The Future of Collective Employment Arbitration: Reconciling the FAA with the NLRA, FLSA, & Other Federal Rights

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I. INTRODUCTION

The Supreme Court granted certiorari in January 2017 in three consolidated cases to resolve a recent and important issue on which federal circuit courts had split. At issue is whether and to what extent an employer may require individual arbitration—while prohibiting collective arbitration—of employment disputes as a condition of employment. The United States Court of Appeals for the Fifth Circuit had previously held that the right of an employer and employee to freely contract includes the right of the parties to agree that all employment disputes will be settled through binding, individual arbitration. Despite this Congressionally-recognized and judicially-protected right to arbitrate disputes, an active National Labor Relations Board ("the Board") during the administration of former President Barack Obama emphasized again and again that there must be limits on the right to arbitrate within the employer-employee relationship. Further, some courts of appeals, including the Seventh and Ninth Circuits, have recently adopted the Board's position that the protections afforded under the National Labor Relations Act make binding arbitration clauses unlawful in the employment context.

This dispute sits at the nexus of two competing doctrines—the right to contract and the protective tenets of American labor relations—and three primary procedural devices: class action, arbitration, and class arbitration. Both class action and arbitration are well-established devices in American jurisprudence, but class arbitration is a newer hybrid concept in which a class of individuals contractually consent to arbitration. The conflict over class arbitration has emerged in the sphere of the employer-employee relationship. Courts are now asked to decide the fundamental question of how traditional labor values fit into an increasingly fast and mobile economy. Today, the mere click of a button in an email or the swipe of a finger on a mobile application can easily waive the right to collective action. At stake is the future of employment disputes in the United States, and the procedural and substantive rights of employers and employees.

This article analyzes the current divide between circuit courts that

have prioritized the freedom of contract epitomized in the Federal Arbitration Act, and those that have prioritized the rights of employees and broader labor protections under the National Labor Relations Act. In this analysis, this article considers the history behind the circuit split and the values at issue, and offers insight into the practical importance and potential contours of the dispute. In addition to resolving a circuit split, the upcoming Supreme Court decision is also poised to test the outer limits of its landmark decision in *AT&T Mobility LLC v. Concepcion*,[1] which upheld class-waiver clauses in standard form contracts that also mandated arbitration. Regardless of the Supreme Court's decision, the increasing use of class waivers and arbitration clauses means that the tension between contracting rights and labor protections is likely to stay relevant for some time.

II. STATE OF THE LAW

This portion of the article examines the current state of the law regarding arbitration agreements in employment contracts. The examination has three main focuses. First, it reviews the broad principles behind both the National Labor Relations Act and the Federal Arbitration Act. Second, it considers the basic procedural devices used to advance collective and class action lawsuits. Third, it analyzes the circuit split concerning whether collective action may be contractually and lawfully waived through arbitration agreements.

A. National Labor Relations Act

Congress enacted the National Labor Relations Act (NLRA) in 1935.[2] The first section of the Act "sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining."[3] In part, the NLRA recognizes the inequality of bargaining power between employees and employers. Spe-

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1 563 U.S. 333 (2011).
2 29 U.S.C. § 151 (2012).
3 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22-23 (1937).

cifically, it notes that employees "do not possess full freedom of association or *actual liberty of contract*,"[4] whereas employers possess greater control of wage and working conditions within and among industries.[5]

The first section of the NLRA concludes by broadly declaring that it shall be the policy of the United States to

eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining* and by *protecting 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.[6]

As illustrated by these parts of the Act, Congress's intent in passing the NLRA was to protect "the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion."[7] Thus, Congress appears to have placed considerable emphasis on the rights of employees to band together and act collectively when dealing with employment matters, without fear of discharge or other repercussion.[8] These rights have generally been referred to as the rights of employees to engage in "concerted activity."[9] By passing the NLRA, Congress largely preempted industrial-relations regulations by the states and placed this area of regulation under the purview of the federal government.[10]

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[4] 29 U.S.C. § 151 (emphasis added).

[5] *See id.*

[6] *Id.* (emphasis added).

[7] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939).

[8] *Id.* (noting that "the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining").

[9] *Concerted Activity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining concerted activity as an "[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed to achieve an objective").

[10] *See* Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286 (1986). The Supreme Court further explained:

> Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council v. Garmon*, that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.

Id. (internal citations omitted).

Through the NLRA, Congress charged the National Labor Relations Board with administering the Act.[11] The Board is an independent five-member body created under the NLRA to safeguard employees' rights to organize into labor unions, engage in concerted activity, and prevent or remedy unfair labor practices.[12] The Board also hears complaints and issues orders regarding unfair labor practices that violate the NLRA.[13] Its orders can be reviewed or enforced by a federal court of appeals.[14] Under the NLRA, the Board has "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the Act.[15] Because the Board has "special expertise,"[16] federal courts have repeatedly held that its interpretations of ambiguous provisions of the Act are entitled to judicial deference.[17] Moreover, as interpretations of the NLRA, the Board's rules are accorded broad deference under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[18]

Under *Chevron*, where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[19] Thus, courts must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'"[20] This deference is

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[11] *See* 29 U.S.C. § 153 (2012) (addressing the creation, composition, appointment, and tenure of the five-member NLRB).

[12] *National Labor Relations Board*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] *Id.*

[14] *Id.*

[15] 29 U.S.C. § 156; *see* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609 (1991).

[16] Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 685–86 (1965).

[17] Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) (noting that when "an issue . . . implicates [the Board's] expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference").

[18] 467 U.S. 837, 843 (1984). *See* NLRB v. United Food & Comm. Workers Union, Local 23, 484 U.S. 112, 123–24 (1987). Given the Supreme Court's pre-*Chevron* level of deference, it has been noted, "the Court's pre-*Chevron* approach to the NLRB arguably anticipated the broad deference accorded to interpretive judgments under *Chevron*." James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 498 (2014) (internal citations omitted).

[19] *Chevron U.S.A., Inc.*, 467 U.S. at 843; *see Chevron Deference*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *Chevron* deference as "[a] two-part test under which a court will uphold a federal agency's construction of a federal statute if (1) the statute is ambiguous or does not address the question at issue, and (2) the agency's interpretation of the statute is reasonable. If the court finds that the legislature's intent is clearly expressed in the statute, then that intent is upheld.").

[20] Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99 (1996) (citation omitted).

not absolute, however.[21] For example, the application of a statutory definition must have a reasonable basis in law,[22] and courts generally provide less deference to the Board's findings or conclusions on issues of law than on issues of fact.[23] Additionally, courts have been less deferential when the Board was interpreting a law in which it had no special expertise.[24] This is a somewhat complicated scheme, especially since the Board often establishes rules through adjudication. Accordingly, it is not always clear whether the Board is establishing a rule or merely analyzing the facts in a given case.

The Board's interpretive function and the courts' varying levels of deference under *Chevron* underscore the inherent tension in this area. For example, the Supreme Court has expressly noted that "[d]eference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'"[25] Although the Board was created to administer the Act, it was not "commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[26] As a result, the Supreme Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[27]

The application of Section 7 of the NLRA, which defines the core rights protected under the Act, is one area of considerable dispute between the Board, employers, and even among different federal courts. Section 7 holds:

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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement

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[21] *See* Entergy Miss., Inc. v. NLRB, 810 F.3d 287, 292 (5th Cir. 2015); *see generally* Brudney, *supra* note 18, at 525 ("Support for NLRB determinations has declined noticeably since *Chevron*, even though the Court remains formally committed to broader deference.").

