ARBITRATION AT THE SUPREME COURT: THE FAA FROM RBG TO ACB

Brian Farkas†

TABLE OF CONTENTS

INTRODUCTION

Justice Ruth Bader Ginsburg left a profound mark on countless areas of law: gender equality, discrimination law, and voting rights, to name just a few. These weighty subjects have rightfully occupied the many scholars and journalists who have analyzed her legacy. These

† Arent Fox LLP; Adjunct Professor of Law, Cardozo School of Law. The author is grateful to the editors of the *Cardozo Law Review* for inviting this contribution.

same subjects have animated vigorous conversations around former President Donald Trump's selection of Justice Amy Coney Barrett—previously of the U.S. Court of Appeals for the Seventh Circuit—to replace her.

Not surprisingly, Justice Ginsburg's impact on arbitration law has not been the focus of much public discourse. Too obscure for an obituary, and certainly not lurid enough for a dramatic confirmation battle. Yet for two reasons, arbitration is a strangely fitting microcosm of Justice Ginsburg's broader legacy: First, she was a central voice on issues of procedural law generally and arbitration law specifically, particularly her writing on so-called "mandatory" employment arbitration. Second, her voice on arbitration cases, especially over the past decade, has largely been in dissent. That dissenting voice echoes across many other higher-profile cases where the "Notorious RBG" broke from the Court's conservative majority.[1]

This short Article will outline the Court's recent arbitration jurisprudence and Justice Ginsburg's important contributions. It will then explore Justice Barrett's likely views on these topics and offer reflections on the potential impact that she may have on the Court's direction.

Spoiler alert: these two judges probably disagree. As in so many other substantive areas, they are likely to analyze arbitration-related issues with different goals and through different interpretive lenses. Nevertheless, arbitration is an area of procedural law that sometimes evades simplistic labels of "liberal" and "conservative." Justice Barrett—who clerked for Justice Antonin Scalia—may take a more idiosyncratic approach to arbitration law than some may expect. As her old boss once hinted in an important dissent, she may align herself with Justice Clarence Thomas, who has himself dissented from the conservative majority in numerous arbitration cases based on principles of textualism and federalism.

To be sure, the Court has lost an important voice on arbitration. Regardless of one's views, Justice Ginsburg's dissents offer clear and thorough articulations of the policy dilemmas in this area. Understanding her critiques helps to illuminate some of the critical issues facing the Court—and possibly Congress and the White House—as we look ahead to the future of arbitration law.

---

1 IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015).

I. ARBITRATION AND THE COURT

This brief Article cannot summarize all of American arbitration law, nor the many ways in which the Supreme Court has shaped it. But a short overview is helpful to contextualize Justice Ginsburg's legacy in this area, as well as the likely direction that the Court may soon travel.

Arbitration is a process of conflict resolution in which a private third-party neutral renders a decision on a dispute.[2] Arbitral awards are generally final and non-appealable, except on relatively narrow grounds.[3] Compared to litigation, the process is generally faster and less expensive, with the benefit of privacy compared to public court proceedings.[4] Parties are permitted to select their neutral arbitrator (compared to the random assignment of a judge), and can choose someone with substantive knowledge about the subject matter of their dispute.[5] Parties can also agree to follow procedural rules that are specific to their conflict, rather than generalized default rules such as the Federal Rules of Civil Procedure.[6] These attributes have made arbitration increasingly attractive to many litigants.[7]

---

2 Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 435–36 (2007) (listing four defining elements of arbitration as "(a) a process to settle disputes between parties; (b) a neutral third party; (c) an opportunity for the parties to be heard; and (d) a final, binding decision . . . by the third party").

3 Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . . When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." (citation omitted) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39 (1987))); *see also* MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After* Hall Street, 62 S.C. L. REV. 407, 410 (2010) ("The grounds for judicial review provided under [the FAA] are extremely narrow and limited.").

4 Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (describing the existence of privacy, as well as potential for agreed-upon confidentiality, in arbitration).

5 Wayne D. Brazil, *When "Getting It Right" Is What Matters Most, Arbitrations Are Better than Trials*, 18 CARDOZO J. CONFLICT RESOL. 277, 284 (2017) ("In some kinds of cases, having decision-makers with subject-matter expertise can improve the efficiency and fairness of the proceedings—both at the case-development stage and during the hearing. In addition, neutrals with subject-matter expertise are less likely to err en route to findings as a result of misunderstanding or confusing field-specific precepts, concepts, or terminology.").

6 *Id.* at 282 ("Arbitration can offer additional procedural flexibilities that are much less likely to be available in a trial.").

7 *Id.* at 282–83.

Arbitration in the United States is largely governed by the Federal Arbitration Act (FAA),[8] a statute passed by Congress in 1925 with the goal of increasing the reliability and consistency of the process for American businesses.[9] Before the FAA, courts' enforcement of arbitration agreements and awards was spotty, with some finding private arbitration to violate public policy by filtering disputes away from the judiciary.[10]

The FAA mandated that arbitration agreements between parties "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[11] With those simple words, Congress directed courts to enforce arbitration agreements and awards (with a few narrow exceptions).[12] The Supreme Court, interpreting the FAA, has pronounced that "[i]n enacting [the FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[13]

At the risk of dramatic oversimplification, the Supreme Court has been particularly active in two broad categories of arbitration-related disputes: first, cases involving the federal preemption of state arbitration laws that conflict with the FAA, and second, cases involving the use of arbitration clauses that simultaneously waive class or collective action remedies, often in the context of consumer and employment contracts. It is worth considering each category in turn.

A. *Federal Preemption of State Arbitration Laws*

First, the Court has long been interested in challenges to state procedural laws that have attempted to regulate or curtail arbitration.

---

8 9 U.S.C. §§ 1–16.

9 States, too, have procedural statutes and rules that govern arbitration within state courts. As discussed *infra*, these state statutes have not infrequently been found to conflict with the FAA. *See* REV. UNIF. ARB. ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2000) (the Revised Uniform Arbitration Act has been promulgated and adopted in many states, albeit with various jurisdiction-specific modifications).

10 David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 645–46 (2020) ("[T]he common law contained special rules, known as the 'ouster' and 'revocability' doctrines, which made it hard to obtain specific performance of a predispute arbitration agreement. These measures reflected the fear that extrajudicial tribunals were 'instrument[s] of injustice' that 'deprive[d] parties of rights.'" (second and third alterations in original) (footnotes omitted) (quoting Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845)).

11 9 U.S.C. § 2.

12 *Id.* § 10 (listing grounds for vacating an award).

13 Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

Perhaps the most foundational of these was the 1984 case of *Southland Corp. v. Keating*.[14] Southland Corporation, the owner and franchisor of 7-Eleven convenience stores, was sued by many of its franchisees in a California state court. The lawsuit involved a claim under the California Franchise Investment Law (CFIL). One provision of the CFIL required that claims between franchisors and franchisees must be brought in court—in other words, such claims could not be brought in private arbitration.[15] Yet the franchise agreement between the parties included a provision requiring that their disputes be resolved through arbitration. Considering the conflict between the parties' contract and the CFIL, the Supreme Court found that the CFIL directly conflicted with the FAA's fundamental requirement that agreements to arbitrate shall be enforceable.[16] More broadly, the Court emphasized that Congress intended to remove barriers to private arbitration agreements and declare a "liberal policy favoring arbitration."[17] Under the Supremacy Clause of the Constitution, state laws must yield to conflicting federal laws.[18] Accordingly, the Court struck down that provision of the CFIL.

In numerous cases following *Southland*, the result was effectively the same: states' attempts to evade the FAA have been repeatedly struck down as being preempted by the FAA's central command that arbitration "shall be valid, irrevocable, and enforceable."[19] The practical effect of the Court's preemption doctrine has been to insulate arbitration from most state legislation and strengthen the uniformity of arbitration law. Critics, of course, counter that this preemption doctrine has made it virtually impossible to regulate arbitration.[20] These critics

---

14 *Id.* at 3.

15 *Id.* at 10.

16 *Id.* at 14–15.

17 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

18 *See Southland*, 465 U.S. at 16; U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

19 9 U.S.C. § 2; *see, e.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); Perry v. Thomas, 482 U.S. 483, 490–91 (1987).

20 *See Southland*, 465 U.S. at 25–26 (O'Connor, J., dissenting); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION (1992) (critiquing *Southland*); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118 (reviewing the legislative history of the FAA and concluding that the law was "never intended to apply in state courts"); Burt Neuborne, *Ending* Lochner *Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 184 (2015) (discussing power imbalances in forming arbitration agreements).

have noted that the Court's preemption doctrine effectively displaces states' usual ability to set procedural law and contract law within their own borders.[21] Nevertheless, the Supreme Court has held firm.

