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A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA

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A SUBSTANTIVE RIGHT TO CLASS PROCEEDINGS: THE FALSE CONFLICT BETWEEN THE FAA AND NLRA

Michael D. Schwartz*

In recent decades, the U.S. Supreme Court's Federal Arbitration Act jurisprudence has greatly expanded the scope of enforceable arbitration agreements. In AT&T Mobility LLC v. Concepcion, decided in 2011, the Court held that a class arbitration waiver in a consumer contract was enforceable, despite state law to the contrary. In January 2012, the National Labor Relations Board ruled that, despite the Court's holding in Concepcion, class waivers in employment arbitration agreements are unenforceable due to employees' right under the National Labor Relations Act to engage in concerted activity. However, nearly all federal and state courts that have subsequently considered this question have declined to follow the NLRB and have enforced similar class waivers.

This Note argues that the NLRB was correct in declaring unenforceable class waivers in employment arbitration agreements. It concludes that because employees' right to invoke class proceedings under the NLRA is a substantive rather than procedural right, the unwaivability of this right creates no conflict with the FAA, even under the Supreme Court's broad interpretation of the statute.

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INTRODUCTION

The Federal Arbitration Act¹ (FAA) makes contractual agreements to arbitrate, with limited exception, “valid, irrevocable, and enforceable.”² In *AT&T Mobility LLC v. Concepcion*,³ the U.S. Supreme Court ruled that a consumer arbitration agreement requiring that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding,”⁴ was enforceable under the FAA.⁵ Further, the Court invalidated a California law that rendered such terms in an adhesion contract unconscionable.⁶ Because the Court enforced the agreement as written, the plaintiffs were barred from invoking classwide proceedings, whether in litigation or arbitration.

Concepcion seemingly opened the door for employers to structure their arbitration agreements, which currently cover millions of employees,⁷ to

1. 9 U.S.C. §§ 1–14 (2006).

2. *Id.* § 2.

3. 131 S. Ct. 1740 (2011).

4. *Id.* at 1744.

5. *Id.* at 1753.

6. *Id.*

7. At least thirty million employees work under employment contracts containing arbitration agreements. Nantiya Ruan, *What’s Left To Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers* 22 (Univ. of Denver Sturm Coll. of Law, Working Paper No. 12-36, 2012), available at <http://ssrn.com/abstract=2159963>.

exclude the use of class proceedings for the resolution of all future disputes.⁸ Recently, however, the National Labor Relations Board (NLRB) ruled that employees' right under the National Labor Relations Act⁹ (NLRA) "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"¹⁰ includes an unwaivable, substantive right to utilize classwide procedures to resolve employment disputes.¹¹

The question, then, is how to reconcile the NLRA's guarantee of employees' right to invoke classwide proceedings with *Concepcion's* requirement of enforcing arbitration agreements that waive this right. Put another way: is an arbitration agreement that precludes classwide procedures in an employment action enforceable?

This Note addresses the enforceability of class waivers in employment arbitration agreements. It argues that the NLRA's protection of concerted activities, which includes the right to invoke classwide proceedings, renders such waivers unenforceable, because employees' right to pursue concerted activity is a substantive right that cannot be waived in an arbitration agreement, not a procedural right that can properly be restricted in an arbitration agreement.¹² The NLRB correctly reached this result, but its diffuse reasoning failed to home in on the critical distinction between substantive and procedural rights. Courts that have addressed this question, many of which hold class waivers enforceable, have also largely ignored this essential analysis.

This Note aims to fill that void and explain why the right to invoke classwide proceedings, while correctly viewed as a procedural right in other contexts, is nonetheless a substantive right in the context of employment contracts governed by the NLRA. This analysis is necessary to understand why the NLRA does not conflict with the FAA, the primary concern of the numerous courts that enforced class waivers.

8. See Kevin B. Leblang & Robert N. Holtzman, *Waivers of Class and Collective Claims in Arbitration Agreements: Recent Developments*, METRO. CORP. COUNS., Nov. 2012, at 22 ("[I]t seems beyond dispute that the Supreme Court has been giving clear guidance that employers entering into arbitration agreements with their employees were permitted to include class and collective arbitration waivers in their agreements.").

9. 29 U.S.C. §§ 151–169 (2006).

10. *Id.* § 157.

11. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *4 (Jan. 3, 2012). The case is currently on appeal to the Fifth Circuit. D.R. Horton v. NLRB, No. 12-60031 (5th Cir. argued Feb. 5, 2013).

12. This Note's thesis should not be confused with the argument that class waivers are invalid where class proceedings are necessary to vindicate a statutory right. The Supreme Court is currently hearing an appeal on this issue in *American Express Co. v. Italian Colors Restaurant*. *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12-133). In the case below, the Second Circuit held that a class waiver is unenforceable where "the practical effect of enforcement would be to preclude [plaintiffs'] ability to vindicate their federal statutory rights." *Id.* at 212. Whether that holding prevails is irrelevant, as here the "practical effect" of a class waiver has no role in the analysis.

Part I describes the nature and purpose of arbitration, class action litigation, and class arbitration, and traces the evolution of the two bodies of law that have culminated in the present conflict: on the one hand, the increasingly broad enforcement of arbitration agreements through judicial interpretation of the FAA and, on the other hand, the expanding scope of employee rights protected by Section 7 of the NLRA. Part II brings these two bodies of law together by reviewing how the NLRB and courts have attempted to resolve the apparent conflict. In *D.R. Horton, Inc.*,¹³ the NLRB held that a class waiver in an employment agreement violated the NLRA and that refusing to enforce the offending term did not conflict with the FAA.¹⁴ While one federal court followed *D.R. Horton* and declared a similar class waiver unenforceable,¹⁵ numerous other courts presented with the same question have held that the FAA compels the enforcement of class waivers in employment agreements.¹⁶

Part III seeks to resolve this split by undertaking what has thus far been missing: an analysis of the distinction between substantive and procedural rights as they relate to class waivers in employment arbitration agreements in order to properly understand the relationship between the FAA and NLRA. By way of comparison to a similar divide in the context of choice of law and the *Erie* doctrine, this part explains why Section 7 rights, including the right to invoke classwide proceedings, are substantive rights outside the domain of the FAA. Finally, this part describes why this result assuages the concerns raised by courts over the reach of the FAA under *Concepcion* and related cases, and thus concludes that employment arbitration agreements which waive all forms of classwide proceedings are unenforceable.

I. STATUTES IN TENSION: THE FAA AND NLRA

This part serves two purposes. First, Parts I.A and I.B define and review three foundational concepts: arbitration, class action, and class arbitration. Next, Parts I.C and I.D use these concepts to trace the evolving interpretations of the FAA and NLRA, which has resulted in the present dispute over the enforceability of class waivers in employment arbitration agreements.

13. 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

14. *Id.* at *5, *10.

15. *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, at *7 (W.D. Wis. Mar. 16, 2012).

16. *See Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-cv-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198 (Ct. App. 2012); *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372 (Ct. App. 2012), *appeal docketed*, 147 Cal. Rptr. 3d 324 (Cal. Sept. 19, 2012).

A. Arbitration

Arbitration is an extrajudicial form of dispute resolution in which a neutral third party selected by the parties hears arguments, reviews evidence, and issues a final and binding decision.¹⁷ As with many other forms of alternative dispute resolution, arbitration replaces the “default” use of litigation to resolve disputes and allows the parties to tailor the procedures used to resolve their dispute in a manner thought to be most beneficial to their needs.¹⁸ The parties can agree to maintain some of the procedural rules governing litigation in a judicial forum, while choosing to abandon or alter other rules.¹⁹ For example, parties outside of a judicial forum may opt to waive some or all of the rules of discovery or the rules of evidence.²⁰

Parties often employ arbitration to resolve disputes because it affords many of the advantages of litigation at a lower cost to the parties.²¹ An arbitration proceeding occurs before a fair and impartial professional, mutually selected by the parties, who has expertise in the relevant area of law.²² The parties can tailor the proceedings to contain as many or as few procedural requirements as they desire, thus creating (at least in theory) a more efficient, expeditious, and inexpensive form of justice.²³ However, use of arbitration, particularly in the employment context, raises many practical concerns due to the significant power imbalance that often exists between employer and employee, thus perhaps belying the perceived benefits of arbitration.²⁴

17. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 7 (1992); R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 *LA. L. REV.* 1533, 1537 (1994); see also S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 *HARV. NEGOT. L. REV.* 201, 243–45 (2012).

18. See Silberman et al., *supra* note 17, at 1539.

19. *Id.*

20. See Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 *SEATTLE U. L. REV.* 659, 667 (2004) (“[A]rbitration can be considerably less expensive because there is far less discovery than is generally permitted in litigation”); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 *U. RICH. L. REV.* 1085, 1086 (2002) (discussing agreements that modify “what evidence may or may not be presented as proof”).

21. See Silberman et al., *supra* note 17, at 1539.

22. *Id.*

23. *Id.*

24. See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *J. EMPIRICAL LEGAL STUD.* 1, 1 (2011) (finding that, in arbitration, employees have a lower win rate and, when victorious, receive lower awards compared to litigation); Alexander J.S. Colvin & Kelly Pike, *The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes* 25 (June 2012) (unpublished manuscript), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1022&context=conference> (concluding that arbitration claims arising from an employer-promulgated procedure “result in relatively fewer employee wins, lower damages, and fewer compromise awards”).

This Note focuses on predispute arbitration agreements—agreements in which the parties stipulate, generally in a written contract, to resolve some or all of their future disputes through arbitration.²⁵ The resulting agreement is often called “mandatory” arbitration because, having consented to submit future disputes to arbitration, a party can be compelled into arbitration when such disputes later arise.²⁶ Predispute arbitration agreements are appropriately referred to as “procedural contracts” because they allow parties to bargain over procedural rights even before a dispute arises.²⁷ While in recent decades the Supreme Court has permitted greater freedom in the structuring of predispute arbitration agreements,²⁸ this Note focuses on the critical limits to enforceable arbitration agreements that still remain.

B. Class Action Litigation and Class Arbitration

The class action is a procedural mechanism that enables one or more parties to bring a legal claim on behalf of other similarly situated individuals.²⁹ Largely unique to the American legal system,³⁰ the class action has been in use since 1966, when Congress promulgated Rule 23 of the Federal Rules of Civil Procedure (FRCP).³¹ A Rule 23 class action has the potential for far greater adjudicative efficiency by permitting, for example, a million victims, each of whom have been defrauded of \$100 apiece by a common defendant, to bring one \$100 million lawsuit rather than one million \$100 lawsuits.³² Because class actions can allow for the aggregation of many similar small value claims, they are considered by many to serve an important public role of allowing “those who are less powerful to band together . . . to seek redress of grievances that would go unremedied if each litigant had to fight alone.”³³ Given the high cost of bringing a lawsuit, such small value claims would likely never be brought

25. See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069 (1998).

26. See *id.*

27. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1105–06 (2011).

28. See *infra* Part I.C.3–4.

29. See Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 770 (2012).

30. See THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 641 (2d ed. 2008) (“[C]lass actions remain another instance of ‘American exceptionalism’ in procedure.”).

31. See Weston, *supra* note 29, at 770. Under Rule 23, a claim can be brought on behalf of others only if the claim satisfies requirements of numerosity of members, commonality of questions of law or fact, typicality of claims or defense, and adequacy of representation. See ROWE ET AL., *supra* note 30, at 646–50; see also FED. R. CIV. P. 23(a). The class claim must also be necessary either to avoid unfairness or serious hardship for the class representative, or would be more efficient than individual litigation. See ROWE ET AL., *supra* note 30, at 650; see also FED. R. CIV. P. 23(b).

