

2019

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### Recommended Citation

Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, 2019 J. Disp. Resol. (2019)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2019/iss1/11>

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# All Balls and No Strikes: The Roberts Court's Anti-Worker Activism

*J. Maria Glover\**

“Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire.” ... “And I’ll remember that it’s my job to call balls and strikes and not pitch or bat.”<sup>1</sup>

For decades, legislatures and courts have created and preserved rights and remedies for vulnerable groups—consumers, employees, victims of mass torts, investors, and the like. Both branches have extolled the virtues of these substantive rights and the private enforcement mechanisms required to effectuate them. However, despite statements like that of Justice Roberts and others that the judiciary is not a lawmaking body—indeed, that the judicial institution should take care to exercise restraint<sup>2</sup>—the Roberts Court has engaged in sweeping reform that tends to extinguish these substantive rights.

In 2012, I traced how the Roberts Court paid scant attention to the integral role private enforcement plays in various regulatory frameworks in which given substantive laws operate.<sup>3</sup> By reducing or eliminating mechanisms of private enforcement, I argued, entire swaths of substantive law would go woefully under-enforced. Since that time, the Roberts Court’s civil justice and procedural jurisprudence—jurisprudence that has brought about systematic retrenchment of substantive

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1. *Roberts’s Opening Statement Before Senate Panel*, N.Y. TIMES, Sept. 12, 2005, available at <https://www.nytimes.com/2005/09/12/politics/politicsspecial/robertss-opening-statement-before-senate-panel.html>.

2. “The role of a practicing attorney is to achieve a desirable result for the client in the particular case at hand. But a judge can’t think that way. A judge can’t have any agenda. A judge can’t have any preferred outcome in any particular case and a judge certainly doesn’t have a client. The judge’s only obligation, and it’s a solemn obligation, is to the rule of law. And what that means is that in every single case the judge has to do what the law requires.”

*Judge Alito’s Opening Statement*, N.Y. TIMES, Jan. 9, 2006, available at <https://www.nytimes.com/2006/01/09/politics/politicsspecial1/judge-alitos-opening-statement.html>.

“But my decisions have never reflected a judgment about the people before me — only my best judgment about the law and the facts at issue in each particular case. For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for the policy results he prefers rather than those the law compels.”

*Here’s Judge Gorsuch’s Full Opening Statement*, NBC NEWS, Mar. 20, 2017, available at <https://www.nbcnews.com/news/us-news/here-s-judge-gorsuch-s-full-opening-statement-n735961>.

“A good judge must be an umpire—a neutral and impartial arbiter who favors no litigant or policy.” *Judge Brett Kavanaugh’s Opening Statement: Full Prepared Remarks and Video*, N.Y. TIMES, Sept. 4, 2018, available at <https://www.nytimes.com/2018/09/04/us/politics/judge-brett-kavanaughs-opening-statement-full-prepared-remarks.html>.

3. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1143 (2012).

rights<sup>4</sup>—reveals that the Roberts Court is not so much *inattentive* to the exigencies of various regulatory frameworks. Instead, the Roberts Court jurisprudence tends to reveal an affirmative deregulatory aim.

Far from merely calling balls and strikes, and in opinions involving questions as varied as ones about class-action rule interpretation, the permissibility of collective action waivers in arbitration agreements, the ability to opt out of collective bargaining dues on First Amendment grounds, standing, and others, the Roberts Court has achieved sweeping deregulation in the past decade. As has been traced in the literature, these deregulatory effects have been particularly pronounced in the area of consumer law.<sup>5</sup> Moreover, the deregulatory effects for the underlying substantive regimes have often been achieved through somewhat indirect, procedural decision-making, but those effects have been almost as significant as if the Court had simply re-written the particular rights-bearing statutes.<sup>6</sup>

During October Term 2017, the Court moved beyond consumer law and ramped up its efforts to effectuate deregulation of employment law. Whatever protections workers have enjoyed throughout our nation's history have been secured in large part through private enforcement.<sup>7</sup> And to be sure, on their faces, critical workplace protection laws like Title VII and the Fair Labor Standards Act ("FLSA")—both of which rely almost exclusively on private litigation for their effectuation—remain completely intact. However, in three critical (but less-blockbuster-than-*Masterpiece Cakeshop*) cases—*Janus v. American Federation of State, County, and Municipal Employees, Epic Systems v. Lewis*, and *Encino Motorcars*—the Court in back-to-back 5-4 rulings stripped workers of mechanisms to pursue their rights against employers who commit wrongs in the workplace. Both history and present experience teach us that the Court's recent opinions will help eliminate the regulatory apparatus for workplace injury, and private employers will enjoy increased ability to essentially rewrite their obligations under substantive law through procedural vehicles.

