.C. § 206 (2018).

[98] 9 U.S.C. § 5 (2018).

and effect as if he or they had been specifically named therein."[99] The FAA itself, however, "contains very few provisions regulating procedure which, in the main, is left to the agreement of the parties."[100] A court must, upon application by the parties within one year from the time the arbitration award is made, grant the award unless it is "vacated, modified, or corrected."[101] If a party claims that the agreement to arbitrate is invalid or otherwise not being honored, that party can petition to federal court.[102] The court, after hearing from the parties, will "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" or "shall proceed summarily to . . . trial."[103]

Arbitration provides parties an out-of-court venue for solving disputes, but the method was extremely unpopular before 1925.[104] Prior to the FAA's passage, the United States' judicial system maintained and reinforced a "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts."[105] Traditionally, arbitration agreements or contracts featuring provisions to compel arbitration were viewed as less enforceable than other contracts.[106] Anti-arbitration sentiments originated in seventeenth-century England, where judges invented rules to stunt the success of arbitration and utilized doctrines to invalidate agreements to arbitrate.[107] English judges encouraged the use of the revocability doctrine, which permitted "either party to retract their assent to arbitrate" until the moment the arbitration ruling was made.[108] In the United States, courts customarily disfavored arbitration agreements on the grounds that they, by acting as a substitute, barred access to legal remedies should disputes arise.[109] Courts,

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[99] *Id*.

[100] Healy, *supra* note 95, at 231.

[101] 9 U.S.C. § 9 (2018).

[102] 9 U.S.C. § 4 (2018).

[103] *Id*.

[104] *See* Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 158 (1988–1989) (noting that arbitration is a "private adjudicatory process" invoked as a form of alternative dispute resolution to filing a suit in court."); *see also* Gould, *supra* note 8, at 620 ("The process of arbitration obtained prominence during World War I . . . .").

[105] Gould, *supra* note 8, at 610.

[106] *See id.*; Speidel, *supra* note 104, at 173 ("[A] basic purpose of the FAA . . . [is] to make agreements to arbitrate future disputes as enforceable as other contracts, but not more so.") (internal quotations omitted).

[107] David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1225 (2013).

[108] *Id.*

[109] Healy, *supra* note 95, at 223.

accordingly, generally held such contracts unenforceable and asserted that they contradicted public policy "on the theory that they were designed to deprive the courts of jurisdiction to hear and determine controversies which would otherwise be within their cognizance."[110]

Thus, in enacting the FAA, Congress intended to abolish the "anachronism of . . . American law"[111] and "make enforceable in the federal courts . . . agreements for arbitration."[112] The FAA has ensured the enforceability of arbitration provisions absent fraud, unconscionability,[113] or other contractually voidable reasons, and, "thus, . . . [has] put contracts to arbitrate on the same footing as other contracts."[114] The FAA's enactment, consequently, has highlighted the ultimate objective of arbitration—achieving "justice between the parties through less formal adjudication" in accordance with the terms of their contractual agreements.[115] The FAA, too, offers incentives to parties in arbitration. For example, arbitration can be a less formal, less expensive, less timely, and less complex setting for resolving legal issues.[116] Parties, in agreeing to arbitrate, selecting arbitrators, and proceeding through the arbitration process, retain some sense of control that can be lost to the court in trial.[117] Arbitrators, unlike sitting judges, are usually experts in the field within which an issue has arisen,[118] and parties enjoy justice without the looming possibility of the decider setting legal precedent.[119]

Significantly, Congress enacted the FAA in the midst of the *Lochner*-era—approximately a decade before the era's conclusion—and its language aligned with the era's interest in free-market promotion of

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[110] *Id.*

[111] H.R. REP. NO. 68-96, at 1 (1924).

[112] Speidel, *supra* note 104, at 169 (citing Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 278 (1925–1926) (emphasis omitted)); *see also* William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 76 (2002) (noting that the FAA was "[e]nacted 75 years ago as a simple procedural device to enforce arbitration in federal courts.").

[113] Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J. L. & PUB. POL'Y 477, 489–90 (2009) ("Unconscionability, a general state law defense to contracts, became the defense of choice in early cases contesting arbitration clauses in employment or consumer agreements.").

[114] Speidel, *supra* note 104, at 169.

[115] *Id*. at 159.

[116] *Id*. at 158, 160.

[117] *Id.* at 160.

[118] Speidel, *supra* note 104, at 161.

[119] *Id.*

parties' rights to contract.[120] The Supreme Court, however, heard very few cases arising under the FAA until the mid-1950s,[121] as most cases concluded at the district[122] and appellate[123] court levels. In 1956, the Court in *Bernhardt v. Polygraphic Company of America, Inc.*[124] "classified the FAA as a substantive law"[125] and opened the doors to many other cases arising under the FAA.[126] Following this case, for example, the Court determined, in *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.*, that arbitration clauses within contracts could be viewed as "separable" from the remainder of the contract.[127]

Today, the Supreme Court's and lower courts' decisions have substantially transformed the FAA.[128] Yet, the FAA retains a divisive and controversial character that has left legal professionals and academics on plainly opposing sides. Proponents of the FAA suggest that Congress established federal court procedure to enforce arbitration agreements without infringing on state contract law.[129] Additionally, advocates

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[120] *See* CHEMERINSKY, *supra* note 60, at 642–44; *see also* 9 U.S.C. ch. 1 (2018).

[121] *See, e.g.*, Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932); Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[122] *See, e.g.*, The Volsinio, 32 F.2d 357 (E.D.N.Y. 1929); Textile Workers Union v. Am. Thread Co., 113 F. Supp. 137 (D. Mass. 1953); Am. President Lines, Ltd. v. S. Woolman, Inc., 239 F. Supp. 833 (S.D.N.Y. 1964).

[123] *See, e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959).

[124] Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956).

[125] Lawson, *supra* note 94, at 477.

[126] *See, e.g.*, Moseley v. Elec. & Missile Facilities, 374 U.S. 167, 168 (1963).

[127] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967).

[128] *See*, *e.g.,* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) (noting that the FAA "creates a body of federal substantive law" and, thus, "underlying issue[s] of arbitrability to be a question of substantive federal law.") (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U. S. 1, 25 (1983)); Volt Info. Scis. v. Bd. of Trs. Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989) (interpreting that the FAA does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself"); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (applying the FAA to all disputes "involving commerce."); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (holding that the FAA displaces, and thus renders invalid, a Montana statute that held contract arbitration provisions unenforceable unless written on the first page of a contract); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–49 (upholding Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) and holding that arbitration provisions are severable from the remainder of a contract for the purpose of enforceability under the FAA).

[129] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 276 (1926).

maintain that arbitration preserves judicial economy[130] and is a fair,[131] private,[132] cost-effective,[133] and time-effective[134] approach to settling disputes.

Alternatively, critics argue that the FAA has failed to achieve its primary legislative objectives.[135] Opponents contend that the FAA unconstitutionally displaces state law.[136] Others argue that the FAA eliminates individuals' rights to legal recourse under the Sixth and Seventh Amendments to the United States Constitution.[137] Some suggest that, by binding state courts to recognize arbitration agreements as enforceable on the same footing as other contracts,[138] the FAA has been extended too far.[139] Consequently, questions linger as to "whether

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130 *See id*. at 269 (noting that one of the "evils which arbitration is intended to correct . . . [is the] great congestion of the court calendars."); *see also* Lawson, *supra* note 94, at 478.

131 *But see* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 66–67 (2005) (suggesting a diminished focus on fairness within the international arbitration context, resulting from the judicialization of arbitration).

132 *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (noting that "[a]rbitration is private but not confidential.").

133 *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777, 795 (2003) (explaining that private employment arbitration "has become the only accessible adjudicatory venue" for low-wage employees, as fees are limited to "filing fees," "hearing fees," and "arbitrator's fees"); *see also* Matthew W. Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions*,*"* 66 CHI.-KENT L. REV. 799, 800 (1990) ("[A]rbitration is swifter and potentially cheaper than a lawsuit . . . .").

134 *See* Hill, *supra* note 133, at 791 (discussing a study comparing 186 employment arbitration awards rendered within the same time frame that 125 employment discrimination trial verdicts of similar legal issues were rendered by the United States District Court for the Southern District of New York).

135 *See* Speidel, *supra* note 104, at 159, 162–64; *see also* Lawson, *supra* note 94, at 464 (suggesting that current case law and the present interpretation of the FAA vastly departs from its drafters' original understandings and intentions).

136 *See* David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J. L. & POL'Y 129, 129–30 (2004) (suggesting that the Supreme Court has extended the FAA's reach too far, "entirely taking state courts and legislatures out of the business of making contract law.").

137 Lawson, *supra* note 94, at 470 ("[I]f trial by jury is a substantive right, it should not be waived by a binding arbitration agreement.").

138 Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)) ("By enacting § 2 [of the FAA], we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'").

139 Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115, 117 (2016) ("[T]he FAA was originally intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes, not the expansive system that exists today involving both state and federal courts and covering virtually all types of non-criminal disputes.").

arbitration is effective in achieving justice between the parties at an advantage in time and expense over litigation."[140]

Within the employment context, the FAA has had a significant effect on the employee-employer relationship.[141] Through the FAA, for example, the Supreme Court has recognized a congressional policy in favor of arbitration in the labor field to minimize strikes.[142] Today, arbitration clauses frequently appear in contracts of employment,[143] sometimes being included in boilerplate forms.[144] Some individuals have criticized the FAA's lasting influence on employment law as anti-employee[145] or anti-state government.[146]

III. JUDICIAL INTERPRETATION AND EXPANSION: CASES THAT HAVE ARISEN UNDER THESE ACTS

Federal and state courts have heard a plethora of cases resulting from the enactments of the Federal Employers Liability Act and the Federal

[140] Speidel, *supra* note 104, at 158 n.3.

[141] *See* Gould, *supra* note 8, at 610 (arguing that the FAA's impact upon the employment relationship "may rival the impact of both the National Labor Relations Act of 1935 and the civil rights statutes of the 1960s.").

[142] *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957).

[143] *See* Gina K. Janeiro, *Balancing Efficiency and Justice: In Support of the Equal Employment Opportunity Commission's Policy Statement Regarding Mandatory Arbitration and Employment Contracts*, 7 AM. U. J. GENDER SOC. POL'Y & L. 125, 127 nn.14–15 (1998) (outlining statistics which illustrate the rising trend of mandatory arbitration clauses as preconditions to employment); *see also* Katherine Eddy, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771, 775 (2001) ("[T]he mandatory arbitration clause . . . is often included in an employee handbook or as part of the paperwork a new employee is required to sign in order to begin work.").

[144] Eddy, *supra* note 143, at 791 (suggesting that "[e]mployers could be forced to endure stricter scrutiny when including arbitration clauses in boilerplate employment contracts.").

