

HORTON HATCHES THE EGG:
CONCERTED ACTION INCLUDES CONCERTED DISPUTE
RESOLUTION

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ABSTRACT

*As interpreted by the Supreme Court, the Federal Arbitration Act has largely swept all before it, validating agreements to arbitrate almost all disputes, including those involving claims under statutes regulating the employment relation. That era may be nearing an end. The National Labor Relations Board recently held in *In re D.R. Horton* that employers may not compel employees to waive their NLRA right to pursue collective legal redress of employment claims. Instead, the NLRA mandates that some mechanism for concerted dispute resolution remain available in arbitral or judicial forums. Unsurprisingly, this decision has generated an enormous amount of litigation. Although the case itself is pending before the Fifth Circuit, courts across the country are now confronting *Horton*-based challenges to the enforcement of mandatory arbitration clauses in employment contracts. To date, they have generally rejected these challenges on various grounds.*

*This Article will explore why these courts are wrong and why agreements that bar concerted dispute resolution are indeed invalid. The Board's articulation of labor law rights ordinarily is entitled to judicial deference. But such deference has been called into question in *Horton* itself in part because of a recent circuit court decision invalidating recess appointments to the Board. As we will demonstrate, however, no deference is necessary because *Horton* reflects the correct—not merely a reasonable—interpretation of the NLRA as well as its predecessor, the Norris-LaGuardia Act.*

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The authors thank Matt Bodie, Edward Hartnett, Jeff Hirsch, Michael Risinger, Jon Romberg, Rebecca White, Steve Willborn, and Mike Zimmer for helpful comments on earlier drafts. Professor Sullivan also thanks Allison Lynn Martin for her superb research assistance on this and other projects.

Moreover, although the Supreme Court has seemingly treated the Federal Arbitration Act as a “super-statute” that overwhelms all before it, the Court has simultaneously denied doing more than applying what textual analysis and interpretive conventions require. The Horton question will force the Court to confront the collision between what the Court says and what it does. Established doctrines of statutory interpretation, recently and resoundingly reaffirmed by the Court, dictate a contrary result. Indeed, to the extent the concerted activity mandate of federal labor law conflicts with provisions of the FAA, the former clearly supersedes the latter.

With apologies to Dr. Seuss, Horton meant what it said and said what it meant. Courts must follow, one hundred percent.

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*“I meant what I said
And I said what I meant. . . .
An elephant’s faithful
One hundred per cent!”¹*

INTRODUCTION

In *In re D.R. Horton*,² the National Labor Relations Board (the NLRB or “Board”) held that employers may not compel employees to waive, through mandatory arbitration agreements or otherwise, their National Labor Relations Act (NLRA) right to concerted pursuit of legal redress of employment claims.³ The decision has generated an enormous amount of litigation and raises profoundly important issues that will affect enforcement across the spectrum of employee rights as well as policies at the heart of labor law.

Although *Horton* itself remains on appeal before the Fifth Circuit, other federal and state courts are now confronting *Horton*-based challenges to enforcement of arbitration clauses that purport to limit employee rights to concerted legal redress by barring employees from asserting claims jointly or through collective or class action procedures. To date, these courts have generally rejected such challenges. They are wrong. Their errors stem from several sources, especially the seemingly impenetrable thicket of Federal Arbitration Act precedents, statutory interpretation doctrines, and other real or imagined decisional impediments. This Article clears away this underbrush, demonstrating why *Horton* is correct.

Horton’s reasoning contains two principal components: (1) the National Labor Relations Act, as well as its precursor, the Norris–LaGuardia Act (NLA), protects employee rights to concerted action for mutual aid and protection and thus invalidates employer-compelled waivers of the right to pursue collective legal redress; and (2) this finding and the right on which it is premised neither conflict with nor are trumped by the Federal Arbitration Act.

The Board’s first conclusion is the natural extension of labor law’s central teachings. Long before crystallization of national labor policy in, first, the Norris–LaGuardia Act of 1932 and, second, the more powerful

1. DR. SEUSS, *HORTON HATCHES THE EGG* (1940). For those unfamiliar with this classic children’s tale, Horton promises to sit on the egg of Mayzie, the lazy bird, while she flies off for a short rest. Needless to say, Mayzie does not return, but faithful Horton continues to warm the egg for nearly a year, in the process undergoing a variety of ordeals. His performance is all the more remarkable since Mayzie clearly provided no consideration for his promise. As will become apparent from this Article, the NLRB’s decision in *In re D.R. Horton* faces analogous legal obstacles.

2. 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

3. *Id.* at *1.

National Labor Relations Act of 1935, employees had resorted to lawsuits to vindicate their rights against their employers, although those rights were considerably narrower than they are today. For example, Horace Gay Wood's famous formulation of the at-will rule⁴ was drawn from contract claims by employees against their employers.⁵ These particular cases were suits by a single plaintiff against his employer, but there were also numerous suits—in contract⁶ or more frequently tort,⁷ or pursuant to newly enacted statutes providing worker protections⁸—in which more than one employee joined to seek relief.

Resorting to legal processes was certainly not the most important way to advance workers' interests. More "direct action" by workers in labor unions, including protests and strikes, was obviously important in those turbulent times. And workers increasingly took to the ballot box to achieve what they could not obtain otherwise—although, in the *Lochner* era, these efforts often were stifled by hostile courts.⁹ Nevertheless, one obvious way for employees to vindicate their rights was through resort to the legal system, and a possible means for employers to foreclose such suits would be to require their workers to sign contracts negating the right to sue or sue jointly. Such a provision in an employment agreement might well have been enforceable under state law as a version of "yellow dog" contracts, the paradigmatic form of which barred employees from joining unions.¹⁰

Fortunately for workers, the Norris-LaGuardia Act declared classic yellow dog agreements contrary to federal labor policy.¹¹ But the statute swept even more broadly, shielding workers' rights from a wide range of

4. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (Albany, N.Y., Weed, Parsons and Co. 1877) ("With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.").

5. *Id.* (citing, *inter alia*, *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870) and *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871)); see also Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990) (arguing that Wood's formulation was well rooted in American common law).

6. *E.g.*, *Gwynne v. Hitcher*, 67 N.J.L. 654 (N.J. 1902).

7. *E.g.*, *Guiliano v. Daniel O'Connell's Sons*, 136 A. 677 (Conn. 1927) (suit by employees for injuries suffered while sleeping in a barn provided by the employer).

8. For example, in 1916 a group of employees joined as plaintiffs to seek their withheld compensation under the state's wage payment law. See *Olson v. Idora Hill Mining Co.*, 155 P. 291 (Idaho 1916).

9. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York statute limiting bakers' work weeks to sixty hours). See generally Jack M. Balkin, "*Wrong the Day It Was Decided*": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005).

10. See, e.g., *Kraemer Hosiery Co. v. Am. Fed'n of Full Fashioned Hosiery Workers, Local No. 10*, 157 A. 588 (Pa. 1931) (enjoining the distribution of union materials inducing the plaintiff's employees to join a union when they had signed individuals agreements not to do so).

11. 29 U.S.C. §§ 102–103 (2006).

concerted activity from both employer and judicial hostility: it declared that workers “shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or *in other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*.”¹² It then went on to provide that “any other undertaking or promise in conflict with the public policy [so proclaimed] . . . is declared to be contrary to the public policy of the United States [and] shall not be enforceable in any court of the United States.”¹³ In short, the NLA invalidated contracts that would preclude concerted action, including concerted resort to the courts.¹⁴

Three years later, the NLRA embraced this declared labor policy and enhanced remedies available by creating the duty to bargain with worker representatives and establishing the National Labor Relations Board to oversee the new regime created. But a core protection of the NLRA, like the NLA, is the right of workers to engage in concerted activities for mutual aid and protection, regardless of whether the workplace is unionized.¹⁵ Any agreement between an employer and employee that suppresses the right to act in concert with other employees to pursue legal action therefore would seem to be as reprehensible as one purporting to bar the workers from organizing or protesting or striking. *Horton* adopts this view, consistent with earlier Board and court precedents invalidating employer efforts to interfere with the rights of workers to seek collective legal redress.

In Part II then, we detail why the Board is clearly correct as a matter of interpreting the labor statutes and, even if it were not so clearly correct, its interpretation of its governing statute must be accorded deference under established administrative law principles. But here is where we begin

12. *Id.* § 102 (emphasis added).

13. *Id.* § 103.

14. Norris–LaGuardia is directed only to federal courts. *See* *Boys Markets, Inc. v. Retail Clerk’s Union, Local 770*, 398 U.S. 235, 247 (1970) (agreeing with the California Supreme Court that “whether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris–LaGuardia Act or section 301.” (quoting *McCarroll v. L.A. Cnty. Dist. Council of Carpenters*, 315 P. 2d 322, 332 (1957))). But many states have “little Norris–LaGuardia” acts. *See e.g.*, N.Y. LAB. LAW § 807 (McKinney 2012). *See generally* Benjamin Aaron, *Labor Injunctions in the State Courts—Part I: A Survey*, 50 VA. L. REV. 951, 953–55 (1964) (listing 33 states with labor laws modeled after federal law; 17 of these states have comprehensive anti-injunction statutes similar to the Norris–LaGuardia Act). Further, agreements in violation of the parallel provisions of the NLRA are not enforceable in state courts under normal principles of preemption. *See* Thomas R. Haggard, *Private Injunctive Relief Against Labor Union Violence*, 71 KY. L.J. 509, 567 (1983) (“Like their federal counterpart, the state ‘Little Norris–LaGuardia Acts’ address a problem that no longer exists. They prohibit state courts from issuing injunctions which, for the most part, would be beyond the power of the states in any event due to subsequently developed doctrines of constitutional law and federal preemption.”).

15. *See* National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

clearing some underbrush. Before the Fifth Circuit, D.R. Horton has made several arguments for vacating *Horton* for lack of a quorum,¹⁶ including the supposed unconstitutionality of one member's appointment under the District of Columbia Circuit's recent decision invalidating certain of President Obama's recess appointments to the Board.¹⁷ Although these issues have broad implications elsewhere, they are unimportant to our larger point: regardless of whether the decision itself survives, the principles announced in *Horton* are correct, and courts must apply them to cases before them.

Yet the elephant in the room, so to speak, is the Federal Arbitration Act (FAA), which Congress enacted in 1925 to "reverse the longstanding judicial hostility to arbitration agreements" and to place arbitration agreements "upon the same footing as other contracts."¹⁸ Thus, Section 2, the FAA's primary substantive provision, provides that a clause that provides for arbitration of any controversy arising out of a covered agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁹

For many years, the FAA was largely limited to enforcing agreements to arbitrate commercial disputes.²⁰ While the statute has since been held to reach agreements to arbitrate employment disputes,²¹ the FAA was passed before the NLA and NLRA, which would seem to require that, to the extent that it would validate an agreement that violates these laws, it give way. Indeed, the savings language in Section 2 explicitly directs a court to do what other laws require. And, given national labor policy, such a result must follow.

16. See discussion in text beginning *infra* note 98.

17. See *Noel Canning Corp. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013); Citation of Supplemental Authorities, *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (5th Cir. Jan. 29, 2013), ECF No. 94 (Bloomberg Law). In *Noel Canning*, the D.C. Circuit held that certain recess appointments to the Board were unconstitutional because they were not subject to Senate advice and consent. 705 F.3d at 499–514. Although the members at issue in *Noel Canning* did not include those who participated in the *Horton* matter, Member Becker, who did participate, was also a recess appointment. See also *NLRB v. New Vista Nursing & Rehabilitation*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013) (2-1) (holding that the Board lacked power to decide the matter below because it did not have the requisite number of members since Member Becker was invalidly appointed during an intrasession Senate break). D.R. Horton also originally contended there was no quorum because of one member's recusal in the case and the alleged prior expiration of Member Becker's appointment. See Brief for the Petitioner/Cross-Respondent at 59–60, *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (5th Cir. May 31, 2012), ECF No. 21 (Bloomberg Law).

18. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

19. 9 U.S.C. § 2 (2006).

20. See RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT I* (1997) (noting that "[a]rbitration of employment disputes in the nonunion sector was virtually unheard of" until the early 1990s).

21. See discussion in text beginning *infra* note 119.

To appreciate this, suppose an employer required each of its workers by individual agreement to arbitrate any dispute they might have concerning terms and conditions of employment rather than collectively bargain, protest, or strike. That such an agreement is enforceable in defiance of labor statutes is risible, and yet the argument that the FAA might somehow trump these concerted actions seems to require just such a result.²²

Still, an individual arbitration agreement might be viewed as merely substituting arbitration for judicial processes, not supplanting labor organizing or bargaining. But this simply underscores the issue of whether the particular agreement conflicts with labor policy. No such conflict exists if an arbitration agreement merely requires an individual employee to arbitrate an individual claim rather than pursue it in court—precisely because the labor laws protect concerted, not individual, action. Yet if the arbitration clause bars *concerted* dispute resolution, the conflict between the clause and the NLA and NLRA is patent. And when there is such a conflict, Section 2 of the FAA tells us what to do: apply the external legal principles (in this case, from federal labor law) to invalidate the agreement.²³

This position seems so obvious as to be ineluctable, at least for a textualist Court. But there is a considerable amount of underbrush that has to be removed in order to see the legal landscape plainly. As Part III.A summarizes, the Supreme Court has continually expanded the reach of the FAA. Falling back on the refrain that “the FAA manifests a liberal federal policy favoring arbitration [agreements],” the Court has enforced almost all such clauses before it.²⁴ Although the FAA could easily have been viewed as *pro tanto* repealed by a wide variety of federal statutes, the Court has uniformly rejected this argument.²⁵ Furthermore, in its most recent FAA jurisprudence, the Court has gone well beyond insisting that arbitration clauses be enforced on the same terms as other contractual provisions. In *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.*²⁶ and *AT&T Mobility v. Concepcion*,²⁷ the Court stated that the enforcement of arbitration clauses as written means, absent other qualifying language, that arbitration must be bilateral—that is, only between the parties to the agreement.²⁸ Taken together, these decisions indicate that an (unqualified)

22. See discussion in text beginning *infra* note 223.

23. 9 U.S.C. § 2.

24. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991); see also discussion in text beginning *infra* note 119.

25. See discussion in text beginning *infra* note 177.

26. 130 S. Ct. 1758 (2010). See discussion in text beginning *infra* notes 70 and 130.

27. 131 S. Ct. 1740 (2011). See discussion in text beginning *infra* notes 71 and 131.

28. See *Concepcion*, 131 S. Ct. at 1751–52; *Stolt–Nielsen*, 130 S. Ct. at 1775–76.

mandatory arbitration clause in an otherwise enforceable contract will preclude joint, collective, or class enforcement in both arbitral and judicial forums.

However, this expansion of the FAA cannot continue indefinitely. At some point, the irresistible force of that statute must meet the immovable object of federal labor law. In Part III.B, we demonstrate the collision between the FAA, as interpreted by the Court, and national labor policy established by the NLA and NLRA.²⁹ We agree with the *Horton* Board that the nature of the substantive right of employees to engage in concerted activities, including the collective pursuit of claims in legal forums, distinguishes it from other matters addressed in the Court's FAA jurisprudence. But where, as in *Horton* itself, an agreement purports to entirely foreclose concerted pursuit of dispute resolution—by barring judicial enforcement while simultaneously foreclosing joint arbitration—the conflict between the two regimes is unavoidable. We therefore disagree with *Horton*'s second conclusion that the right it recognized (collective pursuit of workplace legal claims) under federal labor law does not conflict with the FAA's mandate to enforce arbitration clauses.

The inherent conflict established, Part III.C demonstrates why the national labor policy trumps the FAA.³⁰ As an initial matter, the NLA contains an express repealer of inconsistent laws.³¹ And, by fair implication, the NLRA also repeals conflicting aspects of the FAA. Simply put, a later statute prevails over an earlier one when they contradict one another. Because implied repeal is disfavored, courts should seek to reconcile the enactments. But the presumption against implied repeal gives way when “ordinary interpretive considerations point clearly” towards repeal; “[w]ords such as ‘plain import,’ ‘fair implication,’ or the like” reflect the need for [the requisite] assurance.”³² Consistent with our discussion to this point, we develop in detail why the FAA must yield under this analysis to the later-enacted NLA and NLRA.

