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Publication Date

2013

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WORKING PAPER

2014 - 5

Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights

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May 2014

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Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights

Katherine V. W. Stone

ABSTRACT

In this contribution to the Symposium honoring Stephen Yeazell, the author explores the interaction between group litigation and social context in the contemporary setting. She traces recent developments in the law of class action waivers coupled with mandatory individual arbitration clauses in consumer and employment contracts. She shows how the Supreme Court's decisions in *AT&T v. Concepcion* and *American Express v. Italian Colors* enable large corporations that impose class action bans on consumers and employees to achieve de facto immunity from decades of hard-won protective legislation. She concludes that Yeazell's insight—that the availability of group litigation is intricately linked with a society's social arrangements—is as true today as it was when he first examined the issue in the 1970s.

AUTHOR

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INTRODUCTION

This *UCLA Law Review* Symposium in honor of Stephen Yeazell provides an opportunity to revisit his work on the law governing group litigation and relate his insights to issues involving group litigation today. In his scholarship on class actions, Professor Yeazell shows the ways in which social context and social structure interact with collective forms of litigation, be they modern class actions or ancient chancery suits. More generally, he details the relationship between procedure and social reform at important historical junctures.¹ His message is that procedure matters—specifically, that the procedures that govern the possibility of group litigation both reflect and shape power relations between social groups.

The present era is no exception. Pursuant to an emerging body of law in the field of arbitration, collective litigation is currently under threat. The law of arbitration is not only displacing but is potentially eliminating the ability of consumers and employees to bring collective actions in any tribunal. For the past five decades, consumers and employees have relied on collective actions in the courts to provide social protection and create social rights. Yet now those groups are in danger of disempowerment through the law governing the procedures of group litigation.

Arbitration itself is not new—it has a long pedigree dating back to Roman and canon-law times. This ancient procedure was initially employed as a technique for merchants and craftsmen to resolve disputes within their own communities on the basis of shared communal norms.² For the past twenty-five years, however, arbitration has been put to new uses with the encouragement and assistance of the courts. The developing law of arbitration is now curtailing the availability of class actions generally and undermining the ability of consumers and employees to assert their rights collectively.

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1. See, e.g., STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).
 2. See generally Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–73 (1999) (citing sources on history of arbitration in Europe and early America).

I. THE EXPANDING USE OF ARBITRATION IN PRIVATE CONTRACTS

The current trend began in the 1980s when changes in the U.S. Supreme Court's interpretation of the Federal Arbitration Act (FAA)³ transformed the statute almost beyond recognition.⁴ Previously, the FAA, enacted in 1925, had been interpreted as a narrow statute that applied only to contractual disputes between businesses that were brought in federal court and involved issues of federal law.⁵ In the early 1980s, however, the Supreme Court held that the FAA applied to state as well as federal courts⁶ and to statutory as well as contractual claims.⁷ Since then, courts have applied the FAA to cases involving allegations of unlawful employment practices such as race discrimination, age discrimination, denials of rest breaks, and unpaid wage claims.⁸

When a dispute involves a contract that has a written arbitration clause, the FAA provides that the court *must*, upon motion, stay litigation so that the dispute can go to arbitration.⁹ And after an arbitration is completed, the FAA gives courts extremely limited power to review the arbitral award, no matter how erroneous it might be.¹⁰

As a result of the 1980s developments in arbitration law, arbitration agreements have become ubiquitous. Employers now routinely put arbitration clauses in employment manuals, lenders put them in credit card agreements, hospitals put them in medical consent forms, and businesses of all types insert them in purchase agreements and service contracts.¹¹ Estimates suggest that, as of 2003,

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3. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2006)).
 4. Stone, *supra* note 2, at 953-54.
 5. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 200-01 (1956).
 6. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).
 7. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-27 (1985).
 8. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (applying arbitration to employee's race discrimination claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (applying the Federal Arbitration Act (FAA) to require arbitration of employees' age discrimination claim); *Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628 (S.D. W.Va. 2001) (applying the FAA to compel arbitration of a minimum wage violation claim).
 9. 9 U.S.C. § 3 (2006). In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause. *Id.* § 2.
 10. *Id.* § 10.
 11. *See* PUB. CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 3 (2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf>; *see also* KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 1-3 (2d ed. 2010) ("[A]rbitration agreements are everywhere—from consumer agreements to employment contracts, from mergers and acquisition deals to the routine sale of goods between merchants." (emphasis omitted)).