[145] *See, e.g.,* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) (likening mandatory arbitration of individual employment rights to yellow dog contracts, or contracts between an employee and employer in which the employee promises to not join a union as a condition of employment). Some critics argue that arbitration inherently puts employers, as "repeat players," in an advantageous position over employees by incentivizing arbitrators to rule in favor employers with the possibility of being hired in the future when employment disputes arise. *See* Theresa M. Beiner, *The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 884 (2014).

[146] *See* Finkin, *supra* note 133, at 802 ("[T]he Act's preemptive effect vis-a-vis state employment law is unjustifiable.").

Arbitration Act.[147] The Supreme Court, further, has granted certiorari to hear various legal issues arising under both Acts.[148]

A. Cases Arising Under the FELA

From the FELA's enactment in 1908 through the 1940s, the journeys of most FELA cases ended in the state court systems.[149] The Supreme Court heard a few cases arising under the FELA in the earlier half of the 1900s, such as *North Carolina Railroad Co. v. Zachary*.[150] Yet, it was not until the late 1940s and early 1950s that the Court began to hear many FELA cases, including *Urie v. Thompson*[151] and *Dice v. Akron, Canton & Youngstown Railroad Co.*[152] Over the years, the Supreme Court and other lower courts have broadened and liberalized the FELA.[153] For example, the Court, in *Rogers v. Missouri Pacific Railroad*, held a railroad negligently liable for injuries sustained by its employee.[154] In that case, an employee, at the request of his supervisor, was burning weeds along a railroad track using a hand torch.[155] The supervisor instructed the employee, when a train passed, to cease using the torch, to remove himself

147 *See* cases cited *supra* notes 78, 128.

148 *See* cases discussed *infra* Part IIIA, IIIB.

149 *See e.g.,* Horton v. Or.-Wash. R. & Nav. Co., 130 P. 897 (Wash. 1913); Mobile & Ohio R.R. Co. v. Williams, 121 So. 722 (Ala. 1929); Covington v. Atl. Coast Line R.R. Co., 155 S.E. 438 (S.C. 1930); Louisville & Nashville R.R. Co. v. Parker, 138 So. 231 (Ala. 1931); Miller v. S. Pac. Co., 21 P.2d 865 (Utah 1933).

150 N.C. R.R. Co. v. Zachary, 232 U.S. 248 (1914); *see also* El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87 (1909); Seaboard Airline Ry. v. Horton, 233 U.S. 492 (1914), *superseded by statute as stated in* Fashauer v. N. J. Transit Rail Operations, 57 F.3d 1269 (3d Cir. 1995).

151 Urie v. Thompson, 337 U.S. 163 (1949).

152 Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952).

153 Phillips, *supra* note 57, at 51; *see also* Poff v. Pa. R.R. Co., 327 U.S. 399, 400–01 (1946) (permitting an executrix of a deceased railroad worker, whose death allegedly was caused by the railroad's negligence, to file a FELA claim even though the worker had a closer surviving next of kin); Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 109–13 (1963) (reinstating a jury verdict and, accordingly, holding a railroad company liable for an employee's injuries sustained from an insect bite while working on a railroad in the vicinity of a pool of stagnant water); Norfolk & W. Ry. v. Ayers, 538 U.S. 135, 141 (2003) ("[W]e hold that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos."); Greene v. Long Island R.R., 99 F. Supp. 2d 268, 274 (E.D.N.Y. 2000) (holding that the Metropolitan Transportation Authority was liable under the FELA to employees involved in interstate railway operations). *But see* Burlington N. Santa Fe Ry. Co. v. Loos, 139 S. Ct. 893, 900, 904 (2019) (holding that FELA damage rewards qualify as compensatory and accordingly cannot evade taxation under the Railroad Retirement Tax Act).

154 Rogers v. Mo. Pac. R.R., 352 U.S. 500, 509–11 (1957).

155 *Id*. at 501–02.

from the track, and to stand close by; yet, when a train approached, the employee ran from the tracks and fell into a nearby culvert, injuring himself.[156] Thus, the Court held the company liable for the negligent conditions that led to the worker's injury.[157] The Court has arguably, in large part, "construed this Act most favorably to injured employees;"[158] when hearing cases arising under the FELA, the Court has rarely found in favor of the employer.[159] The Court further extended the FELA's reach to supplant state law in many of these decisions.[160] In three of the aforementioned cases—*North Carolina Railroad Co. v. Zachary*, *Urie v. Thompson*, and *Dice v. Akron, Canton & Youngstown Railroad Co*.—the Courts' decisions have exemplified its broad expansion of FELA.

In *North Carolina Railroad Co. v. Zachary*, the Court considered whether the FELA governed railroad negligence.[161] Burgess, a railroad fireman for the Southern Railway Company, died as a result of the railroad company's alleged negligence, and his estate sued the North Carolina Railroad Company under North Carolina law.[162] While Burgess was walking across the railyard, a train traveling backward "at a reckless and dangerous rate of speed" struck and killed him.[163] In its answer, the railroad corporation asserted that, because Burgess died while engaged in interstate commerce as an employee of a common carrier traveling between state lines, the administrator of Burgess's estate was only able to recover under the FELA instead of state statute.[164] The trial court held that the FELA was not applicable and applied the North Carolina statute.[165]

The Supreme Court determined that, "[i]n order to bring [a] case" under the FELA, the "defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and the plaintiff's intestate must have been employed by said carrier in such commerce."[166] If such conditions were satisfied, the FELA

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156 *Id*. at 502.

157 *Id*. at 510–11.

158 Lewis, *supra* note 42, at 450.

159 *See id*.

160 *See e.g.*, N.C. R.R. Co. v. Zachary, 232 U.S. 248, 252, 261 (1914).

161 *Id*. at 256.

162 *Id*. at 254. Under North Carolina law, the lessor, the railroad corporation, was considered liable for all negligent acts of its lessee, the railroad company, while conducting business. *Id*. Here, the North Carolina Railroad Company, the defendant corporation in this case, was the lessor to the Southern Railway Company, by whom Burgess, the decedent, was employed. *Zachary*, 232 U.S.at 254.

163 *Id*. at 254–55.

164 *Id*. at 255.

165 *Id*. at 255–56.

166 *Zachary*, 232 U.S. at 256.

preempted state law.[167] The Court held that, even though the corporation's activities were "confined to receiving annual rents and distributing them" within North Carolina and, therefore, the corporation did not itself actively engage in interstate commerce, the character of the lessor and lessee relationship (namely, the corporation's leasing its railroad to an interstate railroad carrier) triggered the corporation's responsibility.[168] For purposes of the FELA, the Court held that Burgess was engaged in interstate commerce and, accordingly, remanded the case, allowing FELA to govern the trial.[169]

Zachary paved the road to the Court's now-consistent interpretation of the FELA's jurisdiction. A seemingly standard, unwrinkled FELA case, *Zachary* showcased the FELA's preempting power over state statutes and the FELA's regulation of employment contracts.[170] *Zachary* further established that not only railroad companies engaged in interstate commerce fall under the blanket of the FELA, but so too might overseeing parties to the contract such as corporations or lessors, based on the nature of their relationships with interstate common carriers.[171] In this case, however, the defendant invoked the FELA as a pseudo-defense,[172] as the railroad corporation tried to use the FELA to evade liability.[173] As the Court heard more cases arising under the FELA, a shift occurred; employees became the primary parties to use the FELA to enforce, rather than evade, negligence liability.[174] The Court, significantly, expressly displaced state law that regulated the railroad industry with a piece of federal legislation,[175] suggesting a federal interest in uniformly and intentionally regulating this employment industry and the contracting therewithin.

Approximately thirty-five years after hearing *Zachary*, the Court again expanded the FELA's scope in *Urie v. Thompson*.[176] Tom Urie worked as a locomotive fireman for Missouri Pacific Railroad for thirty

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[167] *Id*.

[168] *Id*. at 257. "[S]uch a lease—certainly so far as concerns the rights of third parties, including employe[e]s . . .—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible." *Id*. at 258.

[169] *Zachary*, 232 U.S. at 260–61.

[170] *See id*. at 256.

[171] *Id*. at 258.

[172] *See id*. at 255.

[173] *See Zachary*, 232 U.S. at 255–56.

[174] *See* cases cited *supra* note 73.

[175] *Zachary*, 232 U.S. at 256.

[176] Urie v. Thompson, 337 U.S. 163 (1949).

years.[177] His employment abruptly ended after he was diagnosed with silicosis, a permanent pulmonary disease caused by inhaling silica dust from the trains on which he worked.[178] This dust made its way into the air because of the employees' use of sanders on the sides of the trains.[179] Urie asserted that Thompson—trustee of the railroad company—and the railroad company "knew[] or . . . should have known" of the danger of employees contracting the disease and, accordingly, sued under the FELA.[180] The Missouri Supreme Court held that "the action could not be maintained by virtue of the [FELA] alone," but instead suggested that the railroad company might be found liable of breaching the Boiler Inspection Act.[181] The Missouri Supreme Court, however, later decided that silicosis was not the "evil at which" the Boiler Inspection Act aims to prevent.[182] The Court granted certiorari to determine, in part, whether the FELA's coverage of injuries included those of occupational disease or whether coverage was limited to injuries sustained as a result of an accident.[183]

The Court, referencing the FELA's § 51 language, took issue with the Missouri Supreme Court's analysis.[184] To start, the Court recognized that the Missouri Supreme Court "assumed that silicosis fell within the statute's broad term 'injury,' and held that it would not 'be reasonable to hold . . . that defendant should have anticipated plaintiff's injury[].'"[185] The Court, however, clarified, "we think silicosis is within the statute's coverage when it results from the employer's negligence."[186] Although, upon the FELA's enactment, "Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads," the FELA's language is "as broad as could be framed" and does not explicitly restrict "the particular sort[] of" resultant injury.[187] The Court held:

[177] *Id*. at 165.
[178] *Id*. at 165–66.
[179] *Id*. at 166.
[180] *Urie*, 337 U.S. at 166.
[181] *Id*. Section 2 of the Boiler Inspection Act, 45 U.S.C.S. § 23 et seq., made it "unlawful for any carrier to . . . permit to be used on its line any locomotive unless said locomotive, its boiler . . . and all parts . . . thereof are in proper condition and safe to operate . . . ." *Id*. at 167 (citing 45 U.S.C. § 23).
[182] *Id*. at 168.
[183] *Urie*, 337 U.S. at 165.
[184] *Id*. at 173–75.
[185] *Id*. at 175.
[186] *Id*. at 180.
[187] *Urie*, 337 U.S. at 181.