32. ROWE ET AL., *supra* note 30, at 640.

33. See Weston, *supra* note 29, at 770–71 (internal quotation marks omitted).

on an individual basis and can only practically be brought by way of a class action.³⁴

However, class actions raise concerns. While a class action case can serve as a powerful deterrent to misbehavior, weak claims brought as a class action can have the perverse effect of inducing settlement simply due to the large amount of money at stake.³⁵ Thus, the class action has sometimes been characterized as “legalized blackmail.”³⁶ Furthermore, while a class action can increase efficiency by aggregating many claims, it can also result in expensive discovery and difficulties in case management and trial proceedings.³⁷ Concerns also arise in ensuring that class counsel, who often stands to receive a financial award far greater than any individual class member, acts in the best interest of all of the class members.³⁸

Class arbitration imports elements of class actions into the arbitral context.³⁹ While class arbitration has existed since the early 1980s, it was not in significant use until receiving implicit approval from the Supreme Court in *Green Tree Financial Corp. v. Bazzle*,⁴⁰ decided in 2003.⁴¹ A plurality held that, where a predispute arbitration agreement was silent on whether classwide procedures could be used, the arbitrator could decide whether the parties intended to allow classwide procedures in arbitration or court.⁴² Spotting an open door to class arbitration, professional arbitration providers such as the American Arbitration Association (AAA) and JAMS⁴³ soon after began setting up specialized rules for administering class arbitrations.⁴⁴

The rules promulgated for class arbitration closely resembled judicial class actions. For example, under the Supplementary Rules of the AAA, if an arbitrator concludes that a predispute arbitration agreement permits class

34. See, e.g., *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).

35. ROWE ET AL., *supra* note 30, at 640.

36. Weston, *supra* note 29, at 770.

37. See ROWE ET AL., *supra* note 30, at 640.

38. See *id.*

39. See Strong, *supra* note 17, at 205–06.

40. 539 U.S. 444 (2003).

41. See Drahozal & Rutledge, *supra* note 27, at 1139; Strong, *supra* note 17, at 206; Weston, *supra* note 29, at 768.

42. See *Bazzle*, 539 U.S. at 452–53; see also Weston, *supra* note 29, at 768. To some extent, the Supreme Court overruled this holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). See *infra* Part I.C.4.

43. The organization was formally called Judicial Arbitration and Mediation Services, Inc., but has since changed its name to JAMS, The Resolution Experts. *About the JAMS Name*, JAMS, <http://www.jamsadr.com/about-the-jams-name/> (last visited Mar. 19, 2013).

44. Strong, *supra* note 17, at 206; see also AM. ARBITRATION ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (effective Oct. 8, 2003) [hereinafter AAA SUPPLEMENTARY RULES], available at http://www.adr.org/aaa/ShowPDF?jsessionid=Q38zRMZQvJFBzn295h3vWxwZDyxRNyqnmT2dlynW2SmlyPCLGRpL!644581746?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf; JAMS, JAMS Class Action Procedures (effective May 1, 2009), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf.

action, he must decide whether class arbitration is appropriate for the case by using standards resembling those enumerated in Rule 23.⁴⁵ If so, the arbitrator adjudicates the case on the merits.⁴⁶

This Note focuses on the use of class waivers in predispute arbitration agreements. Such agreements require that disputes be resolved in arbitration and bar the use of class arbitration, thus effectively precluding all forms of class proceedings in the resolution of all future disputes.⁴⁷ This Note argues that class waivers are unenforceable in employment predispute arbitration agreements.

C. The FAA and the Expanding Scope of Enforceable Arbitration Agreements

The Federal Arbitration Act undergirds the discussion and analysis to come. This section first describes the Act's inception and structure. It then reviews three legal developments that are essential to understanding the present conflict: the application of the FAA to employment contracts, the arbitrability of statutory claims under the FAA, and the interaction between the FAA and class waivers.

1. The Federal Arbitration Act

Through the beginning of the twentieth century, courts viewed predispute arbitration agreements with a high degree of suspicion, often declaring them unenforceable, because they sought to "oust" the court of jurisdiction for adjudication of contractual disputes.⁴⁸ In response, Congress passed the Federal Arbitration Act of 1925⁴⁹ to combat "widespread judicial hostility to arbitration agreements"⁵⁰ and establish a "liberal federal policy favoring arbitration agreements."⁵¹ The Supreme Court has written that the FAA's purpose is to put the enforceability of arbitration agreements on equal footing with all other contracts.⁵² Section 2 of the FAA—the "primary substantive provision of the Act"⁵³—states in full:

45. Drahozal & Rutledge, *supra* note 27, at 1140; *see also* AAA SUPPLEMENTARY RULES, *supra* note 44, R. 4.

46. *See* AAA SUPPLEMENTARY RULES, *supra* note 44, R. 7.

47. *See* Drahozal & Rutledge, *supra* note 27, at 1106–07; Weston, *supra* note 29, at 767 n.1.

48. *See* Drahozal & Rutledge, *supra* note 27, at 1112; *see also* Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 552–53 (2008).

49. Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. §§ 1–14 (2006)).

50. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

51. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also* Weston, *supra* note 29, at 771 ("The regulatory framework for arbitration in the United States is set forth in the Federal Arbitration Act of 1925.").

52. *See* *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (explaining that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts"); Drahozal & Rutledge, *supra* note 27, at 1112.

53. *Moses H. Cone*, 460 U.S. at 24.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁵⁴

This section establishes that agreements to arbitrate dealing with commerce and maritime matters are fully enforceable, whether regarding present or future disputes.⁵⁵ If parties agree to resolve future disputes using the procedural rules of arbitration rather than the default procedural rules of litigation, a court later reviewing the contract must respect and enforce this agreement as written.⁵⁶ The FAA establishes, with discrete and limited exceptions, a body of substantive federal law declaring contractual agreements to arbitrate, including predispute agreements, “valid, irrevocable, and enforceable.”⁵⁷ As detailed below, the scope of this mandate has been significantly broadened in recent decades.

2. The FAA and Employment Agreements

In 1991, in *Circuit City Stores v. Adams, Inc.*,⁵⁸ the Supreme Court addressed whether and to what extent the FAA applied to disputes arising under employment contracts. Section 1 of the FAA excludes from its coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁵⁹ The question for the Court was how broadly to read the exempted “class of workers engaged in foreign or interstate commerce”—whether it should be construed narrowly to exempt only arbitration agreements of workers engaged in transportation or broadly to exempt effectively all employment arbitration agreements.⁶⁰

Employing a thorough textual analysis, the Court held that “the text of the FAA forecloses the construction of § 1 . . . which would exclude all employment contracts from the FAA.”⁶¹ The Court reasoned that the residual “class of workers” term must be controlled and defined by reference to the enumerated categories of workers that precede it—“seamen” and “railroad employees”—and so the exemption can apply only

54. 9 U.S.C. § 2 (2006).

55. See MACNEIL, *supra* note 17, at 102.

56. See Weston, *supra* note 29, at 772 (“A fundamental principle underlying the FAA is to respect freedom of contract.”).

57. 9 U.S.C. § 2; see *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (explaining that the FAA “creates a body of federal substantive law” (quoting *Moses H. Cone*, 460 U.S. at 25 n.32)).

58. 532 U.S. 105 (2001).

59. 9 U.S.C. § 1.

60. *Circuit City*, 532 U.S. at 109.

61. *Id.* at 119.

narrowly to “contracts of employment of transportation workers.”⁶² Thus, the FAA and its “healthy regard”⁶³ for the enforceability of predispute arbitration agreements governs the broad swath of employment contracts.⁶⁴

3. The FAA and Arbitrability of Statutory Claims

Since Congress passed the FAA in 1925, the Supreme Court has reached varied conclusions on whether the statute can compel arbitration of disputes that are statutory in nature. In the decades immediately following enactment, the scope of the FAA in this area was significantly limited. Courts held that many disputes arising under federal statutes, such as securities laws, antitrust laws, and civil rights laws, were nonarbitrable because arbitration was inconsistent with Congress’s intent in creating a cause of action under those statutes.⁶⁵ This broad “nonarbitrability doctrine” persisted for roughly fifty years after the enactment of the FAA.⁶⁶

This began to change in the 1980s.⁶⁷ For example, in the 1985 case *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁶⁸ the Supreme Court considered the enforceability of a predispute arbitration agreement between Mitsubishi, a Japanese automobile manufacturer, and Soler Chrysler-Plymouth, a Puerto Rican distributor.⁶⁹ Their agreement stipulated that all future disputes, controversies, or differences between the parties under their distribution contract would be resolved through arbitration in Japan, in accordance with the rules of the Japan Commercial Arbitration Association.⁷⁰ When a dispute over shipments arose, Mitsubishi filed suit in federal court in Puerto Rico and moved to compel arbitration under the FAA and the terms of the parties’ arbitration agreement.⁷¹ Soler then counterclaimed, alleging, among other things, antitrust violations under the Sherman Antitrust Act.⁷² The question was

62. *Id.*

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

64. Justice Stevens, in dissent, accused the majority of “[p]laying ostrich” by ignoring the “substantial history” indicating that the exemption language was added to the FAA precisely to alleviate concerns by labor unions that the statute might later be interpreted to apply to employment contracts. *Circuit City*, 532 U.S. at 126–28 (Stevens, J., dissenting). The proposed Arbitration Fairness Act seeks to amend the FAA and effectively overrule *Circuit City*. Its most recent incarnation states in relevant part: “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute.” S. 987, 112th Cong. § 402 (2011).

65. Drahozal & Rutledge, *supra* note 27, at 1112–13; *see, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (holding that antitrust claims are nonarbitrable).

66. *See* Drahozal & Rutledge, *supra* note 27, at 1113 (describing how the bifurcation of arbitral disputes and nonarbitrable disputes persisted from 1925 until the 1970s and 1980s); Rutledge, *supra* note 48, at 553.

67. *See* Drahozal & Rutledge, *supra* note 27, at 1113.

68. 473 U.S. 614 (1985).

69. *Id.* at 616–17.

70. *Id.* at 617.

71. *Id.* at 617–19; *see also* 9 U.S.C. § 4 (2006).

72. *Mitsubishi*, 473 U.S. at 619–20.

whether a statutory claim brought by Soler under the Sherman Act could be compelled into arbitration via the FAA.⁷³

Relying on the “liberal federal policy favoring arbitration agreements,” the Court held that, as a general rule, arbitration agreements must be enforced for all claims, including those based on statutory rights.⁷⁴ As a guiding principle, the Court reasoned, Congress’s preeminent concern in passing the FAA was “to enforce private agreements into which parties had entered,”⁷⁵ and so agreements to arbitrate must be “rigorously enforce[d]”⁷⁶ with “any doubts concerning the scope of arbitrable issues . . . resolved in favor of arbitration.”⁷⁷ The Court held that short of Congressional intent deriving from text or legislative history to the contrary, statutory claims can properly be resolved in arbitration because, “[h]aving made the bargain to arbitrate, the party should be held to it.”⁷⁸

The Court stressed that compelling the resolution of the claim to arbitration in no way conflicted with Soler’s ability to bring antitrust claims under the Sherman Act:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.⁷⁹

Because Soler “effectively may vindicate its statutory cause of action in the arbitral forum,”⁸⁰ the Court held the arbitration agreement fully enforceable.⁸¹ Critically, however, congruent with its reasoning the Court carved out an essential limitation: where an arbitration agreement serves as a “prospective waiver of a party’s right to pursue statutory remedies . . . [the Court] would have little hesitation in condemning the agreement as against public policy.”⁸²

In 1989, the Court applied similar reasoning in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁸³ in holding that claims brought under the Securities Act of 1933 were arbitrable; again, the change in forum did not forfeit any substantive rights of the parties.⁸⁴ The Court explicitly overruled its holding in *Wilko v. Swan*,⁸⁵ an earlier case from the “non-

73. *Id.* at 624–25.

74. *Id.*

75. *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

76. *Id.* at 626 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

77. *Id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

78. *Id.* at 628.

79. *Id.*

80. *Id.* at 637.

81. *Id.* at 640.

82. *Id.* at 637 n.19.

83. 490 U.S. 477 (1989).

84. *Id.* at 481.

