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Federal Common Law versus Agency Power:

An Essay on Epic Systems Corporation v. Lewis

Daniel T. Deacon*

This essay examines the Supreme Court's decision in *Epic Systems Corp. v. Lewis*¹ from an administrative law perspective. *Epic Systems* invoked the Federal Arbitration Act's (FAA) guarantee that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"² to invalidate the National Labor Relations Board's (NLRB) ruling that the use of class or collective-action waivers in certain employment contracts violated the federal labor laws.³ This essay argues that *Epic Systems* is part of a broader trend in which the Court has wrested control from administrative agencies under the banner of normal statutory interpretation. But at least when it comes to the FAA, the Court is engaged in statutory interpretation in name only. In fact, over the years, the Court has refashioned the FAA into a form of court-administered federal common law, in which the sparse terms of the FAA have been transformed into "a liberal federal policy favoring arbitration agreements"⁴ which sweeps much more broadly than the framers of the Act would have imagined. In doing so, the Court has increasingly used the FAA to engage in policymaking of its own, particularly when it comes to deciding whether otherwise neutral legal rules in fact discriminate against arbitration agreements by "interfer[ing] with fundamental attributes of arbitration."⁵

Once it is recognized that the FAA has become a species of federal common law,⁶ it becomes easier to understand why the Court erred in *Epic Systems* in finding that the NLRB could not use its interpretive authority under the labor laws to regulate the use of class-action waivers. The Court is a generalist body administering, in the FAA, a trans-substantive statute. That statute's purpose is ultimately to place arbitration contracts "on an equal footing with other contracts."⁷ Any contract that may otherwise be legal under federal or state law is subject to sectoral regulation by agencies acting within the scope of their authority. By sealing off arbitration agreements in particular from federal regulatory authorities, the Court is in fact

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

2. 9 U.S.C. § 2 (1947).

3. See generally *Epic*, 138 S. Ct. at 1612.

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

5. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

6. I follow Thomas Merrill in defining federal common law as "any federal rule of decision that is not mandated on the face of some authoritative federal text." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985).

7. *AT&T Mobility*, 563 U.S. at 339.

privileging those agreements, not putting them on equal footing with other kinds of contracts.⁸

Part I of this essay expands on these arguments in the context of *Epic Systems*. Part II places *Epic Systems* in the context of broader developments in administrative law. These developments have seen the courts—and, in particular, certain judges and Justices—engage in statutory interpretation in order to defeat agency efforts at regulation. Under the surface, however, the courts have in fact engaged in a kind of judicial policymaking of a form that often privileges private property, free exchange, and reducing regulatory compliance costs over the more diffuse public benefits that may flow from regulation. Part II illustrates this trend by examining Justice (then Judge) Kavanaugh’s dissent from denial of rehearing *en banc* in *United States Telecom Association v. FCC*.⁹

I. THE FEDERAL ARBITRATION ACT, FEDERAL COMMON LAW, AND AGENCY POWER

A. The FAA as Federal Common Law

The Federal Arbitration Act traces its roots to 1925.¹⁰ At the time of its enactment, the framers of the Act intended to guarantee that federal courts would honor parties’ agreement that disputes between them be heard by private arbitral tribunals, as well as to prevent courts from adopting rules that discriminated against arbitration specifically.¹¹ The scope of the Act was also considered limited in important ways. Members of Congress shared an understanding that the Act only applied in federal, not state courts, and it did not displace state law regulating arbitration.¹² Congress also did not intend the FAA to cover employment agreements.¹³ In fact, “[i]n passing the FAA, Congress intended to allow arbitration for only a narrow set of legal claims: inter-merchant contract disputes sounding in breach and maritime claims.”¹⁴ Congress also envisioned the Act as applying to agreements between parties of roughly equal bargaining power.¹⁵ Congress did not intend the Act to apply to federal statutory claims as opposed to contractual ones.¹⁶

Over time, each of these limitations has fallen away.¹⁷ The FAA now applies to all kinds of claims, with certain very narrow exceptions, whether brought in state or federal court.¹⁸ The FAA has been read to broadly preempt state rules affecting

8. This argument builds on Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991 (2017).

9. U.S. Telecom Ass’n v. F.C.C., 855 F.3d 381, 417 (D.C. Cir. 2017).

10. 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, 2860 (2015).