nearly one quarter of private sector nonunion workers were subject to arbitration systems that their employer designed and imposed as a condition of employment.¹² In a 2009 survey of sixty-eight companies in the credit card, cell phone, banking, computer manufacture, brokerage, internet provider, and homebuilder industries, the consumer public interest organization, *Public Citizen*, found that 75 percent of major consumer transactions are subject to mandatory binding arbitration.¹³ Moreover, a 2012 survey by the Pew Charitable Trust found that more than half of the fifty largest retail banks and credit unions have mandatory agreements for individual checking account customers.¹⁴ My own survey of service providers, conducted in 2010, found that arbitration was a mandatory term in the service agreements of all four of the largest cell phone companies, five out of eight of the largest cable companies, six out of nine major credit card companies, and two out of four large national retail banks.¹⁵ Another study of the most prominent firms in the telecommunications, credit, and financial services industries found that nearly 93 percent of these businesses routinely insert arbitration clauses into their employment contracts.¹⁶

Since 1991, when the Supreme Court first enforced a mandatory arbitration clause in an employment discrimination case,¹⁷ arbitration has become so frequent that more employees are covered by arbitration clauses than by collective bargaining agreements.¹⁸ Thus, arbitration has largely displaced the civil justice system for most disputes involving ordinary people.

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12. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 410–11 (2007).
 13. ZACHARY GIMA ET AL., PUB. CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf>. For a list of major national companies that currently require consumers to utilize private arbitration for disputes in the fields of telecommunications, consumer banking and credit, student loans, consumer electronics, nursing homes, homebuilders, gift cards, e-commerce, investment advisors and brokers, and employment, see *Forced Arbitration Rogues Gallery*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=5277> (last visited July 16, 2013).
 14. PEW CHARITABLE TRUSTS, BANKING ON ARBITRATION: BIG BANKS, CONSUMERS, AND CHECKING ACCOUNT DISPUTE RESOLUTION 3–4 (2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf.
 15. See Katherine V.W. Stone, *Signing Away Our Rights*, AM. PROSPECT, Mar. 5, 2011, <http://prospect.org/article/signing-away-our-rights-0> (reporting on survey conducted by author, September–October 2010); see also Aissatou Sidime, *The New Fine Print—Credit Card Companies Are Blocking Class-Action Suits in Favor of Binding Arbitration Requirements*, SAN ANTONIO EXPRESS-NEWS, Dec. 17, 2001, at 1E (finding that by the end of 2001, nine of the top ten credit card companies required customers to arbitrate all disputes.)
 16. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008).
 17. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
 18. Colvin, *supra* note 12, at 411; see also Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN

II. THE CONJUNCTION OF ARBITRATION AND CLASS ACTIONS

In recent years, one of the most contentious issues in consumer arbitration law has been class actions, particularly waivers of class actions that are coupled with arbitration clauses in contracts of adhesion. These clauses typically state that the consumer cannot bring any lawsuit or arbitration claim on a class or collective basis. Most credit card companies, banks, telecommunication companies, and other large service providers have been aggressive not only in imposing mandatory arbitration clauses on their customers but also in including class action waivers. For example, 81 percent of the largest retail banks and credit card companies that require mandatory arbitration also ban class actions.¹⁹ Public Citizen found that more than two-thirds of the nearly ninety national companies listed in its Forced Arbitration Rogue Gallery that require consumer arbitration also prohibit class actions.²⁰ And my above-referenced 2010 survey found that *all* the cell phone companies, cable service providers, credit card companies, and major national banks that required arbitration of their customers also required them to waive the right to bring a class or collective action.²¹

The combination of class action waivers and arbitration clauses in adhesion contracts has spurred a great deal of litigation. In 2011, in *AT&T Mobility LLC v. Concepcion*,²² the Supreme Court upheld a class action waiver in a consumer contract against a challenge that the waiver was unconscionable under state law. In that case, an AT&T customer brought a class action alleging that the company had engaged in fraudulent practices by charging sales taxes—approximately fifteen dollars per phone—to customers to whom it promised free cell phones in exchange for a two-year service contract. AT&T's customer agreement included an arbitration clause that also banned class actions and classwide arbitration.