[22] GAF Corp. v. NLRB, 524 F.2d 492, 495 (5th Cir. 1975).

[23] *See* Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 913 (3d Cir. 1981).

[24] *See* Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996) (reversing an order by the NLRB finding that the owner of a shopping center violated the NLRA by preventing a local union from distributing handbills on his property); NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331 (6th Cir. 1990) (reversing order of back pay against related corporation and its shareholders because the corporation was not an "alter ego" of the employer).

[25] NLRB v. Fin. Inst. Emps. of Am., Local 1182, 475 U.S. 192, 202 (1986) (alteration in original) (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965)).

[26] Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

[27] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002).

requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.[28]

Federal courts have interpreted Section 7's language to protect the rights of employees to self-organize;[29] form, join, or assist unions;[30] bargain collectively through representatives;[31] band together in a concerted manner for mutual aid or protection;[32] or abstain from such activity.[33] Together, these rights form a type of freedom of association under the Act for qualified employees.[34]

Section 7 effectuates the intent of Congress to equalize bargaining power between employees and employers "by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[35] The Supreme Court has observed, "[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."[36] One way that employees have increasingly relied on to protect their rights is through lawsuits.

B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), a federal law that sets minimal labor guidelines for employees,[37] is "of the same general character" as the NLRA.[38] It was "enacted by Congress to be a broadly remedial

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[28] 29 U.S.C. § 157 (2012).

[29] Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978) (noting that "the right of employees to self-organize" as "necessarily encompass[ing] the right effectively to communicate with one another regarding self-organization at the jobsite.").

[30] *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 533 (1992).

[31] NLRB v. Erie Resistor Corp., 373 U.S. 221, 233–34 (1963) (noting the NLRA's "repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system"); *see also* NLRB v. Gissel Packing Co., 385 U.S. 575, 596 (1969).

[32] *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 13–14 (1962).

[33] *See* NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973) (noting "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice.").

[34] Although we do not focus on who qualifies under the NLRA and who does not, other commentators have addressed that issue. *See* Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 FIU L. REV. 495, 499–500 (2010); Ellen Dannin, *Not a Limited, Confined, or Private Matter - Who Is an "Employee" Under the National Labor Relations Act*, 59 LAB. L.J. 5, 5 (2008).

[35] NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984).

[36] *Id.*

[37] 29 U.S.C. § 201 *et seq.* (2012).

[38] Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 n.1 (1947).

and humanitarian statute,"[39] and was designed to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[40] To achieve these ends, Congress broadly defined many of the FLSA's key terms.[41] In addition, the law recognized that "due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation."[42] This legislation would prevent employment contracts that "endangered national health and efficiency and as a result the free movement of goods in interstate commerce."[43]

Accordingly, Congress declared the policy of the FLSA was "to correct and as rapidly as practicable to eliminate the conditions above . . . without substantially curtailing employment or earning power."[44] For example, the FLSA sets minimum wages and maximum hours.[45] In order to fully effectuate the Act's remedial purpose, the FLSA authorizes the use of "collective actions" through § 216(b) so that workers can pool their resources and bring similar claims in one action. This section establishes a notice and *opt-in* scheme under which plaintiffs must affirmatively notify the court of their intention to become parties to the suit.[46] Other employment statutes, including the Age Discrimination in Employment Act (ADEA), have likewise adopted § 216(b)'s approach. This differs from Rule 23 class actions, which are considered in more detail in the next section.

C. Class Action and Rule 23

A class action is a lawsuit in which a court authorizes one person or a small group of people to represent the interests of a larger group of

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[39] Dunlop v. Carriage Carpet Co., 548 F.2d 139, 148 (6th Cir. 1977); *accord* Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 597 (1944) ("But these provisions, like the other portions of the [FLSA], are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.").

[40] 29 U.S.C. § 202(a) (2012).

[41] *See Dunlop*, 548 F.2d at 143.

[42] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (footnotes omitted).

[43] *Id.*

[44] 29 U.S.C. § 202(b).

[45] *Id.* at §§ 206–07.

[46] *See* Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1212 (5th Cir. 1995).

people in court.[47] In recent years, many class action lawsuits have been brought against companies regarding alleged problems associated with drug and drug supplements, medical devices, data breaches, appliance and vehicle defects, and—particularly relevant here—wage disputes.[48] However, the legal roots of class action lawsuits are well established and intertwined with concepts found in English law.[49]

American class action lawsuits emerged from the English courts of equity.[50] Specifically, they "developed as an exception to the formal rigidity of the necessary parties rule in equity, as well as from the bill of peace, an equitable device for combining multiple suits."[51] Under the "necessary party rule," all people with a material interest in the suit were required to be joined as a party.[52] Certain exceptions were developed because rigid application of the rule could unfairly deny recovery to a party before the court when the group of people materially interested became too numerous.[53] Among these exceptions was one that allowed for a few to sue for the benefit of the whole:

> where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole.[54]

This early exception was codified in Rule 23 of the Federal Rules of Civil Procedure.[55]

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[47] *Class Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[48] LIST OF LAWSUITS, http://www.classaction.org/list-of-lawsuits [https://perma.cc/5A5F-43FZ]; CONSUMER ACTION, CLASS ACTION DATABASE, http://www.consumer-action.org/lawsuits/ [http://perma.cc/2XCG-N3NX]; *see, e.g.*, Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All of their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(A)(2) in* Wal-Mart v. Dukes, 44 TEX. TECH L. REV. 1087, 1095 (2012) (employment discrimination).

[49] Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858–60 (1998).

[50] STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987).

[51] Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999) (Souter, J.) (internal citations omitted) (citing Hazard et. al., *supra* note 48, at 1859–60; ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 161–67, 200–03 (1950)).

[52] Hazard et al., *supra* note 49, at 1859–60 (citing cases); *see* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 340–74 (1957) (detailing the application of the compulsory joinder rule in various contexts); *see also* Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1255–89 (1961) (tracing the origins and histories of both the necessary and indispensable party rules).

[53] *Ortiz*, 527 U.S. at 832 (quoting West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I. 1820) (Story, J.)).

[54] *Id.*

[55] *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197 (7th Cir. 1971); *see also* Danner

In 1966, Rule 23 underwent a critical revision, which supported a more liberal approach to allowing class action lawsuits.[56] "In drafting Rule 23(b), the Advisory Committee sought to catalogue in 'functional' terms 'those recurrent life patterns which call for mass litigation through representative parties.'"[57] The rule states,

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[58]

Unlike other forms of dispute resolution, under Rule 23 the defendant does not have to agree to handle a dispute as a class action. Rather, the rule provides a procedural device based on the practical need to effectively deal with a group of plaintiffs so numerous that litigating each case individually would not be feasible or economical, either for the parties or the courts.[59] Unlike a collective action under the FLSA, Rule 23 does not have an affirmative opt-in requirement. Thus, if an action is maintainable as a class action pursuant to Rule 23, each person within the class definition is considered to be a class member and, as such, is

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v. Phillips Petroleum Co., 447 F.2d 159, 164 (5th Cir. 1971). The Supreme Court has noted that:

> The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'"

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–49 (2011) (internal citations omitted).