Along the way, we clear even more underbrush, rejecting the contention now accepted by some lower courts that the FAA is the later-enacted law, given that it was reenacted as codified in 1947. We show why this theory is—not to put too fine a point on it—nonsensical.³³

Part IV then turns to what courts confronting *Horton*-based challenges to arbitration clauses can and must decide, both now and after the Fifth

29. See discussion in text beginning *infra* note 132.

30. See discussion in text beginning *infra* note 140.

31. 29 U.S.C. § 115 (2006) (“All acts and parts of acts in conflict with the provisions of this chapter are repealed.”).

32. *Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012).

33. See discussion in text beginning *infra* note 189.

Circuit rules in *Horton*. We demonstrate, in a nutshell, that courts are obliged not to enforce contracts that violate federal public policy, which, as we establish in this Article, prohibits employers from compelling employees to waive their right to pursue collective legal redress through arbitration clauses or otherwise. And this is true regardless of what happens in *Horton* itself. Along the way, we cut through a bit of additional bramble, showing why the doctrine of primary jurisdiction and the Board's concurrent jurisdiction over unfair labor practices do not preclude courts from deciding whether particular agreements violate national labor policy.³⁴

Finally, Part V addresses the implications of this analysis.³⁵ Most obviously, all courts should refuse to enforce arbitration clauses that, like the one in *Horton*, require an employee to resolve employment-related disputes in individual arbitration and waive the right to pursue collective adjudication of claims in any forum. Yet this does not mean that all arbitration agreements in the employment context are unenforceable. As the Board suggested in *Horton*, agreements to arbitrate individual claims are enforceable as long as employees are free to bring aggregated claims in court, and, as we discuss, employers can include clauses in employment contracts that preclude access to judicial forums, if they allow for concerted enforcement of legal claims in arbitration. To this extent, the NLRA and the FAA can be reconciled.

However, there are important limitations on next-generation arbitration agreements. Among the constraints, an agreement containing the arbitration clause must be explicit about how employees can pursue claims together (as well as their right to pursue unfair labor practice charges before the NLRB). An unqualified agreement to arbitrate violates the NLRA because an employee could reasonably understand the agreement to restrict rights to engage in concerted activity. Indeed, this must be true given the Supreme Court's declaration in *Stolt-Nielsen* that "arbitration" means "bilateral arbitration." In addition, employers that mandate arbitration but provide for collective pursuit of legal claims in the arbitral forum must ensure that employees' ability to act concertedly is adequate. This means that, although they need not emulate, precisely, joinder and class procedures available in judicial forums, employers cannot structure arbitration in ways that limit employees' ability to pursue collective redress.

We conclude that, under this new regime, most employers would choose not to include arbitration clauses in their employment contracts. This is partly due to the disclosure obligations such agreements would entail. But it is mostly because one of the primary benefits of arbitration for

34. See discussion in text beginning *infra* note 260.

35. See discussion in text beginning *infra* note 258.

employers—detering or greatly weakening employee claims by precluding resort to concerted legal action—would be lost. And this would simply confirm that, with regard to national labor policy, *Horton* was faithful, one hundred percent.

I. THE EGG IS HATCHED: THE *HORTON* CASE AND JUDICIAL REACTIONS

Horton came before the Board after investigation of a charge filed by former D.R. Horton employee Michael Cuda.³⁶ The company required all employees to sign a mutual arbitration agreement (MAA) as a condition of employment. The MAA provided that all employment disputes must be determined exclusively by final and binding arbitration. Specifically included were claims for discrimination or harassment; wages, benefits, or other compensation; breach of contract; violations of public policy; personal injury; and torts. The only express exclusions were for employee claims for workers' compensation or unemployment benefits.³⁷ Paragraph 6 of the MAA stated:

[T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the 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.³⁸

The agreement further provided that that the signatory employee waives “the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company” and “the right to resolve employment-related disputes in a proceeding before a judge or jury.”³⁹

Presumably, a “class” action is one brought under Rule 23 of the Federal Rules of Civil Procedure or its state analogs. A “collective” action might include the version of opt-in class actions created by the Fair Labor Standards Act (FLSA),⁴⁰ which was in fact the claim that Cuda pressed.

36. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *1 (Jan. 3, 2012).

37. D.R. Horton, Inc., CASE 12-CA-25764, 2011 WL 11194 (N.L.R.B. Div. of Judges Jan. 3, 2011), *rev'd*, 357 N.L.R.B. No. 184 (Jan. 3, 2012).

38. *Id.*

39. *D.R. Horton*, 2012 WL 36274, at *1.

40. 29 U.S.C. § 216(b) (2006). See generally Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence From The Fair Labor Standards Act*, 80 MISS. L.J. 443, 459 (2010); Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1326 (2008).

And the MAA's first sentence suggests that simple joinder of claimants—such as would be allowed under Rule 20 of the Federal Rules of Civil Procedure and its state analogs—is also barred. In sum, the MAA required employees to agree, as a condition of employment, that they would resolve all employment-related disputes in individual arbitration and would not pursue joint, class, or collective litigation of claims in any forum, arbitral or judicial.⁴¹

In 2008, Cuda's attorney notified D.R. Horton that his firm had been retained to represent Cuda and a national class of similarly situated current and former "superintendents" to contest the company's misclassification of them as exempt employees under the Fair Labor Standards Act.⁴² The letter went on to state that it constituted formal notice of a request to commence the arbitration process under the MAA. In response, D.R. Horton denied that the attorney's letters constituted effective notice of intent to arbitrate, citing the language in paragraph 6 of the MAA barring arbitration of collective claims.⁴³ Thereafter, Cuda filed his charge with the NLRB.

Following a trial, the Administrative Law Judge issued a recommended decision addressing two issues. First, the ALJ declined to find that D.R. Horton violated Section 8(a)(1) of the NLRA by maintaining and enforcing a mandatory arbitration agreement with its employees which unlawfully prohibited them from engaging in protected concerted activities, including joint arbitration claims or class action lawsuits. Second, he nevertheless went on to conclude that D.R. Horton had violated Sections 8(a)(4) and (1) by maintaining an arbitration agreement that employees could reasonably understand as restricting their right to file charges with the Board.⁴⁴

The Board accepted the judge's determination that D.R. Horton had committed a violation because the MAA's language would lead employees reasonably to believe that they were barred from filing charges with the Board.⁴⁵ However, contrary to the ALJ, the Board also found that the company had independently violated Section 8(a)(1) by purporting to bar all types of concerted legal claims.⁴⁶

41. *D.R. Horton*, 2012 WL 36274, at *1.

42. *See id.*

43. *See id.*

44. *Id.* at *1–2. After working through several Board decisions that had found the language of arbitration clauses may violate Sections 8(a)(4) and 8(a)(1), the ALJ stated that test is "whether nonlawyer employees would reasonably conclude they are barred or restricted from filing NLRB charges." *Id.* at *24. The judge then concluded that the arbitration agreement, "on its face, would lead employees reasonably to believe they could not file charges with the Board." *Id.* He further found stated that, even if the language were ambiguous, "ambiguous policies or rules that reasonably could be interpreted as violative of employee rights will be construed against the maker of the policy or rule and, even if not followed, will be found to violate the Act." *Id.*

45. *Id.* at *2. In so doing, the Board adopted the ALJ's reasoning.

46. *See id.*

The Board's second holding—that the MAA unlawfully restricts employees' right to engage in concerted action for mutual aid or protection, notwithstanding the FAA—has produced the bulk of the controversy. Although this Article also largely focuses on this determination, both holdings have broad, interrelated implications for the next generation of arbitration clauses in employment agreements, a point to which we will return in Part V.⁴⁷

The Board's conclusion that the arbitration provision of the MAA constitutes an unfair labor practice is premised on three findings: (1) the MAA prohibits the exercise of substantive rights protected by Section 7 of the NLRA; (2) such a prohibition in an individual employment agreement constitutes an unfair labor practice under Section 8(a)(1); and (3) the holding that the MAA violates the NLRA does not conflict with the FAA or undermine its underlying policy.

As an initial matter, the Board had little trouble determining the MAA prohibits the exercise of substantive rights protected under Section 7 of the NLRA. This section provides that employees shall have the right “to engage in . . . concerted activities for the purpose of collective bargaining or *other* mutual aid or protection.”⁴⁸ Relying on the Supreme Court's decision in *Eastex, Inc. v. NLRB*,⁴⁹ and a host of earlier Board decisions,⁵⁰ the Board declared that “[i]t is well settled that ‘mutual aid or protection’ includes employees’ efforts to ‘improve [the] terms and conditions of employment . . . through channels outside the immediate employee–employer relationship,’” including through litigation and arbitration.⁵¹ Indeed, the *Eastex* Court had declared that Section 7 “protects employees from retaliation by their employers when they seek to improve [their] working conditions through resort to administrative and judicial forums.”⁵² The Board added that collective pursuit of a workplace grievance in arbitration is equally protected.⁵³ Thus, according to the Board, the MAA expressly bars employees from exercising rights protected under Section 7 by requiring that they refrain from bringing collective or class claims either

47. See discussion in text beginning *infra* note 260.

48. 29 U.S.C. § 157 (2006) (emphasis added).

49. 437 U.S. 556, 565–66 (1978).

50. *D.R. Horton*, 2012 WL 36274, at *2. The Board cited *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948–949 (1942), holding that the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity, and *Salt River Valley Water Users Ass'n*, 99 N.L.R.B. 849, 853–54 (1952), *enforced*, 206 F.2d 325 (9th Cir. 1953), protecting an employee's circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA.

51. *D.R. Horton*, 2012 WL 36274, at *2 (quoting *Eastex*, 437 U.S. at 565–66).

52. *Eastex*, 437 U.S. at 565–66. The Board also stated that pursuit of grievances by multiple employees joining together or by a single employee seeking redress for a class or collection of employees clearly constitutes “concerted activity.” *D.R. Horton*, 2012 WL 36274, at *2.

53. *D.R. Horton*, 2012 WL 36274, at *2–3.

in court (because the MAA waives their right to a judicial forum) or in arbitration (because the MAA provides that the arbitrator cannot consolidate claims or award collective relief).⁵⁴

Next, relying on *National Licorice Co. v. NLRB*,⁵⁵ *J.I. Case Co. v. NLRB*,⁵⁶ and other precedents,⁵⁷ the Board held that an employer-imposed individual agreement such as the MAA that purports to restrict Section 7 rights constitutes an unfair labor practice under Section 8(a)(1).⁵⁸ And this is true whether the term expressly restricts Section 7 rights or would be reasonably construed by employees as prohibiting such activity.⁵⁹ In so holding, the NLRB emphasized that invalidating agreements waiving the right to engage in concerted activity lies at the core of Section 7 of the NLRA, which built upon and expanded the policies reflected in the Norris-LaGuardia Act's prohibitions on enforcing "yellow dog-like" contracts.⁶⁰ While the paradigmatic "yellow dog" contract purported to bar employees from joining unions, the NLA was framed more broadly to bar enforcement of *any agreement* that interfered with employee concerted action.⁶¹ The NLRA adopted and expanded the labor policy of the NLA, which was

54. The Board also noted that collective enforcement of legal rights in court or arbitration serves the congressional purpose of redressing the inequality of bargaining power. *Id.* at *3.

55. 309 U.S. 350, 360 (1940) (affirming the Board's holding that individual employment contracts that include language discouraging an employee from presenting his grievance to the employer "through a labor organization or his chosen representatives, or in any way except personally" was unlawful and unenforceable).

56. 321 U.S. 332, 337 (1944) (holding that individual employment contracts predating the certification of a union cannot limit the scope of the employer's duty to bargain with the union).

57. See *D.R. Horton*, 2012 WL 36274, at *6 (discussing cases); see also *J. H. Stone & Sons*, 33 N.L.R.B. 1014, 1023 (1941), *enforced in relevant part*, 125 F.2d 752 (7th Cir. 1942) (holding unlawful a clause in employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration).

58. *D.R. Horton*, 2012 WL 36274, at *6. Section 8(a)(1) of the Act declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1) (2006).

59. See *D.R. Horton*, 2012 WL 36274, at *5 (citing *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004)); *id.* at *10 ("When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired. Moreover, as stated above, the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity. That no employees are expressly threatened, disciplined, or discharged does not immunize the employer under existing precedent.").

60. *Id.* at *7-8.

61. Thus, 29 U.S.C. § 102 declares that "[employees] shall be free from the interference, restraint, or coercion of employers of labor, or their agents . . . for the purpose of . . . mutual aid or protection." Section 103 then goes on to provide that:

[a]ny undertaking or promise . . . in conflict with the public policy declared in [§ 102] . . . is [hereby] declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.

29 U.S.C. § 102.

largely limited to withholding court enforcement of contrary agreements, by providing affirmative remedies for employer efforts to prevent or punish concerted action.⁶²

Not having enforcement responsibilities for the Norris–LaGuardia Act, however, the *Horton* Board focused instead on whether there is a conflict between the NLRA—as interpreted in this circumstance—and the FAA. After acknowledging its obligation to accommodate policies under potentially conflicting statutes if possible,⁶³ it found no conflict for several reasons. First, the conclusion that the MAA violates the NLRA neither conflicts with nor undermines the pro-arbitration policy underlying the FAA because it does not treat arbitration clauses less favorably than other contract provisions. Employers simply cannot mandate that employees waive all access to class and collective claims, whether judicial or arbitral.⁶⁴ Indeed, according to the Board, the MAA would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the employee solely on an individual basis.⁶⁵

Moreover, the Supreme Court’s FAA jurisprudence makes clear that an arbitration agreement may require a party to forgo a judicial forum but may not require the party to forgo the substantive rights afforded by the statute.⁶⁶ According to the Board, the MAA’s categorical prohibition of class or collective claims in any forum violates the substantive rights vested in employees by Section 7 of the NLRA. Indeed, the Board emphasized

62. *D.R. Horton*, 2012 WL 36274, at *8.

63. Whether that is true is not so clear. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645–46 (1990) (an agency decision is not arbitrary and capricious when it implements a decision within its statutory mandate without considering potentially countervailing policies arising from other laws).

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

65. *Id.* In fact, an ALJ has now so held, finding in reliance on *Horton* the following clause violates the employee’s Section 7 rights:

I further agree that I will pursue my claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

Convergys Corp., Case No. 14-CA-075249, at *2, 2012 WL 5494972 (N.L.R.B. Div. of Judges Oct. 25, 2012).

66. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“[B]y 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.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 628 (1985))). *See generally* Michael Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and the NLRA*, 81 *FORDHAM L. REV.* 2945 (2013) (contending that, because the right to concerted action is substantive rather than procedural, there is no conflict between the FAA and the NLRA since the FAA cannot affect substantive rights).

that the right to class or collective action is a core substantive right of the NLRA not waivable by individuals.⁶⁷

Further, the Board opined that nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is enforceable. On the contrary, the savings clause of Section 2 of the FAA provides that such agreements may be invalidated on grounds as exist in law for revocation of any contract.⁶⁸ In this context, the “generally applicable” basis for revocation is that the contract term is contrary to public policy (the policy embodied in the NLRA).⁶⁹ To this we might add the same policy embodied in Norris–LaGuardia.

Finally, the Board sought to distinguish *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.*⁷⁰ and *AT&T Mobility v. Concepcion*,⁷¹ the Supreme Court’s recent and seemingly troublesome precedents regarding arbitration clauses and class actions. In those cases, the Court stated a default rule: in the absence of other qualifying language, a clause providing for arbitration means bilateral arbitration—that is, only between the parties to the particular agreement. In so doing, the Court emphasized that class action treatment sacrifices the principal benefits of private dispute resolution, including procedural informality, cost, and other efficiencies.⁷²

Although it acknowledged *Concepcion*’s admonition that the switch from bilateral to class arbitration sacrifices the principal advantages of arbitration, the Board stressed that workplace class claims were likely to be much more manageable than consumer disputes that could cover thousands of claimants. “The average number of employees employed by a single employer, in contrast, is 20, and most class-wide employment litigation, like the case at issue here, involves only a specific subset of an employer’s employees.”⁷³ Further, since the *Horton* holding “covers only one type of contract, that between an employer and its covered employees . . . any intrusion on the policies underlying the FAA” was far more limited than that posed in *Concepcion*.⁷⁴ Thus, the Board concluded that “holding that an employer violates the NLRA by requiring employees . . . to waive their

67. Like other Section 7 rights, however, the right to concerted legal action is waivable by the union in its representative capacity. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956); see also *14 Penn Plaza L.L.C. v. Pyett*, 556 U.S. 247, 248 (2009) (as part of collective bargaining, union may waive individual employee’s right to a judicial forum).