This essay proceeds as follows: Part A traces the Court's employment law jurisprudence from October Term 2017. Part B discusses the regulatory consequences of these opinions and argues that the Court's opinions this past term reflect political commitments that favor and disfavor certain types of claims and claimants.

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4. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 34 (2017).

5. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2007); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015).

6. As I have discussed in prior work, deregulation through procedural decision-making tends to go unnoticed given the significantly lower political salience associated with procedural issues. The Court engages in misdirection when it fails to own up to the substantive implications—and motivations—of these "procedural" decisions. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015).

7. See, e.g., SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).

A. THE SUPREME COURT'S OCTOBER TERM 2017 EMPLOYMENT  
JURISPRUDENCE

The Supreme Court's efforts to curtail mechanisms of private enforcement of substantive rights have been building for at least a decade now. The Court has introduced heightened pleading requirements,<sup>8</sup> restricted the class action device,<sup>9</sup> restricted the reach of state laws through broad pre-emption holdings,<sup>10</sup> and encouraged the recalibration of remedial schemes through private procedural ordering via contract<sup>11</sup>—just to name a few. As I have argued previously, in certain areas of the substantive regulatory landscape, curtailing these mechanisms is not inappropriate.<sup>12</sup> The extent to which private enforcement mechanisms ought to be curtailed, preserved, or perhaps extended depends in no small part upon the overall regulatory apparatus in which various substantive laws operate. Private enforcement mechanisms and the ability to effectuate substantive rights through adjudicative processes will range from being critical to perhaps unnecessary depending on the structure of a given regulatory set-up. However, the Court's efforts to restrict private enforcement mechanisms have been broad-sweeping and agnostic to—even at times willfully indifferent to—the exigencies of the relevant regulatory apparatus involved. The Court's recent employment law decisions suggest that there is more to this deregulatory trend than perceived indifference; instead, deregulation is the desired objective of the conservative majority, which has often demonstrated a willingness to abandon conservative jurisprudential methodology to achieve that objective.

In three cases, all decided October Term 2017, the Supreme Court effectuated a fundamental restructuring of the regulatory apparatus for labor and employment law. In the first, *Epic Systems*, the Court held that a mandatory arbitration provision, contained in a contract between an employee and her employer, was enforceable against that employee under the Federal Arbitration Act (“FAA”), even when that provision prohibited the employee from bringing her claims in a class action proceeding.<sup>13</sup> Accordingly, a class action brought in federal court by employees under, say, the FLSA and state laws for the underpayment of wages, must be dismissed and sent to arbitration as soon as the employer files the inevitable Motion to Compel (individualized) Arbitration. In so holding, the Court rejected the employees' argument, adopted by the Ninth Circuit below, that the FAA could not be interpreted to violate another federal statute, here, the National Labor Relations Act (“NLRA”). The NLRA guarantees workers various protections, including protection against an

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8. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (heightening the federal pleading standard for complaints to “plausible,” and not merely “possible” or “conceivable”); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (clarifying that *Twombly*'s heightened pleading standard applies to all federal cases).

9. See *AT&T Mobility v. Concepcion*, 563 U.S. 333, 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.... [a]nd the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that the Federal Arbitration Act does not allow courts to invalidate waivers of class action arbitration where the plaintiff's cost of litigating a statutory claim separately from the class would exceed the likely recovery).

10. See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempted California state law permitting the invalidation of arbitration agreements).

11. Glover, *The Structural Role of Private Enforcement Mechanisms*, *supra* note 3; see also Jaime Dodge, *The Limits of Private Procedural Ordering*, 97 Va. L. Rev. 723 (2011).