B. *Endorsement of Class and Collective Action Waivers*

Second, in a more diffuse category of cases, the Court has regularly heard challenges to arbitration provisions in the consumer and employment contexts. In these cases, arbitration clauses often simultaneously included a waiver of parties' rights to seek class or collective remedies.[22] For example, a contract to purchase a product might include a provision in which the consumer agrees that any claims she has against the manufacturer will be brought through individual arbitration, and not through a class action with other consumers. Similarly, an employment contract might require that any claims—including discrimination claims[23]—be individually arbitrated with the employer, rather than brought collectively with other similarly affected employees. By and large, the Court has blessed this practice, leading to the widespread use of arbitration provisions with class waivers.

In the 2011 case *AT&T Mobility LLC v. Concepcion*, AT&T customers attempted to bring a class action alleging that the company had engaged in fraudulent sales practices.[24] AT&T offered a free cell phone to anyone who signed up for its service, when in reality, the company charged the customer $30.22 in sales tax on the retail value of the "free" phone. The purchase agreement included an arbitration clause that prohibited class actions, meaning that the affected consumers would need to individually arbitrate their fraud claims with AT&T. When AT&T sought to compel arbitration, the U.S. Court of Appeals for the Ninth Circuit held that the arbitration clause was unconscionable and unenforceable under California law, which prohibited class waivers. The Supreme Court reversed, holding that the

---

21 Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1148 (2015); *see also* Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 182–83 (2002).

22 For a comprehensive overview of this line of cases, see generally Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111 (2015) (discussing and critiquing three arbitration decisions authored by Justice Scalia).

23 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that arbitration agreement can apply to statutory claims in addition to contractual claims); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (arbitration of employment discrimination claim); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (arbitration of age discrimination claim).

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

California rule was preempted by the FAA because it interfered with arbitration. Even a class-wide arbitration (meaning, an arbitration including all affected customers) would obstruct with the fundamental goals of individual arbitration, such as informality and speed.[25] The FAA, the majority held, precludes states from conditioning the enforceability of arbitration agreements on the availability of class proceedings.

Two years later, the Court reaffirmed that principle in *American Express Co. v. Italian Colors Restaurant*.[26] There, the Court considered American Express' form contract with merchants that accept its credit cards, which requires arbitration of all disputes and also prohibits class actions. Several merchants attempted to sue in federal court, claiming that American Express had committed various antitrust violations under the Sherman Act. The U.S. Court of Appeals for the Second Circuit held that the arbitration provision was unenforceable because it would effectively insulate American Express from antitrust claims.[27] Unless the merchants could aggregate their claims, each violation of antitrust law would be too expensive to pursue in court. The Supreme Court reversed, holding that a class action waiver in an arbitration agreement is enforceable, even if the waiver essentially prevents plaintiffs from bringing federal antitrust claims because litigating the claims individually would be prohibitively expensive.[28] Just because a federal statutory claim exists, the Court reasoned, that does not mean that Congress requires that plaintiffs must be able to pursue the claim affordably.[29]

As noted previously, the Supreme Court had already made clear that employment discrimination claims are arbitrable.[30] And the fundamental holdings of *Concepcion* and *American Express*—permitting class action waivers as well as arbitration of statutory

---

25 *Id.* at 344–45 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

26 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

27 *Id.* at 239; *see also* Leading Case, American Express Co. v. Italian Colors Restaurant, 127 HARV. L. REV. 278 (2013).

28 *Am. Express*, 570 U.S. at 236.

29 *Id.* 233–34 ("[T]o say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. '[N]o legislation pursues its purposes at all costs.'" (second alteration in original) (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987)).

30 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

claims—have been readily applied in the employment context.[31] The subsequent Section will delve into two cases in particular in which the Court has further expanded the enforceability and scope of employment arbitration, notwithstanding attempts by employees to avoid those provisions: *Epic Systems Corp. v. Lewis*[32] and *Lamps Plus, Inc. v. Varela*.[33]

Taken together, there is little doubt that the Supreme Court has adopted an increasingly "staunch, expansive pro-arbitration jurisprudence" since the 1980s.[34] This jurisprudence has resulted in greater reliability and rigorous enforcement of arbitration agreements and awards. It has also garnered its share of critics (including on the Court) who believe that the Court has privatized huge numbers of claims through an interpretation of the FAA that is "an edifice of its own creation."[35] Undoubtedly, arbitration is stronger today than ever before.

With that basic summary of American arbitration law and broad overview of some of the Court's major activity in the area, we can explore the legacy of Justice Ginsburg, as well as the Court's potential direction under Justice Barrett.

II. JUSTICE GINSBURG AND ARBITRATION

Much of arbitration law is apolitical. Arbitration is a procedural mechanism that parties generally choose voluntarily, particularly in the context of business-to-business disputes. Most of its statutory and precedential framework is therefore not particularly controversial. To

---

31 *See* E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 47–49 (2015) (describing critiques of employment arbitration agreements with class waivers, particularly in the context of discrimination claims).

32 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

33 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

34 Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 328 (2011); *see also* Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. 405, 410–15 (2013) (describing the history of the Supreme Court's expansion of arbitration doctrine, particularly in the employment context); Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1120–22 (2019) (noting that the Supreme Court's pro-arbitration stance has been accompanied by an anti-litigation stance through "heightened pleading standards, efforts to spare defendants from the burdens of discovery, limits on class certification, and other methods of . . . diminishing 'the power of courts to adjudicate run-of-the-mill civil disputes'" (citation omitted)).

35 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

the extent that arbitration-related cases reach the Supreme Court, decisions are sometimes unanimous and do not always fall along traditional ideological lines. As discussed above, much of the Court's arbitration jurisprudence can be (very roughly) lumped into two categories: first, federal preemption cases and, and second, class waiver, consumer, and employment cases. We will discuss Justice Ginsburg's legacy in each. As one might expect, the political elements of arbitration are far more pronounced in that second category.

A. *Federal Preemption Cases*

In federal preemption cases, there is not much partisan division. Justice Ginsburg largely joined majorities to strike down state statutes or doctrines that conflict with the fundamental purpose of the FAA to make arbitration agreements "valid, irrevocable, and enforceable"[36] or otherwise interfere with the Court's general policy of favoring arbitration.

For example, in *Allied-Bruce Terminix Cos. v. Dobson*,[37] a 1995 case that came early in her tenure, she joined the majority to reverse the Alabama Supreme Court's approval of an Alabama statute that purported to make any pre-dispute arbitration agreement "unenforceable."[38] That law, the Court held, conflicted with the FAA. The next year, Justice Ginsburg wrote a majority opinion along very similar lines in *Doctor's Associates, Inc. v. Casarotto*.[39] There, the Court reversed the judgment of the Montana Supreme Court, which had affirmed the validity of a Montana law that declared arbitration clauses to be unenforceable unless "[n]otice that a contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract."[40] Such a law, she wrote, "places arbitration agreements in a class apart from [regular contracts], and singularly limits their validity."[41] Accordingly, Montana's "prescription is thus inconsonant with, and is therefore preempted by, the federal law."[42] Her views did not change in this regard during her long tenure. Indeed, she joined an

36 9 U.S.C. § 2.

37 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

38 *Id.* at 269 (quoting Allied-Bruce Terminix Cos. v. Dobson, 628 So. 2d 354, 355 (Ala. 1993)).

39 *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

40 *Id.* at 684 (quoting MONT. CODE ANN. § 27-5-114(4)).

41 *Id.* at 688.

42 *Id.*

opinion as late as 2017 to preempt a state's attempt to circumvent the FAA.[43]

In short, Justice Ginsburg was an "arbitration federalist" no different from the rest of the Court's majority. She believed that the FAA established a broad national policy favoring arbitration, and that arbitration agreements and awards should be given a high degree of judicial deference. And she strongly disfavored states' attempts to evade that policy.

B. *Class and Collective Action Waiver Cases*

In the second category of the Supreme Court's arbitration cases, however, the dynamics are different. In cases involving class waivers, employment arbitration, or consumer arbitration, the Court has continually enforced arbitration agreements, against the wishes of employee and consumer plaintiffs. Here, Justice Ginsburg broke sharply with the majority. First, we will consider her dissents in two earlier cases, and then examine two more recent dissents in greater detail.