[56] *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968) (Medina, J.) (requiring a "clear showing" that the proceeding is not a proper class action based on a "proper appraisal of all [Rule 23's] factors" in order to ensure "claimants have been given an effective opportunity to join," which is consistent with the class action "as envisioned" by the drafters). *See also, e.g.,* Karan v. Nabisco, Inc., 78 F.R.D. 388 (W.D. Pa. 1978); *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); Brady v. Lac, Inc., 72 F.R.D. 22 (S.D.N.Y. 1976); Percy v. Brennan, 384 F. Supp. 800 (S.D.N.Y 1974) ("[S]ince Rule 23 grants plaintiffs the right to proceed as a class, they are entitled to do so without demonstrating the necessity of class relief."); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378, 1387 (E.D. Va. 1974); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970).

[57] *Ortiz*, 527 U.S. at 832 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969)).

[58] Fed. R. Civ. P. 23(a).

[59] Hansberry v. Lee, 311 U.S. 32, 41 (1940); Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

bound by judgment, whether favorable or unfavorable, unless he has "opted out" of the suit.

The courts' willingness to allow Rule 23 class actions to proceed has ebbed and flowed since the rule was first adopted. The significant revision in 1966 made class actions more common as a litigation tool.[60] Because class action lawsuits allow the aggregation of many similar small-value claims, which may not make economic sense to bring separately, they are considered by some to serve an important public role in 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."[61] Even in cases where an individual plaintiff's claims are weak or frivolous, the economic realties and risks associated with fighting a class action lawsuit for a defendant can lead defendants to settle early to avoid the high costs associated with defending a class action through trial.[62] Some commentators have criticized this effect as a form of "legalized blackmail," which allows the extortion of defendants through pure economic considerations.[63] Other commentators have vigorously challenged that characterization as nothing more than needless "inflammatory rhetoric that impugns the character of plaintiffs and trial lawyers who bring class actions, and of trial judges who certify them."[64] The tension between fairness and economy for employees and employers under Rule 23 is ongoing; in recent years, parties have begun to utilize alternative dispute resolution devices, such as arbitration, to bridge the gap.

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[60] Maureen A. Weston, *The Death of Class Arbitration After* Conception?, 60 U. KAN. L. REV. 767, 770 (2012).

[61] *Id.*

[62] *Id.*

[63] Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1727 (2006) (citing cases and other commentators). Indeed, at least one state has attempted to unilaterally limit the availability of Rule 23. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010). In *Shady Grove*, the Supreme Court addressed whether Rule 23 took precedence in federal diversity class actions. Specifically, the Supreme Court considered whether Rule 23 preempted a state's attempts to limit class action litigation through statutory provisions that prohibited class actions in lawsuits seeking penalties or statutory minimum damages. *Id.* at 405. It then held that Rule 23 controlled the issue and rejected several lower court decisions that concluded the state law involved was substantive and should therefore govern. *Id.* at 407–16. Justice Scalia, writing for a plurality, concluded that "Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements." *Id.* at 401. Accordingly, he found that since Rule 23 conflicted with the state law, Rule 23 controlled. *Id.*

[64] Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003).

D. Arbitration

Arbitration is a voluntary dispute-resolution process in which parties choose one or more third-party neutral individuals to hear arguments, review evidence, and then make a final, binding decision regarding a dispute.[65] Private arbitration is a matter of party consent and a creature of contract, not coercion by the courts.[66] By consenting to arbitration, the parties take their dispute out of the normal judicial process and forego all of that process's procedural safeguards and protections.[67] One of the primary procedural safeguards that the parties forego in arbitration is the right to appeal to a higher court.[68]

Arbitration has some significant advantages for the parties. First, because the authority of an arbitrator is based on the agreement of the parties,[69] arbitration allows the parties to craft a process that is more tailored to their individual dispute than may be provided in the normal judicial system.[70] For example, the parties can agree to limit or modify certain evidentiary rules or even abandon them altogether.[71] Second, the parties may also limit the issues to be arbitrated.[72] Third, like litigation,

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[65] *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014); R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1537 (1994).

[66] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

[67] *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[68] *See* Gilmer v. Interstate Corp., 500 U.S. 20, 31 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution") (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations").

[69] *Accord Kaplan*, 514 U.S. at 943 (noting that arbitration functions only when "parties have agreed to submit to arbitration."). *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement" (emphasis added); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983) ("[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960) (in explaining the labor arbitrator's function, the court affirms that he or she "has no general charter to administer justice for a community which transcends the parties" (internal quotation marks omitted)); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 641 (2010) ("It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.").

[70] Silberman, *supra* note 65, at 1537–40 (noting the three main types of alternative dispute resolution).

[71] *Id.*

[72] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).

arbitration allows for multi-party dispute resolution, including "class arbitration," which is addressed later in this section. Finally, arbitration allows the parties to choose adjudicators with subject matter and area expertise.[73] Despite the forfeited procedural rights and protections, arbitration is an increasingly popular method of dispute resolution, and its use is buttressed by its enforceability under the Federal Arbitration Act.[74]

i. Federal Arbitration Act

In response to the initial skepticism with which courts traditionally viewed pre-dispute arbitration agreements, Congress passed the Federal Arbitration Act (FAA) in 1925. The Act addressed "widespread judicial hostility to arbitration agreements"[75] and was intended "to place arbitration agreements upon the same footing as other contracts."[76]

Section 2 of the FAA is the "primary substantive provision of the Act."[77] In relevant part, it provides that "[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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[78] The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration"[79] and the "fundamental principle that arbitration is a matter of contract."[80] In light of this, the Supreme Court has enforced arbitration agreements involving federal statutory claims,[81] and federal courts have repeatedly rejected litigants' attempts to claim that a statutory right cannot be fully vindicated

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[73] *See Pyett*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution"); *Circuit City Stores, Inc.*, 532 U.S. at 123; *Gardner-Denver Co.*, 415 U.S. at 57 ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations").

[74] *See* Nick Hall, *Alternative Dispute Resolution 2020*, HOUS. LAW., Sep.-Oct. 2000, at 37, 39 (discussing the growth of ADR as an alternative to litigation).

[75] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); *see* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008).

[76] Gilmer v. Interstate Corp., 500 U.S. 20, 24 (1991); *see Federal Arbitration Act*, BLACK'S LAW DICTIONARY (10th ed. 2014)

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

[78] 9 U.S.C. § 2 (2012).

[79] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

[80] Rent-A-Center, Inc. v. Jackson, 561 U.S. 63, 67 (2010).

[81] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) (citing Rodriguez de Quijas v. Shearson, 490 U.S. 477 (1989) (Securities Act of 1933); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.

through arbitration.[82] Additionally, the Supreme Court has rejected generalized attacks based on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,"[83] and has held that employment contracts are within the scope of the FAA, except for those agreements related to transportation.[84]

The final part of Section 2, however, permits an arbitration agreement to be invalidated and declared unenforceable in limited circumstances, i.e., "upon such grounds as exist at law or in equity for the revocation of any contract."[85] These circumstances have been interpreted to include "generally applicable contract defenses, such as fraud, duress, or unconscionability,"[86] but not to include "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[87]

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court considered the enforceability of a class action waiver in a standard form contract.[88] Specifically, California state law classified most collective-arbitration waivers in consumer contracts as unconscionable and, therefore, unenforceable.[89] Accordingly, under California state law, a court could either refuse to enforce any contract it found "to have been unconscionable at the time it was made" or "limit the application of any unconscionable clause."[90] Relying on the specific language of Section 2 of the FAA and the clear intent of the FAA as a whole, the Supreme Court held that the FAA preempted the state law and that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms."[91]

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614 (1985) (Sherman Act)).