12. Glover, *The Structural Role of Private Enforcement Mechanisms*, *supra* note 3.

13. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

employer prohibiting an employee from engaging in “concerted activities for the purpose of . . . other mutual aid or protection.”<sup>14</sup> By prohibiting collective proceedings, the mandatory arbitration agreement conflicted with the NLRA’s guarantee of employees’ ability to engage in concerted activities free from employer restraints in their pursuit of substantive rights under the FLSA.<sup>15</sup>

The blow to private enforcement through the FLSA and other workplace-related rights effectuated by *Epic Systems* is substantial, yet unsurprising. *Epic Systems* is just the latest in a series of decisions in which the Court not only reinforced its robust commitment to unfettered freedom of contract<sup>16</sup> but also ignored conflicts between the FAA—a “procedural” statute<sup>17</sup>—and the text of other federal statutes, like the FLSA, or the Sherman Antitrust Act, that provide substantive rights of action. In *Epic Systems*, by essentially ignoring the text of the FLSA and extending to the employment context its robust embrace of private contractual arbitration, regardless of procedural restrictions that impede the effectuation of substantive rights, the Court helped close the courthouse doors to another group of litigants—this time, wage-and-hour workers, by and impeding their ability to pursue their substantive statutory rights.<sup>18</sup>

14. 29 U.S.C. s. 157.

15. In practice, employee collective actions to protect their NLRA rights by means conceptually similar to those employed in *Epic Systems* have been upheld by the National Labor Relations Board (NLRB) and the courts for over seventy-five years, a point the dissent noted but which the majority dismissed. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1638-39 (Ginsburg, J., dissenting). Justice Ginsburg notes in her dissent that the NLRB had previously found the following examples, among others, to constitute concerted activity protected by the NLRA: employees jointly filing a FLSA suit; FLSA suits brought on behalf of a class; employees filing a class libel suit; employees filing a class suit with respect to break times; and employees’ class actions about wages. See *id.* (citing cases). The dissent asserts emphatically that, in its haste to reach its result, the majority pays no heed to the fact that the collective bargaining protection in Section 7 is substantially the same as these prior cases.

16. See Glover, *Disappearing Claims*, *supra* note 5.

17. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (Ginsburg, J., dissenting) (pointing out the canon of statutory interpretation that procedural statutes may not override other substantive federal statutes). See also J. Maria Glover, *The Supreme Court’s “Non-Transsubstantive” Class Action*, 165 U. PA. L. REV. 1625 (2017); William Eskridge & John Ferejohn *Super-Statutes*, 50 DUKE L. J. 1215, 1263 (2001) (contending that the Supreme Court has converted the FAA into a super-statutory scheme, making it more powerful than other substantive statutes valued more highly by prior court).

18. In January of 2019, less than one week before this essay went to print, the Supreme Court decided *New Prime v. Oliveira*, No. 17-340 (Jan. 15, 2019), a relatively narrow employment arbitration case. In *New Prime*, however, the Court shocked lawyers and legal observers alike by siding with a worker over a corporation in a case involving the Federal Arbitration Act. See, e.g., Mark Joseph Stern, *The Supreme Court Just Handed a Big, Unanimous Victory to Workers. Wait, What?*, SLATE (Jan. 15, 2019), available at: <https://slate.com/news-and-politics/2019/01/gorsuch-arbitration-labor-new-prime-oliveira.html> Ian Millhiser, *Neil Gorsuch Pens a Devastating Takedown of His Most Important Opinion: Neil Gorsuch Dunks on Neil Gorsuch* (Jan. 17, 2019), available at <https://thinkprogress.org/gorsuch-contradiction-arbitration-cases-896a5e28805d/> (noting that the likelihood of the Court siding with a worker over a corporation in an arbitration case “happens about as often as a unicorn wins the Powerball lottery while simultaneously being struck by lightning.”) In contrast with its decision in *Epic Systems* and its other arbitration decisions over the last decade, the Court’s opinion in *New Prime* hewed strictly to conservative jurisprudential methodology by homing in on the text and original meaning of the Federal Arbitration Act. While the import of this decision remains to be seen, the narrowness of the facts and the holding makes this an opinion of somewhat limited impact on the areas of employment and arbitration law. To be sure, on the one hand, *New Prime* seems to stand for the notion that there is an outer limit to how far the Court is willing to go in ignoring the text of the Federal Arbitration Act. However, *New Prime* creates uncertainty as to precisely when, and in what contexts, the conservative members of the Court will reach that limit; when the conservative members of the Court will hew to conservative jurisprudential methodology—as demonstrated by the adherence to textualism in *New Prime*—and when they will abandon it.