85. 346 U.S. 427 (1953).

arbitrability” era.⁸⁶ However, the Court was careful to note that the predispute arbitration agreement in question only interfered with “procedural components” of the Securities Act, including broad venue provisions in federal courts, nationwide service of process in federal courts, removal of amount-in-controversy requirements, and concurrent state and federal jurisdiction.⁸⁷ Other provisions of the Securities Act not in dispute are substantive, such as placing the burden on the seller to prove lack of scienter when a buyer alleges fraud.⁸⁸ Waiver is permissible for procedural components of the statute, as the Court rejected the “outmoded presumption” that arbitration weakens “the protections afforded in the substantive law to would-be complainants.”⁸⁹

Similarly, in 1991, the Supreme Court considered in *Gilmer v. Interstate/Johnson Lane Corp.*⁹⁰ whether a statutory claim brought in federal court under the Age Discrimination in Employment Act⁹¹ (ADEA) could be compelled into arbitration per the terms of a predispute arbitration agreement between Interstate and one of its employees.⁹² Declaring the arbitration agreement enforceable and compelling arbitration, the Court reiterated many of its arguments from *Mitsubishi*. The Court stated that the employee, because he had agreed to arbitrate, had the burden of showing congressional intent to preclude waiver of a judicial forum for ADEA claims.⁹³ This congressional intent, if it exists, “will be discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.”⁹⁴ The Court stressed that “‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’”⁹⁵

Applying this test, the Court failed to find the necessary congressional intent or conflict of underlying purpose in the text or legislative history of the ADEA.⁹⁶ Arbitration falls within the “ADEA’s flexible approach to resolution of claims”⁹⁷ and allows parties to broadly select the forum for resolving their dispute.⁹⁸ The Court also rejected arguments that specific aspects of arbitration were incompatible with resolution of a suit brought by an employee under the ADEA, such as concerns of bias by the arbitration

86. *Rodriguez de Quijas*, 490 U.S. at 485.

87. *Id.* at 481–82.

88. *Id.* at 481.

89. *Id.*

90. 500 U.S. 20 (1991).

91. 29 U.S.C. §§ 621–634 (2006).

92. *Gilmer*, 500 U.S. at 23.

93. *Id.* at 26 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

94. *Id.* (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

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

96. *Id.* at 35.

97. *Id.* at 29.

98. *See id.* (citing *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 483 (1989)).

panel, lack of extensive discovery, absence of written opinions, inequality of bargaining power between employee and employer, and—of particular importance for this Note—absence of class action relief through arbitration procedures.⁹⁹ On this last point, the Court noted that the arbitrator was not restricted in the types of relief he was permitted to award, and applicable New York Stock Exchange rules provided for collective proceedings.¹⁰⁰ At least on these facts, arbitration did not impinge upon class relief or any other underlying purpose of the ADEA that would render the parties’ predispute arbitration agreement unenforceable. As in *Mitsubishi*, the Court emphasized that arbitration did not prevent the plaintiff from vindicating his underlying age discrimination claim, and so, “[b]y agreeing to arbitrate a statutory claim, [the plaintiff] does not forgo the substantive rights afforded by the statute.”¹⁰¹

Finally, in 2012, the Court in *CompuCredit Corp. v. Greenwood*¹⁰² considered the specificity of legislative instruction required to overcome the presumption of enforceability of an arbitration agreement. The case dealt with a credit card application that stipulated arbitration for resolution of all future disputes.¹⁰³ Customers brought a claim under the Credit Repair Organizations Act¹⁰⁴ (CROA) for misleading representations made by the defendant, a credit card company.¹⁰⁵ The customers argued that, because the CROA contains a provision stating that “[y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization Act,”¹⁰⁶ they could not be compelled into arbitration despite the terms of their predispute arbitration agreement and should have been permitted to bring their CROA claim in court.¹⁰⁷

Citing *Mitsubishi*, the Court reasoned that arbitration agreements must be enforced according to their terms, even when the claims at issue are federal statutory claims, unless the federal statute overrides the FAA by a “contrary congressional command.”¹⁰⁸ The Court held that statutory language merely suggesting a cause of action (here a “right to sue”) is not a sufficient “contrary congressional command” to override the FAA.¹⁰⁹ As in *Mitsubishi*, *Rodriguez de Quijas*, and *Gilmer*, compelling arbitration does not conflict with any substantive statutory rights afforded by the CROA because “contractually required arbitration of claims satisfies the statutory

99. *Id.* at 30–33.

100. *Id.* at 32.

101. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

102. 132 S. Ct. 665 (2012).

103. *Id.* at 668.

104. 15 U.S.C. § 1679 (2006).

105. *CompuCredit*, 132 S. Ct. at 665.

106. *Id.* at 669 (quoting 15 U.S.C. § 1679c(a)).

107. *Id.*

108. *Id.* (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

109. *Id.* at 670 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

prescription of civil liability in court.”¹¹⁰ If Congress wishes to overrule the FAA by prohibiting use of arbitration for certain statutory claims, it must do so “in a manner less obtuse” than the language of the CROA.¹¹¹ The “right to sue” language provides only a “guarantee of the legal power to impose liability.”¹¹² Because this right could be effectuated through arbitration, the Court enforced the terms of the arbitration agreement.

4. The FAA and Class Waivers

The Supreme Court has also shifted in its interpretation of the relationship between the FAA and the use of class arbitration. The Court’s plurality opinion in *Bazzle*, described above,¹¹³ was viewed as a signal that arbitrators could use class arbitration when appropriate and, consequently, use of class arbitration increased significantly.¹¹⁴ More recently, however, the Court has decided two cases that significantly increase the ability of a party to *avoid* use of class proceedings—in both court and arbitration—through use of class waivers in predispute arbitration agreements.¹¹⁵

In the 2010 case *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹¹⁶ the Court decided whether imposing class arbitration on parties whose arbitration agreement is silent on that issue is consistent with the FAA.¹¹⁷ The arbitration agreement in dispute, between shipping companies and a corporate customer, required arbitration of all future disputes but was silent as to whether this permitted use of class arbitration.¹¹⁸

The Court began its analysis with “the basic precept that arbitration ‘is a matter of consent, not coercion.’”¹¹⁹ Accordingly, the Court must “give effect to the contractual rights and expectation of the parties” and ensure that “the parties’ intentions control.”¹²⁰ One area in which the parties must consent is “*with whom* they choose to arbitrate their disputes.”¹²¹ Because class arbitration would essentially require the defendant to arbitrate with many more parties than it explicitly consented, the Court concluded that “a

110. *Id.* at 671.

111. *Id.* at 672.

112. *Id.* at 671 (emphasis omitted).

113. *See supra* notes 40–42 and accompanying text.

114. *See supra* note 44 and accompanying text.

115. *See* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

116. 130 S. Ct. 1758 (2010).

117. *Id.* at 1764.

118. *Id.* at 1764–66. The Court noted initially that its plurality opinion in *Bazzle* did not bear on the present analysis. The Court rejected the parties’ view that the *Bazzle* plurality stood for the proposition that “an arbitrator, not a court, [should] decide whether a contract permits class arbitration.” *Id.* at 1772. Rather, the *Bazzle* plurality determined only that the arbitrator could determine whether an arbitration agreement was indeed silent on the issue of class arbitration. *Id.* at 1771. Thus, the question of whether class arbitration is permitted given contractual silence remained unanswered. *Id.* at 1772.

119. *Id.* at 1773 (quoting *Volt Info. Scis. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

120. *Id.* at 1774 (citations and internal quotation marks omitted).

121. *Id.*

party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”¹²²

In the Court’s reasoning, explicit agreement to enter into class arbitration is necessary because “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”¹²³ The Court offered two justifications for this conclusion. First, class arbitration diminishes the usual benefits of arbitration—“lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”¹²⁴ Second, the shift to class arbitration introduces fundamental changes because, as compared to bilateral arbitration, class arbitration calls for the resolution of many disputes between hundreds or thousands of parties, often sacrifices privacy and confidentiality, binds many absent parties, and greatly increases the commercial stakes.¹²⁵ Class arbitration fundamentally differs from bilateral arbitration and, under the FAA, cannot be imposed on an unwilling party absent explicit contractual consent.¹²⁶

In 2011, the Supreme Court addressed for the first time the enforceability of contractual class waivers in *Concepcion*. A cell phone contract between AT&T and a customer required that all future disputes be brought in arbitration and in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”¹²⁷ However, under California law, a clause waiving classwide procedures in consumer adhesion contracts was unconscionable and thus unenforceable.¹²⁸ The *Concepcions* argued that this rationale for not enforcing the arbitration agreement fell under the “saving clause” of Section 2 of the FAA, which requires that arbitration agreements be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.”¹²⁹ If the California law was not included within the saving clause, then the FAA would preempt the state law and the

122. *Id.* at 1775.

123. *Id.*

124. *Id.*

125. *See id.* at 1776.

126. *See id.* For an article taking to task the Court’s conclusion that class arbitration fundamentally changes the nature of arbitration, see Strong, *supra* note 17 (arguing that class arbitration closely resembles other forms of multiparty arbitration).

127. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) (quoting Petition for Writ of Certiorari at 61a, *Concepcion*, 131 S. Ct. 1740 (No. 09-893)).

128. *Id.* at 1746; *see also* *Discover Bank v. Superior Court of L.A.*, 30 Cal. Rptr. 3d 76, 87 (2005) (holding that where a class waiver “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” the waiver is unconscionable and thus unenforceable).

129. *Concepcion*, 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2 (2006)).

parties' arbitration agreement waiving use of classwide procedures would be enforceable.¹³⁰

Relying heavily on *Stolt-Nielsen*, the Court held that the California law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA, and so was preempted by the FAA.¹³¹ By entering into an arbitration agreement, parties seek to contractually modify the procedural rules that will be used to resolve their dispute.¹³² The Court viewed use of class arbitration rather than bilateral arbitration as a modification of procedural rules akin to altering the rules of discovery or evidence.¹³³ The California law, by forbidding class arbitration waivers in consumer adhesion contracts and thus requiring the availability of classwide procedures, interfered with the freedom of the parties to select their procedural rules, and so "create[d] a scheme inconsistent with the FAA."¹³⁴

As in *Stolt-Nielsen*, the Court emphasized the significant differences between class arbitration and bilateral arbitration. Class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."¹³⁵ Even if a state has legitimate grounds for requiring class proceedings—such as the ability to "prosecute small-dollar claims that might otherwise slip through the legal system"¹³⁶—a state law, such as the California law, is impermissible.¹³⁷ By requiring procedures beyond the scope of the parties' consent, the law stands as an obstacle to the FAA's principle purpose of ensuring that private arbitration agreements are enforced according to their terms.¹³⁸ Reading a class arbitration requirement into the FAA's savings clause for consumer agreements would be "absolutely inconsistent with the provisions of the [FAA]."¹³⁹ Accordingly, the Court overruled the state unconscionability law, with language suggesting a broad endorsement of the enforceability of class waivers in predispute arbitration agreements.¹⁴⁰

130. *See id.* at 1747.

131. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

132. *Id.* at 1748–49 (citations omitted) ("[W]e have held that parties may agree . . . to arbitrate according to specific rules.").

133. *Id.* at 1747.

134. *Id.* at 1748.

135. *Id.* at 1751.

136. *Id.* at 1753.

137. *See id.* at 1748.

138. *See id.* The Court reiterated the point made in *Stolt-Nielsen* that class arbitration cannot be used absent explicit consent from both parties. *Id.* at 1750–51 ("The conclusion follows that class arbitration, to the extent it is manufactured by [California law] rather than consensual, is inconsistent with the FAA.").

139. *Id.* at 1748 (quoting *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227–28 (1998)).

140. *See id.* at 1753; *see also* *Weston*, *supra* note 29, at 781 ("*Concepcion* appeared to require that courts enforce class action waivers, even under circumstances where the bans on collective relief would otherwise impose unconscionable results.").

Putting these developments in FAA jurisprudence together, a few general conclusions can be made. First, the FAA applies to nearly all arbitration agreements in employment contracts, with only narrow exceptions for transportation workers.¹⁴¹ Second, where parties have entered into a predispute arbitration agreement, the FAA compels arbitration of many types of statutory claims, provided that arbitration will not infringe upon any substantive rights of the parties.¹⁴² Third, such claims must be arbitrated according to the clear intent of the parties as expressed in their arbitration agreement.¹⁴³ Where the parties have not agreed to the use of class arbitration, the arbitrator cannot later implement it absent the parties' consent.¹⁴⁴ Class waivers in arbitration agreements are generally enforceable, as state law cannot require the availability of class arbitration.¹⁴⁵ Statutory rights of employees, to be discussed below, should be analyzed with this framework in mind.

D. The NLRA and the Development of Protected Employee Activities

The NLRA is a cornerstone piece of federal legislation establishing basic rights of employees. In order to determine how these rights interact with the FAA, it is necessary to understand the substantive nature of the NLRA and the type of employee activities it protects. To that end, this section first provides background on important elements of the NLRA. Next, it describes the types of employee activities protected by the NLRA as interpreted by the Supreme Court and NLRB, and then it reviews a recent NLRB decision ruling that an employee's invocation of classwide proceedings is one such activity. Finally, this section discusses the waivability of NLRA protections and the appropriate remedy if the Board or a court finds a violation.