11. See *id.* at 2860-61; see also David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 444-45 (2011).

12. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 126-27 (2006); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5, 23-25 (2004); Horton, *supra* note 11, at 445-46.

13. Horton, *supra* note 11, at 446.

14. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 307 (2015).

15. Horton, *supra* note 11, at 447.

16. Leslie, *supra* note 14, at 307-08.

17. See, e.g., Deacon, *supra* note 8, at 999-1001.

18. *Id.*

arbitration agreements, erecting a near-ironclad rule that *all* procedural provisions contained within a contract, which also contain an arbitration clause, must be honored “according to their terms.”¹⁹ The judicial expansion of the FAA has led Justice O’Connor to claim that “the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”²⁰

One might respond to the above by claiming that, in the recent cases, the Court is acting simply as a good textualist. The FAA’s text does, after all, make arbitration agreements generally enforceable, and many of the above limits, besides the exclusion of employment agreements, do not appear plainly on the surface of the Act. Textualism can only get the Court so far. This is especially apparent when it comes to the FAA’s saving clause, which was central to *Epic Systems*. That clause “permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”²¹ The Court has said that the clause does not operate to save contractual defenses that either target arbitration directly *or* that “interfere[] with fundamental attributes of arbitration.”²² For example, in *Concepcion*, the Court dealt with a California unconscionability rule that, in certain circumstances, declared class waivers unenforceable, whether or not they were in a contract which contained an arbitration clause. The Court held the rule was preempted by the FAA. In doing so, the Court applied its own sense of arbitration’s “fundamental attributes” and, notwithstanding the fact that arbitral organizations had been actively developing their own rules for class arbitration, declared those attributes inconsistent with class processes.

Thus, as interpreted by the Supreme Court, the FAA’s saving clause is a powerful tool through which to assert the Court’s own power in the area, essentially allowing the Court to decide which generally applicable contractual rules conflict with the “fundamental attributes” of arbitration and which do not, guided only by a very general sense of what arbitration typically looks like, today or in 1925. And the saving clause is not the only aspect of the FAA that allows the courts to exercise their own discretion. Courts are also put in charge of deciding such amorphous questions as whether there is an “‘inherent conflict’ between arbitration” and another federal law’s “underlying purposes,”²³ and whether certain procedural restrictions in arbitration agreements undermine the “effective vindication” of federal laws.²⁴ Plainly, courts today exercise a large amount of discretion to decide whether certain rules should apply in the arbitration context. And the courts, and the Supreme Court in particular, have generally decided that question one way; Arbitration agreements should be enforced according to their terms. But that conclusion results not from a mechanical application of the text of the FAA and certainly not from the intent of the Act’s framers. It has been, in large part, a choice made by the Supreme Court itself.

19. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *see also* Leslie, *supra* note 14, at 312 (“The Court has converted its judge-made presumption of arbitrability into a presumption of contract terms being enforceable as long as they are inserted into an arbitration clause.”).

20. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995); *see also* Resnik, *supra* note 10, at 112.

21. *See* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

22. *Id.* at 344.

23. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

24. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 242 (2013).