In a second decision, *Janus*, the conservative members of the Court engaged in an aggressive interpretation of the right to free speech and expression embodied in the First Amendment in order to reduce employee access to collective action, diminish employee power at the bargaining table, and advance employer-based economic and (de)regulatory policy. At issue in *Janus* was the legal framework for union fees in Illinois. Under Illinois law, public government employees may unionize; moreover, if a majority of those employees vote to be represented by the union, that union becomes the exclusive bargaining representative for the employees, even those who are not members of the union. Given that exclusive bargaining designation, Illinois law permits unions to charge “agency fees” to non-members—a percentage of member dues—to cover the costs of exclusive representation.<sup>19</sup> The Supreme Court, in another 5-4 decision, held that the “agency fee” provision of the Illinois law was unconstitutional under the First Amendment, on the grounds that it compelled non-members to support collective activities and expression to which they might object.<sup>20</sup> The Court’s decision in *Janus* threatens to hasten the financial collapse of unions that provide the benefits of representation to all employees,<sup>21</sup> and represents another piece in a long campaign by the Court and private advocates to restructure employment law—here, not through interpretation of the NLRA,<sup>22</sup> but through a rather non-conservative and non-restrained interpretation of the First Amendment.

The third part of the Court’s trilogy of restructuring employment law this term came in *Encino Motorcars*. The Court in *Encino* confronted the question of statutory interpretation regarding whether or not automobile dealership employees holding a particular job title were ineligible for overtime pay.<sup>23</sup> Automobile dealers hire employees in dozens of job classifications. Under the applicable FLSA statutory and regulatory provisions, all except three auto-dealership occupations that are explicitly exempted by the law—salesmen, mechanics, and partsmen—are covered by the statute’s overtime pay requirement for work over 40 hours per week. Congress enacted this standard to protect employees from employer exploitation by means of low wages and excessive working hours. The controversy in *Encino* was whether those with the job title of “service advisor” were exempted by the law from overtime pay.

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19. *Janus v. Am. Fed’n of State, Cty. and Mun. Employees*, 138 S. Ct. 2448, 2460-61 (2018).

20. *Id.*

21. While the majority may be correct that some proportion of nonmembers desire not to pay dues because they find the union’s expressions “objectionable,” the inevitable problem lurking just behind the curtain is less one of ideological dissent and more one of free-riding. In other words, it is more likely that those wishing not to pay dues would wish not to less out of ideological dissent rather than a tendency of people to free-ride off the efforts of others. Of course, a desire to benefit from the efforts of others is far from a First Amendment right.

22. Indeed, the Court’s decision in *Janus* is particularly striking when viewed alongside its FAA jurisprudence. The Court has interpreted the FAA very aggressively on the grounds that it is so important for disputes to be resolved outside of litigation. *See supra* note 19. Yet the NLRA is also directed toward resolving disputes outside of litigation, and as a substantive statute, has a much stronger claim than the FAA does to be interpreted in a way that strengthens it. Perhaps the Court might believe that First Amendment arguments should trump the NLRA here. The Court, however, has been undeterred in its robust interpretation of the FAA despite Constitutional due process and separation of powers arguments that have been leveled against such an interpretation. While the analysis in the FAA cases and in *Janus* thus seems in tension, the results are aligned, revealing the deregulatory aims of these decisions: Both disable the enforcement of rights by typically underrepresented groups against parties with greater economic and bargaining power.

23. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2018).

Through a rule it issued in 2011, the Department of Labor interpreted the exemption for salesmen to exclude service advisors, reversing prior practice. Current and former service advisors at Encino Motorcars brought an action claiming overtime pay. The Ninth Circuit, reversing a district court's dismissal of the suit, ruled that service advisors were not covered by the exemptions, thus entitling them to overtime pay.<sup>24</sup> Among the grounds for its decision, the Ninth Circuit invoked a longstanding principle of interpretation in FLSA cases that exemptions must be narrowly construed against the employer.<sup>25</sup> The Supreme Court reversed and held that the auto dealership employee exemptions extended to service advisors as well. More than that, and though unnecessary for its holding, the Court discarded the presumption that the FLSA should be construed *against* employers seeking to add exemptions from overtime pay coverage to the statute.<sup>26</sup> This canon of statutory interpretation of the FLSA, relied upon by the Ninth Circuit, had been applied consistently by courts for over fifty years.<sup>27</sup>

The conservative majority not only rejected this longstanding presumption under the FLSA, but they abandoned their commitments to textualism, and, indeed, ignored the plain language of the statute order to enlarge the exemption provision of the FLSA to a fourth category. Specifically, the FLSA exemption from the overtime compensation requirement applies to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at a covered dealership.<sup>28</sup> By extending this exemption to also include service providers, the Court added an entirely new category of workers to this distinctly enumerated list.<sup>29</sup> Prior Supreme Court FLSA jurisprudence made clear that “the ‘particularity’ of FLSA exemptions ‘preclude[s] their enlargement by implication’”<sup>30</sup> and that “employees outside the Act’s ‘narrow and specific’ exemptions...remain within the Act.”<sup>31</sup> Thus, in the words of Justice Ginsburg’s dissent, the Court thus added “an exemption of its own creation.”<sup>32</sup> Again, this is a far cry from calling balls and strikes and exhibiting judicial restraint; this resembles the judicial activism the conservative members of the Court tend to decry.