1. Purpose and Structure of the NLRA

The National Labor Relations Act of 1935¹⁴⁶ sought to strengthen the ability of workers to organize in order to better their employment

141. *See supra* Part I.C.2.

142. *See supra* Part I.C.3.

143. *See supra* Part I.C.4.

144. *See supra* notes 115–26 and accompanying text.

145. *See supra* notes 127–40 and accompanying text.

146. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)). Portions of the NLRA were amended in the Labor Management Relations Act of 1947 (also known as the Taft-Hartley Act), Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 151), and the Labor Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act), Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401–531). For a historical overview of the development of the NLRA, see JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 35–63 (6th ed. 2012).

conditions.¹⁴⁷ Section 1 of the NLRA makes clear that the primary focus of the statute is the right of employees to act collectively¹⁴⁸:

It is hereby declared to be the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁴⁹

The NLRA gives employees a right to organize and, unlike the National Industrial Recovery Act¹⁵⁰ (NIRA) passed two years prior, the NLRA makes this right legally enforceable.¹⁵¹ The linchpin of the NLRA is Section 7, which provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁵²

Section 7 establishes three rights—the right to organize, the right to bargain collectively, and the right to engage in other concerted activities—that were considered necessary “to establish a balance of bargaining power between employer and employee and thereby avoid the pitfalls and inadequacies that had characterized earlier labor legislation [such as the NIRA].”¹⁵³ The core purpose of Section 7, as the Supreme Court has written, is to “affirmatively guarantee[] employees the most basic rights of industrial self-determination.”¹⁵⁴ To effectuate this guarantee, Section 8 of the NLRA provides: “It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].”¹⁵⁵ Legally enforceable protection of employees’ right to engage in concerted activities is, in the words of the Supreme Court, the “fundamental right” protected by the NLRA.¹⁵⁶

To enforce the rights created by Sections 7 and 8, the NLRA established a new federal agency called the National Labor Relations Board.¹⁵⁷ Sections 3 through 6 of the NLRA created the Board and set out basic details of its composition and operations.¹⁵⁸ Section 9 gives the Board exclusive jurisdiction over questions of employee representation,¹⁵⁹ and Section 10 gives the Board exclusive jurisdiction over enforcement of

147. HIGGINS, *supra* note 146, at 28.

148. *Id.* at 82.

149. 29 U.S.C. § 151 (2006).

150. 15 U.S.C. § 703 (repealed 1935).

151. *See* HIGGINS, *supra* note 146, at 28.

152. 29 U.S.C. § 157.

153. HIGGINS, *supra* note 146, at 28–29.

154. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 61 (1975).

155. 29 U.S.C. § 158(a)(1).

156. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

157. *See* HIGGINS, *supra* note 146, at 29.

158. *See* 29 U.S.C. §§ 153–156.

159. *See* HIGGINS, *supra* note 146, at 29; *see also* 29 U.S.C. § 159.

Section 8 unfair labor practices.¹⁶⁰ Section 10 also sets forth, in broad terms, NLRB procedures, including provisions for judicial review and enforcement of Board orders.¹⁶¹

2. Scope of Section 7 Rights

Section 7 of the NLRA grants employees the right “to engage in other concerted activities for the purpose of . . . mutual aid or protection.”¹⁶² This clause establishes employee protection not just in joining or assisting labor organizations but also in engaging in a broad category of activities that are carried out for their “mutual aid or protection.”¹⁶³ To receive Section 7 protection, an employee activity must meet two requirements. First, the activity must be “concerted”; it must be “undertaken together by two or more employees or undertaken by one on behalf of others.”¹⁶⁴ Second, an employee activity must be for “mutual aid or protection.”¹⁶⁵ Reviewing the types of activities encompassed by these terms will aid in understanding why the Board properly held recently that they include employee use of classwide proceedings.

a. “Concerted Activity”

Courts and the NLRB have endorsed a broad reading of the “concerted” requirement of Section 7 activities. Narrowly, employees act concertedly when they engage in direct group action and “have joined together in order to achieve common goals.”¹⁶⁶ In addition, an individual employee can engage in concerted activity in two other circumstances: “(1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee.”¹⁶⁷ The Supreme Court has justified this broad reading of Section 7 by reasoning that “[t]here is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.”¹⁶⁸

Applying this standard, an individual employee engages in “concerted activity” when he or she protests working hours and travel requirements in the presence of other employees,¹⁶⁹ engages in conversations for the

160. See HIGGINS, *supra* note 146, at 29; see also 29 U.S.C. § 160.

161. See HIGGINS, *supra* note 146, at 29.

162. 29 U.S.C. § 157.

163. HIGGINS, *supra* note 146, at 83.

164. *Id.* at 83–84.

165. For a general summary of these two requirements, see Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 187–200 (2003); see also HIGGINS, *supra* note 146, at 209–33.

166. *NLRB v. City Disposal Sys.*, 465 U.S. 822, 830 (1984); see also HIGGINS, *supra* note 146, at 210–11.

167. *City Disposal Sys.*, 465 U.S. at 831.

168. *Id.* at 835.

169. See *Am. Red Cross Blood Servs. Johnstown Region*, 322 N.L.R.B. 590, 594 (1996).

purpose of initiating group activity,¹⁷⁰ composes a petition protesting a pay system,¹⁷¹ writes a letter to a newspaper seeking community support for a strike,¹⁷² or posts notices regarding workplace illness seeking discussion with other employees.¹⁷³ However, activity by an individual is not concerted if undertaken solely “by and on behalf of the employee himself.”¹⁷⁴ Thus, an employee’s refusal to operate equipment that he believes is unsafe is not concerted activity where no other employees had similarly complained.¹⁷⁵

b. “Mutual Aid or Protection”

A comparably generous reading has been given to the “mutual aid or protection” requirement.¹⁷⁶ *Eastex, Inc. v. NLRB*¹⁷⁷ is the foundational Supreme Court case establishing the breadth of activities encompassed by this clause. In this case, Eastex, a paper products manufacturer, had barred union representatives from distributing to Eastex employees a newsletter seeking union membership and support for proposed employment-related legislation.¹⁷⁸ The union filed a claim with the NLRB, alleging an illegal restraint on employees’ right to engage in “concerted activities for the purpose of . . . mutual aid or protection.”¹⁷⁹ The case ultimately proceeded to the Supreme Court specifically to address the scope of the “mutual aid or protection” clause.¹⁸⁰

The Court ruled that employees act for the purpose of “mutual aid or protection” whenever they seek to improve their terms and conditions of employment, even if these activities occur outside the immediate employee-employer relationship.¹⁸¹ Employees’ activities are protected where, as here, they seek to appeal to legislators to protect their interests as employees, and also whenever employees “seek to improve working conditions through resort to administrative and judicial forums.”¹⁸² The Court held that a narrower reading of the Section 7 protections would “frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions.”¹⁸³ While the Court

170. See *Circle K Corp.*, 305 N.L.R.B. 932 (1991).

171. See *Globe Sec. Sys.*, 301 N.L.R.B. 1219, 1221 (1991).

172. See *Dougherty Lumber Co.*, 299 N.L.R.B. 295 (1990), *enforced*, 941 F.2d 1209 (6th Cir. 1991).

173. See *Martin Marietta Corp.*, 293 N.L.R.B. 719 (1989).

174. *Meyers Indus.*, 281 N.L.R.B. 882, 885 (1986).

175. See *Goodyear Tire & Rubber Co.*, 269 N.L.R.B. 881 (1984).

176. See HIGGINS, *supra* note 146, at 220–27.

177. 437 U.S. 556 (1978).

178. *Id.* at 559–61.

179. *Id.* at 558 (quoting 29 U.S.C. § 157 (2006)).

180. *Id.* at 562 (“Because of apparent differences among the Courts of Appeals as to the scope of rights protected by the ‘mutual aid or protection’ clause of § 7 . . . we granted certiorari.”).

181. *Id.* at 565.

182. *Id.* at 566.

183. *Id.* at 567 (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)).

acknowledged that some activities may be too attenuated to be covered by the “mutual aid or protection” clause, the Court left it to the Board to analyze possible borderline cases in the first instance.¹⁸⁴

Accordingly, Section 7 has been interpreted to protect various forms of appeals to legislators or agencies and filings of judicial actions. Employees engage in Section 7 protected activity when they write letters to legislators opposing changes in immigration law that may affect job security,¹⁸⁵ file safety complaints with state agencies,¹⁸⁶ file employment discrimination claims with a state civil rights commission,¹⁸⁷ or call the Department of Labor regarding changes in lunch policy.¹⁸⁸ Similarly, Section 7 covers an employee who files a petition in court seeking an injunction against employer harassment,¹⁸⁹ a group of employees who file an invasion of privacy suit against an employer using listening devices,¹⁹⁰ an employee who joins others in filing a libel suit,¹⁹¹ and employees who file a breach of contract lawsuit against their employer.¹⁹² In general, such appeals to agencies or courts are activities for “mutual aid and protection” so long as they are not done out of malice or bad faith,¹⁹³ even if they are ultimately found to be without merit.¹⁹⁴

3. Class Action As a Protected Section 7 Right

Recently, in *D.R. Horton*,¹⁹⁵ the Board applied these standards in considering whether, by filing a class action disputing the classification of him and others as supervisors, an employee engaged in activity protected by Section 7. The case dealt with a claim brought by Michael Cuda, a former employee of home building company D.R. Horton.¹⁹⁶ D.R. Horton’s employment agreement, signed by Cuda as a condition of employment, stipulated that all disputes be resolved exclusively in arbitration and that the arbitrator “may hear only Employee’s individual claims . . . and does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.”¹⁹⁷ Cuda filed a claim with the NLRB, alleging that Section 7 protected his right to invoke class proceedings, and so D.R. Horton violated

184. *Id.* at 567–68.

185. *See* *Kaiser Eng’rs*, 213 N.L.R.B. 752 (1974).

186. *See* *Wolfkill Feed & Fertilizer Corp.*, 277 N.L.R.B. 635 (1985).

187. *See* *Franklin Iron & Metal Corp.*, 315 N.L.R.B. 819 (1994), *enforced*, 83 F.3d 156 (6th Cir. 1996).

188. *See* *Salisbury Hotel*, 283 N.L.R.B. 685, 685 (1987).

189. *See* *Mohave Elec. Coop. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000).

190. *See* *Health Enters. of Am.*, 282 N.L.R.B. 214, 215 (1986).

191. *See* *Sarkes Tarzian*, 149 N.L.R.B. 147 (1964).

192. *See* *Trinity Trucking & Materials Corp.*, 221 N.L.R.B. 364 (1975).

193. *Id.* at 365.

194. *Garage Mgmt. Corp.*, 334 N.L.R.B. 940, 940 (2001).

195. 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

196. *Id.* at *1.

197. *Id.* (internal quotation marks omitted).

Section 8 by maintaining an employment contract that required the arbitrator to resolve all disputes on an individual basis.¹⁹⁸

Quoting *Eastex*, the Board first reasoned that Section 7 protects employees seeking to improve their working conditions through resort to administrative, judicial, and arbitral forums, as all are activities undertaken for “mutual aid or protection.”¹⁹⁹ The Board had previously held that a suit filed by multiple employees is a form of concerted activity, and so it concluded that the same classification should apply to claims brought on a classwide basis.²⁰⁰ This is true even if the suit is initiated unilaterally, on behalf of other employees.²⁰¹ Allowing an employee to assert a claim collectively, the Board wrote, serves the purpose of “mutual aid or protection,” and is in line with the underlying purpose of the NLRA as “[e]mployees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively.”²⁰² Thus, the Board held that “an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.”²⁰³ The latter portion of this opinion—whether the Section 7 violation rendered D.R. Horton’s arbitration agreement unenforceable—is discussed below.²⁰⁴

4. Waivability and Enforcement of Section 7 Rights

Once an employee activity is deemed protected under Section 7, a related question is whether the right to engage in the activity can be waived by a contractual agreement between employee and employer. The Supreme Court addressed whether employees can waive their protected rights in *National Licorice Co. v. NLRB*.²⁰⁵

In this case, the employment contract between National Licorice Company and its employees required that all employees relinquish “the right to strike, the right to demand a closed shop or signed agreement with

198. *Id.* at *2.