1. *Concepcion* and *American Express*

As discussed above, the 2011 decision in *Concepcion* expanded the use of class action waivers as part of arbitration clauses.[44] Writing for the majority, Justice Scalia held that the FAA preempts traditional state-level unconscionability defenses to class arbitration waivers in consumer adhesion contracts. Justice Ginsburg did not write separately, but joined Justice Stephen Breyer's dissent (along with Justices Sonia Sotomayor and Elena Kagan).[45]

Justice Breyer's dissent primarily argued that California's doctrine that found the class action waiver to be unconscionable should have qualified under the FAA's so-called "savings clause." Section 2 of the FAA provides that courts can decline to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[46] In his view, this defense put arbitration on the same footing

---

43 Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017) (reversing the Kentucky Supreme Court—which had declined to enforce arbitration agreements under a state law doctrine regarding the power of attorney to waive the right to jury trial for a third party—and finding that the FAA preempts such a doctrine).

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

45 *Id.* at 357 (Breyer, J., dissenting).

46 9 U.S.C. § 2.

as all other contracts, unlike some state statutes that targeted arbitration for special heightened scrutiny.[47] Moreover, the dissent noted that class arbitration—that is, collecting claims and adjudicating them collectively in arbitration—would be a balanced and fair method of dispute resolution. Unlike Justice Scalia, Justice Breyer did not believe that class proceedings would be overly burdensome.[48] Overall, the dissent rejected the majority's sweeping reading of Section 2, as well as its narrow reading of the savings clause.[49]

Justice Ginsburg similarly joined Justice Kagan's dissent in *American Express*. There, the majority held that federal law does not guarantee that plaintiffs must have an affordable path to vindicate their rights, and therefore the high costs of individually pursuing claims is not a sufficient basis to evade an arbitration agreement.[50] Justice Kagan's dissent argued that the Court had effectively allowed arbitration clauses with class waivers to shield defendants from potentially meritorious claims under federal law.[51] In this case, for example, the plaintiffs would have been unable to effectively vindicate their antitrust claims under the Sherman Act because the costs of individually pursuing the claims was far higher than their potential recovery.[52] In Justice Kagan's view, the case was little more than an effort to minimize class remedies and protect defendants: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23 [the Federal Rule of Civil Procedure that provides for class actions], everything looks like a class action, ready to be dismantled."[53]

Taken together, Justice Ginsburg clearly disagreed with the Court's early direction on the intersection between the FAA and class action waivers. Based on the dissents that she joined, she was concerned that the majority was reading Section 2 of the FAA so expansively that it would make it virtually impossible for plaintiffs to pursue potentially meritorious claims.[54]

---

47 *Concepcion*, 563 U.S. at 360 (Breyer, J., dissenting).

48 *Id.* at 362.

49 *See generally* Ian D. Mitchell & Richard A. Bales, Concepcion *and Preemption Under the Federal Arbitration Act*, 4 Y.B. ON ARB. & MEDIATION 9, 15–17 (2012) (reviewing the majority and dissenting opinions).

50 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 239 (2013).

51 *Id.* at 240 (Kagan, J., dissenting).

52 *Id*. at 250.

53 *Id.* at 252.

54 This short Article cannot describe every one of the Supreme Court's arbitration cases in detail. But it is also worth reviewing Justice Ginsburg's dissents in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) and *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015), as well as Justice Stevens's dissent in *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63

2. *Epic Systems Corp. v. Lewis*

Two more recent cases, in 2018 and 2019 respectively, show how Justice Ginsburg's dissenting voice became more pronounced during her tenure: *Epic Systems Corp. v. Lewis* and *Lamps Plus, Inc. v. Varela*.[55] Examining those cases, and her dissents, provides the clearest articulation of her deep concern for the direction of the Court's arbitration jurisprudence.

Epic Systems—which consolidated three cases involving similar issues—required the Court to address the relationship between the FAA and the National Labor Relations Act (NLRA). Epic Systems Corp., a healthcare management company, required its employees to resolve any disputes with the company through individual arbitration. They simultaneously required employees to waive their rights to class or collective actions. In 2015, a former Epic employee named Jacob Lewis sued Epic on behalf of similarly-situated employees in the U.S. District Court for the Western District of Wisconsin, claiming that they had been denied various overtime wages in violation of the Fair Labor Standards Act (FLSA). Epic moved to dismiss the lawsuit, citing the arbitration provision and class action waiver. Yet the district court denied Epic's motion, holding that the waiver was unenforceable because it violated the employees' right to engage in "concerted activities" under Section 7 of the NLRA, which guarantees workers:

> [T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .[56]

The U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's decision.[57] In doing so, the Seventh Circuit deviated from Fifth Circuit precedent. The Ninth Circuit followed the Seventh Circuit.[58]

(2010), which Justice Ginsburg joined. The majority opinions in these cases expanded the scope of class arbitration, class waivers, and arbitrability, respectively. Again, she signaled her concern with the Court's enlargement of arbitration.

55 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633–49 (2018) (Ginsburg, J., dissenting); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420–22 (2019) (Ginsburg, J., dissenting).

56 29 U.S.C. § 157.

57 The Seventh Circuit's decision, dated May 26, 2016, was issued before then-Judge Barrett joined that court. Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), *rev'd*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

58 *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017), *aff'd sub nom.*, *Epic Sys.*

The Supreme Court granted certiorari to resolve the split, ultimately reversing the Seventh Circuit in a 5-4 decision. Writing for the majority, Justice Neil M. Gorsuch framed the central issue of the case as follows, foreshadowing the result:

> 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?[59]

The majority answered the first question in the affirmative and second question in the negative. Through the FAA, the Court held, "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[60] If employers and employees agree to arbitrate and waive class proceedings (as Epic and Lewis did), the FAA requires the enforcement of such an agreement.

Justice Gorsuch began by outlining the legislative purpose of the FAA to "direct[] courts to abandon their hostility"[61] towards arbitration, and instead treat arbitration agreements as "valid, irrevocable, and enforceable."[62] Repeatedly, he observed, the Supreme Court had interpreted the FAA as establishing "a liberal federal policy favoring arbitration agreements."[63] Indeed, the Court has regularly interpreted the FAA to allow the enforcement of arbitration agreements for claims arising from federal statutes, so long as that enforcement does not waive substantive rights conferred by another statute.[64]

The Court rejected the employees' argument that the FAA's savings clause should create an exception for cases under the NLRA.[65] As noted earlier, the savings clause provides that courts can decline to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[66] The employees effectively argued that the NLRA rendered their class and collective action waivers illegal by preventing their ability to collectively bargain. Yet the majority determined that the weight of precedent found that the FAA's

---

Corp., 138 S. Ct. 1612; Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017), *rev'd sub nom.*, *Epic Sys. Corp.*, 138 S. Ct. 1612.

59 *Epic Sys. Corp.*, 138 S. Ct. at 1619.

60 *Id.*

61 *Id.* at 1621.

62 *Id.* (quoting 9 U.S.C. § 2).

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

64 Leading Case, Epic Systems Corp. v. Lewis, 132 HARV. L. REV. 427, 427–28 (2018).

65 *Epic Sys. Corp.*, 138 S. Ct. at 1622.

66 9 U.S.C. § 2.

savings clause only applies to generally applicable contract defenses, such as fraud, duress, or unconscionability—not defenses that "target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"[67] Here, the Epic employees did not identify any such contract defenses that would apply to their employment agreements. For example, they did not allege that their arbitration agreements "were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable."[68] Epic did not put a proverbial gun to their heads to force them into agreeing to arbitrate. Rather, the employees objected more generally that the agreements required individualized arbitration proceedings rather than class or collective actions. This, Justice Gorsuch concluded, is precisely the type of defense that "seeks to interfere with one of arbitration's fundamental attributes."[69]

Indeed, he continued, this logic is fully consistent with the Court's prior determination in *Concepcion*. In that case, a California state law defense prohibited class action waivers in consumer contracts as being unconscionable.[70] The Court held that "the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same . . . . by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration."[71] This would have run counter to "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, [which] would be shorn away and arbitration would wind up looking like the litigation it was meant to displace."[72] Congress wanted the courts to remain alert to "a great variety of devices and formulas declaring arbitration against public policy."[73]

The NLRA provides that employees have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[74] The *Epic* plaintiffs argued that the language of the NRLA inherently conflicts with an interpretation of the FAA that would

---

67 *Epic Sys. Corp.*, 138 S. Ct. at 1622 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011)) (citing Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017)).

68 *Id.*

69 *Id.*

70 *Id.* at 1622–23.

71 *Id.* at 1623.

72 *Id.*

73 *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011)).

74 29 U.S.C. § 157.

require individualized dispute resolution. Justice Gorsuch rejected this argument, characterizing it as just another such "device" to avoid the fundamental goals of arbitration.[75] Section 7, he determined, "does not express approval or disapproval of arbitration" nor indicate any intent to displace the FAA.[76] Congress, he noted, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[77] If Congress had wanted the NLRA to prohibit individual employees' arbitration agreements, such a prohibition would have been made explicit. In sum, employment arbitration programs that include class waivers are enforceable and do not violate the NLRA.