All three cases represent a continuing trend by the Court to interpret laws meant to protect vulnerable workers from adverse actions by employers in a manner that severely limits those rights. All three cases reveal the aggressiveness of the Roberts Court’s approach to deregulation—its deregulatory objectives achieved not through

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24. See *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 939 (9th Cir. 2017) *rev’d*, 138 S. Ct. 1134 (2018).

25. *Id.* at 935.

26. See *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

27. See *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1148 n.7 (2018), (Ginsburg, J., dissenting) (remarking that “[i]n a single paragraph, the Court ‘reject[s]’ this longstanding principle as applied to the FLSA without even acknowledging that it unsettles more than a half century of our precedent.”).

28. 29 U.S.C. §213(b)(10)(A).

29. See *Encino Motorcars*, 138 S. Ct. at 1144 (Ginsburg, J., dissenting) (remarking that had the statutory exemption “covered ‘any salesman or mechanic primarily engaged in selling or servicing automobiles,’ there could be no argument that service advisors fit within it”).

30. *Id.* at 1147-48 (citing *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944)).

31. *Id.* at 1148 (citing *Powell v. United States Cartridge Co.*, 339 U. S. 497, 517 (1950)).

32. *Id.* at 1148.

conservative modes of interpretation, but rather through modes resembling the “judicial activism” that Roberts and other conservative justices often speak against.<sup>33</sup> In one term, the Roberts Court effectuated a one-two-three-punch against the most vulnerable members of the regulatory apparatus for labor and employment law.

## B. THE SUPREME COURT’S DEREGULATION OF EMPLOYMENT LAW

The net effect of the three employment decisions this past term will likely be retrenchment of regulation of the regulatory apparatus for the employer-employee relationship established by Congress. This is true in large part because the enforcement of federal employment and labor laws has long been entrusted to private litigants;<sup>34</sup> without private enforcement, the regulatory apparatus for employment law is almost non-existent: In the last decades, a mere two percent of job discrimination suits were prosecuted by the federal government; 98 percent of suits were brought by private parties.<sup>35</sup> Similarly, Congress did not secure compliance with wage-and-hour standards, reflected in the FLSA, through public regulatory supervision but rather through private litigation in the courts.<sup>36</sup> This choice plays out in stark relief on the ground: The Department of Labor investigates fewer than one percent of FLSA-covered employers each year.<sup>37</sup>

The Court’s decisions in *Epic Systems*, *Janus*, and *Encino Motorcars* strike a significant one-two-three punch at the private regulatory apparatus for labor and employment law. In particular, first, *Epic Systems* strips away any meaningful ability of many low-wage workers to seek the enforcement of rights under the employment laws. It does so just as consumer-law cases like *AT&T Mobility, LLC v. Concepcion*<sup>38</sup> and *American Express v. Italian Colors Restaurant*<sup>39</sup> did before it, by giving employers full permission to include arbitration provisions in employment contracts—provisions which prohibit any sort of class or aggregate litigation.<sup>40</sup> By doing so, employers are able to recalibrate the economics of bringing claims such that few individuals can afford to effectuate their substantive rights, regardless of the merits of their claims. This result is striking, for at least three reasons. One, it is striking in part given the pre-existing power imbalance between employers and, say, wage-and-hour employees with FLSA claims. One mechanism intended to help correct that power imbalance, the class action, has been taken off the table by *Epic Systems*. Even with the Supreme Court’s 2019 decision in *New Prime v. Oliveira*,

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33. See, e.g., J. Harvie Wilkinson III, *Hands Off Constitutions*, WASH. POST (Sept. 5, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/04/AR2006090400700.html> (criticizing conservative justices for engaging in activist constitutional interpretation in order to achieve particular ends, noting that such interpretive methods are inconsistent with true judicial conservatism).