68. 9 U.S.C. § 2 (2006) (providing that arbitration agreements may be invalidated upon any “grounds as exist at law or in equity for the revocation of any contract”).

69. *D.R. Horton*, 2012 WL 36274, at *14–15.

70. 130 S. Ct. 1758, 1775–76 (2010).

71. 131 S. Ct. 1740, 1750 (2011).

72. See *Concepcion*, 131 S. Ct. at 1751–52; *Stolt–Nielsen*, 130 S. Ct. at 1775.

73. *D.R. Horton*, 2012 WL 36274, at *15.

74. *Id.*

right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.”⁷⁵ At the end of this analysis, the Board added that, even if there were a direct conflict between the NLRA and the FAA, the FAA would have to yield because giving effect to the agreement would conflict with both the Norris–LaGuardia Act and the NLRA itself, both of which were enacted after the FAA.⁷⁶

The Board further found that the Supreme Court’s restriction on compelling class arbitration in *Stolt–Nielsen* was not implicated because its holding provides only that employers may not compel employees to waive their right to pursue litigation collectively in all forums, arbitral and judicial: “So long as the employer leaves open a judicial forum for class and collective claims, employees’ NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.”⁷⁷

Shortly after the Board issued its order, D.R. Horton petitioned the Fifth Circuit for review. The NLRB then cross-appealed for enforcement. Both of the Board’s holdings are issues on appeal. Also, as mentioned above, D.R. Horton is challenging whether the Board’s order was validly issued on various quorum-based grounds.⁷⁸ The case is awaiting decision.⁷⁹

In the meantime, the decision has generated an enormous amount of litigation. Although *Horton* decided an unfair labor practices charge, the Board’s analysis is relevant to any attempt to enforce an arbitration agreement against an employee covered by the NLRA.⁸⁰ If the Board is correct, all agreements that bar all joint dispute resolution (whether by court or arbitrator) are void as against the public policy found in federal labor statutes.⁸¹ As a result, lower federal courts and state courts now are confronting many such *Horton*-based challenges to the enforcement of mandatory arbitration clauses in employment contracts.

To date, only a few courts have followed the Board’s lead and refused to enforce arbitration clauses in employment contracts.⁸² A far greater number, including the only circuit court to have confronted the issue, have

75. *Id.*

76. *Id.* at *16 & n.26.

77. *Id.* at *16.

78. *See infra* note 101 and accompanying text.

79. A somewhat earlier version of this Article was critiqued in Petitioner/Cross-Respondent D.R. Horton’s submission to the Fifth Circuit. *See* Petitioner’s Supplemental Letter Brief, D.R. Horton, Inc. v. NLRB, No. 12-60031 (5th Cir. April 12, 2013), ECF No. 113 (Bloomberg Law).

80. Some employees are exempted from the NLRA’s protections, including supervisory personnel. *See* 29 U.S.C. § 152(3) (2006).

81. *See infra* Part IV.

82. *See, e.g.,* *Herrington v. Waterstone Mortg. Corp.*, No. 11–cv–779–bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012); *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011).

rejected these challenges.⁸³ Most have reached this result in one of two ways: first, the court finds, for one reason or another, that it is not bound to apply or consider the Board's interpretation and application of federal labor law to the dispute before it,⁸⁴ or, second, the court disagrees with the NLRB's finding that the NLRA, as interpreted, does not conflict with the FAA, and then concludes that the FAA's policy favoring the enforceability of arbitration agreements trumps what might otherwise be the law.⁸⁵ In the next three parts, we demonstrate why these rejecting courts are wrong.

II. *HORTON* WAS FAITHFUL: FEDERAL LABOR LAW

Horton presents a compelling case that Section 7 of the NLRA provides a right to collective legal redress and that mandatory arbitration clauses like the MMA, that purport to waive that right as a condition of employment, violate the NLRA. As the Board notes, the operative language of Section 7 is broad, providing that employees have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁸⁶ Thus, nothing in the statute itself excludes protection for joint or collective pursuit of workplace claims in judicial or arbitral forums.

Moreover, although the Board and courts have placed other limits on the scope of protected concerted activities, they have never indicated that such collective pursuit of workplace claims is unprotected. On the contrary, the Board has consistently held, with repeated judicial approval, that the NLRA protects the right of employees to join together to pursue workplace grievances through litigation and arbitration.⁸⁷ And, while discussing the

83. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Carey v. 24 Hour Fitness USA, Inc.*, No. H103009, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); *Tenet Healthsystem Phila., Inc. v. Rooney*, No. 12-mc-58, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11-civ-2308 (BSJ) (JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Reyes v. Liberman Broad., Inc.*, 146 Cal. Rptr. 3d 616 (Ct. App. 2012); *Truly Nolen of Am. v. Superior Court*, 145 Cal. Rptr. 3d 432 (Ct. App. 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198 (Ct. App. 2012).

84. See, e.g., *Nelsen*, 144 Cal. Rptr. 3d at 213 ("Since we are not bound by the decisions of lower federal courts on questions of federal law, it follows we are also not bound by federal administrative interpretations.").

85. See, e.g., *Owen*, 702 F.3d at 1054 (stating that the court owes no deference to the Board on its interpretation of the FAA and finding that the FAA overrides the NLRA); *Tenet Healthsystem*, 2012 WL 3550496, at *4 (concluding that *Horton* is not controlling because the Board has no special competence interpreting the FAA).

86. 29 U.S.C. § 157 (2006).

87. See text beginning *supra* note 48; see also *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *2-5 (Jan. 3, 2012); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 199-200 (2003) (discussing cases). See generally *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000); *Altex Ready Mixed*

expansive breadth of the employees' right to engage in concerted activity, the Supreme Court itself has stated that Section 7 "protects employees from retaliation by their employers when they seek to improve [their] working conditions through resort to administrative and judicial forums."⁸⁸ The Board's conclusion that employer-imposed, individual agreements that purport to restrict Section 7 rights, including agreements to pursue claims only individually, run afoul of Section 8(a)(1) and are unlawful is equally well-supported by Board and judicial precedents.⁸⁹ Along the way, the Board also demonstrates convincingly that its conclusions are closely tied to the central policies Congress sought to further in enacting the NLRA (and the earlier Norris-LaGuardia Act): addressing the asymmetries in employer and employee power and protecting vulnerable employees from waiving their rights *ex ante* in individual employment agreements.⁹⁰

Furthermore, it would be bizarre to read Section 7 to protect all sorts of concerted activity—from job actions to petitions to picketing—but not the right to seek collective resolution of claims under formal dispute resolution procedures. There is simply no reason why collectively taking advantage of legitimate and otherwise available dispute resolution methods should receive *less protection* than other forms of concerted activity.⁹¹ While some concerted action has been held to be unprotected as reprehensible or otherwise invalid in objectives or means,⁹² good faith resort to legal

Concrete Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."); Harco Trucking, L.L.C., 344 N.L.R.B. 478 (2005); U Ocean Palace Pavilion, Inc., 345 N.L.R.B. 1162 (2005); United Parcel Serv., Inc., 252 N.L.R.B. 1015 (1980), *enfd.*, 677 F.2d 421 (6th Cir. 1982). The Eighth Circuit recently echoed this conclusion: "[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act." Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011).

88. Eastex, Inc. v. NLRB, 437 U.S. 556, 566 (1978).

89. See text accompanying *supra* note 87; see also *D.R. Horton*, 2012 WL 36274, at *5–8, *10.

90. *D.R. Horton*, 2012 WL 36274, at *3, *7; see also Hodges, *supra* note 87, at 201–03 (arguing forcefully that Section 8(a)(1) prohibits conditioning employment on the waiver of any type of Section 7 rights).

91. And, to be clear, this is the substantive right Section 7 protects. Contrary to how it has been framed by *D.R. Horton* and various media reports, the *Horton* decision does not stand for the proposition that Section 7 creates a right to class certification or a guarantee that all employees can pursue their claims as a class or in a Section 216(b)-style collective action. See *infra* note 260. Rather, Section 7 simply assures that employees can pursue their workplace grievances concertedly, including through not only petitioning, protesting, or striking, but also resort to legitimate and *otherwise available* avenues for collective legal redress.

92. See generally ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 407–33 (2d ed. 2004) (discussing unprotected concerted activity, including activity that is designed to induce unfair labor practices, wildcat strikes, acts involving violence or trespass, methods inflicting excessive injury on employer interests, offensive or harmfully disloyal conduct, work slowdowns, and false accusations against the employer). To be protected, there must also be a sufficient nexus between the concerted activity and work and work conditions, but this will be present in almost every situation in which employees seek to bring claims jointly against their employer.

remedies could not be less like these narrowly excluded categories. Indeed, employees' choice of formal mechanisms is likely to produce less disruption for employers and society than strikes and other more confrontational and disruptive protected actions.⁹³

And, contrary to arguments made against the Board's holding in *Horton*,⁹⁴ there is no textual or other reason to justify treating concerted *preparation* of legal claims differently than the resulting, concerted *pursuit* of those claims. The only obvious reason to do so is itself illegitimate: the formal ability to pursue collective legal redress *is likely to be more effective*. Indeed, this probably explains why D.R. Horton had its employees sign the MAA in the first place. More generally, the pursuit of such claims in concert for mutual aid and protection *outside of collective bargaining* is often critical to the claims' success.⁹⁵ As Professor Ann Hodges stated in her pre-*Horton* article discussing why individual arbitration agreements violate Section 7, aggregated claims "bringing collective power to bear on the defendant" on critical workplace issues and this notion of collective employee power "is precisely what underlies Section 7."⁹⁶

At the same time, nothing suggests that, in enacting Section 8(a)(1), Congress viewed waivers of the right to engage in this kind of concerted activity as less problematic—less of a yellow dog-like contract—than waivers of other forms of concerted activity.⁹⁷ Thus, in our view, the Board's interpretation of the statute and finding of a violation in *Horton* are correct, and clearly so.

Yet lingering in the background are D.R. Horton's challenges to the Board's composition. As suggested earlier, it has been argued before the Fifth Circuit that the decision was invalid for lack of a quorum either because the recusal of one member from *Horton* reduced the participants to two members or because Member Craig Becker's appointment had expired

93. See Hodges, *supra* note 87, at 219–21.

94. D.R. Horton and amici have contended in the *Horton* matter that the MAA does not run afoul of Section 7 because, although employees cannot adjudicate collectively, they can nevertheless act concertedly by, for example, pooling resources, coordinating their litigation, seeking common counsel, and otherwise supporting one another in preparation for the assertion of legal claims. See, e.g., Reply Brief for the Petitioner/Cross-Respondent at 6–7, *D.R. Horton, Inc. v. NLRB*, No. 12-60031(5th Cir. Oct. 12, 2012), ECF No. 84 (Bloomberg Law).

95. While unions can agree through collective bargaining to waive certain Section 7 rights, see *supra* note 67, an employer cannot condition employment on an individual employee's waiver of such rights. See, e.g., *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (holding unlawful contracts restricting employees' rights to strike and other concerted activities); Hodges, *supra* note 87, at 201–03 (discussing cases).

96. See Hodges, *supra* note 87, at 216. In supporting her argument, Professor Hodges offers a detailed account of the history and scope of Sections 7 and 8(a)(1). See *id.* at 189–223.

97. See *Barrow Util. & Elec. Coop., Inc.*, 308 N.L.R.B. 4, 11 n.5 (1992) ("The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law."); Hodges, *supra* note 87, at 220.

by the date of the decision.⁹⁸ Additionally, in reliance on *Noel Canning*, in which the D.C. Circuit's recently held that certain recess appointments to the Board were unconstitutional,⁹⁹ D.R. Horton has also challenged as unconstitutional Member Becker's recess appointment to the Board.¹⁰⁰

None of these theories strike us as strong.¹⁰¹ Nevertheless, we leave agency composition questions to others, largely because our argument here does not require any deference or, indeed, any NLRB decision for its predicates. For the reasons we stated above, the Board's interpretation of the NLRA is the *correct* one, and, thus, the vitality of the actual decision is ultimately of little importance beyond the parties.

Of course, if the *Horton* Board was properly constituted, courts would be bound to follow its reading of the NLRA. Pursuant to well-established doctrines of judicial deference, courts must defer to the Board's interpretation of the statute it administers as long as such an interpretation is reasonable. This is an application of the familiar *Chevron* doctrine, originating in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰² in which the Supreme Court recognized that agency interpretations of silent or ambiguous statutes are due deference from the courts when Congress has delegated law-interpreting power to the agency.¹⁰³ The Court has left no doubt that these principles apply with full force to Board interpretations of the NLRA.¹⁰⁴ And while deference is not due to an

98. See text beginning *supra* note 16.

99. *Noel Canning Corp. v. NLRB*, 705 F.3d 490, 513 (D.C. Cir. 2013).

100. See Brief for the Petitioner/Cross-Respondent, *supra* note 17, at 59–60.

101. The Board convincingly rebuts the first two quorum challenges. See Brief for the Respondent/Cross-Petitioner at 48–54, *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (5th Cir. Sept. 4, 2012), ECF No. 69 (Bloomberg Law) (describing how the two member decision with a third member recusal comports with the NLRA's forum requirement in 29 U.S.C. § 153(b) (2006) and longstanding, judicially approved Board practice and the recognition of both the Legislative and Executive Branches that the session ended on the day *Horton* was decided, not earlier). In addition, while a subsequent decision reached a similar result to *Noel Canning*, see *NLRB v. New Vista Nursing & Rehabilitation*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013) (2-1) (holding that the Board lacked power to decide the matter below because it did not have the requisite number of members since Member Becker was invalidly appointed during an intrasession Senate break), other circuits have reached a contrary conclusion. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962). And a recent law review article on intrasession recess appointments—which, interestingly, the *Noel Canning* court cited but did not discuss—casts considerable doubt on the court's reasoning and holding. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005).

102. 467 U.S. 837 (1984). In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court confirmed that a delegation of adjudicative authority to an agency will support an implied delegation of interpretive authority.

103. *Chevron*, 467 U.S. at 842–44.

104. See, e.g., *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (“For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one.”); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (stating that the Board's views are entitled to “the greatest deference” and citing *Chevron*); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786–87 (1990) (stating that, given

agency's construction of a statute when Congress has spoken to the precise question at issue, there could scarcely be an argument that Section 7 clearly *excludes* concerted *legal* action. In light of the convincing case described above, the Board's reading of the statute as guaranteeing a right to joint legal action and barring mandatory arbitration clauses that purport to waive such a right is at the least clearly reasonable.

A few courts that have refused to follow *Horton* have stated that they need not defer to the Board's conclusions—or the portion of its conclusions—that are premised on the Norris–LaGuardia Act because the Board's interpretation of that statute, unlike the NLRA, is not entitled to deference.¹⁰⁵ While it is true that Board interpretations of the NLA would not be entitled to deference, *Horton* is not predicated on that statute. The Board looked to the NLA as providing an independent basis for invalidating arbitration clauses like the MAA,¹⁰⁶ but it did not base its holding on a violation of the NLA.¹⁰⁷ Rather, the Board offered the NLA's earlier prohibition on yellow dog-like contracts primarily as evidence of longstanding federal labor policy supporting its interpretation of the NLRA.¹⁰⁸

Thus, the Board's decision in *Horton* provides both a correct and, necessarily, “reasonable” interpretation of the NLRA. Courts therefore must adhere to the Board's view. These include both the Fifth Circuit in the *Horton* case itself¹⁰⁹ and the courts addressing *Horton*-based challenges to arbitration clauses.

The precise contours of such a right, however, remain to be developed. For the moment, we note only that, just as labor policy invalidates an agreement that says nothing about arbitration, “but merely require[s] employees, as a condition of employment, to agree to pursue any claims in court against the [employer] solely on an individual basis,”¹¹⁰ so too does an arbitration agreement that bars all concerted pursuit of legal remedies.

the Board's primary responsibility for developing national labor policy, its decisions necessarily must be given deference as long as they are rational and consistent with the NLRA); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (stating interpretations of the Board will be upheld if “reasonably defensible” and citing cases); *see also Mead Corp.*, 533 U.S. at 230 n.12 (citing *Holly Farms* and *ABF Freight System* as examples of where *Chevron* deference has been accorded to formal agency adjudications).

105. *See, e.g., Morvant v. P.F. Chang's China Bistro*, 870 F. Supp. 2d 831, 843–44 (N.D. Cal. 2012) (concluding that no deference is owed to the Board's interpretation of the NLA and that the NLA does not apply to arbitration agreements).

106. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *7–8 (Jan. 3, 2012).

107. *See supra* note 59 and accompanying text.

108. *D.R. Horton*, 2012 WL 36274, at *8 (“The agreement at issue here, then, not only bars the exercise of rights at the core of those protected by Section 7, but implicates prohibitions that predate the NLRA and are central to modern Federal labor policy.”). The Board referred again to the NLA at the end of its discussion of the potential conflict between Section 7 rights and the FAA. *See id.* at *16.

109. *See Sure-Tan, Inc.*, 467 U.S. at 899 (discussing the limited review available to courts of appeal reviewing Board orders).

110. *See D.R. Horton*, 2012 WL 36274, at *11; *supra* note 65.

Yet the Board has also stated that an individual arbitration agreement does not violate the statute as long as it allows employees to pursue collective or class claims in a judicial forum.¹¹¹ Moreover, a mandatory arbitration provision that adequately provided for aggregation of employee claims might not run afoul of federal labor law.¹¹² We explore these matters further in Part V.

Nevertheless, all of this remains subject to a crucial caveat: even if the Board is correct (and entitled to deference) in its interpretation of the NLRA, that does not resolve whether this right trumps other statutory mandates, including the FAA, to the extent these statutes conflict. And the Board is entitled to no deference in either interpreting other statutes, including the FAA,¹¹³ or determining whether and how to accommodate the policies underlying potentially competing statutory regimes.¹¹⁴ Thus, the Board's conclusion that the right to collective pursuit of workplace legal claims under federal labor law does not conflict with the FAA's mandate to enforce arbitration clauses according to their terms is subject to more searching judicial review. We take up this question in Part III.

III. WHY FEDERAL LABOR LAW TRUMPS THE FAA

A. *The Federal Arbitration Act*

As described briefly in the Introduction, the Federal Arbitration Act's intent was to "reverse the longstanding judicial hostility to arbitration agreements" and to place arbitration agreements "upon the same footing as

111. See *D.R. Horton*, 2012 WL 36274, at *16 ("So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration.").

112. In discussing how the policies of both the NLRA and FAA can be accommodated, the Board stated that the MAA violates the NLRA because it waives the right to act collectively in any forum, judicial or arbitral. See, e.g., *id.* at *15 ("[H]olding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible."). The Board also emphasized its history of deference to arbitral proceedings. See *id.* at 17. And its final articulation of its holding is as follows: "We thus hold, for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." *Id.* These statements could be read to suggest that a mandatory arbitration provision that adequately provides for aggregation of employee claims would not violate federal labor law—such a provision would waive access to a judicial forum, but not the right to act concertedly in pursuing legal redress. *But see* Hodges, *supra* note 87, at 218–23 (arguing that restricting access to class actions in judicial forums constitutes an unlawful attempt to cabin Section 7 rights).

113. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–44 (2002) ("[T]he Board's interpretation of a statute so far removed from its expertise merit[s] no deference from this Court.").

114. *Cf. id.* at 144 ("[This Court has] never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes . . . unrelated to the NLRA.").

other contracts.”¹¹⁵ Section 2, the FAA’s primary substantive provision, states in relevant part:

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.¹¹⁶

Although the FAA was for many years largely used only to enforce agreements to arbitrate commercial disputes, arbitration has increasingly been used in a wide variety of settings, including consumer transactions and the workplace. The Supreme Court has viewed that the FAA as manifesting “a liberal federal policy favoring arbitration agreements,” and requires that questions of arbitrability “be addressed with a healthy regard for the federal policy favoring arbitration.”¹¹⁷ True to its word, after some initial hesitation,¹¹⁸ the Court has construed the FAA’s reach broadly¹¹⁹ and issued a number of opinions that subject almost all claims to arbitration where the parties have so agreed. For example, claims under the antitrust laws,¹²⁰ the securities acts,¹²¹ the Racketeer Influenced and Corrupt Organizations Act,¹²² the Truth in Lending Act,¹²³ and the antidiscrimination laws,¹²⁴ have all been held arbitrable. Furthermore, although the FAA could have been viewed as having been *pro tanto*

115. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

116. 9 U.S.C. § 2 (2006).

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

118. In *Alexander v. Gardner–Denver Co.*, 415 U.S. 36 (1974), the Court not only held that submission of a dispute to arbitration does not preclude a subsequent Title VII suit, but also ruled against judicial deference to prior arbitral awards finding arbitration inferior to judicial determination of public law claims. However, in *14 Penn Plaza, L.L.C. v. Pyett*, 556 U.S. 247 (2009), the Court essentially overruled *Gardner–Denver* in the process of finding a union’s agreement to submit member’s ADEA claims to arbitration to foreclose the possibility of a subsequent suit by union members.

119. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (interpreting the language of Section 1, which states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce,” to exempt only employment contracts for transportation workers).

120. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

121. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987).

122. *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987).

123. *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79 (2000).

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

repealed by subsequent federal statutes explicitly creating private rights of action, the Court has uniformly rejected the repeal argument.¹²⁵ At the same time, the Court has held a number of state limitations on arbitration to be preempted by the FAA.¹²⁶

The Court's methodology has been vigorously critiqued on a variety of grounds,¹²⁷ and there has been some pushback in Congress.¹²⁸ But it nevertheless remains true that the FAA generally has defeated all challengers in the employment law context and elsewhere. Indeed, the Court has been increasingly aggressive in enforcing arbitration clauses over time. Again, in both *Stolt-Nielsen* and *Concepcion*, the Court went well beyond insisting that arbitration clauses be enforced on the same terms as other contractual provisions, declaring that the enforcement of arbitration clauses as written means, absent qualifying language, that arbitration must be exclusively bilateral. In holding that arbitration is between only the parties to a given agreement, the Court emphasized that class arbitration

125. *E.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (holding that, despite the Credit Repair Organizations Act's mandate of notification to customers of their "right to sue," the act is silent on whether claims can proceed in an arbitrable forum, and thus, the FAA requires the arbitration agreement to be enforced according to its terms); *14 Penn Plaza, L.L.C. v. Pyett*, 556 U.S. 247 (2009) (rejecting the argument that the Older Workers Benefit Protection Act's prohibition of prospective waivers of rights applied to the arbitration agreements waiving procedural rights to a court suit).

126. *E.g.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (invalidating state law that required judicial consideration of certain state claims).

127. *E.g.*, Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229259; Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1 (2004); David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment*: 14 Penn Plaza v. Pyett, 19 CORNELL J.L. & PUB. POL'Y 429 (2010); Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975 (2010); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825 (2010); Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147 (2010); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400 (2007); David S. Schwartz, *Mandatory Arbitration: Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DEN. U. L. REV. 1017 (1996). *But see* David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999).

128. There have been unsuccessful legislative efforts to restrict the FAA as it applies to employees and consumers, such as the Arbitration Fairness Act, H.R. 1873, S. 987, 112th Cong. (2011). However, more limited efforts have been successful. *See, e.g.*, 18 U.S.C. § 1514A(e) (2006) (barring predispute mandatory arbitration of False Claims Act claims). Further, whistleblowing suits cannot be diverted to an arbitral forum by a predispute agreement under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115, the Affordable Care Act, Pub. L. No. 111-148, § 1558, 124 Stat. 119, amending 29 U.S.C. § 218c, or the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

sacrifices the principal benefits of private dispute resolution.¹²⁹ Thus, based on this conceptualization, the Court held in *Stolt–Nielsen* that the arbitrators who had imposed class arbitration on shipping companies in the absence of express provisions for class treatment in the underlying arbitration agreements exceeded their power.¹³⁰ In *Concepcion*, the Court held that the FAA preempts California’s rule that class action waivers in consumer contracts with arbitration clauses are unconscionable because they interfere with arbitration, even though this rule applied equally to class waivers not involving arbitration provisions.¹³¹

B. The Conflict

Even though *Horton*’s interpretation of the NLRA’s protections is correct, there remains the question whether the NLRA—as well as its precursor, the Norris–LaGuardia Act—conflicts with the FAA and, if so, which statute trumps. While the Board largely downplayed the conflict between the labor law-based right to collective pursuit of legal claims and the FAA’s mandate to enforce arbitration clauses according to their terms,¹³² we believe that the Supreme Court will be forced to acknowledge an irreconcilable conflict between these regimes when each is pushed to its logical limits. This is not due to the text of the FAA, which, again, on its face, clearly gives way, but rather to the Supreme Court’s recent jurisprudence expanding the FAA to the point where it inevitably intrudes on the labor law regime.

The Court’s redefinition of arbitration in *Stolt–Nielsen* and *Concepcion*¹³³ compels the collision with the sphere of federal labor law. In both cases, the Court detailed why class procedures are inconsistent with this ordinary understanding of arbitration and defeat arbitration’s primary benefits, including procedural informality.¹³⁴ It is from this discussion that the Court arrived at the conclusion that the term arbitration, standing alone, means exclusively bilateral—as opposed to aggregated—dispute resolution.¹³⁵ In other words, absent modifying language in the agreement

129. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1748, 1751–52 (2011); *Stolt–Nielsen v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010); text beginning *supra* note 72.

130. 130 S. Ct. at 1772 (finding that the arbitration panel exceeded its power).

131. 131 S. Ct. at 1748–53.

132. The Board reasoned that the FAA merely requires equal treatment of arbitration clauses and other contracts, and because all waivers by individual employees of the right to collective legal redress are prohibited under *Horton*, its interpretation of Section 7 did not run afoul of the FAA. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, WL 2012 36274, at *11 (Jan. 3 2012).

133. See *supra* discussion in text beginning at note 115.

134. *Concepcion*, 131 S. Ct. at 1750–52; *Stolt–Nielsen*, 130 S. Ct. at 1775–76.

135. *Concepcion*, 131 S. Ct. at 1750–52; *Stolt–Nielsen*, 130 S. Ct. at 1775–76.

itself, arbitration means *adjudication limited to the (two) contracting parties*.

As a result, in *Concepcion*, the Court rejected the argument that California's unconscionability-based prohibition on predispute class and collective action waivers was saved from FAA preemption because it applies equally to arbitration and litigation clauses. The Court stated that "[a]lthough [the FAA's] saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives."¹³⁶ The Court then declared that, because the overarching purpose of the FAA "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," requiring "classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."¹³⁷

Moreover, the Court in *Stolt-Nielsen* emphasized that a further intended benefit of arbitration is that it is not judicial. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of *private dispute resolution*: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."¹³⁸ Thus, contrary to the *Horton* Board's suggestion, a requirement that employees be allowed to pursue collective claims in a judicial forum despite their having entered individually into "arbitration" agreements with their employers is inconsistent with the Court's interpretation of the FAA's command.

Taken together, these decisions make clear that an unqualified mandatory arbitration clause precludes all types of joint, collective, or class enforcement in both arbitral and judicial forums. This present understanding of the FAA generates the inevitable conflict with the NLA and NLRA, as those statutes have existed for eight decades. The labor law-based right to collective adjudication (and the corresponding bar to compelled waiver of that right) stands in *direct opposition* to the bilateral conception of arbitration that has emerged in the Court's most recent FAA jurisprudence.¹³⁹

136. *Concepcion*, 131 S. Ct. at 1748.

137. *Id.*

138. *Stolt-Nielsen*, 130 S. Ct. at 1775 (emphasis added).

139. Some lower courts have found such a conflict. *See supra* text beginning at note 82. To be clear, if we are wrong about the effect of *Stolt-Nielsen* and *Concepcion*, and the Court were to return to the text of the FAA to determine whether there is a conflict, then the *Horton* Board—and not its detractors—would still be correct in finding no conflict because Section 2's savings clause plainly tells us to apply external legal principles, which is, in this case, federal labor law. *See supra* text beginning at note 19. In other words, if there is no conflict, employees are entitled to concerted legal redress for the reasons discussed in the last section.

C. *The Intersection of the NLRA, the NLA, and the FAA*

In light of this inherent conflict, even though *Horton* provides the correct interpretation of the NLRA, the question remains whether the NLRA—as well as its predecessor, the NLA—trumps what would otherwise be the command of the FAA.¹⁴⁰ In other words, assuming that an agreement to arbitrate would be valid under the FAA, do federal labor law mandates supersede the earlier statute? In this Subpart, we demonstrate why the answer must be yes.

1. *The Supreme Court's Approach to Statutory Conflicts*

Given its heavily textualist bent when it comes to statutory interpretation,¹⁴¹ it is no surprise that the first place the Supreme Court looks to resolve any potential conflict between two statutes is the language of both. The inquiry regarding federal labor policy and the FAA could both start and end here. The NLA, passed seven years *after* the FAA, repealed “[a]ll acts and parts of acts in conflict”¹⁴² with the NLA’s provisions.¹⁴³ Thus, as we return to below, the NLA’s language seemingly requires a textualist to find that it trumps the FAA where the two conflict.

While the NLRA lacks a comparable express repealer, Supreme Court interpretive methodology requires the finding that it too, as the later-enacted law, repeals the FAA *pro tanto*.¹⁴⁴ Although the “later in time” principle is heavily qualified,¹⁴⁵ Supreme Court jurisprudence on potentially conflicting enactments requires such a result.

140. Essentially the same argument applies to the Norris–LaGuardia Act. *See supra* text accompanying note 59. However, the question of the meaning of that statute as applied to the current question is unaffected by any deference to the NLRB’s expertise since the Board does not administer the NLA.

141. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750 (2010) (comparing federal textualist methodology of statutory interpretation with alternative approaches developed in the states).

142. 29 U.S.C. § 115 (2006).

143. *See* D.R. Horton, 357 N.L.R.B. No. 184, WL 2012 36274, at *12 n.26 (Jan. 3 2012).

144. *See* *Dorsey v. United States*, 132 S. Ct. 2321, 2324 (2012) (“The word ‘repeal’ applies when a new statute simply diminishes the penalties that the older statute set forth”); *id.* at 2340 (Scalia, J., dissenting) (“Because the effect of such an exception is to work a *pro tanto* repeal of § 109’s application to the defendant’s case, the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals.”).

145. Another canon of statutory interpretation—that “a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum,” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)—seems inapplicable to our inquiry since it is hard to describe either the FAA or the NLRA as narrower or broader. In any event, the canon is inconsistent with the principle disfavoring implied repeal even when the more specific statute is the later in time. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* § 28 (2012).

The Court's most recent encounter with this problem was *Dorsey v. United States*,¹⁴⁶ a decision last Term involving an 1871 law that seemed to command one approach to sentencing that was apparently rejected by a later law. Both the majority and the dissent in *Dorsey* agreed on two broad governing principles: first, a later statute prevails over an earlier one when two statutes contradict one another, but, second, implied repeals are disfavored, which means that courts should seek to reconcile two potentially conflicting enactments rather than find the later one to supersede the earlier one. In other words, the two *Dorsey* opinions approach the interpretation of statutes by assuming that, by a lesser or greater degree of clarity, a subsequent Congress's enactments can *pro tanto* repeal an earlier statute. The division in *Dorsey* was all about how hard the effort to reconcile should be, or to put it another way, how strong the presumption against implied repeal is.¹⁴⁷

The majority, authored by Justice Breyer,¹⁴⁸ recognized that a prior law provided a "background principle"¹⁴⁹ that could be altered only when "ordinary interpretive considerations point clearly"¹⁵⁰ toward repeal. The majority also stated that words like "'plain import,' 'fair implication,' or the like reflect the need for that assurance."¹⁵¹ In contrast, Justice Scalia's dissent¹⁵² stressed "plain import" as the test, seeming to require a clearer conflict for implied repeal than would the majority.¹⁵³

The actual issue in *Dorsey* was whether new, lower mandatory minimum sentences under the 2010 Fair Sentencing Act (FSA)¹⁵⁴ (intended to reduce sentences for crack cocaine offenses to make them less disproportionate to minimum sentences for comparable amounts of powder cocaine) apply to those convicted defendants whose crimes were committed prior to the FSA's effective date but sentenced after it. The issue of implied repeal arose because an 1871 statute¹⁵⁵ provided that later-enacted criminal statutes do not change penalties incurred under a prior law

146. 132 S. Ct. 2321 (2006).

147. Whether the principle is a "presumption," a "cardinal rule," or a "canon" varies with the case. The Court usually contents itself with stating that implied repeals are disfavored but has sometimes described this rule as a "presumption." See *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) ("Working against the County's position, however, is a different presumption, this one at full strength: the 'cardinal rule . . . that repeals by implication are not favored.'" (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936))).