[82] "In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 474 (5th Cir. 2002) (citing cases); *see also* CompuCredit v. Greenwood, 565 U.S. 96 (2012) (considering in the context of the Credit Repair Organization Act).

[83] *Rodriguez de Quijas*, 490 U.S. at 481.

[84] EEOC v. Waffle House, Inc., 534 U.S. 279, 299 (2002) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)).

[85] 9 U.S.C. § 2 (2012).

[86] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also* Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987).

[87] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[88] *Id.*

[89] *Id.* at 340.

[90] CAL. CIV. CODE ANN. § 1670.5(a) (West 2016). Under California's rules, unconscionability finding required "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." Armendariz v. Found. Health Pyschcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); *accord* Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[91] *Concepcion*, 563 U.S. at 339 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468,

A year later in *CompuCredit Corp. v. Greenwood*, the Supreme Court considered the FAA in conjunction with another federal statute.[92] Specifically, the Supreme Court considered "whether the Credit Repair Organization Act (CROA) precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act."[93] In considering the case, the Supreme Court first noted the FAA established a clear, liberal policy favoring arbitration.[94] In contrast, the Supreme Court found that CROA did not provide a clear, "contrary congressional command" to preclude arbitration agreements.[95] According to the Supreme Court, "[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest."[96] Because the federal statute was silent on this issue, however, the majority held that the arbitration agreement should be enforced according to its agreed terms.[97]

In 2013, the Supreme Court in *American Express Co. v. Italian Colors Restaurant*, considered whether a contractual waiver of class arbitration was enforceable under the FAA when the cost to a plaintiff of individually arbitrating a claim would exceed what the plaintiff could potentially recovery in the case.[98] Relying on the purpose of the FAA and the overarching principle that arbitration is a matter of contract, the Supreme Court again held that no contrary congressional command required it to reject the waiver of class arbitration, even if the individual cost of arbitration exceeded the potential recovery.[99]

Finally, in *DIRECTV, Inc. v. Imburgia*, the Supreme Court considered a case in which a consumer sought damages from a television service provider for early termination fees in violation of California law.[100] Prior to the lawsuit, the customers and DIRECTV entered into a service agreement, which provided that "any Claim either of us asserts will be resolved only by binding arbitration."[101] The agreement then set out a waiver of class arbitration, stating that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration."[102] The agreement

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478 (1989)) (internal citations omitted).

92 565 U.S. 95 (2012).

93 *Id.* at 96 (internal citations omitted).

94 *Id.* at 97–98.

95 *Id.* at 98.

96 *Id.* at 103.

97 *Id.* at 104–05.

98 133 S. Ct. 2304, 2307 (2013).

99 *Id.* at 2312.

100 136 S. Ct. 463, 466 (2015).

101 *Id.*

102 *Id.*

also included language that said the arbitration provision would be unenforceable if the "law of [the customer's] state" would make the class arbitration waiver unenforceable.[103] A California court of appeals held the agreement unenforceable under California state law, despite preemption of that law by the FAA.[104] After the California Supreme Court denied review, the U.S. Supreme Court reversed and held that a preempted state law could not invalidate the parties' waiver because doing so would treat arbitration contracts differently than other kinds of contracts.[105] In sum, the Supreme Court's recent jurisprudence reflects a clear deference to the rights of the parties to contract for arbitration—in diverse contexts—and its enforcement under the FAA.

ii. Class Arbitration

A byproduct of the popularity of arbitration agreements has been the development of class arbitration. Class arbitration, like class action lawsuits, is a form of multi-party dispute resolution, and is a "uniquely American" method.[106] It co-opts elements of a class action lawsuit and transfers them into an arbitration-based framework.[107] Accordingly, it becomes "[a]n arbitration conducted on a representative basis similar to that of a class action in court, with a single person or small group of people representing the interests of a larger group."[108] Unlike class action under Rule 23, however, which provides a legal basis for consolidation even without the parties' express agreement, class arbitration is, as with arbitration generally, based on the consent of the parties at the time of the contract.[109]

Class arbitration developed in the early 1980s.[110] It was not until the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,[111] however, that class arbitration gained widespread acceptance in the United States.[112] In *Bazzle*, a plurality of the Supreme Court held that

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[103] *Id.*

[104] *Id.* at 467.

[105] *Id.* at 467, 471.

[106] 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, 205 (2012) (quoting *The President and Fellows of Harvard College Against JSC Surgutneftegaz*, 770 PLI/LIT. 127, 155 (2008)).

[107] *Id.* at 205-06.

[108] *Class Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[109] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 358 (5th Cir. 2013) (internal citation omitted).

[110] Strong, *supra* note 106, at 206.

[111] 539 U.S. 444 (2003).

[112] Strong, *supra* note 106, at 206.

class arbitration was not clearly prohibited by a broad arbitration clause in a commercial lending contract, which provided that "[a]ll disputes . . . arising from or relating to this contract or the relationships which result . . . shall be resolved by binding arbitration by one arbitrator selected by [the lender] with consent of [the borrower]."[113] Thus, as long as the lender selected an arbitrator with the consent of the named borrower, the FAA did not prohibit the use of class arbitration.[114] The plurality opinion then held that whether class arbitration was permissible under the agreement's arbitration clause was a matter of contract interpretation under state law.[115] In taking this approach, the Supreme Court, in effect, deferred to the parties' right to contract with each other under mutually agreed terms.[116]

Seven years later in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court considered a consolidated action where shipping companies sought to vacate a ruling allowing their customers to arbitrate antitrust claims as a class.[117] In considering the arbitration agreement (and clarifying the plurality opinion in *Bazzle*), the Supreme Court first held that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"[118] The majority then explained,

An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so 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.[119]

The majority then noted the fundamental changes that resulted when the parties moved from bilateral to class arbitration, including binding absent parties to an arbitration agreement.[120] Accordingly, the Supreme Court stressed that consent is required before parties can enter into class

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[113] *Bazzle*, 539 U.S at 448.

[114] *Id.* at 450–51.

[115] *Id.* at 454.

[116] Based largely on the same position, i.e., the right of the parties to contract under express terms, the dissent argued "the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen." *Id.* at 459 (Rehnquist, C.J., O'Connor and Kennedy, JJ., dissenting).

[117] 559 U.S. 662, 669 (2010).

[118] *Id.* at 681 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629–30 (2009); Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)) (internal citations omitted).

[119] *Id.* at 685.