> [W]hen the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning.[188]

The Court also stated that "[w]hat constitutes negligence for the statute's purposes is a federal question."[189] Under the federal negligence standard, Urie could overcome dismissal at the demurrer level by alleging that the railroad company's negligent use of sanders had caused his silicosis.[190]

The Court, in *Urie*, expanded the FELA's scope as to which "injuries" sustained by railroad employees were protected; generally, *Urie* clarified that the FELA's point of view on the standard of "negligence" was the federal standard.[191] In preempting state law with federal law regarding the negligence standard, the Court continued to recognize the inherent federal power and extended reach that the FELA held. [192] *Urie* created more accessible opportunities for employees to successfully state a claim for negligence when a longstanding history of unsafe working conditions resulted in permanent illness or disease, as opposed to an injury from a singular accident.[193] This decision, likewise, acknowledged the broad reach of the FELA's protections, suggesting that the legislature intended to afford employees a wide capacity to file claims.[194]

Three years after deciding *Urie*, the Court further extended the FELA's scope in *Dice v. Akron, Canton & Youngstown Railroad Co.*[195] Dice, a railroad fireman, was injured while working on a railroad engine that jumped the track.[196] Dice sued under the FELA, alleging that Akron, Canton & Youngstown Railroad Company's negligence caused his injuries.[197] The railroad company denied negligence, produced a written document Dice had previously signed, and claimed that Dice purportedly released the company of all legal action in connection with his injuries

188 *Id*. at 186–87.
189 *Id*. at 174.
190 *Id*. at 175–76.
191 *Urie*, 337 U.S. at 174.
192 *See id*. at 174.
193 *Id*. at 181.
194 *See id*. at 174–75.
195 Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952).
196 *Id*. at 360. A train "jumps the track" when it comes off of the railroad track. *Jump the Track(s)*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/jump%20the%20track(s) (last visited Feb. 17, 2021).
197 *Dice*, 342 U.S. at 360.

under that document.[198] After the trial, the judge entered a judgment notwithstanding the jury's verdict of $25,000 in favor of Dice and asserted that Dice was "guilty of supine negligence" by failing to read the release he had signed.[199] Dice appealed, asserting that he had only signed the document, a settlement agreement form, because the company had falsely ensured him that the document was merely a receipt for backpay.[200] After the Court of Appeals reversed, the Ohio Supreme Court reaffirmed the trial court, holding that Ohio law, not federal law, governed the case and, under Ohio law, "a man of ordinary intelligence who could read[] was bound by the release even though he had been induced to sign it by the deliberately false statement that it was only a receipt for back wages."[201]

The Court granted certiorari and held that the "validity of releases under the [FELA] raises a *federal* question to be determined by federal rather than state law."[202] The Court noted that, through § 51 of the FELA, "Congress . . . granted [the] petitioner a right to recover against his employer for damages negligently inflicted," and that "[s]tate laws are not controlling in determining what the incidents of this federal right shall be."[203] In support of its decision, the Court suggested that "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say" as to available defenses under the FELA.[204] Additionally, "only if federal law controls c[ould] the federal Act be given . . . uniform application throughout the country essential to effectuate its purposes."[205] Thus, applying federal law, the Court held that the release Dice signed was void because the railroad company fraudulently induced Dice to sign it.[206] Consequently, the Court reversed the trial court's decision and remanded the case.[207]

In this 5–4 decision,[208] the Court established that the validity of release agreements arising under the FELA falls under federal, not state,

[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] *Dice*, 342 U.S. at 360–61.
[202] *Id*. at 361 (emphasis added).
[203] *Id*. at 361.
[204] *Id*.
[205] *Dice*, 342 U.S. at 361.
[206] *Id*. at 362–63.
[207] *Id*. at 364.
[208] *See id.* (providing that Justices Frankfurter, Reed, Jackson, and Burton dissented from the Court's opinion).

jurisdiction.[209] The Court reiterated the FELA's legislative intent to address interstate issues, rather than simply intrastate tort claims.[210] By asserting federal jurisdiction, the FELA preempted, and thus supplanted, state law.[211] This decision, however, took an even larger step by setting a precedent concerning agreements to settle or release claims relating to a railroad company's negligent role in a worker's injury. The Court expanded the FELA's reach from the company's mere relationship with the injury to the company's response afterward and the contracts created by the employee and the employer.[212] The Court's decision in *Dice* suggests that the FELA inherently aims to protect employees injured by a railroad company's negligence at each stage of their injury and demonstrates a judicial willingness to decide the bargaining positions of employees and employers in their employment relationship.[213] Subsequently, more FELA claims made their way through the federal court system, continuing to expand the FELA's boundaries and, consequently, favoring employees.[214]

In the almost four-decade span within which these three cases were heard and decided, the United States underwent periods of change.[215] *Zachary,* a product of the shift away from *Lochner*'s antipathy toward general market regulation, signaled the Supreme Court's succeeding view of Congress's power to regulate commerce. The Court there relied on a federal law to supplant state regulation, signaling federal interest in regulation of the railroad industry.[216] Later FELA decisions indicated the Court's willingness to uphold expansive federal regulation of the employment marketplace to protect workers, even when the Court had to preempt state tort law and contract doctrines that stemmed from pro-free market philosophy of freedom of contract and caveat emptor.[217] *Urie* and *Dice*, decided in 1949 and 1952, respectively, combined *Zachary*'s

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[209] *Dice*, 342 U.S. at 361.

[210] *Id*.

[211] *Id*. at 361.

[212] *See id*. at 362.

[213] *See Dice*, 342 U.S.at 363.

[214] Since the 1950s, the Court has heard a plethora of cases arising under the FELA. *See* cases cited *supra* note 153 and *supra* Part IIB.

[215] *See generally* FRIEDMAN, *supra* note 52, at 362–65 (discussing changes in American industrial development and corresponding attitudes and approaches to employer liability lawsuits in the first half of the twentieth century).

[216] *See* North Carolina R.R. Co. v. Zachary, 232 U.S. 248, 256, 261 (1914).

[217] For a recent case reflecting the FELA's gradual expansion, *see* Greene v. Long Island R.R., 99 F.Supp.2d 268, 275 (E.D.N.Y. 2000) (holding that the Metropolitan Transportation Authority was liable under FELA to employees involved in interstate railway operations).

preempting of state law[218] with this new tradition of promoting regulation of welfare and safety.[219] In turn, the Court extended the FELA's broad reach in a way that promoted protection of the individual employee.[220]

B. Cases Arising Under the FAA

The Court's consistent interpretation of the FAA has yielded vast case law involving the FAA and employment.[221] Within much of this case law, the Court has found in favor of compelling arbitration for the employer based on the theory that an employment contract's arbitration clause is the product of equal bargaining and free choice.[222] Time and time again, the Court has broadened the FAA's applicability and scope.[223] As a consequence of the Court repeatedly upholding the FAA, the Court has frequently displaced state statutes and state contract law and thus has drastically affected the employment law landscape. Three cases, *Circuit City Stores, Inc. v. Adams*,[224] *Epic Systems Corp. v. Lewis*,[225] and *New Prime Inc. v. Oliveira*,[226] exemplify this position.

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[218] *See* Urie v. Thompson, 337 U.S. 163 (1949); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952).

[219] *See* FRIEDMAN, *supra* note 52, at 560–62.

[220] *See Urie,* 337 U.S. at 187; *Dice,* 342 U.S. at 361.

[221] *See, e.g.,* Southland Corp. v. Keating, 465 U.S. 1, 16–17 (1984) (holding state law, which invalidated provisions of the FAA, unlawful and thus permitting a franchisor to compel the arbitration clauses in its franchisees' contracts); *see also* cases cited *infra* note 222.

[222] *See, e.g.,* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that the ADEA does not specifically preclude arbitration and, thus, enforcing an employee's agreement to arbitrate his ADEA claim); Preston v. Ferrer, 552 U.S. 346, 349–50, 359 (2008) (holding that the FAA supersedes state laws lodging primary jurisdiction, and thus compelling an employee/service provider to arbitrate a claim brought against an employer, seeking fees due under their contract); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009) (holding that "a collective-bargaining agreement that clearly and unmistakably require[d employee] union members to arbitrate ADEA claims [wa]s enforceable as a matter of federal law."). *But see* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 78 (1998) (finding that a presumption of arbitrability, as suggested by an employer in an employee's ADA case, "does not extend beyond the reach of the principal rationale . . . that arbitrators are in a better position than courts to interpret the terms of a [collective bargaining agreement].") (internal emphasis omitted); EEOC v. Waffle House, 534 U.S. 279, 297 (2002) (noting that courts considering claims brought under the ADA are not required "to balance the competing policies of the ADA and the FAA or to second-guess the agency's judgment concerning which of the remedies authorized by law that it shall seek in any given case.").

[223] *See* cases cited *supra* note 222.

[224] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[225] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[226] New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

In *Circuit City Stores, Inc. v. Adams*, the Court considered whether the FAA's reach extended to employment contracts that included agreements to arbitrate.[227] Saint Clair Adams applied to work at Circuit City Stores, Inc.[228] in October of 1995 and signed an employment application that contained an agreement to settle all application, employment, and termination claims, disputes, and controversies through arbitration.[229] Two years after being hired and working as a sales counselor, he filed an employment discrimination suit in California state court, alleging violations of California's Fair Employment and Housing Act.[230] The United States District Court for the Northern District of California agreed with Circuit City that Adams was obligated to submit all claims against his employer to arbitration, pursuant to the binding arbitration clause, and Adams accordingly appealed to the Ninth Circuit.[231]

The Ninth Circuit, with Adams' appeal pending, determined in a separate case that the FAA did not apply to contracts of employment[232] and, in reviewing Adams' contract with Circuit City, deemed the arbitration clause to which Adams had consented "not subject to the FAA."[233] The Supreme Court, granting certiorari, noted that "the FAA compels judicial enforcement of a wide range of written arbitration agreements," is "applicable in state courts[,] and [is] pre-emptive of state laws hostile to arbitration."[234] Analyzing the text of § 1 of the FAA,[235] the Court noted that § 1 "call[ed] for the application of the maxim *ejusdem generis*."[236] The Court read the term "engaged in commerce" in tandem

227 *Circuit City Stores, Inc.*, 532 U.S. at 109.

228 *Id*. Circuit City Stores, Inc. is a "national retailer of consumer electronics." *Id*.

229 *Id*. at 109–10.

230 *Circuit City Stores*, 532 U.S. at 110.

231 *Id*.

232 *Id*.; *see also* Craft v. Campbell Soup Co., 177 F.3d 1083, 1090 (9th Cir. 1999) ("Congress never intended for the FAA to apply to employment contracts of any sort."); *Circuit City Stores*, *Inc.*, 532 U.S. at 109 (suggesting that the Ninth Circuit construed the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" exemption in § 1 "so that all contracts of employment are beyond the FAA's reach.").