In *Concepcion*, the Ninth Circuit applied a three-pronged test to determine whether the class action waiver in the consumer contract was unconscionable: (1) whether the agreement was a contract of adhesion, (2) whether the dispute was likely to involve small amounts of damages, and (3) whether the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of

THE CHANGING WORKPLACE 27, 27 (Adrienne E. Eaton & Jeffery H. Keefe eds., 1999) (predicting that “[i]f current trends continue, soon more workers will have their workplace rights determined by employer-created arbitration systems than by collective bargaining agreements”).

19. See PEW CHARITABLE TRUSTS, *supra* note 14, at 5.

20. See GIMA ET AL., *supra* note 13.

21. Stone, *supra* note 15.

22. 131 S. Ct. 1740 (2011).

consumers out of individually small sums of money. The Ninth Circuit found all three prongs satisfied and thereby denied AT&T's motion to compel arbitration.²³

The Supreme Court reversed, holding that the California rule was preempted because it interfered with arbitration. Justice Scalia, writing for the majority, added dicta revealing a solicitous concern for the interests of large corporate defendants. He noted the many ways in which class arbitration was an unsatisfactory procedure for them. He stated that class arbitration would undermine the informality, efficiency, and speed that are the *raison d'être* for arbitration in the first place. He also stated that in class arbitration, an arbitrator would have to devise a method to afford absent class members notice, an opportunity to be heard, and a right to opt out.²⁴ He then stated that class arbitration could impose great risks on defendants, who could receive devastating judgments when numerous small claims were aggregated and yet would lose their right to interlocutory appeals or judicial review. For these reasons, he concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation."²⁵

Concepcion was not the first time the Supreme Court suggested that class or collective arbitration was inconsistent with the FAA. A year earlier, the Court ruled in *Stolt-Nielson S.A. v. AnimalFeeds International Corp.* that when an arbitration clause is silent on the subject of class arbitration, a party cannot be compelled to submit to class arbitration.²⁶ In that case, which involved a commercial dispute between two shipping companies, the parties stipulated that they had agreed to arbitrate their disputes but they had not agreed to permit class arbitration. Justice Alito, writing for the majority, found that "[t]his stipulation left no room for an inquiry regarding the parties' intent [on the subject of class arbitration]."²⁷ And in dicta, he noted that "the fundamental changes" that follow from a shift from bilateral to class arbitration could potentially undermine many of the benefits offered by arbitration.²⁸

Since the *Concepcion* decision, which upheld class action waivers combined with arbitration mandates in consumer contracts, lower courts have been divided about its application to employment cases.²⁹ Although *Concepcion* effec-

23. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom. Concepcion*, 131 S. Ct. 1740.

24. "We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator." *Concepcion*, 131 S. Ct. at 1751.

25. *Id.* at 1752.

26. 130 S. Ct. 1758 (2010).

27. *Id.* at 1770.

28. *Id.* at 1776.

29. See Iliza Bershad, *Employing Arbitration: FLSA Collective Actions Post-Concepcion*, 34 CARDOZO L. REV. 359, 362–63 (2012) (reporting that courts have "struggled mightily to determine the enforcement of arbitration agreements [in] employment contracts" after *Concepcion*).

tively shut the door on unconscionability challenges to class action waivers in consumer arbitration agreements, a minority of courts have refused to extend it to the employment setting.³⁰ Most courts, however, have held that class action waivers of employment rights are enforceable.³¹

III. THE PRINCIPLE OF NONWAIVABILITY OF SUBSTANTIVE RIGHTS

Even if the *Concepcion* decision is applied to the employment setting, there is another line of argument courts could use to invalidate waivers of employees' rights to bring collective or class actions. That is the argument that a ban on class litigation would abrogate plaintiffs' substantive statutory rights under federal labor laws.