34. See, e.g., FARHANG, *supra* note 4, at 85.

35. *Id.* at 3.

36. Glover, *The Structural Role of Private Enforcement Mechanisms*, *supra* note 3, at 1150.

37. *Id.* at 1150 n.47.

38. 563 U.S. 333 (2011).

39. 570 U.S. 228 (2013).

40. In *American Express*, the agreement between American Express and merchants who accepted its cards contained a clause that required all disputes to be resolved through arbitration. See *id.* at 231. In *AT&T*, the arbitration clause between *AT&T* and its customers provided that “claims be brought in the parties’ individual capacity, and not as a plaintiff or class member in any purposed class or representative proceeding.” *AT&T Mobility, L.L.C. v. Concepcion*, 570 U.S. at 336.



that reality remains for all but a small subset of workers<sup>41</sup>—those who work in “commerce,” as narrowly defined in the Court’s prior cases.<sup>42</sup> Two, relatedly, it is striking given that most employee relationships are governed by contracts of adhesion, in which employees had no say or bargaining power (and while collective bargaining agreements provide one arguable exception, *Janus* suggests that we will have few of these in the future). While perhaps striking, neither of those prior observations are surprising; those concerns have not proven compelling to the conservative majority in prior arbitration cases. It is a third feature of the opinion in *Epic Systems* that is not just striking, but a bit surprising: *Epic Systems* was decided by the conservative members of the Court—Justices who, in January 2019, extolled their commitment to textualism in *New Prime v. Oliviera*. In *Epic Systems*, however, these very Justices—and in particular Justice Gorsuch (the opinions’ author)—ignored the plain text of the FLSA, which expressly provides for collective action in the statutory text.<sup>43</sup>

Even without class actions, however, many employees have been able to rely on unions to represent their interests in a collective way with employers. *Janus* strikes a blow to this enforcement mechanism as well. Public unions play a significant role in achieving economic security for workers. *Janus* will likely result in a decline in membership—and therefore funding—of these public-sector unions. The lessons from private-sector unions are instructive here. In the aftermath of *Harris v. Quinn*,<sup>44</sup> in which the Court struck down agency fees for private sector unions, membership in such unions dwindled. While the private-sector membership rolls have slightly risen recently, the overall effect has been to deprive those unions of funding. The same is likely to happen with public-sector unions, and the effects will be broad-sweeping, given that around half of union members in the United States

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41. Though a bit premature to see the impact—if any—of the decision in *New Prime v. Oliviera*, some preliminary observations: First, given the Court’s longstanding trend in arbitration jurisprudence of enforcing arbitration agreements, regardless of their terms, it is almost certainly not the case that *New Prime* constitutes a sea change. If *New Prime* did constitute a sea change, it would require overruling a substantial body of precedent built over the last decade, and there was no indication in *New Prime* that the Court has any intentions along these lines. Second, *New Prime* is likely a very limited opinion is especially true given that the decision affects a small subset of workers—commercial truckers—and will thus not likely have a large impact on businesses or their use of arbitration. Third, there are independent reasons to explain the “pro-worker” outcome of *New Prime*. Perhaps chief among these reasons is the reality that classifying truckers, many of whom are “independent contractors” as non-employees under the Federal Arbitration Act would have had far-reaching effects on the interstate trucking industry more broadly, with potentially serious consequences for the transport economy overall. As I have discussed in prior work, Chief Justice Roberts and other conservative justices tend to shy away from results that would create severe disruptions to the market economy, even if that requires a more “liberal” or “plaintiff-friendly” opinion to do so. See J. Maria Glover, *The Supreme Court’s Non-Transsubstantive Class Action*, *supra* note 17. To be clear, as a textual matter, *New Prime* seems undoubtedly correct—and the decision was a unanimous one. What is strange about *New Prime* is not that the textual interpretation seems incorrect—it seems quite right; instead, what is strange is that the Court has often ignored statutory text to reach pro-business results, including in *Epic Systems*.

42. See, e.g., *Hammer v. Dagenhardt*, 247 U.S. 251 (1918) (adopting a very narrow definition of the word “commerce” for purposes of defining which laborers are involved in “commerce” and within Congressional authority over “commerce”).

43. 29 U.S.C. s. 201 et seq.