Justice Ginsburg filed a fiery thirty-page dissent, joined by Justices Breyer, Sotomayor, and Kagan, calling the majority's opinion "egregiously wrong."[78] She took the unusual step of reading her dissent from the bench, a sign of particularly profound disagreement. In short, Justice Ginsburg would have held that Section 7 of the NLRA inherently provides a right to collective action by employees; therefore, in her view, the common law contract defense of "illegality" under Section 2 of the FAA should have invalidated Epic's collective action waivers. Her dissent is notable for its focus on the realities facing many workers, namely the significant disparity in bargaining power that they face. In her view, the majority "subordinates employee-protective labor legislation" to the FAA, and thus "forgets the labor market imbalance" that the NLRA is meant to address, and "ignores the destructive consequences of diminishing the right of employees 'to band together in confronting an employer.'"[79]

Her framing is important. Recall that the majority had framed the core issue in the case as whether the NLRA can be permitted to interfere with the ability of employers and employees to bargain for an arbitration provision.[80] The dissent rejects that framing as being far removed from real-world bargaining. Instead, Justice Ginsburg wrote, the real crux of the case is whether the FAA can be weaponized to "permit employers to insist that their employees, whenever seeking redress" must "go it alone, never mind the right secured to employees" by the NLRA "'to engage in . . . concerted activities' for their 'mutual aid or protection[.]'"[81] The answer to this question, she argues, "should

---

75 *Epic Sys. Corp.*, 138 S. Ct. at 1623.

76 *Id.* at 1624.

77 *Id.* at 1626–27 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

78 *Id.* at 1633 (Ginsburg, J., dissenting).

79 *Id.* (quoting NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984)).

80 *Id.* at 1619 (majority opinion).

81 *Id.* at 1633 (Ginsburg, J., dissenting) (citation omitted) (quoting 29 U.S.C. § 157).

be a resounding 'No.'"[82] The dissent makes essentially two interrelated arguments: first, that the majority has read the NLRA too narrowly, and second, that the majority has read the FAA too broadly.

First, Justice Ginsburg addressed the NLRA. This law, along with its precursor, the Norris-LaGuardia Act, were meant to ensure "that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment."[83] The dissent provided the history of coercive tactics by employers that initially led Congress to pass the NLRA. So-called "yellow-dog contracts" were one-sided agreements employers required employees to sign as a condition of employment that "commanded employees to abstain from joining labor unions."[84] In some ways, mandatory arbitration clauses serve a similar function by foreclosing certain "concerted activities" by employees—namely, class or collective actions. According to Justice Ginsburg, "[s]uits to enforce workplace rights collectively fit comfortably under the umbrella 'concerted activities for the purpose of . . . mutual aid or protection.'"[85] In drafting Section 7 of the NLRA, Congress intended "encompassing legislation" that would protect workers' rights.[86] Its language should be read to encompass access to any procedures that involve concerted activity, even though class and collective actions were not fully developed at the time the NLRA was drafted.[87]

Second, Justice Ginsburg addressed the FAA. In her view, the original intent of the law was "simply to afford merchants a speedy and economical means of resolving commercial disputes."[88] The dissent criticized what it called the majority's drift "away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes" through arbitration. Justice Ginsburg provided a thorough review of the FAA's history.[89] She cited remarks by members of the House and Senate before the FAA's enactment to show that

---

82 *Id.*

83 *Id.* at 1634.

84 *Id.*

85 *Id.* at 1637 (omission in original) (quoting 29 U.S.C. § 157).

86 *Id.* at 1639.

87 *Id.* at 1640.

88 *Id.* at 1643.

89 For further discussion of Justice Ginsburg's dissent, see generally, Farshad Ghodoosi, *Fall of Last Safeguard in Global Dejudicialization: Protecting Public Interest in Business Disputes*, 98 OR. L. REV. 99, 132 (2020); Stephanie Greene & Christine Neylon O'Brien, Epic *Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers' Rights*, 15 STAN. J. C.R. & C.L. 43, 63–66 (2019); Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo-and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2665–66 (2019).

Congress intended the legislation to apply to "voluntary, negotiated agreements."[90] In her view, the Court's "exorbitant application of the FAA" stretched the statute far beyond the contractual disputes it was intended to govern.[91] Over the past few decades, she argued, the Court's interpretation of the FAA's scope has replaced access to the courts with private adjudication in ways that Congress never intended.

While the dissent criticized the Court's "many wrong turns" to expand arbitration, it also did not call for overturning the mountain of FAA precedent.[92] Rather, Justice Ginsburg argued that the FAA and NLRA could be harmonized through the FAA's savings clause. In other words, she would read Section 2 to allow the common law contract defense of illegality to void the arbitration agreement—a solution the majority rejected.

Underpinning her dissent is a major policy concern: the potential for significant underenforcement of federal law. "If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen," she wrote.[93] "Expenses entailed in mounting individual claims will often far outweigh potential recoveries."[94] If employees cannot band together in class proceedings, they will have to fight their claims individually in arbitration.[95] The reality is that many of those claims are simply not worth the legal costs to pursue individually, meaning that potentially meritorious claims will simply never be brought. In this way, employers can effectively insulate themselves from liability.[96] Indeed, legal

---

90 *Epic Sys. Corp.*, 138 S. Ct. at 1643.

91 *Id.* at 1644.

92 *Id.* at 1645.

93 *Id.* at 1647.

94 *Id.*

95 In response to Justice Ginsburg's claim that the Court was trying to return "to the *Lochner* era when this Court regularly overrode legislative policy judgments," Justice Gorsuch retorted that "like most apocalyptic warnings, this one proves a false alarm." *Id.* at 1630 (majority opinion).

96 For his part, Justice Gorsuch was unpersuaded by the dissent, accusing Justice Ginsburg of "relitigating our [FAA] precedents, rehashing arguments this Court has heard and rejected many times." *Id.* In his view, the dissent improperly "imposes a vast construction on section 7's language" based largely on legislative history rather than the actual text of the NLRA. *Id.* at 1631. "Ultimately, the dissent retreats to policy arguments," Justice Gorsuch writes. "It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. . . . The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. . . . The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the [FAA]." *Id.* at 1632.

commentators have generally agreed with Justice Ginsburg that *Epic Systems* will bolster the use of employee arbitration programs, giving more legal shields to employers.[97]

3. *Lamps Plus, Inc. v. Varela*

A second arbitration case worth reviewing in some detail is *Lamps Plus Inc.*, which the Court considered in the subsequent term. That case reveals a similar dynamic on employment arbitration, with the majority again limiting the availability of class remedies.

Frank Varela filed a class action against Lamps Plus, his former employer, accusing the company of releasing confidential employee tax information following a phishing scam that affected approximately 1,300 workers. Varela asserted claims of negligence and breach of contract.[98] However, Varela—like other employees—had signed an arbitration agreement as a condition of his employment.[99] Lamps Plus moved to dismiss the class action and compel individual arbitration with Varela. The district court dismissed the class action, but compelled class arbitration (even though the language of the employment agreement was ambiguous on whether it allowed for class arbitration, or whether it exclusively permitted individual arbitration).[100] The U.S. Court of Appeals for the Ninth Circuit affirmed, finding that under California contract law, the parties' agreement was ambiguous, and further finding that the ambiguity allowed the case to move forward as a class arbitration.

In a 5-4 majority opinion by Chief Justice John G. Roberts, the Court held that an arbitration agreement that is ambiguous regarding the availability of class arbitration does not show sufficient consent by the parties to force that procedure.[101] The agreement between Varela and Lamps Plus included only general language and did not show any evidence that the parties had affirmatively agreed to a class process.

The majority began with the observation that "[t]he FAA requires courts to 'enforce arbitration agreements according to their terms,'"[102]

---

97 Adam Liptak, *Supreme Court Upholds Workplace Arbitration Contracts Barring Class Actions*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/business/supreme-court-upholds-workplace-arbitration-contracts.html [https://perma.cc/NZ77-3P2S].

98 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019).

99 *Id.* at 1413.

100 *Id.*

101 *Id.* at 1416.

102 *Id.* at 1415 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018)).

given that "[a]rbitration is strictly a matter of consent."[103] "Consent is essential under the FAA because arbitrators wield only the authority they are given" and "derive their 'powers from the parties' agreement.'"[104] In traditional individual arbitration, the Court observed, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[105] Class arbitration, the majority found, lacks those benefits; the process is "slower, more costly, and more likely to generate procedural morass than final judgment."[106] In short, "[c]lass arbitration is . . . markedly different from the 'traditional individualized arbitration' contemplated by the FAA."[107]

The Ninth Circuit had relied on the state doctrine of *contra proferentem* that resolves contractual ambiguity against the drafter—here Lamps Plus—to determine that the arbitration provision permitted class arbitration.[108] But given the significant substantive differences between individual arbitration and class arbitration, the Court found, the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a class-wide basis."[109]

Chief Justice Roberts emphasized that this reasoning is consistent with the Court's prior determination in the 2010 case *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[110] which held that a court may not compel class-wide arbitration when an agreement is silent on the availability of such arbitration.[111] "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice' the 'principal advantage of arbitration.'"[112] In short, courts "may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."[113]

---

103 *Id.* (alteration in original) (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010)).