The Supreme Court has long maintained that arbitration is only appropriate when it entails no loss of substantive statutory rights. The Court first expressed this principle in 1985 in *Mitsubishi Motors v. Soler Chrysler-Plymouth*,³² a case in which a party was required to arbitrate a claim arising under the Sherman Antitrust Act.³³ In *Mitsubishi*, the Court stated that arbitration could be ordered only if the litigant "may vindicate its statutory cause of action in the arbitral forum."³⁴ The Court further explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."³⁵

The effective-vindication-of-substantive-rights principle articulated in *Mitsubishi* has been repeated frequently thereafter both by the Supreme Court and by the lower federal courts.³⁶ It is essential to the rationale for closing the courthouse door to otherwise qualified litigants. And it is not a new idea. In the

30. See *Tory v. First Premier Bank*, No. 10-C-7326, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011); *Sanchez v. Valencia Holding Co.*, 132 Cal. Rptr. 3d 517 (Ct. App. 2011); see also Jerett Yan, Recent Case, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 559–61 (2011) (citing cases).

31. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Vilches v. Travelers Cos.*, 413 F. App'x 487, 494 n.4 (3d Cir. 2011); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394 (S.D.N.Y. 2011).

32. 473 U.S. 614 (1985).

33. *Id.* at 640.

34. *Id.* at 637.

35. *Id.* at 628.

36. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

nineteenth century, Judge Story refused to order parties to arbitrate out of a concern that moving from a judicial to an arbitral forum could prejudice the rights of a party and lead to unjust results.³⁷ *Mitsubishi's* effective-vindication-of-substantive-rights principle expressed this same concern by making it clear that if a litigant would be required to forfeit his or her substantive rights in arbitration, then the arbitration clause should not be enforced.

In a number of employment cases, both before and after the decision in *Concepcion*, plaintiffs argued that the enforcement of class action waivers in arbitration agreements would force litigants to forgo their substantive rights and hence that arbitration should not be required.³⁸ Many of these cases arose under the Fair Labor Standards Act (FLSA),³⁹ a statute that explicitly provides that aggrieved employees can bring a “collective action” to enforce its provisions.⁴⁰ Often these cases involved allegations of misclassification—for example, alleging the employees were improperly termed supervisors and thus unlawfully denied overtime payments.⁴¹ In deciding FLSA collective waiver cases, lower courts had to determine whether the provision in the FLSA statute for bringing “collective actions” is a procedural right or a substantive right that, pursuant to *Mitsubishi*, cannot be waived. Most courts that have considered this issue have held that the right to proceed in a collective action under the FLSA is procedural, and thus arbitration was required.⁴²

As explained, the *Concepcion* decision involved a conflict between the FAA and state law, and the Court found the state law to be preempted. In contrast, the effective-vindication doctrine is of primary importance when there is a potential conflict between the FAA and a federal law. In 2012, the Supreme Court put a heavy thumb on the scale in favor of arbitration in cases in which the FAA con-

37. See *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (expressing doubt that “the real legal or equitable rights of the parties can be fully ascertained or perfectly protected” in arbitral proceedings). See generally *Stone*, *supra* note 2, at 973–76 (recounting rationale for the refusal of nineteenth century common law courts to order specific performance of a promise to arbitrate).

38. See, e.g., *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011) (holding that a clause barring class actions was unenforceable because it would require plaintiffs to forgo their substantive rights). But see *Banus v. Citigroup Global Mkts., Inc.*, 757 F. Supp. 2d 394 (S.D.N.Y. 2010) (enforcing class action waiver).

39. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

40. See 29 U.S.C. § 216(b).

41. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011).