199. *Id.* (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978)).

200. *See id.* (citing *Salt River Valley Water Users Ass’n*, 99 N.L.R.B. 849, 853–54 (1952); *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948–49 (1942)).

201. *See id.* at *3.

202. *Id.* (internal quotation marks omitted).

203. *Id.* at *4; *see also* *Hodges*, *supra* note 165, at 229 (“[A] mandatory arbitration agreement should be found unlawful if it does not expressly permit the unquestionably concerted activities of class action . . .”). This right does not guarantee class certification. Rather, “it guarantees only employees’ opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law.” *D.R. Horton*, 2012 WL 36274, at *12 n.24. An employee must be permitted, for example, to use Rule 23 to seek class certification. However, if a judge determines that the Rule 23 requirements are not met, he can then deny certification without infringing the Section 7 right. *Id.*

204. *See infra* Part II.A.

205. 309 U.S. 350 (1940).

any union.”²⁰⁶ This requirement clearly violated “the employees’ rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the [NLRA].”²⁰⁷ The question, however, was whether a violation of the NLRA was grounds to declare the contract unenforceable.²⁰⁸

The Court ruled that the Board was empowered to declare the employment contracts unenforceable under its Section 10 remedial power because “the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the [NLRA], and were a continuing means of thwarting the policy of the [NLRA].”²⁰⁹ The rights protected by Sections 7 and 8 are “public right[s] vested in [the NLRB] as a public body, charged in the public interest with the duty of preventing unfair labor practices.”²¹⁰ Accordingly, “employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes.”²¹¹

The Supreme Court in *J.I. Case Co. v. NLRB*²¹² addressed a related issue. In this case, the employer argued that it did not have to negotiate portions of a collective agreement because employees were already covered by lawful individual employment contracts.²¹³ Again, the Court held that individual employment contracts could not be used as grounds to waive rights protected by the NLRA.²¹⁴ Here, because the collective bargaining process was mandated by the NLRA, access to it could not be waived in individual employment contracts, even if an individual employee received some benefits by bargaining individually.²¹⁵ As in *National Licorice*, the Court emphasized the critical nature of the NLRA as a public law protecting public rights.²¹⁶ Thus, “[w]herever private contracts conflict with [the NLRA’s] functions, they obviously must yield or the [NLRA] would be reduced to a futility.”²¹⁷

Subsequently, the Board has ordered employers to cease and desist from maintaining employment agreements that explicitly restrict Section 7 activity or have the effect of chilling Section 7 activity.²¹⁸ Furthermore, the

206. *Id.* at 355.

207. *Id.* at 360.

208. *See id.* at 351.

209. *Id.* at 361.

210. *Id.* at 364.

211. *Id.*

212. 321 U.S. 332 (1944).

213. *See id.* at 334.

214. *Id.* at 339.

215. *See id.* at 336.

216. *Id.* at 337 (citing *Nat’l Licorice Co.*, 309 U.S. at 364).

217. *Id.*

218. *See* Martin Luther Mem’l Home, 343 N.L.R.B. 646, 646–47 (2004) (citations omitted) (“[O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict

Supreme Court has held that courts cannot enforce contracts that violate the NLRA because they are illegal agreements.²¹⁹ While the NLRB has primary jurisdiction to determine if an agreement violates Sections 7 and 8, federal courts must at all times refuse to enforce contracts if they are found to violate federal law.²²⁰

II. RECONCILING THE FAA AND NLRA: THE ENFORCEABILITY OF CLASS WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

The issue to be analyzed in the balance of this Note is whether, given the Board's ruling in *D.R. Horton* that invoking classwide procedures is a form of concerted activity protected under Section 7 of the NLRA,²²¹ employers can require, as a condition of employment, an agreement to arbitrate all future disputes on an individual basis. The stakes are high. A recent paper found that the prevalence of predispute arbitration agreements in employment contracts has increased markedly in recent decades, paralleling increased judicial acceptance.²²² Studies conducted in the early to mid-1990s found that between 2.1 percent and 9.9 percent of employers had adopted arbitration agreements; by the late 1990s and 2000s the reported range increased to between 14.1 percent and 22.7 percent.²²³ Arbitration agreements have been estimated to cover at least thirty million employees, and commentators believe this number will continue to rise.²²⁴ Furthermore, in light of *Stolt-Nielsen* and *Concepcion*, there is concern that employers can have a sort of "get out of jail free" card by including class waivers as part of arbitration agreements,²²⁵ or even simply by leaving the arbitration agreement silent as to the use of class proceedings.²²⁶

the exercise of Section 7 rights."); *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998) ("Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.").

219. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982) ("While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA].").

220. See *id.* at 83–84 ("The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." (quoting *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948))).

221. See *supra* Part I.D.3.

222. See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007); see also Rutledge, *supra* note 48, at 555 ("Surveys similarly show that . . . a growing number of employers and companies are using arbitration clauses."); Weston, *supra* note 29, at 772 ("Arbitration provisions became standard in employment contracts after . . . *Gilmer*.").

223. See Colvin, *supra* note 222, at 408–10.

224. Ruan, *supra* note 7, at 22.

225. See Weston, *supra* note 29, at 770, 776; see also Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 895 (2008) (concluding that

While the potential conflict between Section 7 NLRA rights and the FAA has been considered in academic literature,²²⁷ the NLRB first squarely addressed the issue only recently in the latter portion of its *D.R. Horton* opinion.²²⁸ In addition to holding that classwide proceedings are a form of concerted activity protected by Section 7, the Board also held that *D.R. Horton*'s arbitration agreement interfered with the employee's Section 7 right and ordered *D.R. Horton* to modify its arbitration agreement.²²⁹ The Board ruled that refusing to enforce the arbitration agreement's class waiver did not create a conflict with the FAA²³⁰ and, even if it did, that the FAA must yield to the NLRA.²³¹

Subsequent to the Board's ruling in *D.R. Horton*, courts throughout the country have ruled on the same issue of employment arbitration agreements containing class waivers. While one federal court agreed with the Board's analysis and declared an arbitration class waiver unenforceable,²³² many other courts have declined to follow the Board's reasoning and have enforced class waivers.²³³ This part lays out the arguments made by both sides of the debate to establish a clearer picture of the conflict as it currently stands. Part II.A presents in greater detail the Board's rationale in *D.R. Horton* and the federal court that followed its holding. Part II.B explores the opinions rejecting *D.R. Horton* and holding class waivers enforceable.

A. The NLRB and a Federal Court Refuse To Enforce Class Waivers

After concluding that pursuit of classwide employment-related claims is a protected Section 7 activity,²³⁴ the Board in *D.R. Horton* made two further rulings. First, *D.R. Horton*'s employment agreement violated Section 8 of NLRA by “interfer[ing] with, restrain[ing], or coerc[ing]

arbitration clauses are often used in consumer contracts to preclude aggregate consumer action, not to promote fairness and efficiency).

226. See Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration in Light of Stolt-Nielsen*, 23 LOY. CONSUMER L. REV. 265, 270 (2011) (stating that after *Stolt-Nielsen*, “[a] court cannot compel class arbitration without a contractual basis for concluding that the parties agreed to it; and presumably no potential defendant would agree to it”).

227. See, e.g., Hodges, *supra* note 165; Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. REV. 43 (2011); John B. O’Keefe, Note, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823 (2005).

228. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *4 (Jan. 3, 2012).

229. *Id.* at *17–18.

230. *Id.* at *10–15.

231. *Id.* at *16.

232. See *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

233. See *Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-cv-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Morvant v. P.F. Chang’s China Bistro*, 870 F. Supp. 2d 831 (N.D. Cal. 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198 (Ct. App. 2012); *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372 (Ct. App. 2012), *appeal docketed*, 147 Cal. Rptr. 3d 324 (Cal. Sept. 19, 2012).

234. See *supra* Part I.D.3.

employees in the exercise of a right guaranteed” by Section 7.²³⁵ Citing *National Licorice*²³⁶ and *J.I. Case*,²³⁷ the Board held it unlawful for D.R. Horton to include a term in its employment agreement that restricted a Section 7 right by requiring employees to pursue claims against their employer only individually.²³⁸

Second, the Board addressed the more critical question: is this ruling consistent with the FAA, particularly in light of the Supreme Court’s ruling in *Concepcion*? The Board held that it was and provided four justifications. First, the Board reasoned that declaring D.R. Horton’s employment agreement unlawful does not conflict with the FAA and its underlying concern about judicial or administrative bodies failing to put private arbitration agreements “‘upon the same footing as other contracts.’”²³⁹ Under *J.I. Case*, any private contract that conflicts with the NLRA is unlawful, so invalidation of D.R. Horton’s arbitration agreement treats it no worse than any other private contract that infringes upon a protected activity.²⁴⁰ Unlike in *Concepcion*, invalidation of the class waiver does not rest on “‘defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’”²⁴¹

Second, the Board concluded that its ruling does not conflict with the FAA, because D.R. Horton’s arbitration agreement waives employees’ substantive Section 7 right.²⁴² The FAA does not compel enforcement of an arbitration agreement that requires a party to “‘forgo the substantive rights afforded by the statute.’”²⁴³ Indeed, the Board determined, “‘the intent of the FAA was to leave substantive rights undisturbed.’”²⁴⁴ The Board wrote that the Section 7 right to bring a class or collective action is substantive, not procedural, because “[t]he right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.”²⁴⁵ While the Board acknowledged that class action rules such as Federal Rule of Civil Procedure 23 are procedural, “‘the Section 7 right to act concertedly by invoking Rule 23, Section 216(b) [of the Fair Labor Standards Act (FLSA)],²⁴⁶ or other legal procedures is not.’”²⁴⁷

235. *D.R. Horton*, 2012 WL 36274, at *5 (quoting 29 U.S.C. § 158(a)(1) (2006)).

236. *See supra* notes 205–11 and accompanying text.

237. *See supra* notes 212–17 and accompanying text.

238. *D.R. Horton*, 2012 WL 36274, at *5; *see also supra* Part I.D.4.

239. *D.R. Horton*, 2012 WL 36274, at *11 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)); *see supra* notes 90–101 and accompanying text.

240. *D.R. Horton*, 2012 WL 36274, at *11.

241. *Id.* at *11 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011)).

242. *Id.* at *12.

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

244. *Id.* at *13.

245. *Id.* at *12.

246. Section 216(b) of the FLSA creates a procedural mechanism similar to that of a Rule 23 class action for enforcement of violations: “An action to recover . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b) (2006).

Third, the Board reasoned that prohibiting class waivers as violative of the NLRA is consistent with the FAA because it falls under the FAA's Section 2 saving clause; arbitration agreements are properly invalidated if based on "grounds as exist at law or in equity for the revocation of any contract."²⁴⁸ Here, enforcing an arbitration agreement that violates federal employment law is against public policy—precisely the type of grounds contemplated by the FAA for declaring an arbitration agreement unenforceable under the saving clause.²⁴⁹

Fourth, even if declaring the agreement unenforceable *does* conflict with the FAA, the Board determined that the FAA must yield to the NLRA.²⁵⁰ The Board cited the Norris-LaGuardia Act,²⁵¹ which provides that a private agreement is unenforceable if it seeks to prohibit a "lawful means [of] aiding any person participating or interested in' a lawsuit arising out of a labor dispute."²⁵² The Norris-LaGuardia Act repealed "[a]ll acts and parts of acts in conflict."²⁵³ Because it was passed seven years after the FAA, the Board reasoned that the Norris-LaGuardia Act repealed the FAA to the extent that it required the enforcement of arbitration agreements with class waivers.²⁵⁴

For all of these reasons, the Board ordered D.R. Horton to cease and desist from maintaining its employment agreement because it required employees, as a condition of their employment,²⁵⁵ to waive the right to maintain class or collective actions in all forums.²⁵⁶

247. *D.R. Horton*, 2012 WL 36274, at *12.

248. *Id.* at *11 (quoting 9 U.S.C. § 2 (2006)).

249. *See id.* at *14.

250. *Id.* at *16.

251. 29 U.S.C. §§ 101–115.

252. *D.R. Horton*, 2012 WL 36274, at *16 (alteration in original) (quoting 29 U.S.C. § 104(d)).

253. *Id.* (quoting 29 U.S.C. § 115).