B. Epic Systems and Agency Power

Epic Systems, written by Justice Gorsuch, treated the question of whether the FAA prevented the NLRB from banning class waivers located in arbitration agreements as a simple question of statutory interpretation. “[A]s a matter of law the answer is clear,” the Court declared. “Congress has instructed the federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”²⁵ The FAA’s saving clause did not apply for the same reason given in *Concepcion*; Requiring class procedures would interfere with what the Court viewed as one of the “fundamental attributes” of arbitration.²⁶ And because, according to the Court, this meant that the FAA could not otherwise accommodate the NLRB’s ruling, that ruling must flow from a “clear and manifest congressional command to displace the Arbitration Act.”²⁷ Nor could the NLRB take shelter under *Chevron*, which would normally allow the NLRB the power to interpret ambiguous provisions of the labor laws. Not only did the “canon against reading conflicts into statutes” take the NLRB’s preferred interpretation off the table, but, the Court declared, “[T]he Board hasn’t just sought to interpret its statute, the NLRA, in isolation: it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act.”²⁸ Thus, one of the premises undergirding *Chevron*—that Congress intends the agency to resolve ambiguities in the statutes it administers—was missing.²⁹

Here is not the place to critique the Court’s interpretation of the federal labor laws. Rather, I want to step back and assess *Epic Systems* from a broader institutional perspective. The Court’s fundamental mistake was in failing to recognize the kind of statute that the FAA is. The FAA is, at bottom, a statute that says a certain kind of contract is enforceable like any other contract. It is a general statute. That is, it applies regardless of the kind of transaction in question or parties involved. And it is administered by the courts in a way that, as I argued above, has allowed for judicial innovation over time and calls for judicial policy judgments at various critical junctures.

Once the FAA is viewed in this way, it becomes easier to see why an agency should be able to interpret its statute in ways that restrict arbitration agreements or that interfere with arbitration’s “fundamental attributes.” Agencies commonly regulate against a background of a more permissive, general legal regime. Indeed, one might say that is their very purpose. When the Environmental Protection Agency restricts emissions from coal-fired power plants, it is interfering with the preexisting legal entitlement of the owners of such plants to emit pollutants into the air as long as doing so does not create a nuisance under state tort law. And when an agency says that a certain kind of contract is illegal, assuming it has the power to do so, that act is only meaningful because the background law would otherwise make it enforceable. We allow agencies to depart from background law because they are performing a specialized task, and their particular knowledge and experience with a given issue gives them special insight when determining whether exceptions should be made to otherwise lawful activity.

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

26. *Id.* at 1622.

27. *Id.* at 1624.

28. *Id.* at 1629.

29. *Id.*

The same dynamic exists when the two legal regimes in question both trace to federal statutes.³⁰ Take the interaction of the federal antitrust laws, and the Sherman Act in particular, with the regulatory regime administered by the Federal Communications Commission under the Communications Act. When the FCC has acted to enforce network neutrality, it has adopted what amounts to a per se ban on certain kinds of vertical contracts—for example, contracts that obligate Internet service providers to grant priority to network traffic associated with certain services.³¹ Such contracts are treated very differently under the court-administered Sherman Act,³² where they are judged according to a rather permissive “rule of reason” inquiry, with the burden on plaintiffs to demonstrate anticompetitive effect.³³ But to my knowledge, no one (including opponents of net neutrality) has argued that the antitrust laws should *bar* the FCC from exercising its *Chevron* authority in order to regulate certain contracts more stringently than background antitrust law. And the courts have upheld the FCC’s authority to do so with scarcely a mention of the Sherman Act.³⁴

In these examples, we can see clearly that agencies often act against the backdrop of some other source of law, including federal law, that would otherwise treat the activity in question as legal. Agencies in these situations normally have no obligation to bend over backwards in order to accommodate the more permissive legal regime—indeed, doing so would be in many cases antithetical to their missions. So why should the FAA be any different? The FAA says that a certain kind of contract is enforceable to the same extent that other kinds of contracts are. As the dissent in *Epic Systems* pointed out, “[t]hrough the Arbitration Act, Congress sought ‘to make arbitration agreements as enforceable as other contracts, but not more so.’”³⁵ By erecting an impenetrable wall around the permissive legal regime established by the FAA and elaborated by the courts, the *Epic Systems* majority failed to appreciate the ways in which agency regulation commonly operates, and in doing so, it unduly privileged the federal common law over legitimate claims of regulatory power.