233 *Circuit City Stores*, *Inc.*, 532 U.S. at 110.

234 *Id*. at 111–12.

235 *See id*. at 114 (stating that Adams' reading of § 1 "runs into an immediate and, in [the Court's] view, insurmountable textual obstacle.").

236 *Id*. The Court explains the concept of *ejusdem generis* as follows: when "the general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature" to those that precede it. *Circuit City Stores*, *Inc.*, 532 U.S. at 114–15 (internal quotations and citations omitted).

with the preceding classes of railroad workers and seamen and, thus, concluded that the term had a "limited reach"[237] that did not apply to all contracts of employment.[238] To interpret otherwise, continued the Court, would contradict the FAA's historical understanding of "commerce" and erroneously permit the Commerce Clause "to reach all corporations engaged in activities subject to the federal commerce power."[239]

Contrary to various opponents'[240] arguments that the FAA would preempt state employment laws that "prohibit[ed] employees like [Adams] from contracting away their right to pursue state-law discrimination claims in court,"[241] the Court pointed to precedent[242] that established Congress's intention to apply the FAA to state courts and preempt state antiarbitration law.[243] Further, the Court noted that "there are real benefits to the enforcement of arbitration provisions" for both parties.[244] Thus, it reversed the Ninth Circuit's judgment and remanded the case for further proceedings consistent with its opinion.[245]

In his dissent, Justice Stevens pointed to the FAA's legislative history, which he noted intended to require courts to enforce *commercial* arbitration agreements.[246] Considering the then-present state of arbitration, Stevens further asserted:

> Times have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.[247]

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[237] *Id*. at 115.

[238] *Id*. at 114.

[239] *Id*. at 117 (quoting U.S. v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975)).

[240] Various *amici*, including 21 state attorneys general, filed briefs in support of Adams. *See Circuit City Stores*, *Inc.*, 532 U.S. at 121.

[241] *Id.* at 122.

[242] *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

[243] *Circuit City Stores*, *Inc.*, 532 U.S. at 122 ("Congress intended the FAA to apply in state courts, and to pre-empt state antiarbitration laws to the contrary.").

[244] *Id*. at 122–23.

[245] *Id*. at 124.

[246] *Id*. at 125 (Stevens, J., dissenting) ("The history of the Act, which is extensive and well documented, makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements, which were commonly used in the maritime context.").

[247] *Circuit City Stores*, *Inc.*, 532 U.S. at 131–32. (Stevens, J., dissenting).

Circuit City Stores explicitly applied the FAA to employment law disputes.[248] Relying upon a textualist interpretation of the FAA, the Court emphasized the limited nature of exclusions embedded in the law and eluded to a floodgate effect upon the Commerce Clause if read otherwise.[249] The Court, further, opposed amicus arguments that such a holding could disadvantageously affect employees and employment applicants and, instead, asserted that arbitration would provide benefits to both sides.[250] The Court, thus, prioritized compelling arbitration in accordance with the parties' contracts over the possible loss of employee protections.[251] Consequently, in compelling arbitration, the Court interpreted the FAA to supplant a state employment statute by federal law.[252] The Court expressly noted that Congress's intention for the FAA was to displace state legislation that was "antiarbitration."[253] The Court, in making this comparison, suggested that state laws that permitted employees to "pursue state-law discrimination claims in court" were, thus, "antiarbitration" and, therefore, defaulted to the provisions as listed in the parties' contracts.[254]

Although the Court in *Circuit City Stores* undoubtedly did not claim to prioritize employers over employees, employment cases to follow continued to broaden the scope of the FAA and promote the compelling of arbitration. The Court reached a turning point in *Epic Systems Corp. v. Lewis*,[255] in which the Court considered whether class arbitration waivers in employment contracts were legally permissible.[256] The Court consolidated three cases[257] into *Epic Systems*, but dedicated its factual background to the circumstances arising under *Morris v. Ernst & Young LLP*.[258] A junior associate at Ernst & Young LLP, Stephen Morris,

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[248] *Id*. at 121.

[249] *Id*. at 117–18.

[250] *Id*. at 122–23.

[251] *Circuit City Stores*, *Inc.*, 532 U.S. at 123.

[252] *Id*.

[253] *Id*. at 122.

[254] *Id*.

[255] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[256] *Id*. at 1619.

[257] *See* Brooke V. Brady, *An Epic Change to Employment Law*, 45 J. CORP. L. 245, 252 n.60 (2019) (listing the three cases, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic Sys. Corp*., 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and noting that each was a "consolidation[] of previous cases and complaints from the Northern District of California, Western District of Wisconsin, and within the National Labor Relations Board itself.").

[258] *See* Morris v. Ernst & Young LLP, 834 F.3d. 975 (9th Cir. 2016); *Epic Systems Corp.*, 138 S. Ct. at 1619.

attempted to sue the firm on behalf of a nationwide class under the Fair Labor Standards Act's (FLSA) collective action provision, alleging violations of fair labor standards under FLSA and California law.[259] In his employment agreement, however, Morris had consented to an individualized arbitration clause; in other words, he promised to arbitrate all legal disputes that arose in proceedings "separate" from other workers.[260] The trial court granted Ernst & Young LLP's motion to compel arbitration.[261] The Ninth Circuit reversed, holding that "an agreement requiring individualized arbitration proceedings violates the [National Labor Relations Act (NLRA)] by barring employees from engaging in the 'concerted activit[y][]' . . . of pursuing claims as a class or collective action."[262] Granting certiorari, the Supreme Court reversed the Ninth Circuit.[263]

Before the Supreme Court, the employees of the consolidated cases argued that the FAA's saving clause[264] created an exception for their cases;[265] the NLRA's protection over collective action rendered their class action waivers illegal.[266] The Court disagreed, stating that "the saving clause recognizes only defenses,"[267] such as "fraud, duress, or unconscionability,"[268] that "apply to 'any' contract," not just employment contracts.[269] By attacking the "individualized nature of the arbitration proceedings," or defenses that directly "target arbitration," "the employees' argument s[ought] to interfere with one of arbitration's fundamental attributes."[270] The Court noted that the National Labor

[259] *Epic Systems Corp*., 138 S. Ct. at 1619–20.

[260] *Id*.

[261] *Id*. at 1620.

[262] *Id*.

[263] *Epic Systems Corp*., 138 S. Ct. at 1632.

[264] Section 2 of the FAA, or the "saving clause," permits courts to "refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id*. at 1622.

[265] *Id*.

[266] *Id*. The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2018), "secures to employees rights to organize unions and bargain collectively." *Epic Systems Corp*., 138 S. Ct. at 1619.

[267] *Id*. at 1622.

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

[269] *Id*. "In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts." *Epic Systems Corp.,* 138 S. Ct. at 1622.

[270] *Id*. "[A]n argument that a contract is unenforceable just because it requires bilateral arbitration is . . . one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability." *Id*. at 1623 (internal emphasis omitted).

Relations Board's (NLRB)[271] general counsel had previously acknowledged that, first, both employees and employers could benefit from arbitration and its attributes and, second, arbitration agreements generally "d[id] not involve consideration of the policies of the [NLRA]."[272] "Congress," the Court explained, "has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[273] Congress "specifically directed [courts] to respect and enforce the parties' chosen arbitration procedures."[274] Because the employees did not "suggest that their arbitration agreements were extracted[] . . . in some . . . unconscionable way that would render *any* contract unenforceable," the agreements were valid.[275] Congress "requir[ed the Court] to enforce, not override, the terms of the . . . agreements before" it.[276]

The Court went further, stating that "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another."[277] Thus, because the NLRA "says nothing about how judges and arbitrators must try legal disputes"[278] and because collective procedures were "hardly known when the NLRA was adopted,"[279] the Court determined that the NLRA and the FAA "enjoy[] separate spheres of influence" that do not intersect and, thus, do not conflict with one

[271] The NLRB is an "independent federal agency [that protects] . . . the right[s] of most private sector employees to organize, [and] to engage in group efforts to improve their wages and working conditions . . . ." NAT'L LABOR RELATIONS BD., *Introduction to the NLRB*, https://www.nlrb.gov/about-nlrb/what-we-do/introduction-to-the-nlrb (last visited Feb. 18, 2021).

[272] *Epic Systems Corp.*, 138 S. Ct. at 1620 (internal quotations and citations omitted).

[273] *Id*. at 1619.

[274] *Id*. at 1621.

[275] *Id*. at 1622. "The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely." *Epic Systems Corp*., 138 S. Ct. at 1621 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); DIRECTV, Inc. v. Imburgia, 577 U.S. ——, 136 S. Ct. 463 (2015)).

[276] *Id*. at 1623.

[277] *Id*. at 1619. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to choose among congressional enactments' and must instead strive 'to give effect to both.'" *Id*. at 1624 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)). For one federal statute to displace another federal statute, the proponent of displacement "bears the heavy burden of showing" such a "clearly expressed congressional intention." *Epic Systems Corp*., 138 S. Ct. at 1624 (internal quotations and citations omitted).

[278] *Id*. at 1619.

[279] *Id*. at 1624.

another.[280] The Court distinguished the employees' action from other NLRA § 7 concerted activity cases.[281] The Court also invoked the *ejusdem generis* rationale, stating that barring arbitration did not comport with the NLRA's listed concerted activities of "self-organization," specifically "'form[ing], join[ing], or assist[ing] labor organizations[]' and 'bargain[ing] collectively.'"[282] To rebut the dissent's prioritization of wage and hour laws[283] and likening of the majority's decision to reviving yellow dog contracts,[284] the Court suggested that it "merely decline[d] to read into the NLRA a novel right to class action procedures."[285]

Justice Ginsburg, in her dissent,[286] argued that, "[b]ecause . . . employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, . . . employer-dictated collective-litigation [waivers] are unlawful."[287] Justice Ginsburg noted that the employees did not intend to "urge that they must have access to a judicial" or other particular forum, but instead that "the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum."[288] Accordingly, she argued that, while the individual claims were "small, scarcely of a size warranting the expense of seeking redress alone," the employees' congregated claims yielded the possibility of effective redress.[289] By compelling arbitration clauses that disallow class arbitration, Justice Ginsburg continued, the majority disregarded "the labor market imbalance that gave rise to . . . the NLRA."[290] Justice Ginsburg chronicled the "tumultuous" turn of the

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[280] *Id*. at 1619.

[281] *Epic Systems Corp*., 138 S. Ct. at 1628 ("[T]his Court's § 7 cases have usually involved just what you would expect from the statute's plain language: 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.").

[282] *Id*. at 1625 (quoting 29 U.S.C. § 157 (2018); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).