104 *Id.* at 1416 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010)).

105 *Id.* (quoting *Stolt-Nielsen S.A.*, 559 U.S. at 685).

106 *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

107 *Id.* at 1415 (quoting *Epic Sys. Corp.*,138 S. Ct. at 1623).

108 *Id.* at 1417.

109 *Id.* at 1414–15.

110 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)).

111 *Lamps Plus, Inc.*, 139 S. Ct. at 1415–16 (citing *Stolt-Nielsen S.A.*, 559 U.S. at 663).

112 *Id.* at 1416 (alteration in original) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

113 *Id.* at 1419.

Interestingly, the case had four separate dissents. Justice Ginsburg wrote the principal dissent (joined by Justices Breyer and Sotomayor); Justices Breyer and Sotomayor also each wrote their own individual dissents; and Justice Kagan wrote a dissent that Justice Ginsburg joined. We will focus here on the arguments raised by Justice Ginsburg's own dissent, which was her last significant writing on arbitration.

She began by noting that she "write[s] separately to emphasize once again how treacherously the Court has strayed" from the original purpose of the FAA.[114] Quoting her own dissent in *Epic Systems*, she reminded the Court that the FAA's initial goal was "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes."[115] The FAA was not, she argued, meant to cover contracts where one party has no bargaining power.[116]

Justice Ginsburg criticized the Court's trend over recent years to "routinely deploy[ ] the [FAA] to deny to employees and consumers" the ability to pursue their claims against corporations.[117] She noted that the Court's pro-arbitration decisions have resulted in the dramatic expansion of arbitration provisions in employment and consumer contracts. This trend has effectively "hobbled the capacity of employees and consumers to band together in a judicial or arbitral forum."[118] Without the ability to access class remedies, smaller-dollar-value claims are virtually impossible to pursue through individual arbitration because of the legal costs involved.[119]

In her view, Frank Varela is a perfect example of these troubling trends. Varela sought to redress his employer's negligence on behalf of 1,300 fellow employees. "The widely experienced neglect he identified [namely, a data breach] cries out for collective treatment," she wrote.[120] But the majority blocked his path to class arbitration. Employees like Varela lack any meaningful ability to negotiate their employment agreements, resulting in what she calls a "Hobson's choice"—they can

---

114 *Id.* at 1420 (Ginsburg, J., dissenting).

115 *Id.* (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting)).

116 *Id.* ("I doubt that any legislator who voted for [the FAA] expected it to apply . . . to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship." (alterations in original) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42 (1991) (Stevens, J., dissenting))).

117 *Id.*

118 *Id.* at 1421.

119 *Id.* ("Few individuals can afford to pursue small value claims; mandating single-file arbitration serves as a means of erasing rights, rather than enabling their 'effective vindication.'" (quoting Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1888 (2016))).

120 *Id.*

either accept arbitration clauses on the one-sided terms set by the employers who draft the agreements, or they can decline to work.[121] While the majority emphasized that arbitration is based on consent, Justice Ginsburg argued that there is actually no meaningful consent at all; Varela and employees like him were effectively forced to "agree" to arbitrate and waive their class remedies.

Justice Ginsburg concluded her *Lamps Plus* dissent with the same plea from her *Epic Systems* dissent—that the FAA should be amended to prevent the Court's expansive reading of Section 2: "'Congressional correction of the Court's elevation of the FAA over' the rights of employees and consumers 'to act in concert' remains 'urgently in order.'"[122]

C. *The FAA and RBG*

Taken together, Justice Ginsburg's legacy on arbitration jurisprudence reveals both acquiescence and discomfort with the Court's direction. On the one hand, she repeatedly voted to affirm the supremacy of the FAA, writing majority opinions to invalidate conflicting state laws that would have regulated arbitration. On the other hand, she clearly sounded the alarm when the majority began endorsing the use of class action waivers integrated into arbitration provisions. Justice Ginsburg saw this practice as a severe threat to the enforcement of federal law, as well as a threat to employees and consumers who could not effectively or economically pursue their claims without class procedures. Her true legacy in arbitration jurisprudence is likely to rest in these dissents on the Court's march towards arbitral supremacy.

It is worth noting that these arbitration cases are hardly the only—or even the most well-known—examples of Justice Ginsburg's dissents in the context of employment law. In the 2007 case *Ledbetter v. Goodyear Tire & Rubber Co.*,[123] the Court considered whether a female plaintiff could bring a salary-discrimination claim under Title VII of the Civil Rights Act of 1964 when the disparate pay is the result of discriminatory pay decisions that occurred outside the statutory limitations period. The plaintiff, Lilly Ledbetter, worked for Goodyear Tire & Rubber Company in its Alabama plant from 1979 to 1998. As she reached retirement, she learned that she had been paid less than

121 *Id.* at 1421–22.

122 *Id.* at 1422 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting)).

123 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

male colleagues. She then initiated an action for pay discrimination under Title VII and the Equal Pay Act of 1963.[124] The 5-4 majority held that such an action would be time barred, and that Congress enacted the limitations period in order to facilitate the quick resolution of discrimination claims. Reading her dissent aloud from the bench, Justice Ginsburg asserted that "the court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination."[125] She further wrote that "the ball is in Congress' court . . . to correct this Court's parsimonious reading of Title VII."[126] Sure enough, Congress passed the Lilly Ledbetter Fair Pay Act in 2009—the first piece of legislation signed into law by President Barack Obama—amending Title VII to permit the time limitation for an equal-pay lawsuit to reset with each new paycheck affected by discriminatory action.[127]

Epic Systems, *Lamps Plus*, and *Ledbetter* reveal Justice Ginsburg's attention not just to the strict language of the relevant statutes, but also to the ways in which those statutes are experienced in the modern workplace. In the context of arbitration, she proved far more willing than her colleagues to call into question the very notion that most employees "agree" to arbitrate in any conscious or voluntary sense. While her dissents on mandatory arbitration did not yield new legislation, like they did in the employment-discrimination arena, they certainly helped to bolster proposed legislation to amend the FAA—a position that has been part of the official Democratic Party platform since 2016.[128] Moreover, her dissents have ensured that the Court's

---

124 *Id*. at 621–22.

125 Marty Steinberg, *Ruth Bader Ginsburg's Biggest Cases: Equal Pay,* Bush v. Gore *and Insider Trading*, CNBC (Sept. 18, 2020, 10:06 PM), https://www.cnbc.com/2020/09/18/ruth-bader-ginsburg-biggest-cases.html [https://perma.cc/DM8R-TMQ5].

126 *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

127 *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (2009) (codified at 42 U.S.C. § 2000e-5(e)(3)); *see also* Kathleen Peratis, *Rhetoric of Justice Ruth Bader Ginsburg: Brief Comparison of the Language of the Advocate with the Language of the Justice*, 25 COLUM. J. GENDER & L. 35, 37 (2013) ("It is called the Lily [sic] Ledbetter Fair Pay Act, but I have always thought of it as the Ruth Bader Ginsburg Fair Pay Act.").

128 *See* Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); *see also* DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM 4 (2016), https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf [https://perma.cc/YT6E-4DW4]; Brian Farkas, Arbitration on the Ballot: The 2020 Election and Beyond, Presentation at the ABA Section of Dispute Resolution Annual Spring Conference (May 21, 2020) (notes and recording on file with author).

majority would need to squarely contend with employee-focused effects of arbitration.[129]

II. JUSTICE BARRETT AND ARBITRATION

On September 26, 2020, President Trump announced his nomination of then-Judge Barrett to fill Justice Ginsburg's seat.[130] Before delving into her likely impact on the Court's arbitration jurisprudence, a caveat is warranted: the paper trail is relatively sparse. During her fifteen years as a law professor at Notre Dame, then-Professor Barrett primarily focused her teaching and research on federal courts, constitutional law, and statutory interpretation.[131] A review of her academic publications does not reveal any significant writing about arbitration, in the employment context or otherwise. Justice Barrett was subsequently confirmed to the U.S. Court of Appeals for the Seventh Circuit and received her judicial commission on November 2, 2017.[132] With only three years on the bench, we should be wary of making definitive conclusions about her views.[133] However, during her time on the Seventh Circuit, she has heard six cases substantially involving arbitration that do shed some light on her approach.[134]

---

129 *See* Fredrick C. Harris, *Specifying the Mechanism Linking Dissent to Action*, 89 B.U. L. REV. 605, 607 (2009) (describing Justice Ginsburg's dissents, as well as Supreme Court dissents more broadly, and their role in effecting legislative change).