254. *Id.*

255. *Id.* at *17–18. An NLRB Administrative Law Judge has subsequently applied *D.R. Horton* in holding that an employer violates Section 8 even where a class waiver can be opted out of, and so it is not a mandatory condition of employment. *See* 24 Hour Fitness USA, Inc., no. 20-CA-035419, 2012 WL 5495007 (NLRB Nov. 6, 2012) ("The requirement that employees must affirmatively act to preserve rights already protected by Section 7 rights through the opt-out process is . . . an unlawful burden on the right of employees to engage in collective litigation that may arise in the future.").

256. The Board made clear that D.R. Horton's arbitration agreement was illegal because it violated the NLRA, not because it violated the FLSA upon which Cuda's claim of misclassification was based. *D.R. Horton*, 2012 WL 36274, at *12 ("[T]he right allegedly violated by [D.R. Horton's arbitration agreement] is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA."). Nonetheless, some courts rejecting *D.R. Horton* have incorrectly focused on the rights protected by the FLSA rather than the NLRA. *See* *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (internal quotation marks omitted) ("[G]iven the absence of any contrary congressional command from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject Owen's invitation to follow the NLRB's rationale in *D.R. Horton*."); *Cohen v. UBS Fin. Servs., Inc.*, No. 12 Civ. 2147 (BSJ)(JLC), 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012) (citations omitted) ("To the extent that Plaintiffs rely on . . . *D.R. Horton* . . . for the proposition that 'a waiver of the

Several months later, in *Herrington v. Waterstone Mortgage Corp.*,²⁵⁷ a federal court in Wisconsin applied *D.R. Horton* in refusing to enforce a class waiver in an employment arbitration agreement. Plaintiff Pamela Herrington brought a claim against her employer for failing to provide overtime pay as required under the FLSA.²⁵⁸ The defendant moved to dismiss or stay the case under the terms of the parties' arbitration agreement, which required all employment disputes be resolved in arbitration, and "[s]uch arbitration may not be joined with or join or include any claims by any persons not party to this Agreement."²⁵⁹ Herrington argued that, consistent with *D.R. Horton*, the arbitration agreement was unenforceable because it required her to give up her right under the NLRA to pursue a classwide claim.²⁶⁰

The court first noted that, under Supreme Court precedent, rulings by the Board are entitled to "the greatest deference" and should be followed if "reasonably defensible."²⁶¹ The court then followed the Board's interpretation of the NLRA that collective actions are protected Section 7 activities.²⁶² The court agreed with the Board that the NLRA provides a substantive right that cannot be waived as a condition of employment.²⁶³ Thus, refusing to enforce the class waiver does not conflict with *Gilmer*, which does not mandate enforcement of an agreement that requires waiver of substantive rights,²⁶⁴ or *Concepcion*, which is distinguishable because it did not deal with a substantive right protected by a federal statute.²⁶⁵ The court found the Board's interpretation of the NLRA in *D.R. Horton* "reasonably defensible" and invalidated the class waiver in the arbitration agreement.²⁶⁶

right to proceed collectively under the FLSA is unenforceable as a matter of law,' this Court . . . declines to follow these decisions.").

257. No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

258. *Id.* at *1.

259. *Id.*

260. *Id.* at *2.

261. *Id.* at *5 (quoting *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)).

262. *Herrington*, 2012 WL 1242318, at *5 ("Particularly because defendant develops no argument that the Board has interpreted the NLRA incorrectly, I see no reason to question the Board's judgment in this instance.").

263. *Id.* at *4.

264. *See id.*

265. *See id.* at *6.

266. *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)). The court severed the class waiver and stayed the case pending arbitration, primarily because neither party had argued that class arbitration was improper for the resolution of the dispute. *See id.* at *7. Very recently, a second federal court refused to enforce a class waiver based on a similar substantive right rationale. *Brown v. Citicorp Serv., Inc.*, No. 1:12-cv-00062-BLW, 2013 WL 645942, at *3 (D. Idaho Feb. 21, 2013) (revoking an employment arbitration agreement by reasoning that the employer's "arbitration agreement does more than merely waive [the plaintiff's] right to a procedural remedy; it bars her from asserting a substantive right that is critical to national labor policy").

B. Federal and State Courts Enforce Class Waivers

Federal district courts in California²⁶⁷ and Arkansas²⁶⁸ and state courts of appeal in California²⁶⁹ have recently enforced class waivers in employment arbitration agreements.²⁷⁰ This section first provides a brief account of the facts in each of these cases and then explores the overlapping reasoning of these courts for enforcing class waivers and refusing to follow *D.R. Horton*.

In *Jasso v. Money Mart Express, Inc.*,²⁷¹ Janelle Jasso brought a class action in state court against her employer for violations of California labor law relating to overtime pay, meal and rest breaks, reimbursement for employment-related expenses, and penalties for late wage payments.²⁷² Jasso had previously signed a predispute arbitration agreement that contained a class waiver.²⁷³ Money Mart Express removed the case to federal court and then moved to compel arbitration according to the terms of their arbitration agreement.²⁷⁴ Rejecting *D.R. Horton*, the court held the arbitration agreement and class waiver enforceable and stayed the case pending arbitration.²⁷⁵

In *Morvant v. P.F. Chang's China Bistro, Inc.*,²⁷⁶ Zachary Morvant and Jean Andrews, former employees of a P.F. Chang's restaurant, brought a class action in state court against P.F. Chang's for violating California labor law by failing to provide meal and rest breaks, refusing to pay for missed meal and rest breaks, failing to pay for overtime, and failing to provide accurate wage statements.²⁷⁷ P.F. Chang's removed the case to federal

267. See *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012).

268. See *Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-cv-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012).

269. See *Nelsen v. Legacy Partners Residential*, 144 Cal. Rptr. 3d 198 (Ct. App. 2012); *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372 (Ct. App. 2012), *appeal docketed*, 147 Cal. Rptr. 3d 324 (Cal. Sept. 19, 2012).

270. While this section discusses only these five opinions, numerous other courts have declined to follow *D.R. Horton*, often with reference to the opinions discussed here. See, e.g., *Long v. BDP Intern., Inc.*, No. H-12-1446, 2013 WL 245002, at *14 n.11 (S.D. Tex. Jan. 22, 2013) ("*Horton* has been widely criticized and not followed by various of district courts."); *Tenet HealthSystem Phila., Inc. v. Rooney*, No. 12-mc-58, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012) (declining to follow *D.R. Horton* in part because many district courts "have declined to adopt its rationale altogether in the face of conflicting Supreme Court precedent, statutory schemes, and questions over its precedential value"); *Spears v. Mid-America Waffles, Inc.*, No. 11-2273-CM, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012) (finding that *D.R. Horton* is contrary to *Concepcion*); *Outland v. Macy's Dep't Stores, Inc.*, No. A133589, 2013 WL 164419, at *5 (Cal. Ct. App. Jan. 16, 2013) (discussing the federal district courts that have rejected *D.R. Horton*); *Papudesi v. Northrop Grumman Corp.*, No. B235730, 2012 WL 5987550, at *7 (Cal. Ct. App. Nov. 29, 2012) (stating that the NLRA does not contain a congressional command to override the FAA).

271. 879 F. Supp. 2d 1038 (N.D. Cal. 2012).

272. *Id.* at 1040.

273. *Id.* at 1041.

274. *Id.* at 1040.

275. *Id.* at 1052.

276. 870 F. Supp. 2d 831 (N.D. Cal. 2012).

277. *Id.* at 834.

court and moved to compel arbitration per the terms of its arbitration agreement, which contained a class waiver.²⁷⁸ The court denied P.F. Chang's motion to compel arbitration as to Morvant because he had never signed the arbitration agreement.²⁷⁹ However, the court granted the motion to compel arbitration as to Andrews,²⁸⁰ rejecting Andrews's argument that *D.R. Horton* rendered the arbitration agreement unenforceable.²⁸¹

In *Delock v. Securitas Security Services USA, Inc.*,²⁸² David Delock and several others brought a class action in federal court against their employer Securitas Security Services.²⁸³ Delock was a site supervisor and his coplaintiffs were security guards.²⁸⁴ They alleged that Securitas violated the FLSA and the Arkansas Minimum Wage Act by forcing them to work off the clock.²⁸⁵ Securitas moved to stay the case pending arbitration, arguing that the employees had agreed to an enforceable arbitration agreement with a class waiver.²⁸⁶ In an initial order, the court held that the employees had accepted the arbitration agreement and granted Securitas's motion to compel arbitration.²⁸⁷ However, the court wrote that it needed more time to determine if the class waiver was enforceable in light of *D.R. Horton*.²⁸⁸ In a later order, the court considered and rejected *D.R. Horton* and enforced the class waiver.²⁸⁹

In *Iskanian v. CLS Transportation Los Angeles LLC*,²⁹⁰ plaintiff Arshavir Iskanian, a driver employed by CLS Transportation, brought a class action in state court against CLS, alleging violation of California law for failure to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner.²⁹¹ He had previously signed CLS's arbitration agreement containing a class waiver.²⁹² The trial court found in favor of CLS and

278. *Id.* at 835.

279. *Id.* at 836–37.

280. The parties agreed that Andrews had accepted P.F. Chang's arbitration agreement. *Id.* at 837.

281. *Id.* at 845 (“[T]he inclusion of a class action waiver provides no basis to hold the Arbitration Agreement unenforceable . . .”).

282. No. 4:11-CV-520-DPM, 2012 WL 1066378 (E.D. Ark. Mar. 29, 2012).

283. *Id.* at *1.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at *3.

288. *Id.* at *4.

289. *Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391, at *4 (E.D. Ark. Aug. 1, 2012) (“The Court declines to endorse, however, the Board's application of the Federal Arbitration Act or its reading of the precedent applying that Act.”).

290. 142 Cal. Rptr. 3d 372 (Ct. App. 2012), *appeal docketed*, No. S204032 (Cal. Sept. 19, 2012).

291. *Id.* at 375–76.

292. *Id.*

granted the motion to compel arbitration.²⁹³ The court of appeal affirmed the ruling.²⁹⁴

Finally, in *Nelsen v. Legacy Partners Residential, Inc.*,²⁹⁵ Lorena Nelsen, a former property manager for Legacy Partners Residential, brought a class action against Legacy, alleging violations of the California Labor Code.²⁹⁶ Nelsen had previously accepted an arbitration agreement with a class waiver, and Legacy moved to compel arbitration.²⁹⁷ The trial court granted Legacy's motion and ordered individual arbitration,²⁹⁸ and the court of appeal affirmed.²⁹⁹

All of these courts enforced employment arbitration agreements with class waivers, and each explicitly rejected *D.R. Horton*. Similar and overlapping reasoning was used throughout. These courts largely accepted the Board's interpretation of the NLRA that use of class proceedings is protected under Section 7, and therefore their inclusion in arbitration agreements violates the NLRA.³⁰⁰ The primary point of contention, rather, was whether enforcing the NLRA here conflicts with the FAA and, if so, how to resolve the conflict. To answer this question, several courts noted that a decision by the Board interpreting a statute other than the NLRA (here the FAA) is not entitled to judicial deference or the "reasonably defensible"³⁰¹ standard applied in *Herrington*.³⁰² Particularly because the NLRB has "no special competence or experience in interpreting the Federal Arbitration Act," the analysis is more searching and critical than that undertaken in the case of the NLRB's interpretation of the NLRA.³⁰³

Under this standard of review, these courts all held that refusing to enforce a class waiver that violates Section 7 creates a conflict with the FAA. The primary justification was that the presumed remedy—compelling class arbitration absent the parties' consent—conflicts with the underlying purpose of the FAA to enforce arbitration agreements as written.³⁰⁴ The focus is on "the broad language in *Concepcion* which

293. *Id.* at 376.

294. *Id.* at 388.

295. 144 Cal. Rptr. 3d 198 (Ct. App. 2012).

296. *Id.* at 202–03.

297. *Id.*

298. *Id.* at 215–16.

299. *Id.* at 216.

300. See *Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391, at *4 (E.D. Ark. Aug. 1, 2012) ("This conclusion is a reasonable reading of the statute."); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944); *National Licorice Co. v. NLRB*, 309 U.S. 350, 360, 364 (1940)); *Iskanian*, 142 Cal. Rptr. 3d at 381. *But see Nelsen*, 144 Cal. Rptr. 3d at 213 ("The Board's decision reflects a novel interpretation of section 7 and the FAA.").