44. 134 S. Ct. 2618 (2014).

are public employees.<sup>45</sup> The defunding of these unions, moreover, will have an important deregulatory impact: Public-sector unions, under the relevant state regimes, are the *exclusive* bargaining agent for the relevant workers with their employers. By design, there are no regulatory alternatives (which is one of the reasons why state legislatures provided for the payment of agency fees in the first place). The Court in *Janus* does not just weaken *an* enforcement mechanism for employment and labor law, it weakens *the* enforcement mechanism for those laws.

Finally, *Encino Motorcars* reduces the number of wage-and-hour employees with access to overtime claims under the FLSA and opens the door wide to further retrenchment of FLSA rights in the future. The FLSA was designed to protect overtime pay for all but three categories of auto workers; the Court has now expanded the number of categories to four.<sup>46</sup> While the holding in *Encino Motorcars* applies only to autoworkers, the Court's analysis in *Encino* leaves ample room for employers, unencumbered by the long-standing presumption that exemptions to the FLSA be construed narrowly against the employer, to now argue that additional categories of workers are exempted from overtime protection under the FLSA. Thus, while the initial effect of *Encino* will be confined to a specific category of automobile workers, the possibility of greater deregulation of labor law has been opened.

In all three of these cases, the Court's departure from conservative jurisprudential methodology is on full display. These decisions—all 5-4 and all decided by the conservative majority—were not reached through conservative interpretive methodology or (often-cited) conservative commitment to judicial restraint.<sup>47</sup> Quite the opposite. In other words, the conservative majority cannot claim that its methodological and jurisprudential commitments dictated these results. It cannot claim that these decisions represent the oft-touted conservative approaches to judicial decision-making. Whatever one's views of these jurisprudential and interpretive methodologies, the conservative majority's departure from them suggests a commitment to other ends, namely, the Roberts Court's commitment to deregulation across various areas of the substantive law.

For example, the decision in *Janus* reflects the embrace of what these same conservative justices might term “judicial activism,” with rather obvious deregulatory objectives. For starters, *Janus* rides roughshod over both the long-standing expectations and reliance interests of state legislatures as well as stare decisis. Twenty-two state legislatures enacted agency-fee legislation to allow unions exclusive representation with employers.<sup>48</sup> The Court does not eliminate the exclusive representation designation, but it eviscerates its ability to function by jettisoning forty-year-old precedent that permitted agency fees to fund the exclusive bargaining arrangements. State legislatures had long relied on that precedent to structure their regulatory approach to labor relations. The decision is not only a blow to unions, then, it is a blow to the entire labor relations structure established by almost half of the states in the country.

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45. Bureau of Labor Statistics, Economic News Release, *Union Members Summary* (2017) (In 2017, 7.2 million employees in the public sector belonged to unions; in the private sector, that number was 7.6 million).

46. *Supra*, note 25.

47. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (calling for conservative jurists to adhere to their long-held commitments to judicial restraint).

48. See *Janus*, 138 S. Ct. at 2499 (Sotomayor, J., dissenting).

Moreover, the decision in *Janus* represents the latest in a trend by conservative justices to weaponize the Constitution in general, and the First Amendment in particular, to achieve what seem like political aims.<sup>49</sup> Putting aside debates about whether and to what extent certain rights exist under the Constitution, it has long been a principle of conservative constitutional jurisprudence that constitutional rights ought not be found under every rock and blade of grass, and that such rights ought to be rooted in both the text and history of the Constitution itself.<sup>50</sup> In *Janus*, the majority all but ignores the fact that it has long provided leeway for public employers to curtail the speech of its employees (indeed, a contrary result would cripple employment regulation in the United States).<sup>51</sup> Further, the majority in *Janus* all but acknowledges that the First Amendment right not to speak is only *possibly* infringed in the case of agency-fee set-ups. The majority acknowledges that public-sector unions are not permitted to use agency fees for political speech, but it points out that a non-member would have a hard time knowing precisely what his or her money went to fund. To illustrate that point, the majority provides a list of public union expenses, which includes “salary and benefits,” “office printing, supplies, and advertising,” “postage and freight,” “telephone,” and “convention expense,” and notes that a non-member would need an audit to figure out precisely where the money went.<sup>52</sup> Not only are these line items administrative, rather than political, in nature, but also, more importantly, the First Amendment right being “infringed,” according to the majority, is not one derived directly from the text of the First Amendment, but rather a speculative one. *Maybe, possibly*, the union used the agency fees to express views with which the non-member disagreed. That is quite a strong read of a First Amendment right—that one’s right to free speech—a right the Court has stated time and time again is somewhat limited in the context of public employment—“shall not [*maybe, possibly*] be infringed.”