42. See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002). But see *Raniere*, 827 F. Supp. 2d 294 (refusing to enforce waiver of class action in a Fair Labor Standards Act (FLSA) action).

flicts with other federal statutes. *CompuCredit Corp. v. Greenwood*⁴³ involved a class action complaint brought by credit card holders who alleged violations of the Credit Repair Organizations Act (CROA).⁴⁴ The plaintiffs received credit card applications that included a clause obligating them to submit all disputes relating to their accounts to binding arbitration. Plaintiffs argued that arbitration should not be required because the CROA contains several provisions giving consumers a private cause of action for violations thereof and stating that any waiver of rights in the statute is unenforceable.⁴⁵

Despite explicit statutory language preserving consumers' right to sue, the Supreme Court ordered the case to arbitration. Justice Scalia, writing for the majority, held that the right to sue and the nonwaiver provision in the statute did not give parties a right to bring an action in court; rather, a right to arbitration could suffice. "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."⁴⁶ The Court also stated that the arbitration is required "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'"⁴⁷

As in *CompuCredit*, the FLSA arbitration cases pose a potential conflict between two federal statutes. And as explained above, to date, most courts confronting a class action waiver in a FLSA case avoid a conflict and uphold arbitration by characterizing the FLSA's collective action provision as a procedural rather than a substantive right. While such a determination may be defensible in the FLSA context, the same argument cannot be made concerning arbitration and class action waivers in claims arising under the National Labor Relations Act (NLRA).

IV. EMPLOYEES' RIGHT TO ENGAGE IN COLLECTIVE ACTION IS A SUBSTANTIVE RIGHT UNDER THE NLRA

Section 7 of the NLRA creates a right for employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴⁸ Under the statute, this right is enforceable by the National Labor

43. 132 S. Ct. 665 (2012).

44. 15 U.S.C. § 1679-1679j (2006). The Credit Repair Organizations Act also provides that credit repair organizations send their customers the following sentence: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* § 1679c(a).

45. *Id.* § 1679c(a).

46. *CompuCredit Corp.*, 132 S. Ct. at 673.

47. *Id.* at 669.

48. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

Relations Board (NLRB or Labor Board), which has primary jurisdiction over claims alleging that the right has been violated. Section 7 has long been termed the “core” of the labor law statute.⁴⁹ Indeed, it is considered the central provision for which the remainder of the statute is designed to implement.⁵⁰ Moreover, courts have held that employees’ right to engage in collective action includes a right to engage in collective litigation to enforce employment laws.⁵¹

The right of collective action created by Section 7 of the NLRA has a long history. Throughout the nineteenth century, the primary goal of the national unions was to achieve legislative reforms that would protect labor’s right to organize and engage in collective action. Thus, for example, in the 1870s and 1880s, the New York Workingman’s Assembly and the Federation of Organized Trades and Labor Unions—two precursor organizations to the American Federation of Labor (AFL)—pressured state legislatures to enact two measures they believed would assist union efforts to organize: (1) the repeal of the common law doctrine of criminal conspiracy and (2) legislation to permit unions to incorporate.⁵² The criminal conspiracy laws had been used throughout the nineteenth century to penalize collective action such as strikes, so unions sought their repeal.⁵³ In addition, unions wanted a right to incorporate in order to act collectively in the judicial arena.⁵⁴ As a result of labor agitation and political mobilization, organized labor made considerable progress in both goals at the state level.

49. See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984) (observing that Section 7 was the primary means by which Congress implemented its purpose of equalizing the bargaining power of employees and employers); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978) (“[T]he right to organize is at the very core of the purpose for which the NLRA was enacted.”); *Div. 1287, Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Missouri*, 374 U.S. 74, 82 (1963) (“Collective bargaining, with the right to strike at its core, is the essence of the federal scheme.”); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (“[T]he right of employees to organize for mutual aid . . . is the principle of labor relations which the Board is to foster.”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1937) (holding that employees have a fundamental right to organize and Section 7 of the National Labor Relations Act (NLRA) is meant to safeguard this right).

50. See *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at 10 (Jan. 3, 2012) (“The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.”).

51. See *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184.

52. VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 121–22 (1993); Katherine Van Wezel Stone, *Labor and the American State: The Evolution of Labor Law in the United States*, in *THE RISE AND DEVELOPMENT OF COLLECTIVE LABOUR LAW* 351, 357–58 (Marcel van der Linden & Richard Price eds., 2000).