[120] *Id.* at 686.

arbitration, and reversed the decision of the court of appeals.[121]

E. Circuit Split

On their own, as considered previously, courts have repeatedly shown a willingness to preserve the remedial goals of the NLRA and the FAA. Yet the NLRA and FAA are not always considered in isolation. The Board and several circuit courts have recently considered how the two acts interact with one another. This section of the article will consider several recent circuit court decisions that have considered this issue.[122]

i. D.R. Horton, Inc. v. NLRB (5th Cir. 2013)

In 2006, a homebuilding company required all of its existing and new employees to sign a mutual arbitration agreement as a condition of their employment.[123] The employees agreed that all "disputes and claims," including for compensation and benefits, would be resolved by individual, "binding arbitration," rather than in class or collective action proceedings.[124] In 2008, a group of employees who signed the arbitration agreement initiated a collective arbitration proceeding regarding misclassification under the FLSA.[125] The company responded by claiming that collective arbitration was barred, but that individual arbitration by the employees was allowed.[126] One of the employees, Michael Cuda, subsequently filed an unfair labor charge, claiming that the agreement waiving class action was a violation of the NLRA.[127]

An administrative law judge held that the company's agreement violated Sections 8(a)(1) and 8(a)(4) of the NLRA "because its language would cause employees to reasonably believe that they could not file unfair labor practice charges with the Board."[128] The Board then issued a

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[121] *Id.* at 687.

[122] The cases included in this section are not the only recent ones to have analyzed these issues. *See, e.g.*, Chan v. Fresh & Easy LLC, No. 15-51897 (Bankr. D. Del. Oct. 11, 2016) (endorsing the Seventh and Ninth Circuits' approach); Owens v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (upholding the company's arbitration clause).

[123] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 349 (5th Cir. 2013).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] D.R. Horton, Inc. & Michael Cuda, an Individual, No. 12-CA-25764, 2011 WL 11194

decision upholding the finding that the agreement violated Section 8(a)(1) because the waiver deprived the employees of their right to engage in protected activity under Section 7 of the NLRA.[129] The decision noted that "[t]he Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation. . . . Collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA."[130] The Board also determined that the agreement violated Section 8(a)(1) because it required employees to waive their right to maintain joint, class, or collective employment-related actions in any forum.[131] Accordingly, the Board ordered the company to rescind the arbitration agreement or revise it to clarify that its employees were not prohibited from filing charges with the Board, nor resolving employment-related claims collectively or as a class.[132]

The company appealed. The Fifth Circuit disagreed with the Board's decision in part because it did not give proper weight to the FAA.[133] Despite recognizing the judicial deference that should be given to the Board's decisions when interpreting ambiguous provisions of the NLRA, it nonetheless found, based on Supreme Court precedent, including *Concepcion*, that:

The NLRA should not be understood to contain a congressional command overriding application of the FAA. The burden is with the party opposing arbitration, and here the Board has not shown that the NLRA's language, legislative history, or purpose support finding the necessary congressional command. Because the Board's interpretation does not fall within the FAA's "saving clause," and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms.[134]

Accordingly, the Fifth Circuit determined that the rights of collective action embodied in the NLRA do not make it distinguishable from the Supreme Court authority that clearly directed enforcement of arbitration agreements.[135] The Fifth Circuit then followed this approach in *Murphy Oil USA, Inc. v. NLRB*.[136]

(N.L.R.B. Div. of Judges Jan. 3, 2011).

[129] *In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2283 (N.L.R.B. 2012).

[130] *Id.* at 2278.

[131] *Id.* at 2288.

[132] *Id.* at 2289-90.

[133] *D.R. Horton*, 737 F.3d at 362.

[134] *Id.* (internal citation omitted).

[135] *Id.*

[136] 808 F.3d 1013 (5th Cir. 2015).

ii. Murphy Oil USA, Inc. v. NLRB (5th Cir. 2015)

In *Murphy Oil*, the operator of gas stations across multiple states required its employees to sign agreements to individually arbitrate employment disputes, thus waiving their rights to file or participate in a group, class, or collective action.[137] The agreement explicitly made employment conditional on signing the agreement.[138]

Nevertheless, four employees filed a collective action lawsuit against the company in federal district court alleging various FLSA violations.[139] The alleged violations included the company's failure to pay the plaintiffs for overtime and other off-the-clock activities, like visiting competitors' stations to compare their listed gas prices.[140] The company moved to compel individual arbitration of the claims and to dismiss the collective action as provided by the arbitration clause.[141] Ultimately, the district court granted the company's motion.[142] After the motion was filed but not yet decided, the lead plaintiff filed an unfair labor practice charge against the company, alleging violations of Section 8(a)(1) of the NLRA.[143] The charge alleged that the company's mandatory arbitration agreement essentially prohibited employees from engaging in protected, concerted activities and that the language of the clause could lead employees to reasonably believe that they were not permitted to file unfair labor practice charges with the Board.[144]

The Board issued its decision in October 2014, reaffirming the Board's *D.R. Horton* theory,[145] and noting, "With due respect to the courts that have rejected *D.R. Horton*, and to our dissenting colleagues,

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[137] *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72, at *3 (October 28, 2014). Under the agreement,

> [d]isputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever.

Id.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at *3–4.

[142] *Id.* at *4.

[143] *Id.*

[144] *Id.*

[145] *Id.* at *7, *30

we adhere to its essential rationale for protecting workers' core substantive right under the [NLRA]."[146] The Board began its analysis by noting that it has the primary responsibility for developing and applying national labor policy, "which is built on the principle that workers may act collectively—at work and in other forums, including the courts—to improve their working conditions."[147] It then criticized the Fifth Circuit's *D.R. Horton* opinion for "giv[ing] too little weight to this policy," and arguing that "[t]he costs to Federal labor policy imposed by the Fifth Circuit's decision would be very high."[148] The Board then reaffirmed its position that collective rights under Section 7 are substantive rather than procedural (with the exception of the right to refrain from concerted activity).[149] Therefore, "[b]ecause mandatory arbitration agreements like those involved in *D.R. Horton* purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid."[150] The Board then argued that there was not inherent conflict between the NLRA and the FAA.[151] Accordingly, the Board found that the company had committed unfair labor practices, violating the NLRA.[152] The company then petitioned the Fifth Circuit for review of the Board's decision.

The Fifth Circuit granted the petition in part, upholding general enforcement of arbitration agreements.[153] Relying on its previous ruling in *D.R. Horton*, the Fifth Circuit noted "an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration."[154]

iii. Lewis v. Epic-Systems Corp. (7th Cir. 2016)

In *Lewis*, a company emailed its employees an arbitration agreement, which contained a provision that required individual arbitration for any wage and hour claims brought by an employee.[155] Under the terms

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[146] *Id.* at *6.
[147] *Id.* at *7.
[148] *Id.*
[149] *Id.* at *8.
[150] *Id.*
[151] *Id.* at *10.
[152] *Id.* at *21.
[153] Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).
[154] *Id.* at 1016.
[155] Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

of the agreement, employees could not decline the agreement if they wanted to keep their jobs, and they were deemed to have accepted the terms if they continued to work for the company.[156] The email requested that recipients agree to the terms by clicking two buttons.[157]

One employee who clicked these buttons, Jacob Lewis, subsequently had a dispute with the company regarding overtime pay.[158] Instead of proceeding under the arbitration clause, however, Lewis sued the company in federal court, contending the company had violated the FLSA and Wisconsin law by misclassifying him and other employees as exempt from overtime and thereby depriving them of overtime pay.[159] The district court declined to dismiss the suit because the arbitration clause violated the NLRA by interfering with the employee's right to engage in concerted activities for mutual aid and protection under Section 7, and Epic appealed.[160]

On appeal, the Seventh Circuit unanimously affirmed the district court's decision based on the rationale promulgated in the National Labor Relation Board's—rather than the Fifth Circuit's—*D.R. Horton* decision.[161] Namely, the Seventh Circuit held that engaging in class, collective, or representative proceedings is a "concerted activity" under Section 7 of the NLRA.[162] Under Section 8 of the NLRA, such "concerted activity" is protected from employers engaging in the unfair labor practice of interfering with, restraining, or coercing employees who exercise these rights.[163] The Seventh Circuit also rejected the position that the arbitration agreement had to be enforced under the FAA, noting "[l]ooking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case."[164]

In considering the FAA, however, the Seventh Circuit attempted to harmonize the NLRA and FAA. The Seventh Circuit reasoned that the "savings clause" of the FAA states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

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[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 1161.