148. Justice Breyer was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

149. *Dorsey*, 132 S. Ct. at 2324.

150. *Id.* at 2332.

151. *Id.*

152. Justice Scalia was joined by Chief Justice Roberts, and Justices Thomas and Alito.

153. *Dorsey*, 132 S. Ct. at 2340–44 (Scalia, J., dissenting).

154. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

155. Codified at 1 U.S.C. § 109 (2006).

unless they “shall so expressly provide” for such effect,¹⁵⁶ and the FSA does not expressly refer to the 1871 law either by name or by some language such as “notwithstanding any provision to the contrary.”¹⁵⁷

The threshold question then was the effect of the 1871 law’s requirement of an “express statement. Although Congress occasionally passes statutes that explicitly purport to control later enactments,¹⁵⁸ both the majority and dissent in *Dorsey* agreed that courts are not bound by such provisions—even absent such a qualification—if there is an irreconcilable conflict between the earlier and later enactments. The majority held that “statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.”¹⁵⁹ It cited Justice Scalia’s concurring opinion in *Lockhart v. United States* for the proposition that “[o]ne legislature . . . cannot abridge the powers of a succeeding legislature,” and that was true “regardless of [the later law’s] compliance with any earlier-enacted requirement of an express reference or other ‘magical password.’”¹⁶⁰

Nevertheless, the principle against implied repeal requires a thumb on the scale in favor of the prior law remaining effective. How heavy a thumb split the majority and dissent. Justice Breyer wrote that, while “[t]he underlying question before us is one of congressional intent as revealed in the [later statute’s] language, structure, and basic objectives,”¹⁶¹ the Court “must assume that Congress did not intend”¹⁶² it to supersede the earlier statute unless “ordinary interpretive considerations point clearly in that

156. *Dorsey*, 132 S. Ct. at 2330 (“[A] federal saving statute [1 U.S.C. § 109] phrased in general terms, provides that a new criminal statute that ‘repeal[s]’ an older criminal statute shall not change the penalties ‘incurred’ under that older statute ‘unless the repealing Act shall so expressly provide.’” (quoting 1 U.S.C. § 109)).

157. Similar language is used literally thousands of times in the United States Code.

158. See, e.g., 15 U.S.C. § 1012(b) (2006) (“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance”); 42 U.S.C. § 2000bb-3 (2006) (“Federal statutory law adopted after [the date of the enactment of this Act] is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.”).

159. *Dorsey*, 132 S. Ct. at 2331 (citations omitted).

160. *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (internal quotation marks omitted). Justice Scalia traced the principle of each Congress’s supremacy over prior Congresses to *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87 (1810), and *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803), in the United States. He did note that, while a statute’s requiring express language to overturn the enactment is not binding on the later Congress, “legislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware.” *Lockhart*, 546 U.S. at 148. Scalia subsequently referred to this as “the repealability canon.” SCALIA & GARNER, *supra* note 145, § 45.

161. *Dorsey*, 132 S. Ct. at 2326.

162. *Id.* (emphasis omitted).

direction.”¹⁶³ And, “clearly” means by “‘plain import,’ ‘fair implication,’ or the like.”¹⁶⁴ Looking to both textual and purposive clues, the majority concluded that Congress intended the new minimums to apply to any sentences handed down after the statute became effective.¹⁶⁵

The dissent, while agreeing with the majority that express-statement requirements regarding repeal “are ineffective,”¹⁶⁶ nevertheless, believed that the majority did not sufficiently respect the canon against implied repeal, which required “a clear demonstration of congressional intent” to repeal or amend the prior law.¹⁶⁷ Scalia recognized that prior cases had not been pellucid as to the standard for implied repeal but contended that the majority’s “fair implication” standard was too low a bar: “Because the effect of such an exception is to work a *pro tanto* repeal of § 109’s application to the defendant’s case, the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals.”¹⁶⁸ This meant that courts should recognize a legislative deviation “from § 109 (or any similar statute establishing a background interpretive principle) only when the ‘*plain* import of a later statute directly conflicts’ with it.”¹⁶⁹ Given his more demanding standard for implied repeals, Justice Scalia found that the plain import of the Fair Sentencing Act does not require repeal of the prior law.¹⁷⁰

Whether the majority retreated from a more demanding rule or merely declined to push the presumption as far as Scalia urged may be debated; after all, the dissent admitted that “our cases have not spoken with the utmost clarity” regarding the standard.¹⁷¹ Further, whether the differences

163. *Id.* at 2332.

164. *Id.*

165. For Justice Breyer, the overarching purpose of the Fair Sentencing Act was to reduce the disparity between sentences for similar offenses. He therefore concluded that applying the old mandatory minimums to post-August 3rd sentencing would perpetuate the disparities Congress had tried to reduce—it would read the statutes to require radically different sentences for individuals who had not only committed similar crimes but were sentenced at the same time. *Id.* at 2333–34.

166. *Id.* at 2339 (Scalia, J., dissenting) (“Although § 109 purports to require that subsequent legislation opting out of its default rule must do so ‘expressly,’ the Court correctly observes that express-statement requirements of this sort are ineffective. Because ‘one legislature cannot abridge the powers of a succeeding legislature,’ a statute is ‘alterable when the legislature shall please to alter it.’ Consequently, the express-statement requirement of § 109 is itself subject to repeal on the same terms as any other statute, which is to say that a repeal may be accomplished by implication.” (citations omitted) (quoting *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87 (1810), and *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803))).

167. *Id.* at 2339 (Scalia, J., dissenting).

168. *Id.* at 2340 (citations omitted).

169. *Id.*

170. *Id.*

171. *Id.* at 2239; *see also* *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (stating that when there are “two acts upon the same subject, effect should be given to both if possible,” but nevertheless suggesting that repeal by implication by the later act should be found “where provisions in the two acts are in irreconcilable conflict” or when “the later act covers the whole subject of the earlier one and is

in the majority's and Scalia's formulation of the rule had much effect on the divergent outcomes is doubtful. While the doctrinal result is that a majority of the Court adopted the "fair implication" test for implied repeal rather than Scalia's "plain import" test, the broader significance of the case is the willingness of the majority to look to statutory purposes rather than confine itself to the text to see if the later law trumps the presumption against implied repeal.

2. *Dorsey's Teachings Apply to the Intersection Between Federal Labor Law and the FAA*

Although some have argued that the Court treats certain enactments as "super-statutes" (of which the FAA is often the poster child) trumping ordinary interpretive principles,¹⁷² that is contrary to *Dorsey's* teachings. Indeed, the unanimity of the Court in rejecting any "magic password" limitation on later legislatures forecloses the most obvious way in which Congress could signal the "super-ness" of an enactment. Thus, the *Dorsey* methodology—the Court's official ideology of statutory interpretation—applies to all apparent statutory conflicts, including those involving the FAA.

Indeed, the Court has recently expressly denied that it accords the FAA any special status. In *14 Penn Plaza L.L.C. v. Pyett*,¹⁷³ it held that a collective bargaining agreement providing for arbitration of discrimination claims did not deprive employees of what would otherwise be their right to a judicial forum under the ADEA.¹⁷⁴ In the process, the majority rejected Justice Stevens' criticism in dissent that the Court was displaying a "preference for arbitration:"¹⁷⁵ contrary to that "accusation, it is the Court's

clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."). Cf. *Morton v. Mancari*, 417 U.S. 535 (1974) (reconciling Title VII's ban on racial and national origin discrimination in employment with a statutory employment preference for Indians in the federal Bureau of Indian Affairs by looking to the underlying purposes of both statutes).

172. William N. Eskridge, Jr. & John Ferejohn in *Super-Statutes*, 50 DUKE L.J. 1215, 1215–16 (2001), argue that "[n]ot all statutes are created equal." Rather, for a variety of reasons, some laws achieve a higher status under which "institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute." *Id.* at 1216. Indeed, they argue that the FAA is such a super statute. *Id.* at 1260 ("[T]he Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute's plain meaning and the probable expectations of its framers in 1925."). While it would be hard to disagree with the authors' thesis that, as a matter of descriptive reality, some statutes seem to be more important than others, that view is inconsistent with the Court's official ideology. See Ronald Turner, *When The Court Makes Law and Policy (With Special Reference to the Employment Arbitration Issue)*, 19 HOFSTRA LAB. & EMP. L.J. 287, 301 (2002) (stating that the Court casted itself as "a faithful agent of Congress" when broadening its interpretation of the FAA, but suggesting that the Court's primary reason for altering its interpretation of the FAA was "the Court's changing view on the attractiveness and adequacy of arbitration").

173. 556 U.S. 247 (2009).

174. *Id.* at 274.

175. *Id.* at 275 (Stevens, J., dissenting).

fidelity to the ADEA's text—not an alleged preference for arbitration—that dictates the answer to the question presented.”¹⁷⁶

That position is likewise consistent with *Shearson/American Express v. McMahon*,¹⁷⁷ where the Court explicitly confronted an alleged conflict between the FAA, on the one hand, and the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act, on the other, and laid out an approach for determining which would prevail. Having concluded that the FAA, considered in isolation, would mandate enforcement of an agreement to arbitrate statutory claims, the Court wrote:

Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent “will be deducible from [the statute's] text or legislative history,” or from an inherent conflict between arbitration and the statute's underlying purposes.¹⁷⁸

Placing the burden on the party opposing arbitration, which has been repeated several times since in similar contexts,¹⁷⁹ seems simply another way to say that repeals by implication are disfavored (the FAA being the earlier statute vis-à-vis the others). And the *McMahon* Court acknowledged that the FAA must give way if another statute so requires. That determination follows from an “inherent conflict” or from other indications in the text or legislative history.¹⁸⁰

176. Justice Stevens had argued that the purpose of the ADEA was undercut by permitting compulsory arbitration of age discrimination claims, but the majority viewed such a conclusion as incorrect:

Justice Stevens' personal view of the purposes [of] the ADEA . . . is not embodied within the statute's text. Accordingly, it is not the statutory text that Justice Stevens has sought to vindicate—it is instead his own 'preference' for mandatory judicial review, which he disguises as a search for congressional purpose. This Court is not empowered to incorporate such a preference into the text of a federal statute.

Id. at 267 n.9 (majority opinion).

177. 482 U.S. 220 (1987).

178. *Id.* at 226–27 (citations omitted).

179. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000) (analyzing a Truth in Lending Act claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (analyzing an ADEA claim).

180. Of course, the current Court would not be as comfortable with resort to legislative history to discern such intent as was the court in the *McMahon* decision. *See Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001) (“As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.”). *See generally* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the*

Even the Court's most recent encounter with a potential conflict between the FAA and a later-enacted federal statute is consistent with this view. In *CompuCredit Corp. v. Greenwood*,¹⁸¹ the Court was confronted with the Credit Repair Organizations Act (CROA),¹⁸² a portion of which required credit agencies to provide consumers with a notice that "[y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization Act."¹⁸³ Since CROA also has a nonwaiver provision,¹⁸⁴ the argument was that the statute created a right to sue in court and barred waiver of that right. The Supreme Court held otherwise, but it did so on purportedly textualist grounds.

In brief, the majority found that the CROA's notice requirement did not accord consumers a right to sue. "Rather, it imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth (in quotation marks) in the statute. The only consumer right it creates is the right to receive the statement, which is meant to describe the consumer protections that the law elsewhere provides."¹⁸⁵ As for the language in the statute "elsewhere providing" a right to sue, references to "action," "class action," and "court," simply "cannot do the heavy lifting that respondents assign them. It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit," which is not enough to override the command of the FAA.¹⁸⁶ While one might not be impressed by

Burger and Rehnquist Eras, 89 JUDICATURE 220 (2006) (finding a substantial drop-off in use of legislative history over the period from 1986 to 2002).

181. 132 S. Ct. 665 (2012).

182. 15 U.S.C. § 1679 (2006). The statute regulates "credit repair organizations," which purport to provide services to improve consumer credit ratings. The statute creates both administrative enforcement mechanisms and a private right of action.

183. 15 U.S.C. § 1679c.

184. "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a).

185. *CompuCredit*, 132 S. Ct. at 670 (emphasis omitted). The Court went on:

Interpreting the "right to sue" language in § 1679c(a) to "create" a right to sue in court not only renders it strikingly out of place in a section that is otherwise devoted to giving the consumer notice of rights created elsewhere; it also renders the creation of the "right to sue" elsewhere superfluous.

Id.

186. *Id.* The Court noted, inter alia, that similar arguments could have been made in a number of cases, including *Gilmer*. "Thus, we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *Id.* at 671. While none of the statutes it cited contained a similar nonwaiver provision, that Court noted:

[I]f a cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a "right of the consumer," § 1679f(a). It takes a considerable stretch to regard the nonwaiver provision as a "congressional command" that the FAA shall not apply.

Id.

the Court's reasoning,¹⁸⁷ the opinion's structure purports to be a simple application of the principle that enactments are to be reconciled, if possible, consistent with the Court's interpretive principles.¹⁸⁸

Thus, as a matter of current doctrine, the question is what the "fair implication" of the NLRA is for waivers of collective legal redress, not whether the FAA is somehow a more important statute. In this analysis, some guidance might be found in the fact that the FAA has been held to give way to at least some claims within the bankruptcy jurisdiction of the federal courts.¹⁸⁹

3. *The Operative Dates of Enactment*

Before turning then to whether the NLRA and NLA have repealed the FAA, however, there is one remaining, albeit illusory, obstacle. Before the Fifth Circuit, D.R. Horton has argued that the FAA should be viewed as having been passed *after* the NLA and NLRA.¹⁹⁰ This argument seems bizarre at first blush since the FAA was originally enacted in 1925¹⁹¹ while Norris-LaGuardia was passed in 1932¹⁹² and the NLRA in 1935.¹⁹³

187. Justice Ginsburg dissented. She argued that Congress enacted the statute "with vulnerable consumers in mind—consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration." *Id.* at 676 (Ginsburg, J., dissenting). Accordingly, Ginsburg wrote:

I would hold that Congress, in an Act meant to curb deceptive practices, did not authorize credit repair organizations to make a false or misleading disclosure—telling consumers of a right they do not, in fact, possess. If the Act affords consumers a nonwaivable right to sue in court, as I believe it does, a credit repair organization cannot retract that right by making arbitration the consumer's sole recourse.

Id. Justice Sotomayor, joined by Justice Kagan, concurred, although finding the issue "much closer" than had the majority. In the process, the concurrence wrote:

I do not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question.

Id. at 675 (Sotomayor, J., concurring).

188. The majority also noted that at the time of CROA's enactment, "arbitration clauses in contracts of the type at issue here were no rarity," and "[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." *Id.* at 672 (majority opinion).

189. See, e.g., *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012) ("We join our sister circuits in holding that, even in a core proceeding, . . . a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code."). See generally Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183 (2007); Notes, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296 (2004).

190. See Brief for the Petitioner/Cross-Respondent, *supra* note 17, at 35.

191. Act of Feb. 12, 1925, Pub. L. No. 68-401, 43 Stat. 883 (1925).

192. Act of Mar. 23, 1932, Pub. L. No. 72-65, 47 Stat. 70 (1932).

193. Act of July 5, 1935, Pub. L. 74-198, 49 Stat. 449 (1935).

However, D.R. Horton looks to the FAA's reenactment in 1947¹⁹⁴ as part of the continuing codification of all titles of the United States Code as the basis for its argument.

There is, in fact, some lower court authority prior to *Horton* that suggests that the date of reenactment is the operative point in assessing the interaction of two conflicting statutes, some of which involves the relationship between the FAA and the Carriage of Goods by Sea Act of 1936 (COGSA).¹⁹⁵ And some post-*Horton* lower court cases have seized upon this principle to claim that the FAA therefore trumps any contrary commands of the NLRA.¹⁹⁶ We will see that both the earlier cases and the current authority err—and badly so—in looking to the date of reenactment as the operative date.

In *Indussa Corp. v. Steamship Ranborg*,¹⁹⁷ the Second Circuit held that COGSA barred enforcement of a forum selection clause naming a foreign *judicial* forum because of the risk of lessened liability.¹⁹⁸ Although arbitration was not involved, *Indussa* indicated in dictum that a different result would follow were an arbitration agreement being considered: even if COGSA would point towards invalidation in that context, “presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947.”¹⁹⁹ In short, the Second Circuit would have looked to the 1947 reenactment of the FAA as the operative date in deciding the relative priority of the two statutes.