301. See *supra* note 261 and accompanying text.

302. See *Delock*, 2012 WL 3150391, at *3; *Nelsen*, 144 Cal. Rptr. 3d at 213; *Iskanian*, 142 Cal. Rptr. 3d at 381–82.

303. See *DeLock*, 2012 WL 3150391, at *3.

304. See *id.* at *2; *Jasso*, 879 F. Supp. 2d at 1048; *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 842 (N.D. Cal. 2012); *Iskanian*, 142 Cal. Rptr. 3d at 380.

articulates a strong policy choice in favor of enforcing arbitration agreements and thereupon holds that class waiver provisions should not be stricken or render the agreements unenforceable.”³⁰⁵ Under both *Stolt-Nielsen* and *Concepcion*, class arbitration cannot be compelled absent clear intent.³⁰⁶

Because they found a conflict between the NLRA and the FAA, these courts applied *CompuCredit*'s “contrary congressional command” test to determine if the NLRA should overrule the FAA.³⁰⁷ Because the NLRA does not contain a command in its text or legislative history requiring the availability of classwide claims, class waivers in employment arbitration agreements must be enforced in accordance with the FAA.³⁰⁸ Even if there is a right under the NLRA to classwide proceedings, it gives way to the FAA when waived in an arbitration agreement.

Courts also rejected *D.R. Horton*'s conclusion that the Norris-LaGuardia Act overrides the FAA's mandate to enforce illegal arbitration agreements.³⁰⁹ As with the FAA, the Board's interpretation of the Norris-LaGuardia Act is not entitled to judicial deference, because the Board is interpreting a statute other than the NLRA.³¹⁰ The Norris-LaGuardia Act is inapplicable to the enforceability of class waivers, these courts reasoned, because it applies only to infringements on joining or withdrawing from labor organizations.³¹¹ Even if it was applicable, courts concluded that the Norris-LaGuardia Act, like the NLRA, contains no *CompuCredit* “contrary congressional command” overriding the FAA.³¹² Finally, *D.R. Horton*'s implied repeal claim—that the Norris-LaGuardia Act overrules the FAA because it was enacted later—also fails because “[t]hrough Congress first enacted the FAA in 1925, it reenacted the statute in 1947—after passing the Norris-LaGuardia Act and reenacting the NLRA.”³¹³ Accordingly, courts held that the Board erred in “concluding that the FAA had to give way

305. *Jasso*, 879 F. Supp. 2d at 1048.

306. *See Morvant*, 870 F. Supp. 2d at 842.

307. *See Delock*, 2012 WL 3150391, at *5; *Jasso*, 879 F. Supp. 2d at 1045–46; *Morvant*, 870 F. Supp. 2d at 845; *Nelsen*, 144 Cal. Rptr. 3d at 214; *Iskanian*, 142 Cal. Rptr. 3d at 382; *see also supra* notes 102–12 and accompanying text. *CompuCredit* was decided after *D.R. Horton* and so was not discussed in the Board's opinion.

308. *See Delock*, 2012 WL 3150391, at *5 (“The NLRA's text contains no command that is contrary to enforcing the FAA's mandate.”); *Jasso*, 879 F. Supp. 2d at 1047; *Morvant*, 870 F. Supp. 2d at 845 (“Because Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA . . . the Court cannot read such a provision into [the NLRA].”); *Nelsen*, 144 Cal. Rptr. 3d at 214 (“[T]here is no language in the NLRA . . . demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA.” (internal quotation marks omitted)); *Iskanian*, 142 Cal. Rptr. 3d at 382 (“The *D.R. Horton* decision identified no ‘congressional command’ in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms.”).

309. *See Delock*, 2012 WL 3150391, at *5–6; *Jasso*, 879 F. Supp. 2d at 1047; *Morvant*, 870 F. Supp. 2d at 843–44.

310. *See Morvant*, 870 F. Supp. 2d at 843.

311. *Id.* at 843–44 (citing 29 U.S.C. § 103(a)–(b) (2006)).

312. *See Jasso*, 879 F. Supp. 2d at 1049; *Morvant*, 870 F. Supp. 2d at 843.

313. *Delock*, 2012 WL 3150391, at *5.

because of when Congress had enacted [the NLRA and the Norris-LaGuardia Act].”³¹⁴

III. THE SUBSTANTIVE RIGHT SOLUTION

As detailed in Part II, the NLRB and courts have split on whether to enforce class waivers in employment arbitration agreements. Courts that enforced class waivers focused primarily on the policy, articulated in *Concepcion*, of enforcing arbitration agreements according to their terms in the absence of a contrary congressional command in the NLRA, as required by *CompuCredit*, to overcome this policy.³¹⁵ This part argues that this application of *Concepcion* and *CompuCredit* fails to consider a critical distinguishing feature of Section 7 rights. While the plaintiffs in *Concepcion* sought class proceedings as a *procedural* right, class proceedings are protected by the NLRA as a *substantive* right. The Supreme Court’s interpretation of the FAA has never mandated the enforcement of arbitration agreements that interfere with substantive rights. While the Board discussed this point in *D.R. Horton*, its justification was lacking.³¹⁶ Those courts critical of *D.R. Horton* failed to address this argument.

This part fills the void left by the NLRB and courts by providing a more thorough analysis of the distinction between substantive and procedural rights. The Supreme Court has rich precedent distinguishing between substantive and procedural rules for purposes of choice of law in federal courts. Because similar concerns are implicated in rights that arise in choice of law as in rights that relate to the enforceability of arbitration agreements, understanding how the line between substance and procedure is drawn in the former can aid in determining how to properly draw the line in the latter.

Part III.A reviews the distinction between substantive and procedural rules for determining choice of law in federal courts. Part III.B explores how courts use similar considerations in determining whether or not to enforce aspects of arbitration agreements. Part III.C applies this framework to the right under the NLRA to invoke classwide proceedings and concludes that this right is a substantive right. Because the right is substantive, it cannot be waived in an employment arbitration agreement, a conclusion in full accord with the Court’s FAA jurisprudence.

314. *Id.*

315. *See supra* Part II.B.

316. *See* D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *5, *12 (Jan. 3, 2012) (reasoning that the D.R. Horton’s arbitration agreement “clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA” and rejecting the claim that “the Section 7 right to bring a class or collective action is merely ‘procedural’”).

A. *The Substance/Procedure Dichotomy for Choice of Law*

When a federal court serves as the forum for the adjudication of state law claims by exercising its diversity jurisdiction,³¹⁷ the court must determine whether to apply state or federal law. The *Erie* doctrine answers this question.³¹⁸ In *Erie Railroad Co. v. Tompkins*,³¹⁹ the question for the Supreme Court was whether, in determining the duty of care owed by a railroad company to a pedestrian walking alongside the track, a federal court adjudicating the claim was required to apply Pennsylvania tort law.³²⁰ The Court held that, where no constitutional provision or federal statute applied, the federal court must apply relevant Pennsylvania tort law rather than general federal common law.³²¹ When sitting in diversity jurisdiction the federal courts must apply the substantive law of the relevant state,³²² as mandated both by the Rules of Decision Act³²³ and by the Constitution itself.³²⁴

The Supreme Court soon acknowledged the difficulty in determining whether a state law is “substantive,” and thus must be applied in federal court. In *Guaranty Trust Co. v. York*,³²⁵ the question was whether a state statute of limitations that had run barred a federal court from adjudicating the underlying claim.³²⁶ In other words, is a statute of limitations a “substantive” or “procedural” rule?³²⁷ The Court’s answer was not based on whether the state law is “deemed a matter of ‘procedure’ in some sense.”³²⁸ Rather, a law is procedural if it “concerns merely the manner and the means by which a right to recover . . . is enforced,” and substantive if it would “significantly affect the result of a litigation for a federal court to disregard [the state law].”³²⁹ Because the state statute of limitations is

317. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . between Citizens of different States.”).

318. For a more detailed account of the *Erie* doctrine and its underlying rationales, see Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine From a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 941–49 (2011).

319. 304 U.S. 64 (1938).

320. *Id.* at 69–70. The claim was brought in federal court for the Southern District of New York. However, because the accident in dispute occurred in Pennsylvania, its tort law would govern if any state law governed at all.

321. *Id.* at 80.

322. *Id.* at 78 (“Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”).

323. 28 U.S.C. § 1652 (2006) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

324. *Erie*, 304 U.S. at 80 (holding that in failing to apply state law, lower courts have “invaded rights which in our opinion are reserved by the Constitution to the several States”).

325. 326 U.S. 99 (1945).

326. *Id.* at 109.

327. *Id.*

328. *Id.*

329. *Id.*

“outcome determinative” in the sense that it would completely bar recovery had the suit been brought in state court, it is deemed a substantive state rule that must be applied by the federal court.³³⁰ Thus, the plaintiff’s claim was barred in federal court by the application of the state statute of limitations.³³¹

The distinction between “substantive” and “procedural” rules is also implicated when a federal court must determine whether to apply a state law that appears to clash with a Federal Rule of Civil Procedure. Under the Rules Enabling Act³³² (REA), the Supreme Court is empowered to prescribe “general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals,” on the condition that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”³³³ As the Court stated in *Hanna v. Plumer*,³³⁴ the broad command of the *Erie* doctrine is identical to that of the REA: “[F]ederal courts are to apply state substantive law and federal procedural law.”³³⁵ A rule is valid under the REA only if it is “procedural” and, if so, it trumps any conflicting state procedural rules in federal court.

To determine whether a rule is procedural, the *Hanna* Court provided a refined account of the somewhat simplistic *Guaranty Trust* “outcome determinative” test: “The test must be whether a rule really regulates procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”³³⁶ Applying this test, the Court held that Rule 4 of the Federal Rules of Civil Procedure, which prescribes the proper manner of service of summons, is procedural because it relates only to the “practice and procedure of the district courts.”³³⁷ The rule was not substantive even though the Court acknowledged that the ways in which it differs from state rules may in some cases be outcome determinative.³³⁸

Recently in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,³³⁹ the Supreme Court affirmed in a plurality opinion that the dividing line between “substance” and “procedure” when analyzing a Federal Rule (and thus the validity of the rule itself) is whether the rule “really regulate[s] procedure.”³⁴⁰ For the plurality, “[t]he test is not whether the rule affects a litigant’s substantive rights; most procedural rules

330. *Id.* at 110.

331. *Id.* at 112.

332. 28 U.S.C. § 2072 (2006).

333. *Id.*

334. *Hanna v. Plumer*, 380 U.S. 460 (1965).

335. *Id.* at 465.

336. *Id.* at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (internal quotation marks omitted)).

337. *Id.* (internal quotation marks omitted).

338. *Id.* at 468.

339. 130 S. Ct. 1431 (2010).

340. *Id.* at 1442 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (internal quotation marks omitted)).

do.”³⁴¹ Rather, the distinction is based on what the rule itself regulates: procedural rules valid under the REA govern only “the manner and the means by which the litigants’ rights are enforced”; substantive rules invalid under the REA alter “the rules of decision by which [the] court will adjudicate [those] rights.”³⁴² Substantive rules “alter the rights themselves, the available remedies, or the rules of decision by which the court adjudicate[s] either.”³⁴³ Understanding substantive rules as those that alter “the rights themselves” is vital to the analysis to come below.

Shady Grove also provides a second important point. The particular question before the Court was whether Rule 23 of the FRCP which, as discussed above, provides the conditions upon which a class action may be maintained, is procedural and thus valid under the REA.³⁴⁴ Applying its newly articulated test, the Court held that Rule 23 is valid because, like other forms of joinder, a class action “merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.”³⁴⁵ A class action is procedural because it “leaves the parties’ legal rights and duties intact and the rules of decision unchanged,” even if it has significant “incidental effect[s]” on the likelihood or nature of claims that it enables.³⁴⁶ Thus, for purposes of *Erie* choice of law analysis, use of class actions is a procedural, not substantive, right.

B. The Substance/Procedure Dichotomy and Arbitration Agreements

A similar analysis in distinguishing substance and procedure implicitly guides courts’ determination as to whether to enforce terms in arbitration agreements. Both an agreement to submit a claim to arbitration and a decision to remove a state claim to federal court are choices of forum for resolution of disputes.³⁴⁷ Predispute arbitration agreements serve as a “specialized kind of forum-selection clause” that set both “the situs of the suit but also the procedure to be used in resolving the dispute.”³⁴⁸ Similarly, removal to federal court changes the site of the suit and results in the implementation of federal procedural rules.³⁴⁹ Unsurprisingly then, the Supreme Court’s increasing acceptance of procedural modifications through both forum selection clauses and arbitration agreements have developed in tandem in recent decades.³⁵⁰ As is true for the FRCP, arbitration

341. *Id.*

342. *Id.* (quoting *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

343. *Id.* at 1443.