53. See, e.g., *People v. Melvin*, 2 Wheeler Cr. Cas. 262 (N.Y. 1810). See generally Wythe Holt, *Labour Conspiracy Cases in the United States, 1805–1842: Bias and Legitimation in Common Law Adjudication*, 22 *OSGOODE HALL L.J.* 591 (1984).

54. See Stone, *supra* note 52.

After 1890, however, unions faced a new threat to their ability to engage in collective action. The enactment of the Sherman Antitrust Act led to prosecutions against unions for engaging in boycotts, organizing strikes, and other collective activities. In response, the AFL and the national unions embarked on a sustained campaign to gain a labor exemption from the antitrust law. The result of their twenty-year campaign was the enactment of the Clayton Antitrust Act of 1914,⁵⁵ an amendment to the Sherman Act that appeared to exempt unions from the operation of the antitrust laws and leave them free to engage in peaceful collective action.⁵⁶ But to the unions' surprise, in 1921 the Supreme Court gave a crippling narrow interpretation of the Clayton Act in *Duplex Printing Press Co. v. Deering*.⁵⁷ The unions again responded by mounting political pressure, and, in 1932, achieved the passage of the Norris-LaGuardia Act.⁵⁸

The Norris-LaGuardia Act stated that employees have a right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁵⁹ It further provided that the right cannot be waived by individual contract or curtailed by a court injunction.⁶⁰ In 1935, Congress gave additional protection to workers' collective actions by enacting the National Labor Relations Act which specified, in Section 7, that employees have a right to engage in concerted activities for mutual aid and protection.⁶¹

As the preceding history suggests, the right of workers to act collectively to improve wages and working conditions embodied in Section 7 was a long-fought and hard-won substantive right. In one of the first decisions to interpret the NLRA, the Supreme Court held that an employer could not use individual contracts to compromise or extinguish employees' right to engage in collective action.⁶²

The Supreme Court has interpreted employees' Section 7 rights broadly to apply not only to immediate workplace-centered collective action but also to collective action concerning working conditions directed toward judicial and legislative arenas.⁶³ Courts have also established that the right of collective action protected by Section 7 includes the right to bring lawsuits contesting working

55. Pub. L. No. 63-212, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-27 (2006)).

56. 15 U.S.C. § 12.

57. 254 U.S. 443 (1921).

58. Stone, *supra* note 52, at 362-65 (recounting the history of the Act's passage).

59. Norris-LaGuardia Act of 1932 § 2, 29 U.S.C. § 102 (2006).

60. *Id.* § 104.

61. *Id.* § 157. For a detailed discussion of the history and philosophy underlying Section 7, see Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 843-50 (1989).

62. See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

63. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

conditions on a collective basis.⁶⁴ For example, in 1942, the Fifth Circuit found that an agreement imposed by an employer on individual employees, pursuant to which employees promised to submit any and all disputes with the employer to individual arbitration, was a per se violation of the NLRA.⁶⁵ The Court stated:

By the clause in dispute, . . . 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[and] . . . imposed a restraint upon collective action.⁶⁶

In 2012, the NLRB revisited the issue of the impact of private arbitration agreements on Section 7 rights in *In re D.R. Horton, Inc.*⁶⁷ The case involved an employee of a major homebuilder, Michael Cuda, who claimed he had been misclassified as a supervisor and thus deprived of overtime and other protections of the FLSA. When Cuda began working, he was given a contract with a provision that required arbitration of all disputes relating to his employment. The arbitration agreement also provided that the arbitrator “may only hear the Employee’s individual claims” and “does not have authority to fashion a proceeding as a class or collective action or award relief to a group or class of employees.”⁶⁸ Cuda sought to arbitrate his complaint on a class basis, with a national class of current and former supervisors who alleged they had been similarly misclassified.⁶⁹ The company refused to arbitrate.⁷⁰ Cuda then filed an unfair labor practice charge with the NLRB alleging that the arbitration provision, which forced him to waive the right to engage in a class arbitration, was a violation of his right to engage in collective action for mutual support and protection under Section 7 of the NLRA.⁷¹ The Labor Board agreed.⁷²

In *D.R. Horton*, the Labor Board held that “employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.”⁷³

64. See, e.g., *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[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.”); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (“[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith.”).