130 Peter Baker & Nicholas Fandos, *Trump Announces Barrett as Supreme Court Nominee, Describing Her as Heir to Scalia*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/09/26/us/politics/amy-coney-barrett-supreme-court.html [https://perma.cc/6WP2-ETG3].

131 *Hon. Amy Coney Barrett*, UNIV. NOTRE DAME, https://law.nd.edu/directory/amy-barrett [https://perma.cc/YCA7-NNUW].

132 *Barrett, Amy Coney*, FED. JUD. CTR., https://www.fjc.gov/history/judges/barrett-amy-coney [https://perma.cc/833S-UUB4].

133 The two most recent Supreme Court nominees—Justice Gorsuch and Justice Kavanaugh—had more developed judicial records, having each served as appellate judges for over a decade prior to their elevation. Justice Gorsuch sat on the U.S. Court of Appeals for the Tenth Circuit from 2006 to 2017, and Justice Kavanaugh sat on the U.S. Court of Appeals for the D.C. Circuit from 2006 to 2018. *See Gorsuch, Neil M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/gorsuch-neil-m [https://perma.cc/74NP-MF6J]; *Kavanaugh, Brett M.*, FED JUD. CTR., https://www.fjc.gov/history/judges/kavanaugh-brett-m [https://perma.cc/YE34-T28L]. Accordingly, each had greater opportunity to develop a predictable jurisprudence in discrete areas such as arbitration.

134 In addition to these six, she authored the opinion in *Webb v. Financial Industry Regulatory Authority, Inc.*, 889 F.3d 853, 855 (7th Cir. 2018). Although that case involved a FINRA arbitration, the legal issues on appeal were not directly connected to arbitration law.

A. *Six Decisions from the Seventh Circuit*

Of the six arbitration-related appeals Justice Barrett heard on the Seventh Circuit, all were unanimous. She authored the opinions in three. Of the three opinions that she joined but did not author, none raised particularly controversial or novel questions of law.

In *Hurn v. Macy's, Inc.*,[135] the per curiam panel affirmed the district court's confirming of an arbitral award. David Hurn, a former Macy's employee, had brought several employment-related claims in arbitration. The arbitrator entered an award for Macy's. Hurn attempted to vacate that award in the district court, but the judge confirmed it. On appeal, Hurn claimed that the arbitrator did not permit him to ask a particular question at the hearing, that the arbitrator fell asleep during the hearing, and that the arbitrator was generally biased against him. The Seventh Circuit found that none of these arguments supported vacating the award under Section 10(a) of the FAA, particularly given that Hurn was unable to offer any evidence of bias or any instance of prejudice.

In *Betts v. United Airlines, Inc.*,[136] the per curiam panel considered an appeal by Kathleen Betts, an airline pilot who was fired after twice failing alcohol tests. She challenged her termination in an arbitration, which she lost, and then sued to vacate the award. Her lawsuit relied primarily on a provision of the Railway Labor Act; however, the district court found no basis to sidestep the "deferential standard" applied to review of the award. The Seventh Circuit agreed with the district court that Betts "presented no valid reason to disturb the award."[137]

In *Brock Industrial Services, LLC v. Laborers' International Union Construction & General Laborers Local 100*,[138] the Seventh Circuit unanimously reversed the denial of a motion to vacate an arbitration award. Brock Industrial Services, LLC—an Illinois-based provider of scaffolding, painting, insulation, and shoring—had entered into a labor agreement with Local 100 of the Laborers' International Union, which required arbitration of grievances and established a specific procedure for such proceedings. However, the agreement established a somewhat different arbitration procedure for disputes about whether these particular laborers or another union was entitled to perform certain work. The district court found that the first procedure should apply to

---

135 Hurn v. Macy's, Inc., 728 F. App'x 598 (7th Cir. 2018) (facts drawn from opinion).

136 Betts v. United Airlines, Inc., 768 F. App'x 577 (7th Cir. 2019) (facts drawn from opinion), *reh'g denied* (May 30, 2019), *cert. denied*, 140 S. Ct. 2659 (2020).

137 *Id*. at 578.

138 Brock Indus. Servs., LLC v. Laborers' Int'l Union Constr. & Gen. Laborers Loc. 100, 920 F.3d 513 (7th Cir. 2019) (facts drawn from opinion).

a particular dispute, confirming that arbitration panel's award, but the Seventh Circuit reversed, finding that only the second procedure was appropriate. The outcome turned largely on the language of the parties' contractual agreements.

In the three arbitration-related cases for which Justice Barrett actually authored the opinion, one was relatively straightforward. In *Goplin v. WeConnect, Inc.*,[139] the Seventh Circuit unanimously affirmed the district court's denial of an employer's motion to compel arbitration. Brooks Goplin worked for WeConnect, Inc. When he began at the company, he signed a document called the "AEI Alternative Entertainment Inc. Open Door Policy and Arbitration Program"—an arbitration policy that repeatedly referred to an entity called "AEI" rather than "WeConnect." Goplin brought a collective action against WeConnect in federal court, alleging violations of the FLSA. WeConnect sought to dismiss the case and compel arbitration, arguing that "AEI" was the company's former name. WeConnect tried to argue that it was indeed a party to the arbitration agreement, despite the use of the former name. But the district court found that it failed to meet its burden that the two corporate names were actually the same entity. WeConnect then moved the district court for reconsideration, which the court denied. On appeal, Justice Barrett wrote that the court "will only reverse a district court's finding of fact if it is clearly erroneous"—which was not the case here.[140] Rather, the district court evaluated the evidence before it, and made a finding regarding the nature of WeConnect's corporate status in relation to the arbitration agreement. Accordingly, its decision was affirmed. Justice Barrett did not opine on the FAA or anything regarding the arbitration agreement itself. While this decision is, in some sense, "against" arbitration, it also supports the fundamental notion that arbitration is a "creature of contract" between the named parties—a principle that courts have long recognized.[141]

Her two remaining arbitration-related cases are somewhat more involved. In *Herrington v. Waterstone Mortgage Corp.*,[142] Justice Barrett wrote for a unanimous three-judge panel on an issue of arbitrability—the gateway question of whether a particular dispute can be subject to

139 Goplin v. WeConnect, Inc., 893 F.3d 488 (7th Cir. 2018) (facts drawn from opinion), *cert. denied*, 139 S. Ct. 810 (2019).

140 *Id*. at 490.

141 *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring).

142 Herrington v. Waterstone Mortg. Corp., 907 F.3d 502 (7th Cir. 2018) (facts drawn from opinion).

arbitration.[143] The case concerned the arbitration of FLSA claims Pamela Herrington brought against Waterstone Mortgage Corporation, her former employer. The district court had initially compelled arbitration of the claims and instructed the arbitrator to conduct a collective proceeding to include the claims of other employees. The arbitrator awarded ten million dollars to her and 174 similarly situated employees. However, the U.S. Supreme Court then decided *Epic Systems*, which permitted class waivers in the employment context. Herrington's employment agreement with Waterstone included the provision that "[any] arbitration may not be joined with or join or include any claims by any persons not party to this Agreement."[144]

The question for the Seventh Circuit was whether the issue of arbitrability should be decided by arbitrator or the district court. Herrington argued that Seventh Circuit precedent precluded treating the availability of class or collective arbitration as an issue of arbitrability—that is, consolidating arbitrations into a single proceeding should be treated identically as holding a class or collective arbitration. The panel disagreed, holding that the consolidation of separate claims is fundamentally not the same as a process that includes class representatives. Accordingly, the Seventh Circuit vacated the district court's order enforcing the arbitral award and remanded the case to conduct a threshold inquiry to determine whether Herrington's agreement authorizes class arbitration. Importantly, the district court was ultimately still free to confirm the award so long as the award was based on the agreement's language. However, the arbitrability determination needed to come first. The upshot is that the availability of class or collective arbitration is a threshold question of arbitrability for the court to evaluate based on the terms of the contract, unless the parties unmistakably delegated the question to the arbitrator. This decision largely accords with numerous other circuit courts.[145]

Finally, in *Wallace v. Grubhub Holdings, Inc.*,[146] Justice Barrett once again wrote for a unanimous three-judge panel on a matter concerning employment arbitration. This consolidated appeal involved Grubhub, an online delivery service that allows customers to order food from a variety of restaurants through its website and app. Food delivery drivers work for Grubhub as independent contractors—not employees

143 For a general discussion of arbitrability, *see* David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323 (2019).