[283] *Id*. at 1647 (Ginsburg, J., dissenting). In her dissent, Justice Ginsburg argues that "Congress expressed its intent, when it enacted the NLRA, to 'protec[t] the exercise by workers of full freedom of association,' thereby remedying '[t]he inequality of bargaining power' workers faced." *Id*. at 1637 (Ginsburg, J., dissenting) (quoting 29 U.S.C. § 151).

[284] *Epic Systems Corp*., 138 S. Ct. at 1634, 1648–49 (Ginsburg, J., dissenting).

[285] *Id*. at 1630.

[286] Justice Ginsburg was joined by three other justices—Justices Breyer, Sotomayor, and Kagan—in her dissent, making *Epic Systems* a 5–4 case. *See id*. at 1633 (Ginsburg, J., dissenting).

[287] *Id*. at 1641 (Ginsburg, J., dissenting).

[288] *Epic Systems Corp*., 138 S. Ct. at 1636 (Ginsburg, J., dissenting).

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

[290] *Id*. (Ginsburg, J., dissenting).

twentieth century, marked by yellow-dog contracts[291] and fruitless efforts by workers to collectively act.[292] In passing the Norris-LaGuardia Act (NLGA)[293] and the NLRA, legislators "aimed [to] protect[] employees' associational rights."[294] Justice Ginsburg noted that by enacting §§ 102 and 103 of the NLGA, Congress specifically "sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind."[295] Congress prohibited "coercive employer practices . . . three years later . . . when it enacted the NLRA."[296] Justice Ginsburg cited statutory language directly from §§ 7 and 8(a)(1) of the NLRA, which respectively granted employees the right to engage in "*other* concerted activities" to collectively bargain or pursue mutual aid and made any violation of this right an "unfair labor practice."[297] "Other" activities, she suggested, comfortably included "[s]uits to enforce workplace rights collectively," like the suits before the Court.[298] Justice Ginsburg noted that the NLRB's expansive history of upholding employees' efforts to pursue collective and class lawsuits regarding employment conditions was "endorsed" by the federal judicial system.[299] This endorsement therefore supported a finding that the NLRA protected the employees' rights to pursue class proceedings, regardless of class arbitration waivers in their employment contracts.[300] Even if the FAA and NLRA were "inharmonious," the NLRA should govern because Congress passed it after the FAA and it applies more directly to the case at bar.[301]

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[291] By using "yellow-dog contracts," as Justice Ginsburg explained, "employers required employees to sign as a condition of employment[] typically . . . abst[inence] from joining labor unions." *Id*. at 1634 (Ginsburg, J., dissenting).

[292] *Epic Systems Corp*., 138 S. Ct. at 1634 (Ginsburg, J., dissenting).

[293] 29 U.S.C. § 101 et seq. (2018).

[294] *Epic Systems Corp.*, 138 S. Ct. at 1634–35 (Ginsburg, J., dissenting).

[295] *Id*. at 1635 (Ginsburg, J., dissenting). Justice Ginsburg cited congressional remarks to substantiate this conclusion with respect to legislative intent. *See id*. (Ginsburg, J., dissenting) (citing 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris)) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts).

[296] *Id*. (Ginsburg, J., dissenting).

[297] *Epic Systems Corp.*, 138 S. Ct. at 1635 (Ginsburg, J., dissenting) (emphasis in original altered) (quoting 29 U.S.C. §§ 157, 158(a)(1)).

[298] *Id*. at 1637 (Ginsburg, J., dissenting). The drafters' legislative intent included "remedying '[t]he inequality of bargaining power' workers faced," such as through "collective litigation." *Id*. (Ginsburg, J., dissenting) (quoting 29 U.S.C. § 151).

[299] *Id*. at 1638 (Ginsburg, J., dissenting) (citing Leviton Mfg. Co. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973); Brady v. National Football League, 644 F.3d 661, 673 (8th Cir. 2011)).

[300] *Epic Systems Corp.*, 138 S. Ct. at 1638 (Ginsburg, J., dissenting).

[301] *Id*. at 1646 (Ginsburg, J., dissenting).

Justice Ginsburg suggested that the majority, in a *Lochner*-like fashion, restricted federal employment regulation.[302] Not only did the majority restrict employment legislation, she argued, but it "subordinate[d] employee-protective labor legislation to the [FAA]."[303] Thus, she continued, the majority's determination created a slippery slope within the FAA's scheme.[304] "The inevitable result of [the] decision," she explained, would "be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[305]

Epic Systems expanded the FAA's reach beyond merely promoting the enforcement of arbitration clauses in employment contracts; it unambiguously allowed for the waiving of class arbitration within employment.[306] Using a textualist approach and reflecting a free-market theory of employment contracting, the Court broadened the FAA's bounds in a way that some consider went farther than ever before by implicating labor and employment.[307] As opposed to merely supplanting state legislation, like in *Circuit City Stores*,[308] the Court in *Epic Systems* created policy tensions with a different piece of federal legislation, the NLRA, to assure that a parties' arbitration clause was executed in accordance to the terms of their contract.[309] By determining that class arbitration efforts by employees did not constitute, and thus fell outside

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[302] *See id.* at 1633–35, 1638 (Ginsburg, J., dissenting) (referencing various *Lochner*-era cases); *see also id.* at 1630 ("This dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments.").

[303] *Epic Systems Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

[304] *Id.* at 1645 (Ginsburg, J., dissenting).

[305] *Id.* at 1646 (Ginsburg, J., dissenting).

[306] *Id.* at 1632.

[307] *See Epic Systems Corp.*, 138 S. Ct. at 1625; *see also* Michael J. Yelnosky, *Labor Law Illiteracy: Epic Systems Corp. v. Lewis and Janus v. AFSCME*, 24 ROGER WILLIAMS U. L. REV. 104, 107–09 (2019) (suggesting that, in applying *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which provided for consumer class arbitration waivers within employment, the Court erroneously crossed into NLRA territory); Lise Gelernter, *The Impact of Epic Systems in the Labor and Employment Context*, 2019 J. DISP. RESOL. 115, 116–17 (2019) (discussing the decision's impact on non-unionized workers).

[308] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122 (2001).

[309] *Epic Systems Corp.*, 138 S. Ct. at 1628; *see also* Carson E. Miller, *Epic Systems Corp. v. Lewis: Individual Arbitration and the Future of Title VII Disparate Impact and Pattern-or-Practice Class Actions*, 87 U. CIN. L. REV. 1167, 1179 (2019) ("Justice Gorsuch refused to read a right to class actions into Section 7 of the NLRA . . . .").

of the protective walls of, "concerted activity,"[310] the Court interpreted the FAA to affect and limit an entirely separate federal law.[311]

Epic Systems rocked the FAA's position within employment law in a way many deem pro-employer.[312] Some critics argue that, even prior to *Epic Systems*, a presumption of arbitrability existed within the scope of employment.[313] *Epic Systems*, in critics' eyes, solidified that presumption; as a result of this decision, some contend, the FAA takes precedent over conflicting laws.[314] Accordingly, some side with Justice Ginsburg's dissent.[315] Academics predicted the decision's long-lasting effect on business practices, specifically with respect to inclusion of mandatory arbitration waivers within employment contracts.[316] These predictions

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310 *Epic Systems Corp.*, 138 S. Ct. at 1628 ("[T]his Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: 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.").

311 Some critics argue that the Court's holding not only affects "the way arbitration agreements are drafted," but further "the way that administrative agencies interact with the court system." Brady, *supra* note 257, at 252, 255 (suggesting that *Epic Systems* established a "new vehicle" through which ambiguous litigation would be interpreted by courts). "After *Epic Systems*, [*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)] does not apply when two federal agencies disagree over the meaning of a statute. . . . Now, an agency will no longer receive deference when its interpretation of a statute limits a different statute that it does not administer." *Id.* at 255; *see also* Alyssa S. King, *Arbitration and the Federal Balance*, 94 IND. L.J. 1447, 1450 (2019) ("[T]he Supreme Court's decision in *Epic Systems* that the FAA trumped the agency's interpretation of a statute suggests that agencies will need specific statutory authorization to regulate arbitration."); Miller, *supra* note 309, at 1182 ("When the Court decided *Epic Systems*, it expanded more than three decades of pro-arbitration jurisprudence to overturn the NLRB's working interpretation of the NLRA.") (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991); Leading Case, *Epic Systems Corp. v. Lewis,* 132 HARV. L. REV. 427, 427–28 (2018)).

312 *See* Linda Coberly, et al., *An "Epic" Win for Employers on Arbitration Agreements*, WINSTON & STRAWN LLP (May 2018), https://www.winston.com/images/content/1/3/v2/138780/Lit-SCOTUS-Epic-MAY2018.pdf.

313 *See*, *e.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1201–02 (1993) ("[T]he law of employment arbitration appears to be developing a broad presumption of arbitrability that will cover virtually all statutory claims.").

314 *See* David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 694 (2018).

315 *See*, *e.g.*, Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L. J. 616, 642 (2019) ("[I]n *Epic Systems Corp. v. Lewis*, the Court curtailed the ability of workers to engage in group legal action, holding that employers may force workers to sign arbitration agreements with class-action waivers. In so doing, it narrowed the meaning of section 7 of the NLRA, which protects concerted action among workers.").

316 *See* Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 7 (2019) ("This decision will likely encourage businesses to adopt mandatory employment arbitration and class action waivers even more widely."); Stephen A. Plass,

were valid. Judicially speaking, *Epic Systems*' reasoning has been directly followed by similar cases in which courts have considered the validity of class arbitration waivers in employment contracts.[317] An Economic Policy Institute report cites that as of 2018, 53.9% of nonunion, private-sector employers have mandatory arbitration procedures.[318] Mandatory arbitration, generally and with respect to waiver of class arbitration, is firmly planted in employment law.[319] *Epic Systems* suggests the Court is taking a step toward *Lochner*-era deregulation and privatization.[320]

The Court's potential pathway to *Lochner* is supported by its 2019 decision in *New Prime Inc. v. Oliveira*.[321] In *New Prime*, the Court considered whether, (1) "[w]hen a contract delegates questions of arbitrability to an arbitrator, . . . a court [must] leave disputes over the application of § 1's exception for the arbitrator to resolve," and whether (2) "the term 'contracts of employment' refer[s] only to contracts between employers and employees, or [if instead] it also reach[es] contracts with independent contractors."[322] New Prime, an interstate trucking company, independently contracted Dominic Oliveira as one of its drivers.[323] Under his working relationship with New Prime, Oliveira agreed to resolve any dispute through arbitration.[324] When Oliveira, as a member of a class, attempted to sue New Prime in federal court for illegally denying its drivers minimum wage, the company sought to compel arbitration in

Federalizing Contract Law, 24 LEWIS & CLARK L. REV. 191, 240 (2020) ("The Court's conclusion [in *Epic Systems*] that the parties are at liberty to make contracts to arbitrate on a class or representative basis is effectively an empty theory for workers and consumers who have no contractual input.").