65. *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), cert. denied, 317 U.S. 649 (1942).

66. *Id.*

67. 357 N.L.R.B. No. 184 (Jan. 3, 2012).

68. *Id.* at 1.

69. *Id.* at 20.

70. *Id.* at 21.

71. *Id.* at 2.

72. *Id.* at 16.

73. *Id.* at 3.

It invoked the principle from *Mitsubishi* that arbitration could not be used to force parties to “forgo substantive rights afforded by a statute.”⁷⁴ And it presented a detailed history of the statutory language and subsequent interpretative history to demonstrate that employees’ right engage in collective action embodied in Section 7 is a substantive right. The Labor Board concluded that in Cuda’s case, “[T]he [class action] waiver interferes with the workers’ substantive rights under the NLRA.”⁷⁵

D.R. Horton is currently on appeal.⁷⁶ In the interim, some lower courts have followed it,⁷⁷ but most have declined to do so.⁷⁸ As one district court explained, the NLRB is entitled to deference when interpreting the NLRA, but “the NLRB has no special competence or experience interpreting the FAA.”⁷⁹ The issue may reach the Supreme Court. In the interim, however, the Supreme Court decided a case that will have important implications for the future of the effective-vindication doctrine and hence for the ability of employees’ to escape forced waiver of their Section 7 rights.

V. *AMERICAN EXPRESS V. ITALIAN COLORS RESTAURANT*

In June 2013, the Supreme Court decided *American Express Co. v. Italian Colors Restaurant*.⁸⁰ The case arose when a group of merchants brought a class action against American Express (Amex) alleging that the credit card company imposed on them an illegal tying arrangement in violation of the Sherman Antitrust

74. *Id.* at 11 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

75. *Id.* at 13. In addition, the fate of the *D.R. Horton* decision will depend on the outcome of the Supreme Court’s opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert granted*, No. 12-1281 (U.S. June 24, 2013), in which the D.C. Circuit held that three of President Obama’s recess appointments to the National Labor Relations Board (NLRB) were unconstitutional so that all the cases decided in their term, including *D.R. Horton*, were invalid. The Supreme Court granted cert to review the *Canning* decision on June 24, 2013.

76. For a thorough analysis of *D.R. Horton, Inc.*, see Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2235008>.

77. See *Herrington v. Waterstone Mortg. Corp.*, No. 11-CV-779-BBC, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012); *Owen v. Bristol Care, Inc.*, No. 11-04258-CV-FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012); *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011).

78. See *Tenet HealthSystem Phila., Inc. v. Rooney*, No. 12-MC-58, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 843 (N.D. Cal. 2012); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11-Civ-2308(BSJ)(JLC), 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2010 WL 4962813 (S.D. Tex. Dec. 1, 2010), *aff’d*, 669 F.3d 202 (5th Cir. 2012).

79. *Tenet HealthSystem Phila., Inc.*, 2012 WL 3550496, at *4. Some courts have also declined to follow *D.R. Horton* because the Labor Board deciding the case did not have a quorum.

80. 133 S. Ct. 2304 (2013).

Act. Each of the merchants' contracts with Amex contained a clause that prohibited them from bringing any dispute to a forum other than arbitration and required that all disputes be arbitrated on an individual basis. Amex moved to compel arbitration, and the district court granted the motion. The merchants contended that arbitration of the antitrust claim on an individual basis would cost hundreds of thousands of dollars, whereas the average recovery would be only \$5000. Hence, they claimed, without the ability to bring a class or collective action, it would be economically impossible to pursue their claims, and hence they would lose their substantive rights. The Second Circuit agreed. It held that the class action ban could not be enforced "because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery."⁸¹ The court went on to state that "enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."⁸²

When *Italian Colors* first reached the Supreme Court, the Court vacated the Second Circuit decision and remanded in light of its decision in *Stolt Nielson*. On remand, the Second Circuit adhered to its initial determination. The court recounted the testimony of experts who established that it would be prohibitively expensive for any individual merchant to raise the antitrust claim in an arbitration. The court concluded: "We find the record evidence before us establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Accordingly, it refused to enforce the group litigation waiver.