344. *Id.* at 1442; see also *supra* notes 29–38 and accompanying text.

345. *Shady Grove*, 130 S. Ct. at 1443.

346. *Id.*

347. See *supra* Part I.A.

348. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

349. See Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1091–93 (2011) (discussing the “*Hanna*-like quality to the Court’s FAA decisions”).

350. See *supra* Part I.C.3; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (explaining the benefits of forum selection clauses).

agreements are valid and enforceable because they modify only the procedural rights of the parties, the “manner and the means by which the litigants’ rights are enforced.”³⁵¹

Where an arbitration agreement modifies only the procedure of adjudicating a dispute, courts with increasing stringency enforce the agreement pursuant to the FAA.³⁵² Typical examples of procedural rights that can be modified through an arbitration agreement are the scope of discovery³⁵³ and rules of evidence,³⁵⁴ as these leave the rights themselves that are being adjudicated unaffected. The same is generally true for predispute agreements to arbitrate a statutory claim. By agreeing to arbitration, “a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”³⁵⁵ If an arbitration agreement only changes the forum in which a dispute is resolved, then the FAA mandates that a reviewing court enforce the agreement as written.³⁵⁶ Accordingly, the Supreme Court has held that a predispute agreement to arbitrate does not interfere with a party’s ability to bring substantive claims under antitrust,³⁵⁷ securities,³⁵⁸ age discrimination,³⁵⁹ or misrepresentations in advertising statutes;³⁶⁰ the substantive claim is adjudicated through the agreed upon arbitration procedures rather than standard judicial procedures.

However, where terms of an arbitration agreement *do* interfere with substantive rights of the parties, courts have declared the terms unenforceable and have either severed the offending clauses or invalidated the entire arbitration agreement. For example, because Title VII provides for statutory punitive damages, parties cannot agree to ban such damages for Title VII claims brought in arbitration.³⁶¹ The same is true for punitive

351. *Shady Grove*, 130 S. Ct. at 1442 (quoting *Miss. Publ’g Corp. v. Murphree*, 325 U.S. 438, 446 (1946)); see *supra* notes 339–43 and accompanying text. That the FAA was not intended to require the enforcement of arbitration agreements that interfere with substantive legal rights is evidenced in the writings of Julius Henry Cohen, a primary drafter of the FAA. See *Hall St. Assocs. L.L.C. v. Mattel*, 552 U.S. 576, 589 n.7 (2008). Cohen wrote a companion article explaining that, under the FAA, “[w]hen the agreement to arbitrate is made, it is not left outside the law. Proceedings under the new arbitration law are as much a part of our legal system as any other special proceeding or form of remedy.” Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 279 (1926). Agreements to arbitrate provide parties with a different forum but cannot leave them “outside the law.” *Id.*

352. See *supra* Part I.C.3.

353. See *supra* note 20 and accompanying text; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (holding that an arbitration agreement is enforceable even if discovery “procedures might not be as extensive as in the federal courts”).

354. See *supra* note 20 and accompanying text.

355. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see *supra* notes 68–82 and accompanying text.

356. See *supra* notes 90–101 and accompanying text.

357. See *supra* notes 68–82 and accompanying text.

358. See *supra* notes 83–89 and accompanying text.

359. See *supra* notes 90–101 and accompanying text.

360. See *supra* notes 102–12 and accompanying text.

361. See *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003).

damages permissible under the D.C. Human Rights Act³⁶² and treble damages in federal antitrust claims.³⁶³ In all of these, enforcing the arbitration agreement would displace a statutory remedy, a substantive component of the statute.³⁶⁴ Refusing to enforce such agreements is consistent with the Supreme Court dicta in *Mitsubishi* and *Gilmer* that clauses in arbitration agreements that interfere with statutory rights or remedies are invalid.³⁶⁵ Thus, while a party can be bound to resolve a Title VII employment dispute in arbitration rather than in court, previously agreed upon limits on damages must be lifted to allow the underlying statute to “function fully and adequately under the law.”³⁶⁶

The Supreme Court undertook this process of disentangling substantive and procedural components of a statute in *Rodriguez de Quijas*.³⁶⁷ The Court enforced waiver through arbitration of “procedural components” of the Securities Act, which included provisions regarding federal venue, service of process, and removal requirements.³⁶⁸ However, the Court implied that it would not have enforced a waiver of the burden-of-proof stipulation, as that is a substantive component of the statute.³⁶⁹ The differentiation seems to closely track *Shady Grove*, as waiver of procedural components of the statute would alter “the manner and the means by which the litigants’ rights are enforced,” while waiver of substantive components would alter “the rules of decision by which the court . . . adjudicate[s].”³⁷⁰ Thus, the *Shady Grove* framework is a logical way to analyze the enforceability of class waivers in employment arbitration agreements.

C. *The Substantive Nature of Class Proceedings As Protected by the NLRA*

The final step is to apply this framework to determine if employees’ right to invoke classwide proceedings is a procedural right that can be enforceably waived under the FAA or a substantive right that cannot be enforceably waived in predispute arbitration agreements. Underlying the analysis is the Supreme Court’s holding in *Shady Grove* that use of Rule 23 to bring a class action is a procedural, not a substantive, right.³⁷¹ Rule 23 and use of class actions more generally are procedural rights because they “leave[] the parties’ legal rights and duties intact and the rules of decision unchanged.”³⁷² The Court in *Concepcion* similarly viewed class arbitration

362. See *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005).

363. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006).

364. See *supra* note 343 and accompanying text.

365. See *supra* notes 82, 100–01 and accompanying text.

366. *Hadnot*, 344 F.3d at 478.

367. See *supra* notes 83–89 and accompanying text.

368. See *supra* note 87 and accompanying text.

369. See *supra* note 88 and accompanying text.

370. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (quoting *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

371. See *supra* notes 344–46 and accompanying text.

372. *Shady Grove*, 130 S. Ct. at 1443.

as a procedural right that cannot be forced on a party absent explicit agreement, akin to altering the rules of discovery or evidence.³⁷³

However, unlike Rule 23 and other class mechanisms meant simply to aggregate similar claims, the nature of the right here is different. Viewed through the *Shady Grove* framework, when employees seek to use classwide proceedings as a form of collected activity for their mutual aid or protection, the right is substantive, not procedural. This conclusion follows from the NLRA itself. The discrete purpose of the NLRA is to strengthen the ability of workers to organize through collective activities.³⁷⁴ Protection of employees' ability to act collectively is the "fundamental right" of the NLRA and "guarantees employees the most basic rights of industrial self-determination."³⁷⁵ Because Section 7 rights are so fundamental, an individual employee cannot waive them contractually, even if doing so would be to the individual employee's benefit.³⁷⁶ The violation of Section 7 and the harm to the employee occurs at the moment he is presented with an employment agreement with an offending term, even if he has suffered no subsequent harm by the employer and even if the employer has made no attempt to enforce the illegal term.³⁷⁷

For these reasons, as a Section 7 right, an employee's invocation of classwide proceedings is not solely procedural as it was in *Shady Grove*; it is not merely the "the manner and the means by which the litigants' rights are enforced."³⁷⁸ Invocation of classwide proceedings *is* the right. A class waiver in an employment arbitration agreement interferes with a substantive right—Section 7 protections are, in the words of *Shady Grove*, "the rights themselves" for which a party seeks relief from the NLRB or the courts.³⁷⁹ As such, this right cannot be modified in a predispute arbitration agreement, and attempts to do so (in the form of a class waiver) must not be enforced.

This conclusion is entirely consistent with the FAA jurisprudence reviewed above. In *Mitsubishi*, *Rodriguez de Quijas*, and *Gilmer*, enforcement of arbitration agreements did not conflict with the parties' ability to seek relief for infringement of their statutory substantive rights for antitrust, securities, and age discrimination violations.³⁸⁰ Here, however, enforcement of the arbitration agreements, which requires waiving the use of class proceedings, directly infringes the right being sought.³⁸¹ As stated in both *Mitsubishi* and *Gilmer*, arbitration agreements are unenforceable if they interfere with substantive rights.³⁸² In *Stolt-Nielsen* and *Concepcion*,

373. See *supra* notes 127–40 and accompanying text.

374. See *supra* notes 147–49 and accompanying text.

375. See *supra* notes 154, 156 and accompanying text.

376. See *supra* notes 212–17 and accompanying text.

377. See *supra* note 218 and accompanying text.

378. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

379. See *supra* note 343 and accompanying text.

380. See *supra* notes 68–101 and accompanying text.

381. See *supra* notes 127–204 and accompanying text.

382. See *supra* notes 82, 100–01 and accompanying text.

the plaintiffs' desired use of classwide proceedings was a procedural right because the plaintiffs sought it as a means of expediting or vindicating other substantive rights.³⁸³ Accordingly, in both, the Court considered whether this change in procedure was appropriate given the agreement of the parties.³⁸⁴ Here, however, class proceedings are the substantive right protected by statute and, indeed, there is no other substantive right that the NLRA serves to protect. Just as under the *Erie* doctrine, removal to federal court should not upset the substantive rules of the states, use of arbitration rather than the courts should not upset the substantive rights of employees. In accordance with the NLRA, employers cannot use an agreement to arbitrate as a means of denying employees their substantive right to employ classwide proceedings for the resolution of a dispute.

Understanding the Section 7 right as substantive rather than procedural resolves the criticisms raised by the courts that objected to the Board's *D.R. Horton* holding.³⁸⁵ Refusing to enforce class waivers in employment contracts does not run afoul of the holding of *Stolt-Nielsen* or *Concepcion* by creating a conflict with the FAA, because the FAA has never been held to mandate the enforcement of arbitration agreements that waive substantive rights.³⁸⁶ Rather, the cases consistently hold that parties can and should use predispute arbitration agreements as a means of modifying only their procedural rights, whether arising under federal statutes or not. Furthermore, there is no conflict between the NLRA and the FAA because refusing to enforce a class waiver does not require compelled class arbitration.³⁸⁷ Rather, employers need only "leave[] open a judicial forum for class and collective claims,"³⁸⁸ and so would not be compelled into a type of arbitration with which they did not agree.³⁸⁹ Where there is no conflict between the NLRA and the FAA, the *CompuCredit* "contrary congressional command" test to resolve statutory conflict is irrelevant.³⁹⁰ Infringing a substantive right takes the enforceability of an arbitration agreement outside of the FAA's mandate and, as the Supreme Court has consistently held, such agreements are unenforceable.

383. See *supra* notes 116–40 and accompanying text.

384. See *supra* notes 116–40 and accompanying text.

385. See *supra* notes 300–14 and accompanying text.

386. See *supra* notes 82, 100–01 and accompanying text.

387. *Contra supra* notes 304–06 and accompanying text.

388. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *16 (Jan. 3, 2012).

389. This remedy differs from that in *Herrington*, in which the class waiver was severed and the court permitted the use of class arbitration, likely due to ambiguity in the intent of the parties. See *supra* note 266. However, given the strong language in *Stolt-Nielsen* and *Concepcion* that nonconsensual class arbitration is inconsistent with the FAA, as a general rule access to invocation of judicial class action, rather than class arbitration, is the proper remedy. See *D.R. Horton*, 2012 WL 36274, at *16.

390. See *supra* note 108 and accompanying text.

CONCLUSION

Over the last few decades, the Supreme Court has interpreted the FAA to afford great discretion in allowing parties to use arbitration agreements to alter the procedural rules by which their disputes will be resolved. Recently, the Court held that this discretion generally includes the ability to waive classwide proceedings in the resolution of future disputes. However, discretion in structuring arbitration agreements has never been extended to permit waiver of substantive rights protected by statute. One such unwaivable substantive right is invocation of classwide proceedings under Section 7 of the NLRA. Accordingly, refusing to enforce predispute arbitration agreements that waive this right creates no conflict with the FAA. As the NLRB correctly held in *D.R. Horton*, employment arbitration agreements with class waivers must be declared unenforceable.