[317] *See*, *e.g.*, Lamps Plus Inc. v. Varela, 139 S. Ct. 1407 (2019) (following *Epic Systems* and holding that a trial court could not disallow a class arbitration mandate within an employment contract). Law Professor Alyssa S. King suggests that this line of cases may contradict pre-*Epic Systems* sentiment regarding arbitrability. "Before the Supreme Court's decision in *Epic Systems*, a district court even upheld an arbitrator's decision to interpret the National Labor Relations Act (NLRA) as instructing him to ignore a class waiver in a contract and allow class arbitration." *See* King, *supra* note 311, at 1465.

[318] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018) (https://files.epi.org/pdf/144131.pdf).

[319] *But see* Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020) (https://www.nytimes.com/2020/04/06/business/arbitration-overload.html) (suggesting that large companies have become "scared to death" by workers' endless individual arbitration claims and are thus seeking ways out of their arbitration procedures).

[320] *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting); *s*ee *also* discussion *infra* Section IV.

[321] New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

[322] *Id*. at 536.

[323] *Id*.

[324] *Id*.

accordance with the terms of their agreement.[325] The First Circuit[326] agreed with Oliveira that disputes over "whether the parties' contract falls within the [FAA]'s ambit or § 1's exclusion" should be resolved by a court "before invoking the statute's authority to order arbitration."[327] That court also agreed that § 1's exclusionary provision applied to certain "'contracts of employment[,]' remove[d] from the [FAA's] coverage not only employer-employee contracts but also contracts involving independent contractors."[328] Thus, the court of appeals determined that "it lacked authority under the [FAA] to order arbitration."[329]

Granting certiorari, the Court affirmed the First Circuit.[330] Writing for the majority, Justice Gorsuch[331] set an explicit boundary on the FAA, stating, "[w]hile a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional,"[332] and bolstered its position with limited examples.[333] The Court agreed with the First Circuit, stating, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration."[334] An agreement, the Court noted, "may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the [FAA] authorizes a court to stay litigation and [compel] arbitra[tion]."[335] The Court rejected New Prime's argument that, based on the delegation

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[325] *New Prime Inc.*, 139 S. Ct. at 536.

[326] *See* Oliveira v. New Prime, Inc., 857 F.3d 7, 24 (1st Cir. 2017). This case was heard before the Court decided *Epic Systems* in 2018.

[327] *New Prime Inc.*, 139 S. Ct. at 537.

[328] *Id*. Section 1 of the FAA, entitled, "'Maritime transactions' and 'commerce' defined; exceptions to operation of title," reads, in part: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1 (2018).

[329] *New Prime Inc.*, 139 S. Ct. at 537.

[330] *Id*. at 544.

[331] *See id*. at 536. Justice Kavanaugh, then newly appointed to the Court, did not participate in the decision. *Id*. at 544.

[332] *New Prime Inc.*, 139 S. Ct. at 537. The Court also noted that the FAA "bears its qualifications." *Id*. at 536.

[333] *Id*. at 537 ("If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§ 3 and 4 of the Act often require a court to stay litigation and compel arbitration 'accord[ing to] the terms' of the parties' agreement. . . . [A]ntecedent statutory provisions limit the scope of the court's powers under §§ 3 and 4[,]" including § 2, which only applies the FAA "when the parties' agreement to arbitrate is set forth as a 'written provision in any maritime transaction or a contract evidencing a transaction involving commerce,'" and § 1, which expressly does not apply the FAA to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

[334] *Id*.

[335] *New Prime Inc.*, 139 S. Ct. at 537–38.

clause within the parties' contract[336] and the severability principle,[337] "an arbitrator should resolve any dispute over § 1's application" to Oliveira's claim.[338] The Court, instead, asserted that "a *court* may use §§ 3 and 4 to enforce a delegation clause only if the clause appears in a 'written provision in . . . a contract evidencing a transaction involving commerce' consistent with § 2" and "a *court* should 'determine[] that the contract in question is within the coverage . . .'" of the FAA prior to invoking the severability principle.[339] The power to make these eligibility determinations, therefore, lies with the courts.

The Court determined that § 1's definition of "contracts of employment" included employers' agreements to work with independent contractors, not just with workers classified as "employees."[340] Thus, the court lacked authority under the FAA to compel arbitration because Oliveira fell within § 1's exception.[341] In 1925, when the FAA was passed, the drafters and the public would not have restricted "employment" to those with explicit "employee" titles; instead, the FAA's reach would broadly include "agreements that require[d] independent contractors to perform work."[342] The Court, further, cites the neighboring statutory text: "contracts of employment of . . . any . . . class of *workers* engaged in foreign or interstate commerce."[343] Other sections that referenced workers in specific fields "swept more broadly . . . than might seem obvious today."[344] The Court rejected the policy concerns raised by New Prime,[345] suggesting that "pav[ing] over" statutory language "in the name of more expeditiously advancing a policy goal" could belittle Congress's

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[336] "A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration." *Id.* at 538.

[337] "[U]nder the severability principle, [the Court] treat[s] a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears." *Id.*

[338] *Id.*

[339] *New Prime Inc.*, 139 S. Ct. at 538 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967)) (emphasis added).

[340] *Id.* at 539, 542.

[341] *Id.* at 544.

[342] *Id.* at 539. The Court cites dictionaries that equate "employment" to "work" and that fail to differentiate between different kinds of work or workers. *New Prime Inc.*, 139 S. Ct. at 539–40.

[343] *Id.* at 541 (emphasis in original) (quoting 9 U.S.C. §1 (2018)).

[344] *Id.* at 543 (explaining, for instance, that shipboard surgeons were deemed "seamen" for the purpose of § 1).

[345] *See id.* at 543 ("New Prime suggests[] we must order arbitration according to the terms of the parties' agreement" in order to "counteract judicial hostility to arbitration," as intended by the drafters).

intentional limitations on the FAA.[346] In coming to its decision, the Court noted that it "'respect[ed] the limits up to which Congress was prepared' to go when adopting the [FAA]."[347] Thus, it found, Oliveira's agreement to engage in interstate commerce was subject to § 1's exception; the First Circuit had appropriately determined that it lacked the authority to compel arbitration of Oliveira's claim.[348] When a contract delegates questions of arbitrability to an arbitrator, a court need not necessarily leave disputes over the application of § 1's exception for the arbitrator to resolve, and the term "contracts of employment" therein reaches contracts with independent contractors.[349]

Thus, in *New Prime*, the Court found in favor of the plaintiff-workers bringing a claim.[350] Some deem *New Prime* a wrench in the Court's relatively consistent pro-arbitration[351] and, consequently, pro-employer interpretation of the FAA because the decision broadened workers' abilities to achieve "exempt" status and evade responsibility to comply with arbitration clauses within their contracts.[352] Others contemplate that the Court's ruling could greatly expand workers' rights in the interstate transportation industry, where independent contractors are highly utilized,[353] and call *New Prime* an "escape route" from *Epic Systems*.[354]

Although it resulted in a win for employees, the Court's decision in *New Prime* is predicated on supplanting some state efforts to regulate employment generally and arguably does not diminish its free-market-forward interpretation of the FAA. The Court determined that, under the

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[346] *New Prime Inc.*, 139 S. Ct. at 543.

[347] *Id*. (citing United States v. Sisson, 399 U.S. 267 (1970)).

[348] *Id*. at 544.

[349] *See id*. at 542.

[350] *New Prime Inc.*, 139 S. Ct. at 544.

[351] *See* Imre S. Szalai, *The Supreme Court's Landmark Decision in New Prime Inc. v. Oliveira: A Panoptic View of America's Civil Justice System and Arbitration*, 68 EMORY L.J. ONLINE 1059, 1066 (2019) ("The Supreme Court has changed the FAA on several different levels, such as by expanding its scope and applicability; developing special pro-arbitration tests and presumptions; and imbuing the statute with special preemptive powers.").

[352] *See* Daniel B. Pasternak & Melissa Legault, *US Supreme Court Unanimously Rules in Favor of Workers, Holding Trucking Company's Arbitration Agreement Exempt from Federal Arbitration Act*, NAT'L L. REV. (Jan. 15, 2019), https://www.natlawreview.com/article/us-supreme-court-unanimously-rules-favor-workers-holding-trucking-company-s ("The ruling is noteworthy particularly because the Court, with a conservative majority, chose to interpret the FAA in a way that expands worker's rights.").

[353] *See id.*

[354] *See* William B. Gould IV, *Dynamex Is Dynamite, but Epic Systems Is Its Foil - Chamber of Commerce: The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 1019 (2018) (proposing that the *New Prime* decision and cases brought under California state law over Uber's independent contractor classification might avoid *Epic Systems*' grasp).

FAA, federal courts wielded power over arbitrators to determine whether a provision was arbitrable.[355] In other words, the federal judiciary—not officers of state arbitration systems—decides whether a contract qualifies for an exception under the FAA. Further, the boundaries allegedly pushed by the Court fall squarely within the FAA's preexisting statutory exception[356] and do not accord or create a new "out" from arbitration for most employees disinterested in the clauses to which they had previously consented. The Court, once again, relied upon textualism and directly analyzed the case through the lens of the FAA's text.[357]

Because of its scope, perhaps *New Prime* merely exemplifies the singular exemption built into the FAA in § 1. Maybe *New Prime* has a restricted effect in its limited application to a small subset of workers. In July of 2020, the First Circuit in *Waithaka v. Amazon.com, Inc*. similarly demonstrated the limited latitude and explicit boundaries of this exception.[358] Perhaps, like a case decided by the Roberts Court in 2019 concerning a FELA claim,[359] the Court's textualist interpretation has yielded a narrow decision. Some argue that the Court's holding in *New Prime* is so limited that it even created loopholes for employers with respect to compelling arbitration of workers' claims under state law[360]—even purposefully.[361] Moreover, in the handful of decisions in which agreements to arbitrate employment claims have been struck down, many agreements featured conditions that the presiding court found to be violative of general contract principles.[362] Arbitration may have too great a grasp on the modern legal system for a mere case like *New Prime* to

355 *See New Prime Inc.*, 139 S. Ct. at 537–38.

356 9 U.S.C. § 1 (2018).

357 *See New Prime Inc.*, 139 S. Ct. at 541–42.

358 Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1st Cir. 2020) (determining that employment contracts of delivery workers who locally transport goods on the last legs of interstate journeys fall into the FAA's § 1 exemption).

359 *See* Burlington N. Santa Fe Ry. v. Loos, 139 S. Ct. 897–99 (2019).