II. THE GROWTH OF ADMINISTRATION BY COURT

In this Part, I will argue that *Epic Systems* is part of a broader trend in which the courts have begun to use court-administered rules to trump the power of agencies. Although there are several possible examples of this trend, I will focus here on one (in addition to the use of the FAA): the growth of the “major questions” or

³⁰ For a comprehensive analysis of the interaction between the FAA and other federal statutes that shares some similarities, but also has some differences, with the one offered here, see David L. Noll, *Arbitration Conflicts*, Minn. L. Rev. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186735.

³¹ See generally *IN THE MATTER OF PROTECTING & PROMOTING THE OPEN INTERNET*, 30 FCC RCD. 5601 (2015).

³² On the Sherman Act as a body of court-administered federal common law, see, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008).

³³ See Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 803 (2012).

³⁴ See *U.S. Telecom Ass’n v. F.C.C.*, 825 F.3d 674 (D.C. Cir. 2016).

³⁵ *Epic Sys.*, 138 S. Ct. at 1645 (Ginsburg, J., dissenting) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

“major rules” doctrine. Using that doctrine, the Supreme Court and some lower courts have seized interpretive authority from administrative agencies and transferred it to the courts. Although the courts say that they are doing so to honor the intent of Congress, the malleability of the major questions doctrine allows the courts significant discretion in its application, discretion that often amounts to a policy judgment concerning the substance of the agency rule in question.

The major questions doctrine is an exception to *Chevron*’s command that courts defer to reasonable agency interpretations in cases of statutory ambiguity. Although the doctrine has antecedents going back several decades,³⁶ I will focus on two recent applications: Chief Justice Roberts’ version of the doctrine in *King v. Burwell* and Justice Kavanaugh’s in the D.C. Circuit net neutrality appeal. *King* concerned the availability of tax credits for individuals to buy health insurance in states that had not established insurance exchanges following enactment of the Patient Protection and Affordable Care Act (sometimes known as “Obamacare”).³⁷ The Internal Revenue Service answered that question in the affirmative. Under normal deference principles that answer would stand, provided the statute was ambiguous and the IRS’s interpretation reasonable. But the Court held that normal deference principles didn’t apply. It explained itself with only the following:

The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.³⁸

Instead of deferring to the IRS’s views the Supreme Court interpreted the statute itself and determine its “correct reading,” without reference to the IRS’s view. In doing so, the Court in *King* found that the correct reading of the statute was in fact the one preferred by the agency. But the Court was clear: It was for the courts, and not the IRS, to make that call.

Two features of the *King* move are worthy of attention. First, the explanation for why the question was a “major” one is left remarkably vague. The only real explanation given is that the case involved a lot of money and affected a lot of people. But that is true for many agency decisions. Where is the line to be drawn? The Court has not said. Second, the rationale for the doctrine is left similarly unclear. *King* says that it is following Congress’s lead by presuming that Congress would not wish such major questions to be left to agency determination. But the *King* majority failed to comprehend that the question is a comparative one; Would Congress rather prefer agencies *or courts* to resolve ambiguities, even when doing so would have “major” consequences? As Cass Sunstein has argued, there are good reasons to think that the traditional justifications for allocating such decisions to agencies apply equally, or even more so, in the context of “major questions.”³⁹

36. For a history of the doctrine, see Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017).

37. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

38. *Id.* at 2489 (internal citations omitted).

39. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243 (2006) (criticizing major questions exception in part because “expertise and accountability, the linchpins of *Chevron*’s legal fiction,

King thus allows courts to transfer interpretive authority away from agencies and toward themselves using a vague and malleable rubric for determining “major-ness,” and without explanation for why doing so is faithful to Congress’s intent. A slightly different version of the doctrine was deployed by Justice Kavanaugh in his dissent from denial of rehearing en banc in the D.C. Circuit’s recent net neutrality appeal.⁴⁰ That appeal concerned the FCC’s decision to reclassify Internet service providers—companies such as Comcast and Verizon—as “telecommunications carriers” under the Communications Act. That decision had the consequence of applying a set of “common carrier” obligations to such companies under Title II of the Act. The D.C. Circuit panel upheld the FCC’s authority to do so; the Act was ambiguous regarding whether ISPs qualified as telecommunications carriers, and the FCC’s determination that they did so qualify was reasonable under *Chevron*.⁴¹

Justice Kavanaugh would have granted the ISPs rehearing petition and held that the FCC did not have such authority. He would have done so using a different version of the “major questions” doctrine, which he relabeled the “major rules” doctrine. Under the “major rules” doctrine, Congress must “clearly authorize[]” “major rules.”⁴² That rule in essence flips the *Chevron* inquiry. Instead of determining whether there is an ambiguity resolved by the agency in a reasonable way, the court must instead determine whether there is a *clear* indication that Congress intended the agency to act *in this way*. When does that rule apply? Justice Kavanaugh states that it applies when “an agency wants to exercise expansive regulatory authority over some major social or economic activity.”⁴³ Although conceding that “determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality,” Justice Kavanaugh would have found the rule in *United States Telecom Association* to be a “major” one because it applied common carrier regulations to ISPs, which had not been done before.⁴⁴

I have argued elsewhere that Justice Kavanaugh’s version of the “major rules” doctrine suffers from a hidden baseline problem.⁴⁵ If whether ISPs qualify as “telecommunications carriers” is truly ambiguous, then it would seem that *any* answer to that question—yes or no—would have potentially “major” consequences.⁴⁶ After all, failures to regulate can also have significant costs. What Justice Kavanaugh seemed to say was that rules that cause significant costs or other disruption to regulated entities must be clearly authorized by Congress. But why is that a fair understanding of Congress’s intent? Congress is presumably aware that lack of regulation can also have negative consequences, and it has (by hypothesis) not supplied an answer of its own. The “major rules” doctrine, at least as deployed by Justice Kavanaugh, thus appears to artificially disfavor pro-regulatory agency decisions. And because whether the “major rules” doctrine applies will, as Justice Kavanaugh conceded, often amount to an ad hoc judgment by the reviewing court. The doctrine

are highly relevant to the resolution of major questions; it follows that so long as the governing statute is ambiguous, such questions should be resolved by agencies, not by courts”).

40. *U.S. Telecom Ass’n v. F.C.C.*, 855 F.3d 381, 417 (D.C. Cir. 2017).

41. *See U.S. Telecom Ass’n v. F.C.C.*, 825 F.3d 674, 708 (D.C. Cir. 2016).

42. *U.S. Telecom Ass’n*, 855 F.3d at 418 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

43. *Id.* at 421.

44. *Id.* at 422-23.

45. *See* Daniel T. Deacon, *Judge Kavanaugh and “Weaponized Administrative Law”*, YALE J. ON REG. (July 11, 2018), <http://yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/>.

46. *See id.*

allows the courts significant discretion to curtail pro-regulatory agency decisions where the court concludes that the costs associated with the agency action are simply too high and seemingly without reference to any *benefits* that might be captured by the agency action.

What does all this have to do with *Epic Systems*, the subject of this trio contained in this Journal issue? I believe that *Epic Systems* is part of a trend that is also reflected in the “major questions” cases. The courts in these cases speak in the language of statutory interpretation. They are all nominally about what Congress might intend or what it has commanded. But in fact, the expansion of these doctrines reflects a privileging of the *courts*’ power, not Congress’s. In each case, the Court reserves for itself significant discretionary power. It wields that power—often, though not always—to curtail agency efforts at regulation, even in situations where according to the otherwise generally applicable rules the agency’s word should prevail. With the recent additions of Justice Gorsuch and Justice Kavanaugh to the Supreme Court, we are likely to see a continuation of this trend. Whether it eventually expands to the elimination of *Chevron* altogether is anyone’s guess.