[162] *Id.* at 1154 ("Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's plain language controls, and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees' access to such remedies.") (internal citation omitted).

[163] *Id.* at 1161.

[164] *Id.* at 1156.

law or in equity for the revocation of any contract," including illegality.[165] Moreover, the NLRA prohibits contractual provisions that strip away employees' rights to engage in concerted activities, including the collective action in arbitration at issue in *Lewis*. The court, therefore, found that "[b]ecause the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove."[166] Notably, the Seventh Circuit took the position that the right to engage in "concerted activity" through class or collective action is a substantive right under the NLRA, even though the class action device is procedural, noting "[t]he right to collective action in section 7 of the NLRA . . . lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute."[167] Accordingly, the Seventh Circuit held that because the waiver required employees to relinquish a right that the Board has declared to be substantive, the waiver was not enforceable under the FAA.[168]

iv. Morris v. Ernst & Young, LLP (9th Cir. 2016)

In *Morris v. Ernst & Young, LLP*, two employees were required to sign agreements as a condition of employment that required individual arbitration and prohibited collective arbitration or collective action in court.[169] An employee subsequently brought a class and collective action case against the company in federal district court regarding misclassification to deny overtime wages in violation of the FLSA and California labor laws.[170] On the company's motion, the district court ordered individual arbitration and dismissed the case, and the employee appealed.[171]

The Ninth Circuit, relying on *Chevron*, found that the intent of Congress was clear from the NLRA and was consistent with the Board's interpretation.[172] According to the Ninth Circuit, because the FAA did not mandate the enforcement of contract terms that waived substantive—rather than procedural—federal rights, the FAA's savings clause prevents

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[165] *Id.*
[166] *Id.* at 1157.
[167] *Id.* at 1160.
[168] *Id.* at 1159.
[169] 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).
[170] *Id.*
[171] *Id.*
[172] *Id.* at 981.

a conflict between the acts.[173] Therefore, the Ninth Circuit found that the FAA's enforcement mandate evinced the employee's substantive right to collective action under the NLRA.[174] The court then held that the agreement violates the NLRA, reversed the district court's dismissal, and remanded the case.[175]

Unlike the Seventh Circuit's unanimous decision in *Lewis*, however, the Ninth Circuit's *Morris* decision included a scathing dissent from Judge Sandra Ikuta.[176] Judge Ikuta argued that the Ninth Circuit majority should have endorsed the Fifth Circuit's *D.R. Horton* ruling and a similar ruling by the Second Circuit involving the same arbitration clause at issue in *Morris*.[177]

F. Procedural & Substantive Rights

The nature of the rights at issue in the aforementioned cases, i.e., whether they are procedural or substantive, though not the primary focus of the opinions, is critically important because it impacts how courts must view the rights and how they are treated when in conflict. "The line between procedural and substantive law is hazy," however,[178] and the two types are not "mutually exclusive categories with easily ascertainable contents."[179] In some situations, "procedure and substance are so interwoven that rational separation becomes well-nigh impossible."[180] Justice Felix Frankfurter has even observed that "substance" and "procedure"

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[173] *Id.* at 986.

[174] *Id.*

[175] *Id.* at 990.

[176] *Id.*

[177] *Id.* at 998 (referencing Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013)).

[178] Erie R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring in result); *see* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 419–20 (2010) (Stevens, J., concurring in part and in judgment) (considering the nature of procedure and substance).

[179] Sibbach v. Wilson & Co., 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting).

[180] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting).

mean different things in different contexts.[181] Nevertheless, generally speaking, a procedural right is a right that derives from legal or administrative procedure.[182] It helps to protect and enforce a substantive right.[183] Conversely, a substantive right is "a right of substance rather than form."[184] It is a right that can be protected by law and enforced.[185]

G. Supreme Court

On January 13, 2017, the Supreme Court granted cert and consolidated the appeals from decisions in the Fifth Circuit's *Murphy Oil* case, the Seventh Circuit's *Lewis* case, and the Ninth Circuit's *Morris* case.[186] At the time of publication, the Supreme Court had adopted a briefing schedule for the consolidated cases, which was not yet complete.

III. THE SUPREME COURT & BEYOND

As reflected by the foregoing discussion, the Board and several of the circuit courts have taken vastly different approaches to the FAA, NLRA, and the very nature of the rights at issue. Because of this split in the circuits and the need for clarity on the appropriate approach, it is unsurprising that the Supreme Court granted review of these decisions.[187]

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[181] *See* Guaranty Tr. Co. v. York, 326 U.S. 99, 108 (1945). In writing for the majority, Justice Frankfurter observed:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws.

Id. (citations omitted).

[182] *Right*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] NLRB v. Murphy Oil, Inc., 137 S. Ct. 809 (2017); Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017); Ernst & Young, LLP v. Morris, 137 S. Ct. 809 (2017).

[187] *Id.*

At the time of publication, Associate Justice Neil Gorsuch had recently been confirmed to the Supreme Court. A review of Justice Gorsuch's prior judicial writing has shown him to be skeptical of certain core doctrines of administrative law and agency deference in particular.[188]

The stage is now set for one of the most important employment and arbitration cases in years, with the potential for far reaching implications that may impact millions of working Americans. While the Supreme Court has yet to rule on the issue presented, the addition of Justice Gorsuch and recent case law, as addressed previously, make it likely that the Supreme Court will adopt the Fifth Circuit's approach. However, resolution could also come in a narrower form, rather than as a sweeping decision. This section considers the future of class waivers in the employment context at the Supreme Court and the impact of such waivers generally.

A. Likely Affirmation of the Fifth Circuit Approach

Recent case law from the Supreme Court shows a strong deference to the FAA.[189] While the Supreme Court has yet to consider class waivers in the employment context,[190] its language in *Morris* that "an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement," is particularly sweeping in the FAA context.[191] Additionally, the Supreme Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[192] Given the current composition of the Supreme Court, along with this recent precedent and trend in favor of arbitration rights, the Supreme Court is likely to adopt the reasoning of the Fifth Circuit in *D.R. Horton* and *Murphy Oil*, and expand its ruling in *Concepcion* to the employment context. Adopting a narrower approach, however, would allow the Supreme Court to avoid

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[188] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2016); United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc); *see generally*, Eric Citron, *The Roots and Limits of Gorsuch's Views on* Chevron *Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference [https://perma.cc/LW65-XKDU].