144 *Herrington*, 907 F.3d at 504.

145 The case has already been favorably cited by the Ninth Circuit in *Shivkov v. Artex Risk Solutions Inc.*, 974 F.3d 1051 (9th Cir. 2020).

146 Wallace v. Grubhub Holdings, Inc., 970 F.3d 798 (7th Cir. 2020) (facts drawn from opinion).

who would be entitled to the protections of the FLSA. The plaintiffs were drivers in various cities who argued that they should, in fact, be covered by the FLSA and therefore entitled to overtime pay. However, each driver "had signed a 'Delivery Service Provider Agreement' that required them to . . . arbitrat[e] . . . 'any and all claims' arising out of their relationship with Grubhub."[147] Grubhub moved to compel arbitration. The delivery drivers opposed, arguing that they are exempted from the FAA because they qualify as one of the statute's exempted categories of workers. Section 1 of the FAA provides, in relevant part, that "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."[148] Two district courts rejected the argument that the delivery drivers fell into that residual category of "workers engaged in foreign or interstate commerce," and thus compelled them to arbitration.[149] On appeal, the Seventh Circuit affirmed.

Justice Barrett's opinion began by recounting the general standards that apply to arbitration, generously citing *Concepcion* and *Epic Systems*. She emphasized that "the FAA sweeps broadly" to achieve a liberal policy favoring arbitration.[150] She then engaged in a textualist reading of Section 1 to show why the delivery drivers should not qualify, noting that Section 1 contains two enumerated categories of workers—"seamen" and "railroad employees"—as well as a residual category of "any other class of workers engaged in foreign or interstate commerce."[151] Obviously, Grubhub drivers are neither seamen nor railroad workers. But are they a "class of workers engaged in foreign or interstate commerce"?

To determine the meaning of that residual category, Justice Barrett—again showing her textualist inclinations—wrote that "our inquiry 'begins with the text.'"[152] Much of her analysis centered on the 2001 case, *Circuit City Stores, Inc. v. Adams*,[153] the Supreme Court's most comprehensive analysis of Section 1 of the FAA. There, the plaintiff had argued that Section 1 should broadly encompass all categories of employment contracts within Congress's commerce power, which would have essentially left the FAA applicable only to commercial arbitration. The Court had rejected that argument, finding

147 *Id.* at 799.

148 9 U.S.C. § 1.

149 *Wallace*, 970 F.3d at 799.

150 *Id.* at 800 (citation omitted).

151 9 U.S.C. § 1.

152 *Wallace*, 970 F.3d at 800 (quoting Ross v. Blake, 136 S. Ct. 1850, 1856 (2016)).

153 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

instead that Section 1's residual category applies only to workers engaged in the movement of goods in interstate commerce.[154] The narrower reading makes more sense in context, the majority held. After all, if the residual category applied to essentially all workers, there would have been no reason to specifically identify "seamen" and "railroad employees" separately in the beginning of the clause. Applying *Circuit City*, Justice Barrett cited a book on judicial interpretation co-authored by her old boss, Justice Scalia, for the proposition that "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."[155]

She then explored whether the delivery workers meet the definition of a class of workers whose central job involves the interstate movement of goods. The plaintiffs focused their arguments on the wrong question—whether they sometimes carry goods that move across state lines. "As they see it, the residual exemption is not so much about what the worker does as about where the goods have been," the court wrote, referencing the possibility that a bag of potato chips may have crossed several states before landing in a delivered meal.[156] But this is not enough to bring the delivery drivers into the ambit of Section 1. Rather, "[their] occupations [must be] centered on the transport of goods in interstate or foreign commerce."[157] Justice Barrett applied the Supreme Court's instruction in *Circuit City* that Section 1's exceptions must "be controlled and defined" rather than expansive.[158]

In sum, Justice Barrett found that Section 1's exception was too narrow to fit these plaintiffs. The plaintiffs ultimately could not demonstrate that "the interstate movement of goods is a central part of the job description of the class of workers to which they belong"—nor did they "even try to do that" in the district court proceedings.[159] Accordingly, the district courts were affirmed.

How might Justice Ginsburg have addressed this case differently? That is a difficult question to answer. But we do know that she joined two separate dissents in *Circuit City* by both Justice David Souter and Justice John Paul Stevens. Justice Stevens's dissent heavily criticized "the Court's parsimonious construction of § 1 of the [FAA]"—a

---

154 *Id.* at 121.

155 *Wallace*, 970 F.3d at 801 (alteration in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012)).

156 *Id.* at 802.

157 *Id.*

158 *Id.* at 801 (quoting *Circuit City*, 532 U.S. at 106).

159 *Id.* at 803.

construction that "is not consistent with its expansive reading of § 2."[160] Put differently, the Court broadly construed the command that arbitration "shall be valid, irrevocable, and enforceable" in Section 2, but narrowly construed the types of workers who should be excluded from the FAA's scope in Section 1. Justice Ginsburg therefore may have considered the arguments of the delivery drivers in a different light; perhaps Congress *did* intend to exclude workers who bring goods across state lines, as opposed to merely categories of workers whose jobs are "centered on transport" as Justice Barrett held. In other words, Justice Ginsburg may have adopted a less "parsimonious" reading of Section 1.

B. *The FAA and ACB*

What could Justice Barrett's six arbitration-related decisions mean for the future of the Supreme Court? For three reasons, the answer is "probably nothing." First, six cases hardly provide a robust data set from which to extrapolate. Second, circuit judges are bound by Supreme Court precedent. It is fully possible that Justice Barrett's opinions in her prior role represented a faithful application of existing law, rather than a statement of her own views—especially given that all six cases were unanimous.[161] And third, her opinions do not attempt to shift or critique existing law; rather, they enforce the holdings of Supreme Court precedent without criticism.

Considering the six cases in totality, they do show a general stance favoring mainstream arbitration law. *Hurn* and *Betts* enforced arbitral awards; *Brock* and *Goplin* were "pro-arbitration" in the sense that their analyses turned on the language of the arbitration agreements; and *Herrington* and *Wallace* applied existing Supreme Court precedent on

---

160 *Circuit City*, 532 U.S. at 124 (Stevens, J., dissenting).

161 As a law professor at Notre Dame, Justice Barrett wrote extensively on stare decisis, an important interpretative doctrine regarding the application of precedent to the facts of a new case. The doctrine has two basic forms: "vertical" stare decisis is a court's obligation to follow the precedent of a superior court, and "horizontal" stare decisis, is a court's obligation to follow its own precedent. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712–13 (2013) ("In the Supreme Court, stare decisis is a soft rule; the Court describes it as one of policy rather than as an 'inexorable command.'" (quoting Payne v. Tennessee, 501 U.S. 808, 827–28 (1991))). Justice Barrett has argued that, while courts should be conscious of the reliance that litigants place on precedent, they should nevertheless apply "flexibility" in cases where "a litigant demonstrates that a prior decision clearly misinterprets the statutory or constitutional provision it purports to interpret." Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1075 (2003). In such cases, "the court should overrule the precedent." *Id.* At the very least, one can conclude that Justice Barrett has thought deeply about the question of when the Supreme Court can shift its own precedent, and has concluded that there are instances when it is appropriate to set aside stare decisis.

questions of arbitrability and FAA exclusions, respectively.[162] Justice Barrett faithfully cited significant FAA decisions like *Circuit City*, *Concepcion*, and *Epic Systems* without any hint of critique. Moreover, her decisions represent a comfort with curtailing class and collective procedures. In *Herrington*, for example, she noted the "reduced efficiency" of non-individual proceedings.[163] In short, her views would seem to fit comfortably within existing doctrine.

As part of the Supreme Court confirmation process, Justice Barrett's written responses to questions of members of the Senate Judiciary Committee provide a similar perspective.[164] Four Senators (all Democrats) posed questions that touched on arbitration: Kamala Harris, Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono.[165] In sum, the questions all asked Justice Barrett to comment on Supreme Court precedent. Her responses were largely non-substantive. For example, in response to a question from Senator Blumenthal about potential power imbalances between workers and corporations in forming arbitration agreements, Justice Barrett wrote: "This question calls for my views on a matter of public policy. As a sitting judge, it would be inappropriate for me to offer an opinion on the matter."[166] In response to a question from Senator Hirono about *Epic Systems*, Justice Barrett wrote: "This question calls for my views on both the soundness of a Supreme Court precedent and how that precedent should apply in future litigation. As a sitting judge and as a judicial nominee, it would be inappropriate for me to opine on either issue."[167]

In sum, neither her six Seventh Circuit cases nor her Senate questionnaire demonstrates disagreement with existing law. (In her first year on the Supreme Court, she has also not yet had the opportunity to comment on any significant arbitration cases).