360 *See* Gelernter, *supra* note 307, at 125–26 (2019) (suggesting that, in *New Prime*, "the Supreme Court ducked the issue of whether parties can use state arbitration laws to enforce FAA-exempt arbitration agreements" and "was completely silent on the possibility of using state arbitration laws to enforce [such] agreement[s].").

361 *See* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 AM. BUS. L.J. 815, 871 (2019) ("Given the Supreme Court's strong pro-arbitration stance, it would not be surprising if the Court agreed that states may enforce arbitration provisions against workers exempt under section 1 because it would further, rather than undermine, the federal policy favoring arbitration.").

362 *See*, *e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1301 (9th Cir. 1994) ("[A]ppellants did not knowingly enter into any agreement to arbitrate employment disputes.").

alter.[363] The judicial system's steady expansion of the FAA's scope is arguably too wide for one limited case to thwart.[364]

IV. ANALYSIS: DIFFERENTIATING THE ACTS AND FACTORS THAT YIELDED SUCH DIFFERENCES

Over the years, the Court has read the FELA to promote government regulation of the employment marketplace by reining in freedom of contract-based principles, but it later has read the FAA to bypass government regulation of the employment marketplace by exalting freedom of contract principles. The disparate Supreme Court decisions analyzed above, admittedly, are not in direct temporal conflict; the FELA was in its prime in the mid-twentieth century, whereas the FAA maintains a place in the Court's docket today.[365] The FELA caters to employees of railroad corporations and common carriers,[366] whereas the FAA is plainly exempted from handling such employment disputes.[367] Yet, both Acts serve as bases through which employees and employers attempt to resolve employment disputes. Both, in practice, supplant some state control with federal regulation.[368] How, then, does one almost primarily benefit employers and the other employees?

A. *Similarities Between the FELA and the FAA*

Both the FELA and FAA control important aspects of employment law—protection and safety of employees, and the means and venue through which employees can pursue claims. The FELA provides railroad workers a cause of action under which they can seek to obtain damages for employer negligence.[369] The FAA supplies for employment disputes

[363] *See* Reed C. Trechter, *New Prime Inc. v. Oliveira: Putting the Wheels Back on the FAA's Section 1 Exemption for Transportation Workers*, 72 OKLA. L. REV. 731, 735 (2020) ("Over time, however, the judiciary's willingness to scrutinize arbitration agreements prior to relinquishing jurisdiction to an arbitrator diminished to the point where courts' interpretation of the FAA appeared to place arbitration agreements on a pedestal.").

[364] *See id*.

[365] *See* cases cited *supra* note 73; cases cited *supra* note 128. *See also* the Supreme Court's most recent decision on an arbitration issue, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 528 (2019) (holding that a lower court determination that a dispute is "wholly groundless" is inconsistent with the FAA's arbitration requirements).

[366] 45 U.S.C. § 51 (2018).

[367] Healy, *supra* note 95, at 224.

[368] *See* discussion *infra* Part IV A.

[369] *See* 45 U.S.C. § 51 et seq. (2018).

an alternative venue whose attributes include privacy and promptness.[370] Both laws have embedded language aimed at decreasing obstacles to recourse. The FELA's statutory language implicates liability of "[*e*]*very* common carrier by railroad while engaging in" interstate commerce for "*any* person suffering injury while . . . employed by such carrier in such commerce."[371] The drafters expressly addressed assumption of risk by disallowing employers to blame-shift and evade liability.[372] Likewise, the FAA requires all issues referable to arbitration under a contract to be arbitrated "in accordance with the terms of the agreement."[373] Thus, the FAA supplies the alternative dispute resolution venue for employers and employees in compliance with the conditions set forth in their contracts to avoid hypothetical push-back or delay from either party.[374]

The Court, further, has expanded the scope of both laws quite extensively over time. The Court has qualified its broadening of both laws by relying upon the social and judicial sentiments around which each was passed. In considering FELA arguments, the Court concentrated on the alleged negligence at bar and presumed wrongdoing on the part of the employer.[375] One could argue that this presumption is not misplaced among the backdrop of the longstanding history of railroad worker injury or death,[376] paired with railroad corporation wrongdoing and lack of liability for railroad company negligence.[377] Alternatively, in interpreting

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[370] *See* 9 U.S.C. ch. 1 (2018); *see also* Speidel, *supra* note 104, at 158, 160.

[371] 45 U.S.C. § 51 (2018) (emphasis added).

[372] 45 U.S.C. § 54 (2018).

> (In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.).

[373] 9 U.S.C. § 4 (2018).

[374] *See id*.

[375] *See e.g.,* N. C. R.R. Co. v. Zachary, 232 U.S. 248 (1914); Urie v. Thompson, 337 U.S. 163 (1949); *see also* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 362 (1952)

> (In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the [FELA] to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.)

[376] Williams-Searle, *supra* note 41.

[377] MORGAN, *supra* note 44, at 59–60.

the FAA cases, the Court has deferred to the arbitration clause in question absent allegation of wrongdoing, and has almost presumed validity of the clause prior to reviewing it.[378] The Court, in reviewing FAA arguments, grounds this presumption in history of the FAA, namely in the widespread hostility toward arbitration that yielded the FAA's enactment[379] and the necessity to avoid fallback toward public antiarbitration sentiment.[380] Both under the FELA and the FAA, the Court has widened both Acts' breadth, arguably with the intent to prevent the pre-enactment reality from reemerging in the American public.[381] One could argue that the Court's wide expansion of the FELA is not necessary to remediate the railroad industry today, which has accepted and maintains a higher minimum degree of applicable safety standards.[382] One could also argue that the Court's broadening of the FAA does not comport with a current need to put arbitration clauses on the same footing as other contracts.[383]

In expanding the laws' breadths, the Court has, on several occasions, used the laws to supplant other preexisting law. More specifically, the Court has, through the FELA and the FAA, supplanted state statutes. The FELA, in giving federal courts jurisdiction over interstate railroad negligence cases,[384] frequently overrides state legislation.[385] This

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[378] *See*, *e.g.*, Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018); *see also* Finkin, *supra* note 133, at 802 (suggesting that a "strong presumption of arbitrability as to federal statutory claims" reflected the state of the FAA in the early 2000s).

[379] *See Epic Systems Corp.* 138 S. Ct. at 1621; Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111–12 (2001).

[380] *See Epic Systems Corp*., 138 S. Ct. at 1621.

[381] *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 362 (1952); *Epic Systems Corp*., 138 S. Ct. at 1621.

[382] In the year 2019, the United States Department of Transportation's Federal Railroad Administration released an Overview Report, reporting only nine employee deaths on duty over the course of the calendar year in which 419,971,624 employee hours were logged. In 2018, the number of employee on-duty deaths totaled at seventeen, with 438,365,661 employee hours logged. *See Overview Reports – Accident/Incident Overview*, U.S. DEP'T OF TRANSP.: FED. RAILROAD ADMIN., https://railroads.dot.gov/accident-and-incident-reporting/overview-reports/overview-reports (last visited Feb. 20, 2021). *But see* Phillips, *supra* note 57, at 52–53 (emphasizing that the railroad industry still retains a dangerous character).

[383] *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5, 29–30 (2004).

[384] The "FELA . . . gives the federal district courts jurisdiction over such cases." Chris Carlisle, *State Sovereign Immunity Trumps the Supremacy Clause: Does Federal Law Apply to the States in the Wake of Alden v. Maine 119 S. Ct. 2240 (1999)*, 23 HAMLINE L. REV. 177, 217 n.283 (1999) (citing 45 U.S.C.A. §§ 51, 56); *see also* 45 U.S.C. § 56 (2018) ("Under this chapter an action may be brought in a district court of the United States[] . . . .").

[385] *See* Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 863–64 (1987).

supplanting of state law has driven out legislation inconsistent with the FELA's goals.[386] The Court, further, has supplanted state statute in applying its interpretation of the FAA.[387] In *Circuit City Stores*, the Court specifically expressed congressional intent for the FAA to preempt state statute.[388] Academics recognize the FAA's "preemptive effect" in employment law.[389] Under both laws, the Court has effectively stunted state legislation through preemption.

B. *Differences Between the FELA and the FAA – What and Why?*

Certainly, the FELA and FAA exhibit some similar traits. Yet, each Act has been interpreted in a starkly different way, resulting in one law through which the Court has gone out of its way to override free-market employment contracting[390] and another through which it has endorsed free-market contracting to a degree critics consider unfair to employees.[391] An array of factors may be attributed to the Court's differing perceptions toward employees and employers and its divergent interpretations of the FELA and the FAA.

Perhaps the makeup of the Court has led to different interpretations of each law. A Court that highly considers the effect of its judgments on the "little guy," or, in the case of the FELA, an injured railroad worker,[392] would likely produce distinctive results from a Court that is mired in a textualist approach of following the agreements of the parties presented before it.[393] Perhaps both Courts applied purposiveness, by looking at the

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386 *See* Schwartz, *supra* note 383, at 25 (comparing the FAA and the FELA's intention to and execution of preempting state law).

387 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111–12 (2001).

388 *Id*. at 112.

389 *See* Finkin, *supra* note 133, at 802 (agreeing with another academic that "the current state of FAA doctrine, at least as applied to individual contracts of employment, is indefensible[] . . . ."); Greene & O'Brien, *supra* note 361, at 842 ("[W]ithout federal legislation or a radical change in the Court's composition and direction on arbitration jurisprudence, the Court will undoubtedly find that the FAA preempts such legislation.").

390 *See*, *e.g.*, Urie v. Thompson, 337 U.S. 163 (1949); Dice v. Akron, Canton & Youngstown R.R.. Co., 342 U.S. 359 (1952).

391 *See* Van Wezel Stone, *supra* note 145, at 1017–18.

392 *See Urie*, 337 U.S. at 181 (construing broadly the term "injuries" to expand and qualify more workers to seek relief).

393 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 117–18 (2001) (utilizing a textualist approach in analysis); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1625 (2018) (utilizing a textualist approach in analysis); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541 (2019) (utilizing a textualist approach in analysis); *see also* Trechter, *supra* note 363, at 751

"evil" the statute intended to correct,[394] in interpreting the cases before them.[395] Because one Congress sought to protect workers in enacting the FELA and another Congress sought to protect parties contracting at an arm's length in business and promote judicial efficiency under the FAA, maybe the Court followed suit.[396]

Alternatively, the FAA Courts' majorities may have valued arbitration as a neutral venue for contracting parties, including employers and employees, that, overall, provides ample social benefits. In the cases before the Court, the parties "contracted for arbitration," and it is arguably not the Court's job to provide remedy if, later, one party regretted the conditions to which it contracted.[397] In *Circuit City Stores*, the Court reasoned that arbitration had benefits for not only employers seeking to compel arbitration of claims, but also for employees bringing claims.[398] In *Epic Systems*, the Court explicitly listed "simplicity" and "inexpensiveness" as reasons for which the aggrieved employees could benefit from individually arbitrating their claims.[399] Comparatively, the Court has shown its willingness to render void a contract that prevented a railroad worker his right to remedy under the FELA, even when a lower court determined that the worker could understand the contract's terms.[400] Furthermore, in deferring to compel arbitration, the Court could, in theory, point to the integration and utilization of arbitration in other American fields, such as federal administrative agencies. For instance, the NLRB upheld arbitration agreements and awards in a myriad of cases prior to the

(commenting on the *New Prime* Court's "textualist analysis to close the form over function loophole in the simplest way possible.").