With respect to its holding that a forum selection clause choosing a foreign judicial forum violated COGSA, *Indussa* has since been overruled by *Vimar Seguros y Reaseguros v. M/V Sky Reefer*,²⁰⁰ which found that

194. 61 Stat. 699 “codif[ie]d and enact[ed] into positive law” Title 9 and also repealed the Statutes at Large from which the codification had been drawn. Act of July 30, 1947, ch. 392, 61 Stat. 669 (1947).

195. 46 U.S.C. §§ 30701–30707 (2006).

196. See, e.g., *Delock v. Securitas Sec. Servs. USA*, 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012) (“Though Congress first enacted the FAA in 1925, it reenacted the statute in 1947—after passing the Norris–LaGuardia Act and reenacting the NLRA. The terms of § 2 of the Federal Arbitration Act have never varied. The Board stumbled on the statutory history by concluding that the FAA had to give way because of when Congress had enacted these statutes.”) (citations omitted).

197. 377 F.2d 200, 202 (2d Cir. 1967) (en banc).

198. 46 U.S.C. § 30701(3)(8) (“Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.”).

199. *Indussa*, 377 F.2d at 204. While the sentence was certainly dictum, and unexamined to boot, the author of the opinion was Judge Friendly, and he spoke for an en banc court, which may have added to the authority of his language.

200. 515 U.S. 528 (1995). The Court glancingly referred to the effect on arbitration clauses. *Id.* at 534 (“As foreign arbitration clauses are but a subset of foreign forum selection clauses in general, the *Indussa* holding has been extended to foreign arbitration clauses as well. The logic of that extension would be quite defensible, but we cannot endorse the reasoning or the conclusion of the *Indussa* rule itself.”) (citations omitted). The Court noted that COGSA might be implicated by the arbitrators’

selection of a foreign *judicial* forum consistent with COGSA, and therefore explicitly avoided deciding how to resolve any conflict with the FAA. The dissent of Justice Stevens reached the opposite conclusion, but by reconciling the two enactments rather than finding that one trumped the other.²⁰¹ However, the First Circuit opinion below in *Sky Reefer*, while reaching the same result, had relied on *Indussa*'s language as to the relative chronology of the two statutes in holding that the 1947 reenactment of the FAA made it the more recent, and therefore, trumping statute.²⁰²

Thus, some authority holds that reenactments of statutes as part of codification into positive law can affect the interpretation given to them. Indeed, most recently, the Eighth Circuit expressed this view in a case considering whether the Fair Labor Standards Act's provisions regarding employee collective actions would trump an agreement substituting arbitration for litigation and barring class arbitration. The court held no: while the FAA was passed prior to the 1938 FLSA, "[t]he decision to reenact the FAA [in 1947] suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes."²⁰³

A final basis for support for looking to the reenactment date is *Chicago & North Western Railroad Co. v. United Transportation Union*,²⁰⁴ in which the Court reconciled the Norris-LaGuardia Act and the Railway Labor Act

decision, but it found that possibility premature since the arbitrators might well apply COGSA, and if they rendered a decision contrary to COGSA's mandates, the district court had retained jurisdiction to ensure compliance with that statute. *Id.* at 540–41.

201. Justice Stevens dissented in *Sky Reefer*, primarily contending that *Indussa* was correct as to foreign judicial forum selection clauses and seeing no difference between those and foreign arbitration clauses. *Id.* at 548 n.7 (Stevens, J., dissenting). As for the argument that the Federal Arbitration Act commanded a different result, Stevens acknowledged that "[i]t may be that the Court does violence to COGSA in order to avoid a perceived conflict with another federal statute," the FAA. *Id.* at 554. But the majority went too far in undermining COGSA Section 3(8) to avoid that conflict since any conflict could easily be avoided by applying the language of the FAA to provide that arbitration agreements should be treated like any other contract: "[A]n arbitration clause may be invalid without violating the FAA if, for example, . . . the terms of the clause are illegal under a separate federal statute which does not evidence a hostility to arbitration." *Id.* at 555–56.

202. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 732 (1st Cir. 1994), *aff'd on other grounds*, 515 U.S. 528 (1995), held that an agreement to arbitrate in a foreign forum was permissible, holding that, to the extent that COGSA was inconsistent with such a position, the FAA controlled. In the process, it cited, with no more discussion than *Indussa*, that decision's language that, with respect to the canon privileging later-enacted statutes over earlier ones, "the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed." *Id.* That court had also apparently treated the FAA as a super-statute because it added that "[n]ext, and perhaps of paramount importance, we believe that the strong federal policy favoring arbitration supports the primacy of the FAA over COGSA where arbitration agreements are concerned." *Id.*

203. See *Owen v. Bristol Care*, 702 F.3d 1050, 1053 (8th Cir. 2013), discussed *supra* in text at note 83.

204. 402 U.S. 570 (1971).

(RLA)²⁰⁵ by allowing the district court to consider whether the NLA would permit an injunction when the RLA seemed to require one.²⁰⁶ The Court did suggest in a footnote that the relevant section of the Railway Labor Act (which has been passed originally in 1926) “was re-enacted in 1934, two years after the [NLA]. In the event of irreconcilable conflict between the policies of the earlier, general provisions of the Norris–LaGuardia Act and those of the subsequent, more specific provisions of [the RLA], the latter would prevail under familiar principles of statutory construction.”²⁰⁷

Ultimately, however, *United Transportation Union* exposes the problem underlying the *Indussa* line of authority. The reenactment of the RLA in 1934 was part of a substantive amendment to the statute in a number of important respects,²⁰⁸ not merely a formal reenactment of a Title of the U.S. Code as part of an ongoing codification effort.

Indeed, there is authority that rejects giving any substantive effect to a pro forma reenactment. Perhaps most important are two Supreme Court cases. The first, *Bulova Watch Co. v. United States*, indicated that the appropriate date for assessing priority is the date of origin of a statute, not a subsequent reenactment.²⁰⁹ The second, *Finley v. United States*, stressed that “[u]nder established canons of statutory construction, ‘it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.’”²¹⁰ Further,

205. 45 U.S.C. § 152 (2006).

206. *United Transp. Union*, 402 U.S. at 581–82 (while the NLA “does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act,” its policy “suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff’s right.” (quoting Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 772–73 (1961))).

207. *Id.* at 582 n.18 (citation omitted).

208. Among other things, the amendments created a new administrative body, the National Railroad Adjustment Board, to resolve certain labor disputes, strengthened the statute’s protections of employees’ right to organize and bargain collectively, and empowered a reformed National Mediation Board to hold elections or otherwise choose representatives. THE RAILWAY LABOR ACT 73–78 (Chris A. Hollinger ed., 3d ed. 2012).

209. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (“Petitioner further contends that § 2411 (a) is a later enactment than § 3771 (e) and, for that reason, should take precedence over it. We do not believe that § 2411 (a) can fairly be regarded as a later enactment than § 3771 (e), for at the time § 3771 (e) was enacted, in 1942, a predecessor provision of § 2411 (a) had long been on the books. Save for the word ‘hereby’—of no possible significance—that predecessor provision was identical with the present § 2411 (a).”) (citation omitted).

210. *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912)); see also *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (Even where a provision has been enacted into positive law, actions of the codifiers, such as the choice of arrangement of sections, “cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.”); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (“[A] change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.” (quoting *Pac. Coast S.S. Co.*, 225 U.S. at 198–99 (1912))).

lower courts have frequently refused to attribute a change in meaning to a recodified version of an original statute,²¹¹ although admittedly, the precise question of a reenactment on the relationship of two statutes has rarely arisen outside of the *Indussa* context.

In any event, not only does the contrary approach betray a mechanical analysis for construing potentially conflicting statutes that later Supreme Court cases, most recently *Dorsey*, have rejected, but also, and more pointedly, attributing such meaning to reenactment is contrary to the express purpose of codification of the U.S. Code, which is to provide a more authoritative source of the law.²¹² Prior to codification, the provisions found in the Code are merely “prima facie evidence” of the law, subject to being trumped by the source statutes at large; afterwards, the “prima facie” modifier is removed and such provisions become “legal evidence” of the law without the need to resort to the statutes at large.²¹³ But the fact that the language of the law is now fixed for evidentiary purposes does not imply that the time of enactment ceases to be the operative date for interpretive purposes. That explains the Supreme Court’s counseling against giving substantive weight to the fact of reenactment in *Bulova* and *Finley*. Indeed, consistent with this view, the legislative history of the 1947 enactment expressly disclaims any substantive purpose.²¹⁴

211. See *Cal. Pub. Emp. Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 104 n.16 (2d Cir. 2004) (“The amendment of Section 22(a) in 1998 is also of diminished significance in light of the fact that Section 1452(a) was enacted well after the original version of Section 22(a).”). But see *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977) (The majority and dissent disagreed as to whether the reenactment of a statute thereby rendered the legislative history of the original statute irrelevant to an interpretive question.).

212. See generally Will Tress, *Lost Laws: What We Can’t Find in the United States Code*, 40 GOLDEN GATE U.L. REV. 129 (2010). Briefly, the Code reflects a compilation of statutes passed by Congress and therefore is not necessarily authoritative until any given title is reenacted. Until that time, the Code version “remains prima facie evidence of the law, the language of the session laws encoded in the title trumps that of the Code.” *Id.* at 132. This means that “the Code cannot prevail over the Statutes at Large when the two are inconsistent.” *Id.* (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943)). Once a title is reenacted, however, it becomes not merely prima facie evidence of the law but supersedes whatever might be found in the Statutes at Large. *Id.*

213. 1 U.S.C. § 204(a) provides:

The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

1 U.S.C. § 204(a) (2006) (emphasis added); see also Nancy Pelosi, Speaker of the House of Representatives, *Preface to the UNITED STATES CODE ANNOTATED* 9 U.S.C.A., at xvii (West 2009) (“This 2006 edition establishes prima facie the general and permanent laws of the United States except for those titles of the Code that have been revised, codified, and enacted into positive law and are legal evidence of the law contained therein.”).

214. S. REP. NO. 80-664, at 1 (1947) (The Code was passed into law “without any material change[s]” and with “[n]o attempt . . . to make amendments in existing law.”).

Furthermore, ascribing substantive meaning to a reenactment defies the logic of *Dorsey*. For example, assuming that the Board's interpretation of the NLA in *Horton* is correct, that 1932 statute expressly repealed the FAA to the extent it would authorize waivers of the right to concerted action. While that repeal could itself be repealed by a subsequent enactment, the FAA's reenactment in 1947 did *not* repeal any laws other than those contained in Title 9 itself.²¹⁵ Lacking a textual basis for repeal, both majority and dissent in *Dorsey* require that the two enactments be reconciled, and the obvious way to reconcile them is simply to hold that the reenactment was not intended to have substantive effects; rather, as with all such reenactments and codifications, it was designed merely to provide an authoritative text.²¹⁶

Finally, the approach taken by courts willing to ascribe significance to the date of recodification would generate yet another problem when the NLRA, NLA, or *any other statute* purportedly repealed by another comes up for reenactment. Unless the codifiers caught the problem, the meaning of the statutes would flip every time a relevant title of the United States Code was reenacted into positive law. Surely, there is no justification for such a random result.

4. *Federal Labor Statutes Trump the Conflicting FAA*

We now turn at last to whether the FAA has been repealed by the NLA and NLRA. As we discussed in the Introduction, Sections 2 and 3 of Norris–LaGuardia broadly declare invalid contracts that preclude concerted activity for mutual aid and protection, including pursuit of concerted legal redress.²¹⁷ And Section 15 of the Act provides that all “acts or parts of acts

215. Act of July 30, 1947, ch. 392, § 14, 61 Stat. 669 (“The sections or parts thereof of the Statutes at Large . . . codified in this Act, *insofar as such provisions appear in title 9*, United States Code and supplements thereto . . . are hereby repealed . . .”) (emphasis added).

216. Indeed, the courts that have looked to the 1947 reenactment without considering its purpose have failed to recognize that, from such a constrained textualist perspective, it really does not matter whether that year or 1925 is the operative date. As we have seen, *see supra* text beginning at note 19, Section 2 of the FAA specifies that a clause that provides for arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2006). Had the FAA been first enacted in 1947, the extant federal labor laws at that time would have required revoking any agreement barring all collective redress; thus, reenacting the language of the FAA would not change the result. We thank Jon Romberg for this argument.

217. *See supra* text beginning at note 12 (discussing the concerted activity protections afforded by Sections 2 and 3's broad bar against contracts in conflict with these protections). Again, although it does not rely on the NLA to reach its conclusion, the *Horton* Board offered a compelling case for the same conclusion. *See* D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *5–6 (Jan. 3, 2012). At least one lower court confronting a *Horton*-based challenge to an arbitration agreement has concluded that Section 3 applies only to the types of agreements listed in that section's two subparts—paradigmatic yellow dog contracts that induce an employee agreement not to join a labor organization. *See* *Morvant v. P.F. Chang's Chinese Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012) (“Additionally, the Norris–LaGuardia Act specifically defines those contracts to which it

in conflict with the provisions of this chapter *are repealed*.”²¹⁸ Moreover, the NLA remains in force—the NLRA, among other things, simply adopted and expanded its protections.²¹⁹ Thus, if, as it appears, the NLA prohibits enforcement of arbitration clauses purporting to bar employees’ aggregation of claims, we need not even engage in an inquiry into implied repeal, since, to the extent the FAA would mandate enforcement of such clauses, it is *expressly repealed*.

But even if the NLA does not do all of the repeal work, the NLRA surely does. The NLRA-based right to concerted activity (and the corresponding bar to compelled waiver of that right), which encompasses collective pursuit of legal redress, stands in *direct opposition* to the FAA’s arbitration clause enforcement mandate when the clause in question bars concerted remedial efforts. Again, as discussed in Parts III.A and B, above, the Supreme Court’s recent FAA jurisprudence declares that the conception of arbitration embodied in the FAA is private, bilateral adjudication, and, thus, an unqualified arbitration clause thereby precludes all types of joint, collective, or class enforcement in both arbitral and judicial forums. By fair implication then—and, we suggest, even “plain import”—the NLRA repeals the FAA to the extent the FAA would otherwise mandate enforcement of arbitration clauses that bar concerted legal redress of employment law claims.²²⁰

Indeed, once one considers the right to collective legal redress and the corresponding bar to compelled waiver of that right in light of the larger universe of protected concerted activity, it becomes even more obvious that the NLRA must trump the FAA. Section 7 protects concerted activity for mutual aid and protection triggered by workplace terms and conditions, *whether or not those terms and conditions might give rise to independent legal claims*,²²¹ and Section 8(a)(1) prohibits employers from compelling

applies. 29 U.S.C. § 103(a), (b). An agreement to arbitrate is not one of those contracts to which the Norris LaGuardia Act applies.”). But the court misreads the statute, which simply states that a prohibited undertaking or promise *includes* these classic provisions. *See* 29 U.S.C. § 103 (2006) (“Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following . . .”). Thus, as the *Horton* Board stated, Section 3 sweeps much more broadly, capturing yellow dog-like contracts that interfere in other ways and with other types of concerted activity. *See D.R. Horton*, 2012 WL 36274, at *5–6.

218. 29 U.S.C. § 115 (emphasis added).

219. *See supra* text beginning at note 48; *see also D.R. Horton*, 2012 WL 36274, at *16.

220. It is worth reiterating that if the Court were instead to seek to find the easiest way to reconcile these statutory regimes, it would find it in the text of the FAA’s savings clause, which plainly instructs that external legal principles—here federal labor law—apply. *See supra* text beginning at note 19 and note 139.

221. 29 U.S.C. § 107.

individual employees, as a condition of employment, to waive this right.²²² As discussed in Part II above, there is no indication that Congress in enacting Section 7 intended the right to engage in concerted activity for mutual aid and protection to be *less robust* or *less protected from employer-compelled waiver* when the underlying worker grievances or complaints rise to the level of a legal dispute. On the contrary, given the seriousness of the alleged work-related violations that accompany employees' legal claims and the conflicting interests of employers, the collective pursuit of such claims is among the most essential forms of concerted activity outside of the collective bargaining context. This explains why the Board and the Court, from early on, have taken as a given that Section 7 embodies a right to pursue legal claims collectively.