[189] *See supra* Part II.D.i (discussing the FAA and recent Supreme Court cases reflecting judicial deference toward arbitration and freedom of contract).

[190] It has, however, considered the applicability of the FAA in the employment context in Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[191] Morris v. Ernst & Young, LLP, 834 F.3d 975, 998 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). *See supra* text accompanying notes 117-21 (addressing *Stolt-Nielsen*).

[192] *See supra* note 27.

unintended consequences while still providing the clarity that both employers and employees desire. This section will first consider a broad approach to deciding the consolidated cases, and then outline the benefits of a narrower alternative.

i. Broad Approach

Under a broad approach, the Supreme Court would weigh the right to contract against the right to engage in concerted, collective, or class-based activity. This approach necessarily entails consideration of procedural and substantive rights.[193] To date, the circuit courts have evaluated this issue through the lens of the statutory frameworks and intent of the FAA and the NLRA, i.e., the broad approach.[194] As each of the now-consolidated cases was litigated by the Board, it makes sense why this approach was taken.[195] The inclination to view each employment dispute under the NLRA's framework is problematic, however. As explained by the Fifth Circuit in *D.R. Horton*, viewing all employment disputes as falling under the NLRA's concerted activity protections could pose a challenge to the benefits of arbitration generally, and to the FAA.[196] Judge Sandra Ikuta shared this concern in her dissent to the Ninth Circuit's *Morris* decision, stating:

> the majority exhibits the very hostility to arbitration that the FAA was passed to counteract. The Court recognized in *Concepcion* that the pre-FAA judicial antagonism to arbitration agreements "manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy."[197]

Because the NLRA's notion of concerted activity is vaguely defined, it is conceivable that an active Board or skilled practitioners could convert Section 7's protections into a tool to circumvent the FAA.

Conversely, broadly extending the FAA to the employment context would not just be extending *Concepcion*, but could be viewed as an act of judicial lawmaking. While there is a clear argument that the broad language embodied by the NLRA and FAA *can* be read in concert, as

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[193] *See supra* Part II.F (describing procedural and substantive rights).

[194] *See supra* Part II.E (discussing the Fifth, Seventh, and Ninth Circuit Court cases in which the courts considered the FAA's application the NLRA).

[195] *Id.* (reflecting that the Fifth, Seventh, and Ninth Circuit Court cases were litigate by the Board).

[196] *See* D.R. Horton v. NLRB, 737 F.3d 344, 349 (5th Cir. 2013) (discussing 29 U.S.C. § 157 (2012)).

[197] Morris v. Ernst & Young, LLP, 834 F.3d 975, 998 (9th Cir. 2016) (Ikuta, J., dissenting), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

the Seventh and Ninth Circuit opinions did, trying to do so has resulted in judges who have also needed to weigh competing policy interests.[198] If this Supreme Court is asked to make a ruling that will turn on policy preference, it is unlikely that true clarity will be achieved. Rather, the decision will be subject to review as the composition of the Justices change. Similarly, the very nature of the FAA and NLRA may shift in step with the Justices of the Supreme Court.

Ultimately, viewing each employment dispute under the NLRA's framework is as unnecessary as it is problematic. As presented, the consolidated cases do not require the Supreme Court to stretch to try to engage in a strained textual analysis in the name of policy neutrality. Each consolidated case stems from a dispute that was originally brought under the FLSA or equivalent state wage laws.[199] Therefore, the Supreme Court could review the consolidated cases through the narrower lens of the FLSA's collective action provisions. This would functionally adopt a case-by-case approach, and therefore avoid expressly weighing a fundamental aspect of the NLRA against the FAA.

ii. Narrower Alternative

Instead of endorsing the Fifth Circuit's sweeping proposition that concerted, collective, or class rights do not involve substantive rights and may broadly be preempted by the FAA, the Supreme Court could endorse a case-by-case or statute-by-statute approach, which could harmonize *Concepcion* and related case law with specific employment law statutes, such as the FLSA. If a case involves no such statute, then *Concepcion* and *Stolt-Nielsen* suggest that the class waiver would be valid.[200] Similarly, federal statutes that do not explicitly provide for class or collective mechanisms would also likely be subject to class waivers. As the cases on appeal each implicate the FLSA, the Supreme Court could narrow its focus to the FAA and FLSA, rather than the FAA and NLRA.[201]

Taking this approach, the Supreme Court might find that the FLSA,

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[198] *See supra* Parts II.E.iii and iv (reviewing the Seventh and Ninth Circuit Courts of Appeals decisions).

[199] *See supra* Parts II.E.ii, iii, and iv (discussing the nature of the claims brought in each of the Fifth, Seventh, and Ninth Circuit Court cases).

[200] *See supra* text accompanying notes 88–91 (analyzing *Concepcion*) and text accompanying notes 117–21 (analyzing *Stolt-Nielsen*).

[201] *See supra* Parts II.E.ii, iii, and iv (describing the FLSA claims brought in each of the Fifth, Seventh, and Ninth Circuit Court cases).

unlike Rule 23 and perhaps also unlike the NLRA, precludes class waivers because it contains explicit provisions authorizing, sanctioning, and protecting collective activity.[202] Unlike in Rule 23 class actions, collective actions under the FLSA require employees to "opt-in."[203] This means that employees neither bear the costs nor reap the benefits of a pending action unless they affirmatively "consent" to being involved in that matter.[204] This requirement was added by Congress to limit how many and what types of plaintiffs could be joined in these types of collective actions.[205] This opt-in requirement is also why FLSA collective actions are subject to standards that are distinct from those of Rule 23 class actions.[206] In the context of an FLSA collective action, the Supreme Court could find more explicit text[207] and Congressional intent in the statute to overcome any preemption by the FAA.[208]

Although the Court has not always provided deference to the decisions of the NLRB,[209] it has recently and explicitly recognized the policy and remedial goals of the FLSA.[210] For example, to facilitate the ability of employees to make timely and informed decisions as to whether to opt-in to an FLSA collective action, courts are authorized to facilitate notice to eligible employees and determine the contours of the FLSA notice process.[211] "Even if a collective action is not ultimately certified, the process of allowing individual . . . workers to lodge their claims in a forum where they can be recognized, evaluated, and possibly settled, is consistent with the policy choice Congress made when it created the FLSA right of action."[212] In contrast, class waivers would likely preclude

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[202] *See* 29 U.S.C. § 216(b) (2012). The Supreme Court may also find the same regarding the Age Discrimination in Employment Act (which incorporates procedural provisions from the FLSA; 29 U.S.C. § 626(b)) and other federal statutes with explicit collective provisions.

[203] *Id.*

[204] *See* Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 916 (5th Cir. 2008) (quoting LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir.1975) (per curiam)).

[205] *See* Chase v. AIMCO Props., L.P., 374 F. Supp. 2d 196, 199 (D.D.C. 2005).

[206] *Id.* (granting first stage FLSA conditional certification but denying certification under Rule 23 standards).

[207] *See, e.g.*, Frye v. Baptist Mem'l Hosp., Inc., 495 F. App'x 669 (6th Cir. 2012) (construing the text of the FLSA literally to require each plaintiff to file a consent in court, which could also be interpreted to requiring a plaintiff to first proceed to court before consenting to arbitration in each FLSA dispute, regardless of whether the plaintiff had also agreed to arbitrate the dispute).