Having said that, there is one way in which she could have an important impact on arbitration jurisprudence: Justice Barrett clerked for Justice Scalia, who himself has an interesting history with

---

162 *See supra* Section II.A.

163 Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 509–10 (7th Cir. 2018). Interestingly, Justice Barrett also described "arbitration's primary detriment" as being "a drastically narrowed ability to seek error correction through appellate review." *Id.* (footnote omitted). This is an interesting and somewhat surprising observation for her to make; it is more common for finality to be described as a *benefit*, rather than a *detriment*, of arbitration.

164 Nomination of Amy Coney Barrett to the U.S. Supreme Court: Questions for the Record, Submitted October 16, 2020, https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/73HW-JMJX].

165 *See generally id.*

166 *Id*. at 142–43.

167 *Id*. at 152.

arbitration. Recall that, since *Southland Corp. v. Keating*[168] in 1984, the Court has held that the FAA preempts conflicting state laws.[169] The precedent created by *Southland* has been used to strike down state legislation in both traditionally "red" and traditionally "blue" states that have tried to regulate or curtail arbitration.[170]

Justice Scalia's dissenting views in *Allied-Bruce Terminix Cos., v. Dobson*[171] are instructive. There, the Court invalidated an Alabama statute that made pre-dispute arbitration agreements invalid and unenforceable. That statute, the majority held, was preempted by the FAA. The FAA applies to all disputes "involving commerce"—even where the dispute in question was seemingly local and the parties themselves did not contemplate interstate commerce—and thus the arbitration agreement at issue in the case was valid and enforceable.

Justice Thomas dissented, and was joined by Justice Scalia.[172] Justice Thomas' dissent rejected the threshold issue of whether the FAA should apply at all, adopting the arguments that Justice O'Connor made in her dissent in *Southland*. Like Justice O'Connor, Justice Thomas did not (and still does not) believe that the FAA was intended to displace state statutes in state courts.[173]

Justice Scalia joined in Justice Thomas' dissent, but he also wrote separately, stating that he would be willing to overturn *Southland*, because that case "entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."[174] However, Justice Scalia further stated that he "shall not in the future dissent from judgments that rest on *Southland*."[175] This stands in contrast to Justice Thomas, who has continued to dissent in each subsequent decision based upon *Southland*.[176]

---

168 Southland Corp. v. Keating, 465 U.S. 1 (1984).

169 *See supra* Section I.A.

170 For a helpful discussion of the politics of FAA preemption, *see generally* Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. LEGIS. 711 (2016); Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711 (2015); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013).

171 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

172 *Allied-Bruce Terminix Cos.*, 513 U.S. at 285 (Thomas, J., dissenting).

173 For a detailed discussion of Justice Thomas's views on the FAA, see generally Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOT. L. REV. 33 (2016).

174 *Allied-Bruce Terminix Cos.*, 513 U.S. at 284–85 (Scalia, J., dissenting).

175 *Id.* at 285.

176 Farkas, *supra* note 173, at 61–73 (analyzing Justice Thomas' consistent rejection of *Southland*).

What do these squabbles have to do with Justice Barrett? If Justice Barrett shares her judicial mentor's skepticism of *Southland* and aligns herself proactively with Justice Thomas, the Court could see renewed interest in overturning or limiting *Southland*. If three more Justices could be convinced—not necessarily an impossible task—the upshot could be that individual states would have greater liberty to pass laws that regulate or curtail arbitration. Again, such regulation has been attempted in both "liberal" and "conservative" jurisdictions alike, but has been shot down by FAA preemption.

All of this is pure speculation. Justice Barrett has not stated publicly any views on FAA preemption. However, her writing and speaking *has* often engaged with—what she has called—"the question of who decides."[177] That is, who makes which decisions within a federal republic? Like Justice Thomas and Justice Scalia, Justice Barrett clearly sees the value in states' ability to decide many policy questions.

Undoubtedly, Justice Ginsburg and Justice Barrett may approach FAA cases differently. But one could imagine that they may actually align on the question of whether the FAA prevents an individual state from regulating arbitration in some ways—for example, by passing a law to prohibit arbitration of sexual harassment claims.[178] Time will tell whether Justice Barrett adopts a states-rights-focused view of the FAA in the spirit of Justices Scalia and Thomas.

CONCLUSION

Two popular images of Justice Ginsburg emerged after her passing. In one image, her former colleagues and clerks described her as the

---

177 *A Conversation with Amy Coney Barrett*, HILLSDALE COLLEGE (May 21, 2019), https://www.hillsdale.edu/conversation-with-amy-coney-barrett [https://perma.cc/YV6R-QJFB].

178 In the wake of the #MeToo Movement, numerous states have enacted such legislation, including Arizona, California, New York, New Jersey, Pennsylvania, and Washington—despite the likelihood that these statutes will soon be struck down as preempted under current FAA doctrine. For more discussion on the relationship between the #MeToo Movement and mandatory arbitration, see Jamillah Bowman Williams, Lisa Singh, & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 386 (discussing the rise of so-called "#MeToo Bills" to prohibit mandatory employment arbitration of discrimination claims in various jurisdictions). *See also* Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 59 (discussing proposed legislation); *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements [https://perma.cc/N7RL-YC25]; Brian Farkas, *The Life and Death of CPLR 7515: New York's Attempt to Prohibit Mandatory Arbitration of Sexual Harassment Claims*, 14 NEW YORK DISPUTE RESOLUTION LAWYER 18 (Fall 2021), https://nysba.org/new-york-dispute-resolution-lawyer-vol-14-no-2/ [https://perma.cc/HE8J-42AX].

hardest working person they had ever known, attentive to every detail, reading studiously into the wee hours of the morning, and supremely attentive to the granular rules of civil procedure. In the other image, described by politicians and pundits, she was a populist folk hero, crusading tirelessly for equal rights. Less a technocrat than a superhero.

Arbitration probably sounds about as tedious to most Americans as Swedish civil procedure.[179] Justice Ginsburg's writing on arbitration has not exactly been the focal point of any celebrations of her legacy. Yet her arbitration jurisprudence represents the happy confluence of those two popular images. She saw the connections between procedural and substantive justice—a steadfast belief that defective procedures cannot produce fair outcomes.

The Supreme Court will miss Justice Ginsburg's voice on these subjects, not necessarily because she persuaded the majority to shape the law, but because her dissents served as a continuing critique of arbitration's expansion within our legal system. Undoubtedly, the remaining members of the Court's liberal wing will pick up Justice Ginsburg's mantle. Whether 5-4 or 6-3, this group is unlikely to alter the Court's direction on employment and consumer arbitration in the near future. This is not to say that her ink was wasted, however. "Dissents speak to a future age," Justice Ginsburg famously said.[180] "It's not simply to say, '[m]y colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant view."[181]

From what we know of Justice Barrett, she is likely to continue walking in the Court's current path to strengthen and expand arbitration. Although she heard only six arbitration-focused cases on the Seventh Circuit, she faithfully applied existing precedent from cases like *Circuit City*, *Concepcion*, and *Epic Systems*. Her opinions ultimately resulted in bolstering of arbitration in the employment law context. Some (like the current majority) would argue that these decisions support Congress' intended policy that liberally favors the private resolution of disputes. Others (like Justice Ginsburg) would argue that these decisions come at the expense of workers' ability to hold management accountable through collective actions.

---

179 Following her clerkship in the U.S. District Court for the Southern District of New York, Justice Ginsburg accepted a position at Columbia Law School to research and write about Swedish civil procedure. Between 1963 and 1970, she "published more than a dozen books and articles on the Swedish legal system." Cary Franklin, *Justice Ginsburg's Advocacy and the Future of Equal Protection*, 122 YALE L.J. ONLINE 227, 229 n.5 (2013).

180 Derrick Wang, *Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions*, 38 COLUM. J.L. & ARTS 239, 281 n.207 (2015).

181 *Id.*

Of the many compelling articles in this special edition of the *Cardozo Law Review*, I suspect this is one piece that most readers will skip. When talking about the Supreme Court, the sexy constitutional topics are the ones that draw eyeballs. No normal person looks at Justice Ginsburg's expansive legacy and immediately thinks about arbitration clauses buried in the fine print of dusty contracts. No normal person looks at Justice Barrett's appointment and immediately considers the impact of her tenure on the interpretation of those clauses. Bigger fish to fry.

But Supreme Court legacies are built not only in sweeping narratives of moral clarity. Progressivism and conservativism, federalism and anti-federalism, equality and discrimination. They are also fought in the details—procedural rules, contractual clauses, jurisdictional battles. Legal minutia that will never make the front page. Here, too, in the quiet corners of the law where most will never look, she was Notorious.