Yet it is in the opposite circumstance—where worker grievances involve workplace conditions that do *not* rise to the level of potential legal violations—that the conclusion that the FAA must yield is undeniably driven home. Since *Gilmer v. Interstate/Johnson Lane Corp.*, nearly all of the debate and criticism surrounding application of the FAA in the employment context has been focused on mandatory arbitration of *legal* claims, and, in particular, statutory claims. But Section 2 of the FAA potentially reaches far more broadly than that, covering a contract term “to settle by arbitration a *controversy* thereafter arising out of such contract or transaction.”²²³ In other words, the FAA sweeps in work-related controversies that do not involve alleged legal violations but merely conflicting interests.²²⁴

To see how this reality might apply in the workplace context, consider how Section 2 of the FAA might apply to the controversy in *NLRB v. Washington Aluminum Co.*,²²⁵ the seminal concerted action case. There the

222. 29 U.S.C. § 158(a)(1).

223. 9 U.S.C. § 2 (2006) (emphasis added). It is worth noting that the “arising out of such contract or transaction” language has been treated in *Gilmer* and its progeny as covering claims that subsequently arise out of allegedly unlawful employer activities during the employment relationship—that is, Section 2 covers clauses that mandate arbitration of antidiscrimination, wage and hour, and other statutory and common-law claims that arise from employer acts or omissions during employment. There is no reason why other “controversies” (not involving alleged legal violations) subsequently arising from employer acts or omissions during employment would be treated differently.

224. Arbitration over economic or other interests rather than legal violations is by no means unprecedented. Two examples, albeit from collective bargaining contexts, and, hence, not raising the deeply troubling concerns addressed here, include major league baseball's use of “final offer arbitration” to resolve salary disputes, *see* Benjamin A. Tulis, *Final-Offer “Baseball” Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85 (2010), and “interest” arbitration in public sector bargaining. *E.g.*, *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774 (Wash. 2010) (discussing Washington's regime of interest arbitration), *See* Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 OHIO ST. J. ON DISP. RESOL. 1 (2013); *see also* Ben Einbinder, *What FINRA Can Learn from Major League Baseball*, 12 PEPP. DISP. RESOL. L.J. 333 (2012).

225. 370 U.S. 9 (1962).

Supreme Court affirmed the Board's finding that seven workers who had left work together to protest the shop's bitterly cold *but not unlawful* conditions had engaged in protected concerted activity under Section 7.²²⁶ If the FAA's broad bilateral arbitration enforcement mandate survives the NLRA in this context, an employer could require that all employees agree, as a condition of employment, to submit *Washington Aluminum*-like complaints or disputes—all “controversies over conditions in the shop”—exclusively to individualized, binding arbitration.

This would effectively end the labor laws.²²⁷ If such a provision were actually “enforceable,” it would directly interfere with the employees' undisputed right to walk out together or engage in other forms of collective protest. This is true whether, as a result, employees could be compelled to arbitrate individually such controversies or be subject to discipline, or employers could, in reliance on the FAA, enjoin the collective action in favor of arbitration.²²⁸ And the existence of such an arbitration clause would interfere with Section 7 rights even if the employer would somehow still be precluded from retaliating against employees who chose to act collectively anyway. Not only would the presence of such a clause chill employees from exercising their Section 7 rights because they could reasonably interpret it to prohibit concerted activity (with the explicit or implicit threat of discipline),²²⁹ but also the presumptive obligation to make

226. *Id.* at 15.

227. Indeed, the Board held very early on that Section 7's right to concerted activity cannot be waived via a contractual term requiring individualized negotiation followed by arbitration between an employee and employer. *J. H. Stone & Sons*, 33 N.L.R.B. 1014, 1030 (1941), *enforced in relevant part*, 125 F.2d 752 (7th Cir. 1942). In enforcing the Board's order, the Seventh Circuit stated as follows with regard to the arbitration clause:

[W]e agree with the Board that the so-called adjustment provision, contained in the contracts, constitutes a violation of the Act per se. . . . By the clause in dispute, the employee bound himself to negotiate any differences with the employer and to submit such differences to arbitration. The result of this arbitration was final. Thus the employee was obligated to bargain individually and, in case of failure, was bound by the result of arbitration. This is the very antithesis of collective bargaining. By this provision the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration. It is pointed out by respondents that this is a form of arbitration clause often found in contracts between a Union and an employer. We assume, however, that under such circumstances, the arbitration clause is the result of an agreement reached with the duly selected bargaining agent of the employees. Such action is in conformity with the Act, but must be distinguished from the instant case where the clause was agreed to as a result of individual action and thereafter imposed a restraint upon collective action.

NLRB v. Stone, 125 F.2d 752, 756 (7th Cir. 1942) (emphasis added).

228. Whether the anti-injunction provisions of the Norris-LaGuardia Act might still apply, even if the FAA were read to trump the workers right to concerted action, is an interesting question that need not be pursued at length here. This would, however, raise yet another potential conflict between the FAA, in this case the power of the court to order arbitration, 9 U.S.C. § 4 (2006), and the anti-injunction mandate of 29 U.S.C. § 104 (2006).

229. Again, an employer violates Section 8(a)(1) of the NLRA if a rule it promulgates would “reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326

complaints initially in individualized arbitration proceedings would obviously complicate and impede employees' choices at the moment at which they must decide whether to engage in some kind of collective response.²³⁰

A contrary conclusion would mean that the right to engage in concerted activity for mutual aid and protection—to make a joint demand, walk out together, etc.—could be and likely would be rendered empty by arbitration clauses in individual employment contracts. Put another way, bilateral arbitration, if valid and enforceable via the FAA as now conceived by the Supreme Court, would interfere with the exercise of Section 7 rights *across the spectrum of protected concerted activity*. It would facilitate an even broader kind of yellow dog constraint than courts and commentators have feared to date.

Congress could not have intended this result. The NLRA clearly trumps the FAA.

IV. HORTON'S CONSEQUENCES FOR ARBITRATION CLAUSE ENFORCEMENT

Given that *Horton's* conclusion is correct, the Fifth Circuit, provided it rejects D.R. Horton's challenges to the Board's composition, should affirm the Board's decision. But courts have been known to make mistakes. And this could happen at various points in the analysis; for example, the Fifth Circuit could defer to the Board on the meaning of the NLRA but still reverse—again, erroneously, in our view—because of the FAA.

Whatever the Fifth Circuit decides will, of course, determine the outcome in the *Horton* matter itself (absent a grant of certiorari), but the same question will continue to arise in other contexts. Given its policy of nonacquiescence,²³¹ the Board may—and should—still rule against the use

N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999); *see also* Lutheran Heritage Village–Livonia, 343 N.L.R.B. 646, 648 (2004). Such a clause would be akin to other kinds of ambiguous or overbroad rules that run afoul of Section 7 because they chill concerted activity. *See, e.g.*, Operations Management Memorandum 12-59 from Ann Purcell, Assoc. Gen. Counsel, to all Reg'l Dirs., Officers in Charge, and Resident Officers, "Report of the Acting General Counsel Concerning Social Media Cases" (May 30, 2012), *available at* http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM%5C+12 (discussing employer social media policies and rules that violate Sections 7 and 8(a)(1)).

230. In *J. H. Stone & Sons*, 33 N.L.R.B. 1014, 1023 (1941), the Board reached a similar conclusion:

The terms of this provision preclude an employee from dealing with the respondents through a representative until after there has been an attempt at settlement of the dispute by direct dealing between the respondents and the individual employee. The effect of this restriction is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.

231. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Rebecca Hanner White, *Time for a New Approach:*

of similar clauses in other unfair labor practices cases.²³² More importantly for present purposes, the question will continue to confront any district court when an employer seeks to stay an employee's suit pending arbitration or compel arbitration. Perhaps district courts in the Fifth Circuit would be bound by that court's conclusions in *Horton*, but courts elsewhere will not be.

In such a case, the employee would presumably claim that the arbitration clause was invalid (either entirely or to the extent it foreclosed concerted legal redress in court or arbitration),²³³ and the district court will face the same statutory conflict issue now before the Fifth Circuit in *Horton*: do the NLRA and NLA preclude an employer from barring collective dispute resolution and, if so, do they trump the FAA? The analysis in this Part shows why these courts should, regardless of any decision by the Fifth Circuit, answer both questions in the affirmative.

However, a preliminary issue that such a court might confront is whether the doctrine of agency primary jurisdiction requires resort to the NLRB for such a challenge or whether the court could make its own determination. There is simply no issue of primary jurisdiction to the extent that the resistance to the arbitration clause is predicated on the NLA.²³⁴ Unlike the NLRA, the Board has no jurisdiction over the NLA, much of which is directed explicitly to the courts.²³⁵ However, the Board has

Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board, 69 N.C. L. REV. 639 (1991).

232. It has been pointed out, however, that the Board's antiforum shopping principles often allow a losing party to seek review in a favorable circuit. Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FLA. INT'L U. L. REV. 437 (2010).

233. Assuming it believed *Horton* to be correct, the district court would still have to conduct a severability analysis to decide whether a provision barring class dispute resolution, including class arbitration, was invalid in toto or whether it should be read to bar class actions but permit class arbitration. See *infra* text beginning at note 261.

234. See *supra* text beginning at note 105.

235. Although the NLA announces national labor policy in much the same terms as the NLRA, its operative provisions are directed to the courts. Thus, 29 U.S.C. § 101 bars any "court of the United States" from "issu[ing] any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U.S.C. § 101 (2006). The Court has noted that courts are free to make determinations under the NLA even if the Board has jurisdiction to decide the same issue under the NLRA. The opinion of Justice White for three justices in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965), rejected a claim of primary jurisdiction because "courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which [like the NLRA] defines 'labor dispute' as including 'any controversy concerning terms or conditions of employment.'" Justices Goldberg, writing for himself and two other justices, agreed on this point in an opinion otherwise dissenting from White's opinion but concurring in the judgment. See *id.* at 710 n.18.

exclusive jurisdiction over NLRA unfair labor practices per se.²³⁶ If that jurisdiction restricts courts' power to adjudicate, an employee would have to file an unfair labor practice charge with the Board, and the court proceeding would be stayed pending its resolution.

The unfair labor practice avenue has its own complications, including whether the six-month NLRA limitations period²³⁷ began to run when the arbitration agreement was signed (in which case a charge might well be untimely) or only when the employer sought to enforce it—as by seeking to stay the court suit. If the former, the employee might well be caught in a catch-22 by which her failure to file a charge when presented with the arbitration agreement essentially validated the employer's action since there would be no agency procedure to which the court might defer.²³⁸ Alternatively, perhaps the very unavailability of the NLRB forum would free a court to decide on the validity of the contract.

But such complications arise only if the court has to defer to NLRB action in the first place, and it is unlikely there is any need to do so at all. “Primary jurisdiction”²³⁹ generally requires courts to accord agencies the

236. *Amalgamated Util. Workers v. Consol. Edison Co.*, 309 U.S. 261, 264 (1940) (“Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose.”).

237. 29 U.S.C. § 160(b).

238. Some authority suggests that the statute runs when the employee learns of the violation which would arguably be when he was asked to sign the arbitration agreement. *See Livingstone v. Schnuck Mkt., Inc.*, 950 F.2d 579, 583 (8th Cir. 1991) (“Because appellant did not file his complaint until September 1, 1989, approximately ten months after he was aware of the union’s alleged breach, the district court correctly found that appellant’s cause of action [a hybrid § 301/duty of fair representation suit subject to the six-month limit in § 160(b)] was time-barred.”); *see also Local Union No. 189*, 381 U.S. at 687 (suggesting that Section 10(b)’s limitation period would preclude a charge with respect to a case “filed more than six months after” the challenged collective bargaining agreement was signed); *International Ass’n of Machinists v. NLRB*, 362 U.S. 411, 422–23 (1960) (“It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered.”).

239. The Court occasionally uses the term “primary jurisdiction” to “refer to the various considerations articulated in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) and its progeny that militate in favor of preempting state court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board.” *Sears v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 198 n.29 (1978). *See generally* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97 (2009); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL’Y J. 209 (2008). This usage has no application to a proceeding in federal court to enforce an arbitration agreement. It is true that the FAA is also often enforced in state court since that statute does not accord subject matter jurisdiction to federal courts, which therefore require an independent basis of jurisdiction. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983) (“[The FAA] creates a body of federal substantive law establishing and regulating the duty to honor an

first opportunity to address questions within agency expertise before themselves rendering a decision.²⁴⁰ So phrased, a district court might well view *Horton* itself as satisfying any requirement of giving the NLRB first crack at whether the NLRA preserves the right of covered employees to bring collective claims in some forum. However, it is possible that the *Horton* Board was not properly constituted (in which case the NLRB would be viewed as not having spoken), and, in any event, a more expansive view of primary jurisdiction would require the court to give the agency an opportunity to address the exact question before the court. That would mean requiring the employee to file an unfair labor practices charge with the Board, the resolution of which would determine an important aspect of the case before the court but still leave the court to decide whether to stay the suit.

The argument, then, would be that the Board should decide first whether a particular arbitration clause constitutes an unfair labor practice, leaving to the court only the second question of the relationship between the NLRA and the FAA.²⁴¹ But it seems very likely that such deferral to the NLRB would not be required even had *Horton* never been decided, and it is certainly not required if the Board is found to have spoken on the issue.²⁴² The most relevant decision is *Kaiser Steel Corp. v. Mullins*,²⁴³ which involved the question whether a collective bargaining agreement was

agreement to arbitrate, yet it does not create any independent federal-question jurisdiction . . .”). See generally Richard A. Bales & Jamie L. Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, 80 U. COLO. L. REV. 89 (2009). However, even if the effort to stay or compel arbitration is in state court, that court would presumably not be barred from considering the matter by virtue of *Garmon* preemption since it would merely be deciding the meaning of federal statutes.

240. See, e.g., *Reiter v. Cooper*, 507 U.S. 258, 268–69 (1993) (“[P]rimary jurisdiction . . . is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.”); see also *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) (The primary jurisdiction doctrine “seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency’s specialized knowledge, expertise, and central position within a regulatory regime.”) (citations omitted).

241. Under this scenario, the Board’s decision would resolve whether the use of the arbitration clause barring collective arbitration was an unfair labor practice, leaving to the court the question of the extent, if any, to which it should enforce the arbitration agreement. The possibilities, obviously, are to refuse to enforce the entire clause and thus hear the case or to enforce arbitration while striking the prohibition of class arbitration. As we have seen, however, foisting class arbitration on the parties without an explicit agreement (indeed, in the face of an explicit, if invalid, prohibition of it) is problematic in light of the Supreme Court’s decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). See *supra* discussion in text beginning at note 70.

242. See *Hodges*, *supra* note 87.

243. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

unenforceable because it contained an illegal “hot cargo” clause.²⁴⁴ Under Section 301 of the Labor Management Relations Act, federal courts have jurisdiction to adjudicate claims of violations of collective bargaining agreements,²⁴⁵ and the union sued Kaiser, claiming such a violation. Kaiser, in turn, defended by arguing that contract, if construed as the union argued, would violate the statute and, in its words, be “void.”²⁴⁶

Such a determination would seem to lie squarely within a court’s duty to enforce contracts when valid and refuse to enforce them when not.²⁴⁷ But for the lower courts, that duty was tempered by the jurisdiction of the NLRB over unfair labor practices. The Supreme Court, however, found this insufficient to justify refusing to adjudicate contract claims. It recognized that the Board “is vested with primary jurisdiction to determine what is or is not an unfair labor practice” and thus “[a]s a general rule, federal courts do not have jurisdiction over activity which ‘is arguably subject to § 7 or § 8 of the [NLRA],’ and they ‘must defer to the exclusive competence of the National Labor Relations Board.’”²⁴⁸ Nevertheless, the Court rejected any Board-exclusive jurisdiction:

[A] federal court has a duty to determine whether a contract violates federal law before enforcing it. “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.”²⁴⁹

244. See 29 U.S.C. § 158(e) (2006) (“It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable [sic] and void . . .”). Kaiser also claimed the clause was illegal under the Sherman Act. *Kaiser Steel*, 455 U.S. at 77.

245. 29 U.S.C. § 185(a).

246. *Kaiser Steel*, 455 U.S. at 72.

247. *Id.* at 77 (“There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.”).

248. *Id.* at 83.

249. *Id.* at 83–84 (quoting *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948); see also *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975) (“This Court has held, however, that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.”)).