In November 2012, the Supreme Court again granted certiorari in *Italian Colors* to decide whether excessive expense is an adequate reason to refuse to enforce an arbitration agreements' class action waiver. *Italian Colors* is similar to *Concepcion* in that in both cases, a large number of plaintiffs attempted to sue a large company on a class basis for a recovery that would be too small to justify if brought in an individual action. In *Italian Colors*, however, the issue is not preemption, but whether the waiver of a class action would lead to the loss of a substantive federal right.

The Supreme Court upheld the class action waiver in *Italian Colors* despite irrefutable evidence that the cost of bringing an antitrust case was so high that

81. *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010), *remanded to sub nom.* *In re Am. Express Merchs.' Litig.*, 634 F.3d 187 (2d Cir. 2011), *aff'd on reh'g*, 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom.* *Italian Colors*, 133 S. Ct. 2304.

82. *In re Am. Express Merchs.' Litig.*, 634 F.3d at 197–98.

without the ability to proceed as a class action, the case could not be brought at all. In doing so, Justice Scalia, writing for the majority, cast doubt on the effective-vindication-of-substantive-rights principle. He called it mere “dicta,” and he stated that, at most, it might apply to “filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable,” but that it did not apply in the present case.⁸³ He wrote, cryptically, “[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”⁸⁴

Justice Kagan delivered a strong and thoughtful dissent that took issue with Scalia’s sophistry and refocused on the crucial issue at stake. The overall effect of the opinion, she explained, is that “[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”⁸⁵ She pointed out that the majority’s decision would permit companies to impose arbitration clauses on consumers that not only preclude class actions but that also shorten statutes of limitations, limit the kinds of evidence consumers offer, or remove the ability of an arbitrator to grant meaningful relief. She argued that the effective-vindication rule was essential to prevent stronger parties from using these and other kinds of measures to eviscerate statutory protections. As she explained,

The effective-vindication rule [ensures that] arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights . . .⁸⁶

Although the *Italian Colors* case itself involved a dispute brought by merchants, the majority’s decision will have important consequences for employees and consumers. By narrowing the effective-vindication doctrine, the Court has potentially undermined the basis of the *D.R. Horton* decision. One could distinguish *Italian Colors* from *D.R. Horton* on the ground that in the latter, the substantive right was not the ability to offer proof bearing on a statutory right but rather was the core right itself. Scalia’s treatment of the effective-vindication doctrine as mere dicta, however, does not bode well for the success of this argument in the future. It suggests that the result of *Italian Colors* may be the destruction of protection for collective action that has been at the heart of the labor laws

83. *Italian Colors*, 133 S. Ct. at 2310–11.

84. *Id.* at 2311.

85. *Id.* at 2313 (Kagan, J., dissenting).

86. *Id.* at 2315.

for over sixty years.⁸⁷ In addition, the decision will require employees and consumers to arbitrate their federal statutory rights even when, to paraphrase Justice Kagan, they have been given an adhesive contract that effectively deprived them of all legal recourse.

CONCLUSION

Procedure matters, now as much as ever. The ability of large corporations to impose arbitration and ban class actions threatens to undo the achievements of many decades of consumer and employee movements. The legal trends remind us of the continuing relevance of the insights of Stephen Yeazell who demonstrated that, in other eras, the availability and shape of group litigation was intricately linked with a society's social arrangements. So too is it today, and the trends in the Courts give us reason to be concerned. The results of the Supreme Court's arbitration jurisprudence may signal a major change in our social and economic system, one that will have ramifications for a long time to come.

87. See Yan, *supra* note 30, at 552 (noting that “[t]he unavailability of the class proceedings would have dire ramifications on employees seeking to vindicate their rights”).