The deregulatory motivations in *Janus* are further revealed by the majority’s rejection of arbitration as a possible form of recourse for non-members who wish to know with more precision what the union does with their fees.<sup>53</sup> Ironically, the majority rejects the union’s argument that union-funded arbitration is an avenue by which non-members can challenge the union’s spending. Specifically, the majority notes how expensive it is to hire attorneys and experts to launch a case.<sup>54</sup> This was precisely the argument raised by the merchants and rejected by the majority in *Italian Colors*; there, the Court found that it was “too darn bad” that merchants with otherwise valid antitrust claims would not be able to pursue them in arbitration because of the costs of attorneys and experts.<sup>55</sup> Given this tension, it is hard to escape the suspicion that the conservative majority almost always favors some types of claims and disfavors others. It is likewise hard to escape the growing suspicion that the conservative majority almost always favor the claims either brought by or that

49. See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (demonstrating that the First Amendment is increasingly being used as a deregulatory tool).

50. See, e.g., J. Harvie Wilkinson III, *Hands Off Constitutions*, WASH. POST (Sept. 5, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/04/AR2006090400700.html>.

51. *Janus v. Am. Fed’n of St., Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (Ginsburg, J., dissenting).

52. *Janus*, 138 S. Ct. at 2482.

53. See *Janus*, 138 S. Ct. at 2482 (stating that even in arbitration proceedings “objectors must still pay for the attorneys and experts needed to mount a serious challenge”).

54. See *id.* (noting that “[t]he attorney’s fees incurred in such a proceeding can be substantial”).

55. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (Kagan, J., dissenting).

favor corporate entities and disfavor claims by those who would challenge corporate interests.

The same can be observed in *Epic Systems*, which not only builds on a line of cases that disregard longstanding precedent regarding the Federal Arbitration Act as well as longstanding canons of construction regarding the supremacy of substantive federal statutes over procedural ones, but which also takes the arbitration line of cases a step further by holding that the Supreme Court's interpretation of the FAA (not the text of the FAA itself) trumps a substantive federal statute *that explicitly provides for collective action* in the text of the statute.<sup>56</sup> Likewise, the interpretation of the FLSA in *Encino Motorcars*, for example, does *not* derive from the statutory text; if anything, it directly contradicts the clear statutory text.<sup>57</sup> In short, in all three of these decisions, the bare conservative majority abandons long-standing principles of restraint and tenets of conservative jurisprudence in what must almost unavoidably be seen as results-oriented efforts.

### CONCLUSION

A judge, according to Justice Alito, “can’t have an agenda.”<sup>58</sup> Viewed in that light, these cases are troubling. In these decisions, the conservative majority selectively uses and abandons of conservative methodologies and demonstrates an unstable commitment to statutory text in order to achieve what looks strikingly like a broad deregulatory agenda. Especially in our modern political climate, perhaps such commitments to judicial restraint seem quaint. Indeed, some have commented in recent years that the Court's political commitments are rendering it irrelevant.<sup>59</sup> The reality is anything but. The Court's political commitments are extraordinarily relevant, especially to corporations seeking increased deregulation without the difficulty of securing legislative intervention. This essay discusses this reality in the context of employment law, but the deregulatory agenda has been extended, and likely will extend, far beyond employment law. Indeed, amidst homilies about judicial restraint and independence, the Court is setting itself up as a second legislative body, its deregulatory aims worrisomely political in nature, but far from irrelevant. Litigants already have capitalized on this reality. Elected legislatures of the states and nation, elected executives, and the body politic itself will find it increasingly difficult to resist.

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56. 29 U.S.C. s. 201 et seq.; *Supra* note 15; but see *New Prime v. Oliveria*, No. 17-340 (Jan. 15, 2019) (finding that *Oliveria* was exempt from a forced arbitration agreement because the Federal Arbitration Act exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” and applying the narrow definition of “commerce” set forth in prior opinions that included truckers). The combined effect of *Epic Systems* and *New Prime*, at the time of this essay, is to reveal quite plainly the instability of the conservative Justices' commitment to conservative judicial decision-making.

57. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (noting an absence of a commitment to textualism as one of the hallmarks of “conservative” jurisprudence run afoul of its fundamental rule-of-law commitments).

58. See *supra* note 2.

59. See, e.g., David A. Kaplan, *What's the Point of the Supreme Court?*, N.Y.C. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/opinion/supreme-court-kavanaugh-partisan.html>.