In short, when a court has jurisdiction to decide a contract claim, it has the duty to do so even if an agency could, in the exercise of its administrative power, also pass on the question.²⁵⁰

The language of the *Kaiser* opinion is sweeping, and it relied on antitrust decisions that did not rest on statutes using the “void” language. Further, the Supreme Court later reaffirmed *Kaiser* in *Textron Lycoming Reciprocating Engine Division v. United Auto*,²⁵¹ in which the Court noted that, “if, in the course of deciding whether a plaintiff is entitled to relief for the defendant’s alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense.”²⁵² It also approved suit by “a declaratory judgment plaintiff accused of violating a collective-bargaining agreement [who] may ask a court to declare the agreement invalid.”²⁵³

In short, it seems plain that primary jurisdiction should not bar, or delay, court resolution of an arbitration controversy.²⁵⁴ Most obviously, to

250. See *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) (“The issue here is not whether the Court should find Defendants liable for a violation of the NLRA, but whether the Court should consider the legality of a contract provision in deciding whether to enforce such provision. This is plainly within the Court’s jurisdiction.” (citing *Kaiser Steel*, 455 U.S. at 86)); see also *Davis v. Nordstrom, Inc.*, No. C 11-3956 CW, 2012 WL 4478297 (N.D. Cal. Sept. 27, 2012) (apparently viewing *Kaiser Steel* as permitting court decision); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012) (finding *Kaiser Steel* to permit court decision).

251. 523 U.S. 653, 658 (1998); see also *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 50 (1998) (refusing to require a lower court to abstain from deciding hear a good faith claim of breach of the duty of fair representation even though there was an arguable violation of Sections 7 and 8 of the NLRA, which the Board would normally adjudicate). The Court in *Marquez* stated that while “federal district courts cannot resolve pure statutory claims under the NLRA, they can resolve statutory issues to the extent that the resolution of these issues is necessary for a decision on the plaintiff’s duty of fair representation claim.” *Id.*

252. *Textron*, 523 U.S. at 658.

253. *Id.* *Textron* did, however, disallow a suit brought to invalidate a collective bargaining agreement since such an action did not trigger the federal court’s power to enforce a contract: “[T]he federal court’s power to adjudicate the contract’s validity is ancillary to, and not independent of, its power to adjudicate [s]uits for violation of contracts.” *Id.* In the case of arbitration, however, a properly premised motion to compel or stay under the FAA requires the federal court to determine the validity of the arbitration clause.

254. In addition, there are several other problems with referral to the NLRB that counsel against deferral. Beyond the potential time bar question regarding an unfair labor practice charge, there is no guarantee of Board action since it is the Board’s General Counsel who decides whether an unfair labor practice complaint will be issued. *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 687 (1965) (White, J., concurring in the judgment) (concluding that deferral is inappropriate when “there is no guarantee of Board action. It is the function of the Board’s General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue”). Second, even a successful submission and NLRB decision would entail serious delay: staying the decision whether to stay a court case pending arbitration will necessarily stay the litigation until the Board resolves the charge. The courts have been very concerned at the potential for invoking primary jurisdiction to delay suits that the court will ultimately hear. See generally RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.6, at 1213 (5th ed. 2010) (“[C]ircuit courts almost invariably resolve primary jurisdiction disputes through . . . a balancing test in

the extent that a properly constituted Board has expertise on the question of the meaning of the NLRA, it has spoken in *Horton*. It is true that there may be variations on the Board's theme that do not precisely replicate the issues in that case, but there is little left of the benefits of NLRB expertise.²⁵⁵ Even if *Horton* were to be vacated because the Board was not properly constituted, the authority we have surveyed counsels against a court staying its decision pending proper Board action.

Further, the courts in deciding whether to stay an otherwise cognizable suit pending arbitration are doing what common law courts have done for centuries—determining whether an agreement is an enforceable contract when the terms may be inconsistent with public policy, whether found in a statute (as in *Horton*) or formulated by the court itself.²⁵⁶ The Court has often found otherwise valid agreements to be unenforceable because they violated public policy.²⁵⁷

The Supreme Court has not been detailed in defining when an agreement violates public policy. But it has recognized its duty to refuse to enforce agreements that violate “some explicit public policy,” the recognition of which “is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”²⁵⁸ And, again, *Kaiser* stated that illegality of a contract clause under the NLRA violates the public policy of the United States.²⁵⁹ Thus, an arbitration clause that violates the NLRA clearly qualifies.

The bottom line then, is that, again assuming a properly constituted Board, the Fifth Circuit should affirm *Horton*. But before it does, or even if it does not, other courts confronting challenges to arbitration clauses in employment cannot ignore the *Horton* reasoning, regardless of the authority of the decision itself. They are obliged to determine on their own

which they weigh the potential delay resulting from invocation of primary jurisdiction against the advantages of applying the doctrine.”).

255. Cf. *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491 (10th Cir. 1996) (stating that a dispute should be referred to the relevant agency; although the NLRB had addressed the general issue of indemnification provisions in tariffs several times, it had not addressed the particular provision at issue, and there were potentially distinguishing features.).

256. See generally Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms* 70 OHIO ST. L.J. 1127 (2009).

257. See, e.g., *Oubre v. Entergy Operations*, 522 U.S. 422 (1998) (refusing to enforce release to the extent it was inconsistent with federal law but not declaring it void for all purposes); *Hurd v. Hodge*, 334 U.S. 24 (1948) (refusing to enforce a racially restrictive covenant as inconsistent with federal statute giving barring racial discrimination in the sale or ownership of property); see also *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 766 (1983) (“As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by Barrett violates some explicit public policy, we are obliged to refrain from enforcing it.”).

258. *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

259. See *supra* text accompanying note 243.

what the federal public policy is, and should, consistent with the analysis in this Article, refuse to enforce offending clauses.

V. LOOKING FORWARD: ELEPHANT BIRDS AND YELLOW DOGS

This Article demonstrates why the courts that have rejected *Horton*-based challenges to individual arbitration clauses in employment agreements are wrong. These courts are bound to refuse to enforce contracts that violate federal public policy, and *Horton* correctly assessed federal labor law; as we have demonstrated, that law must trump conflicting applications of the FAA. This is true regardless of whether the Board was properly constituted, but, if the Board was properly constituted, its interpretation and application of the NLRA is also entitled to deference. In short, and putting aside the Board composition issue, the Fifth Circuit should affirm the Board's decision in *Horton*. More sweepingly, however, all courts should refuse to enforce individual arbitration clauses that, like the MAA, require employees to resolve all employment-related disputes in individual arbitration and waive employees' right to pursue collective adjudication of claims in any forum, arbitral or judicial.

Nevertheless, this does not mean that all mandatory arbitration agreements in the employment context are unenforceable under federal labor law. As the Board itself stated in *Horton*, agreements to arbitrate individual claims are enforceable as long as employees are free to bring aggregated claims in court.²⁶⁰

Moreover, in theory, employers might be able to include arbitration clauses in individual employment contracts that preclude access to judicial forums, if they allow for comparable collective enforcement in arbitration. Neither Section 7 itself nor *Horton*'s interpretation of the statute necessarily guarantees employees access to a judicial forum to enforce their rights collectively. To that extent, the NLRA and the FAA can be reconciled.²⁶¹ As long as the arbitration really provides comparable access to collective enforcement—that is, a genuine substitute for pursuing aggregated redress in a judicial forum—employers may remain able to mandate it.

However, there are unresolved issues and important qualifications in assessing what types of next-generation arbitration agreements might be

260. D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, at *12–13 (Jan. 3, 2012).

261. Indeed, the Board noted the centrality of arbitration of collective grievances in labor policy. *Id.* at 13. (“[A]rbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award. . . . Rather, our holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively in any forum, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA.”).

valid. First, employers who opt for the second approach—mandating arbitration but providing for collective pursuit of legal claims in the arbitral forum—would have to ensure that employees’ ability to act concertedly is at least as generous as forms of joint adjudication available in court. Obviously this means, at minimum, that employers could not erect procedural barriers to joinder or prosecution of aggregated claims that, as a practical matter, limited employees’ ability to pursue collective redress.²⁶²

What alternative structures and procedures would be sufficient will need to be fleshed out by the Board and courts. To be sure, Congress could not have intended Section 7 to mandate all of the procedural particulars of collective actions as currently constituted in Section 216 of the FLSA or Rule 23, since neither existed at the time of the NLRA’s enactment (nor, for that matter, did any of the Federal Rules of Procedure).²⁶³ But it is also clear that an employer cannot, at least unless providing comparable mechanisms in arbitration, limit employees’ access to currently available procedural mechanisms for pursuing collective redress in court—whether ordinary joinder, a collective suit under Section 216, a Rule 23 class action, or otherwise.²⁶⁴ After all, that would be tantamount to allowing an employer to condition employment on an individual employee’s waiver of otherwise legal concerted activity, which it clearly cannot do.²⁶⁵

The point is that, while employers cannot bar or limit employees from proceeding collectively, they do not necessarily need to replicate in arbitration precisely the forms of joint or representative adjudication available in judicial forums. Employers therefore might be able to fashion alternative forms of aggregated adjudication that vary somewhat from judicial procedures, as long as they are comparable or more generous in all

262. For instance, they could not so narrowly define properly joined parties or claims or impose other substantive limitations on joint or representative adjudication to all but preclude employees from proceeding collectively.

263. When the NLRA (the Wagner Act) was enacted, *see* Pub. L. No. 74-198, 49 Stat. 449, neither the FLSA nor the modern class action (which is embodied in the 1966 version of Rule 23 and parallel state provisions) was in existence. Indeed, the Federal Rules of Civil Procedure were not promulgated until 1938. *See* FED. R. CIV. PRO. (describing origin of rules in an historical note prefacing most recent publications). However, party joinder was commonplace and other forms of collective and representative actions existed in both state and federal courts prior to these statutes, STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION*, 220-24 (1987). Ironically, one of the cases Professor Yeazell cites is *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 F. 598 and 90 F. 608 (N.D. Ohio 1898), which held that union leaders could adequately represent members in a suit against strikers because their interests were the same.

264. Again, Section 7 assures that employees can pursue their workplace grievances concertedly, including through not only petitioning, protesting, or striking, but also resort to legitimate and otherwise available avenues for collective legal redress. And Section 8(a)(1) prohibits employer interference with such a right. *See supra* text beginning at note 48.

265. Again, a union can waive certain Section 7 rights of the employees it represents—e.g., the right to strike—in exchange for concessions in collective bargaining, but individual employees cannot. *See supra* note 67.

important respects. Thus, new forms of aggregated arbitral adjudication could emerge, to be tested, over time.

A serious problem for employers, however, is that under either approach—i.e., allowing collective pursuit of legal claims in court or providing for it in arbitration—the agreement containing the arbitration clause would need to be explicit about how employees can pursue claims collectively. An unqualified agreement to arbitrate claims or even “individual claims” would violate Section 8(a)(1), because an employee could reasonably understand the agreement to restrict rights to engage in concerted activity.²⁶⁶ Indeed, employees *necessarily* would reasonably understand arbitration to impose such a restriction because the Supreme Court declared in *Stolt–Nielsen* that “arbitration,” standing alone, *means* “bilateral arbitration.”²⁶⁷

The burden, therefore, will fall on employers to include explicit language in arbitration clauses clarifying employee rights to pursue claims collectively in either judicial or arbitral forums. This would be in addition to language clarifying for employees that the (otherwise ambiguous) arbitration clause does not bar them from pursuing unfair labor practice charges before the NLRB—consistent with *Horton’s* first, far less noticed finding.²⁶⁸ And, as we suggested in Part III.C’s discussion of *Washington Aluminum*, the clause would also have to make sufficiently clear to employees that arbitration does not preclude other kinds of protected concerted activity—that is, collective activities in nonadjudicatory settings, such as strikes, pickets, etc. Thus, the choice remains with employers whether or not to include mandatory arbitration clauses in employment contracts, but that choice will carry with it risks and disclosure obligations.²⁶⁹

266. See, e.g., *Lutheran Heritage Village–Livonia*, 343 N.L.R.B. 646, 647 (2004) (stating that a rule is unlawful if it explicitly restricts Section 7 protected activities, and, if it does not explicitly restrict protected activities, it violates Section 8(a)(1) upon a showing that employees would reasonably construe the language to prohibit Section 7 activity or the rule has been applied to restrict the exercise of Section 7 rights); *Hodges*, *supra* note 87, at 214 (“Accordingly, at a minimum, employer imposition of an arbitration agreement that does not expressly permit class arbitration should be found to violate the NLRA because it interferes with employees’ Section 7 rights.”).

267. *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775–76 (2010).

268. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at *2 (Jan. 3, 2012).

269. An arbitration clause containing inadequate disclosures or qualifications will subject the employer to a possible unfair labor practice charge. When an employer moves to stay an individual employee’s suit pending arbitration, the court could find that the offending arbitration clause, although invalid as a waiver of concerted legal redress, is nevertheless enforceable with regard to the individual suit, under a severability analysis or otherwise. Yet, while it is true that severability of invalid clauses in arbitration agreements seems to be the preferred practice, the court would have to decide whether enforcement of the offending clause, even with regard to an individual employee’s suit, should nevertheless be denied to avoid incentivizing unfair labor practices and potentially chilling concerted activity. See *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (finding that severing the punitive damages bar and otherwise enforcing the arbitration clause was proper when the agreement contained a severability clause, and it contained only one discrete illegal provision); *Spinetti v. Service*

In Dr. Seuss's story, the egg that Horton hatched produced an elephant-bird,²⁷⁰ and perhaps the NLRB's *Horton* decision will hatch new forms of collective legal redress in arbitration. But we suspect such an elephant-bird will rarely take flight. As a first cut, the disclosure obligations described above will deter many employers from including arbitration clauses in employment agreements. These are matters few employers, if given the choice, would opt to highlight for their workforce. In other words, employers may very well prefer to forgo the benefits of arbitration in order to remain silent on these matters.

Moreover, many employers will perceive the benefits of arbitration to be greatly—even dispositively—diminished if arbitration is no longer a viable means of precluding collective pursuit of workplace-related claims. This will not be because employers greatly value the “informality” and simplicity of bilateral arbitration, as the Supreme Court declared in *Stolt-Nielsen* and *Concepcion*. Nor will it be because arbitration of collective claims is unworkable or necessarily inefficient; on the contrary, there is a long history of collective and representative adjudication in the labor context that belies this contention.²⁷¹ It is, rather, because of what many critics of the Supreme Court's FAA jurisprudence have been saying all along: an employee's legal claims that cannot be aggregated with the claims of other employees are far less likely to be pursued at all. This is a major reason why arbitration clauses like the MAA, which explicitly waive access to collective enforcement, are so common.²⁷² And this underlying motive—to deter claims—is sufficiently apparent elsewhere that those who do not see it either have not been paying attention or are looking the other way.

Corp. Int'l, 324 F.3d 212, 219–23 (3d Cir. 2003) (finding an agreement to arbitrate enforceable after severing attorneys' fees and costs provision).

270. As Dr. Seuss reports:

And the people came shouting, “what's all this about...?”
 They looked! And they stared with their eyes popping out!
 Then they cheered and they cheered and they cheered more and more.
 They'd never seen anything like it before!
 “My goodness! My gracious!” they shouted. “My Word!
 It's something brand new!
 It's an elephant-bird!!”

DR. SEUSS, *supra*, note 1.

271. Cf. *D.R. Horton*, 2012 WL 36274, at *3 (discussing the history and collective nature of labor arbitration conducted pursuant to grievance procedures contained in collective bargaining agreements).

272. Some employers hesitate to include arbitration clauses in their employment contracts because they are concerned that such terms might encourage claims, at least among employees who perceive arbitration—rightly or wrongly—as a quick and easy way to seek legal redress. Still, we suspect such a concern often gives way in light of the countervailing deterrent effects and other benefits of the employees' waiver of access to aggregated enforcement. It would not give way, however, if these countervailing benefits no longer existed.

To be sure, the *Concepcion* majority showed little concern about otherwise viable claims being lost without access to aggregation.²⁷³ Yet, whether the majority's thinking in that case was right or wrong, the Court would be obliged to reach a contrary conclusion in the employment context. The consumer plaintiffs in *Concepcion*, unlike employees, have no federal right to collective pursuit of legal redress. And contract terms designed to deter employees from pursuing their interests by collective action are precisely the kind of yellow dog-like provisions Congress sought to combat in enacting the NLA and the NLRA.

All of this simply confirms that the Board got it right. *Horton* meant what it said and said what it meant. Courts must follow, one hundred percent.

273. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (“The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”) (citations omitted).