[208] *But see* Sutherland v. Ernst & Young LLP, 726 F.3d 290, 296–97 (2d Cir. 2013) (construing the FLSA's opt-in requirement as compatible with a class waiver's consent to "opt-out" of collective activity).

[209] *See, e.g.*, *supra* note 27.

[210] *See, e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047 (2016).

[211] *See supra* notes 37–46, 203–04 and accompanying text (discussing the FLSA and its procedures).

[212] Chase v. AIMCO Props., L.P., 374 F. Supp. 2d 196, 201 (D.D.C. 2005).

additional employees from obtaining notice of their ability to join a pending matter, which the FLSA permits under certain conditions.[213] This notice and affirmative opt-in requirement is not merely a procedural tool because it protects access to employees' substantive wage rights.[214] In a world of class waivers, many employees will likely never receive this notice, and will thus lose their ability to evaluate their potential wage claims and to timely, accurately, and efficiently pursue these statutory rights as Congress intended.

Some courts have suggested that because the FLSA permits an employee to opt-in to an FLSA collective action, the employee should also be able to contract to waive this right.[215] However, the FLSA provides specific, intentional, and important redress for employees whom Congress has already recognized may not be empowered to truly bargain as to their working conditions.[216] For instance, the FLSA does not allow an employee to contract away his or her right to receive lawful minimum wage, if the employee is lawfully entitled to such wage.[217] The FLSA also does not allow an employee to forego his or her entitlement to overtime wages when the law says the employee is entitled to the overtime wage.[218] Similarly, the FLSA likely should not permit an employee to contract away his or her right to notice of a pending collective action, or the rights of putative class members.

Although the Supreme Court could still split along policy lines, following this narrower, statute-specific approach would provide clearer text and Congressional intent for the Court to evaluate than is possible under the broader approach taken by the appellate courts. This approach could also avoid the need to reach a sweeping ruling while still providing further clarity than currently exists. The Supreme Court could adopt the reasoning of *D.R. Horton* but find that employment statutes like the FLSA and ADEA, which explicitly provide for collective rights, preclude enforcement of class waiver provisions. This approach could be appealing to Chief Justice John Roberts who has shown a tendency to avoid sweeping rulings when possible and to look for a way to avoid

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[213] *See supra* text accompanying notes 37–46, 203–04 (describing the FLSA and its procedures as mandated by Congress).

[214] *See supra* Part II.F (discussing substantive and procedural rights, including in the context of the Fifth Circuit's *D.R. Horton* case).

[215] *See, e.g.*, Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 (2d Cir. 2013) (citing Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052–53 (8th Cir. 2013) ("Even assuming Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well."); *see also*, Long John Silver's Rests., Inc. v. Cole, 514 F.3d 345, 350 (4th Cir. 2008).

[216] *See supra* text accompanying notes 37–46 (discussing the FLSA and its procedures).

[217] *See id.*

[218] *See id.*

political encroachment.[219]

B. Additional Rights at Issue

If the Supreme Court does, in fact, adopt the Fifth Circuit's reasoning in *D.R. Horton* and *Murphy Oil*, the employer and management-side community would rightfully view the holding as an enormous victory. The NLRA and FLSA were both passed into law because Congress recognized that employees generally possess unequal bargaining power with their employers.[220] However, affirming the Fifth Circuit's reasoning would, in effect, require the Supreme Court to conclude that employees are sufficiently powerful to negotiate arbitration agreements with their employers and voluntarily consent to such agreements' terms.[221] Such an outcome could have far-reaching implications because it would alter how courts view the nature of the employment relationship.

Regardless of how the Supreme Court rules on the circuit split, it is unlikely there will be full resolution to this issue. The Board was bullish during the Administration of President Obama on labor rights, but that attitude may change under the new Trump Administration.[222] It is even possible that NLRA enforcement efforts may fundamentally change or largely dissipate. Nevertheless, there are already other cases that focus on the outer limits of what constitutes concerted activity. For example, in *Three D, LLC v. NLRB*, the Second Circuit affirmed the Board's decision and recognized that employees' Facebook posts and "likes" were protected concerted activity.[223] In reaching its decision, the Second Circuit explicitly found that a contrary view would pose limitless threats to employees' free speech rights.[224]

Importantly, without the ability to engage in collective activity through class arbitration, social media could become an even more vital forum for employees to voice their employment concerns. In recent years, there has generally been a decline in union activity;[225] however,

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[219] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012) (finding the individual mandate portion of the Affordable Care Act to be a tax).

[220] *See supra* note 42.

[221] Otherwise, the class waiver agreements would be unenforceable pursuant to common law principles.

[222] *See supra* Part II.E (discussing several of the Board's decisions during the Obama administration).

[223] 629 F. App'x 33, 36–38 (2d Cir. 2015) (citing Three D, LLC (Triple Play), 361 N.L.R.B. No. 31 (2014)).

[224] *Id.*

[225] The union membership rate—the percent of wage and salary workers who were members of

employment review websites and social media give individual employees some means to confront seemingly unfair working conditions and seek empowerment.[226] Employers, rewarded by a broad victory at the Supreme Court and a less active Board, may push other work-related issues forward in a manner that could implicate—if not existentially threaten—broader free speech considerations.

Notwithstanding the Supreme Court's ultimate decision or breadth of approach, employees will need to be educated so they can make informed decisions in this new reality. Advocates for workers' rights may need to find new and extra-judicial alternatives to preserve traditional labor, wage, and speech rights and educate the public so that a fair balance between the rights of employers and employees may be preserved.

IV. CONCLUSION

As set forth in this article, class arbitration is a relatively new phenomenon compared to traditional labor and collective rights.[227] As of the publication of this article, the judicial system seems poised to further sanction the use of arbitration as an acceptable alternative to Congressionally-recognized means to enforce substantive rights. Presently, the focus is on the propriety of class waivers in the employment context.[228] While a Supreme Court review of these waivers is likely to focus on the FAA and judicial economy, the issues involved are complex and paramount for both employers and employees.

In essence, the judicial system is now asked to decide how traditional labor values should fit into an increasingly fast and mobile economy, where the right to contract may be used to waive or limit an employee's rights at the click of a button or the swipe of a screen. The future of employment disputes in the United States, and both procedural and substantive rights, are at stake. The discord on this question challenges

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unions—was 11.1 percent in 2015, unchanged from 2014, according to the U.S. Bureau of Labor Statistics. The number of wage and salary workers belonging to unions, at 14.8 million in 2015, was little different from 2014. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers. BUREAU OF LABOR STATISTICS, UNION MEMBERS—2016 (2017), http://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/Y9MN-CA9G].

[226] *See, e.g.*, GLASSDOOR, http://www.glassdoor.com/reviews/index.htm [https://perma.cc/ME5D-ZW32].

[227] *See supra* Part II.D.ii (analyzing class arbitration).

[228] *See supra* text accompanying note 186 (discussing the three cases before the Supreme Court related to class waivers in the employment arbitration context).

how and whether traditional labor values will continue to impact the employment relationship. While the Supreme Court may resolve this narrower issue soon, the competing interests at stake are poised to stay relevant for years to come.