[394] *See Purposive Interpretation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An interpretation that looks to the 'evil' that the statute is trying to correct . . . .").

[395] *See*, *e.g.*, Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). In both of these cases, the Court considered legislative intent behind the respective Acts. *See id.*

[396] One may ponder, however, about whether it is the Court's duty to reconcile legislative intent with the Acts' real consequences, or whether the Court should follow Congress's intentions to their vanishing points. *See Circuit City Stores*, *Inc.*, 532 U.S. at 105, 131–32 (2001) (Stevens, J., dissenting) (arguing that "times have changed" and judges need to recognize when the pendulum has been pushed far enough). For more on legislative intent, *see generally* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016).

[397] *See Epic Systems Corp*., 138 S. Ct. at 1621.

[398] *Circuit City Stores*, *Inc.*, 532 U.S. at 121–22.

[399] "*Epic Systems Corporation v. Lewis* described 'individualized' proceedings along with 'speed and simplicity and inexpensiveness' as all among arbitration's 'fundamental attributes.'" King, *supra* note 311, at 1484 (quoting *Epic Systems Corp.*, 138 S. Ct. at 1622–23).

[400] Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361 (1952).

Court's decision in *Epic Systems*.[401] Evidence of widespread governmental acceptance of arbitration could support the Court's decision to protect arbitration moving forward.

Both the FAA and FELA have supplanted state law. The directions which these preemptive actions have taken, however, contrast. Critics liken the FAA's rerouting of traditional court jurisdiction into arbitration to "privatization of justice" under which arbitrators, appointed privately, lack oversight and accountability.[402] Some criticizers warn that "repeat player" employers who, unlike their employees, have preexisting relationships with certain arbitrators may use the assurance of future work to leverage promising decisions from arbitrators.[403] The FAA, some argue, goes further than simply supplanting state law—under *Epic Systems*, the Court debatably used the FAA to supplant other federal law. In her dissent to *Epic Systems*, Justice Ginsburg argued that the majority showed partiality toward the FAA over the NLRA, where the NLRA should have ruled.[404] By subordinating to the FAA, a law aimed to provide employees protection in the labor space, she contended, the majority opened the door to "underenforcement of federal and state statutes designed to [help] vulnerable workers."[405]

The FAA's established reach and the Court's demonstrated interest in enforcing the contents of the parties' employment contracts may amount to widespread deregulation on a larger scale within employment law; the Court took a step from merely preempting state statute[406] toward supplanting other federal statutes that got in the way of the arbitration clause at issue and, accordingly, the FAA. Such a degree of deregulation is undoubtedly at odds with the intent and interpretation of the FELA and, thus, distinguishes the two laws. The FELA mandates industry regulation, which it deems vital because of the power imbalance between the

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[401] *See*, *e.g.*, Kvaerner Phila. Shipyard, Inc., 347 N.L.R.B. 390 (2006); Smurfit-Stone Container Corp., 344 N.L.R.B. 658 (2005); Aramark Services, Inc., 344 N.L.R.B. 549 (2005).

[402] Malin & Ladenson, *supra* note 313, at 1208–09, 1238 (advocating for courts' *de novo* review of legal decisions made in arbitration to provide lacking oversight). *But see* King, *supra* note 311, at 1489–90 (explaining heightened expectations of arbitrators under the American Arbitration Association).

[403] Finkin, *supra* note 133, at 800 ("[T]he arbitrator may be biased by his or her desire for future selection, especially where the employer is likely to be a 'repeat player' with respect to future arbitrations involving other employees[] . . . .").

[404] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting).

[405] *Id*. at 1646–47 (Ginsburg, J., dissenting) (citing Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protections*, 80 BROOKLYN L. REV. 1309 (2015)).

[406] *See* Schwartz, *supra* note 383, at 29–30.

employer and the employee;[407] accordingly, the FELA regulates employers' abilities to evade liability in incidents of employee injury.[408] The FAA, by this logic, conversely views employers and employees at the same bargaining level.[409] Thus, the Court, in either rejecting or assuming the underlying fairness of the employment contracts in these markets, has taken two opposing positions against itself. The Court hearing FELA cases appears to read into harmed litigants an inherent sense of inequal political and social power,[410] while the Court hearing FAA cases emphasized the bargaining power held by both parties in the decision to include arbitration clauses within their contracts.[411] Inevitably, therefore, the Court in FELA cases has gone out of its way to curb a free-market approach to employment contracting, where the Court in FAA cases has gone out of its way to promote free-market theories of employment contracting by assuming equal positions of bargaining power by the employer and the employee.

The widespread deregulatory effect of the Court's interpretation of the FAA bolsters the proposition that the Court may be traveling in the direction of another *Lochner*-era. Notably, critics have likened the Court's interpretation of the FAA to something out of the *Lochner*-era.[412] Some academics point to cases in which the *Lochner*-era Court sweepingly struck down statutes in the name of contractual freedom;[413] likewise, the

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[407] *See* Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 308 (2013) (discussing the power imbalance between the employer and the employee and considering employer vulnerability as addressed by the FELA and workers' compensation programs); *see also* King, *supra* note 311, at 1448 ("Consumer and employment arbitration have drawn special objections as plaintiffs often have little bargaining power and face capacious clauses requiring them to arbitrate federal and state statutory rights.").

[408] 45 U.S.C.A. § 51 (2018).

[409] *See Epic Systems Corp.*, 138 S. Ct. at 1636 (Ginsburg, J., dissenting) ("The Arbitration Act, in [the defendant-employers'] view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.").

[410] *See* Beiner, *supra* note 145, at 884 (comparing "repeat player" employers and unexperienced employees within the context of arbitration and respective power dynamics).

[411] *See Epic Systems Corp.*, 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? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?").

[412] *See e.g.*, Van Wezel Stone, *supra* note 145, at 1018.

[413] *See*, *e.g.*, Langager, *supra* note 62, at 511 n.77 (citing Adair v. United States, 208 U.S. 161, 175 (1908), and asserting that the Court, there, held that "any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land").

Court has read the FAA to invalidate laws to uphold the integrity of the parties' employment contract and arbitration clauses therein.[414] Both during the *Lochner*-era and today, in interpreting the FAA, the Court has prioritized the freedom of parties to contract[415]—then, through the due process clause,[416] and, today, under the employment contracts that feature arbitration clauses.[417] Instead of leaning on the concept of "liberty" for support, as did the *Lochner*-era Court, the Court today rests upon upholding legislative intent to prevent the resuscitating of judicial hostility toward arbitration in modern jurisprudence[418] and enforcing the equal positions of bargaining the parties to the arbitration agreement held.[419] As employers are the ones that usually seek to compel arbitration,[420] resultant decisions that uphold the FAA tend to find for the business sector above individual or class litigants.[421] Could the Court's interpretation of the FAA in recent years signal a period of deregulation? Some argue, yes.[422] If corporations can avoid labor unions and regulators—both judicial and legislative—in their employment transactions by embedding arbitration clauses, the power of which continues to grow with almost each case before the Court, employers might benefit in the same way as they would have in the *Lochner*-era from autonomy, individual responsibility, and lack of worker regulation, the

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[414] *See Epic Systems Corp.*, 138 S. Ct. 1621 (noting that, because the arbitration agreements were not otherwise contractually void, they were valid).

[415] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 34 (1998) ("Invoking freedom of contract language seldom heard since *Lochner v. New York*, the judiciary has approved the use of arbitration, even when the 'agreement' to arbitrate is a condition of employment.").

[416] *See* CHEMERINSKY, *supra* note 60, at 644 ("*Lochner v. New York* thus announced three themes that were followed until 1937: Freedom of contract was a right protected by the due processes clauses of the Fifth and Fourteenth Amendments[] . . . .").

[417] *See Epic Systems Corp.*, 138 S. Ct., at 1619.

[418] *See*, *e.g.*, *id*., at 1621.

[419] *See* Finkin, *supra* note 133, at 800, 807 (asserting the lack of bargaining power over terms and conditions of employment held by employment hiring candidates).

[420] *See* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 690 (2001).

[421] *See*, *e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus Inc. v. Valera, 139 S. Ct. 1407 (2019).

[422] *See* Langager, *supra* note 62, at 511 n.77.

characteristics that shaped that period.[423] These features, contrarily, stand for everything that the FELA arguably worked to combat.[424]

V. CONCLUSION

From the Supreme Court's divergent interpretations, two federal laws have resulted that, while sharing some characteristics and comparably supplanting state regulatory power, have reached opposing results with respect to general employment regulation, free-market theory of contracting, and a "winning" party outcome. The Court's decisions in each of the six cases arising under the FELA and FAA analyzed herein have shaped the boundaries and expanded the inherent power of each respective law. While judicial interpretations of both laws have pushed their statutory limits, critics have more fervently resisted the Court's interpretation of the FAA and the results its interpretation has produced.

The Court in FELA cases has gone out of its way to deny equal bargaining power and free-market theories of employment contracting, while the Court in FAA cases has gone out of its way to support equal bargaining power and free-market theories of employment contracting. Various factors could account for the Acts' different interpretations, from the Court's makeup and priorities to the possibility that the Court is returning to another *Lochner*-era, marked by deregulation and supplanting of state and federal regulatory law. Whether this proposition is realistic is up to the critic; the Court itself has strongly disavowed this suggestion.[425] Time will tell. As the Court hears more cases and continues to draw lines around the FAA's power, the employment sphere will take resultant shape, and differences and similarities between the FELA and the FAA will continue to emerge.

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[423] *See id.*

> ([T]oday's Court is injecting a similar type of laissez-faire attitude through a broader and broader reading of the FAA. An employee may contract to have access to a jury closed to him, to have his statutory rights interpreted by a company hired by the employer, and to forego his right to band together with his fellow employees to enforce his statutory, contractual, and common-law rights and protections against his employer).

[424] *See id.*

[425] *See Epic Systems Corp.*, 138 S. Ct. at 1630 ("The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. . . But like most apocalyptic warnings, this one proves a false alarm.").