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“Horton and the *Who*”: Determining *Who* is Affected by the Emerging Statutory Battle Between the FAA and Federal Labor Law

*D.R. Horton Inc., v. NLRB*¹

I. INTRODUCTION

In the early 20th century, social changes brought about a system designed to protect employees. As part of the American system of labor laws, workers are given certain rights to proceed collectively, to “band together,” and to proceed as a unit.² Labor laws were first enacted in the United States during a period of Supreme Court jurisprudence that granted a broad array of powers to corporations, in the form of “liberty of contract.”³ Justice Holmes dissented in *Lochner v. New York*, and planted a seed in his opinion that would later go on to support the idea behind federal labor laws.⁴ Today, the Court’s Federal Arbitration Act (FAA) jurisprudence on the interpretation of the FAA strays closer to the old *Lochner* era of interpretation.⁵ In *D.R. Horton* federal labor law and the FAA squared off in such a way that one must displace the other on the issue of enforceability of a class arbitration waiver.⁶

There are two statutes in play in *D.R. Horton*. On the one hand there is the National Labor Relations Act (NLRA),⁷ which creates a method by which workers may proceed collectively in a lawsuit.⁸ On the other hand is the FAA,⁹ which promotes the enforcement and validity of arbitration agreements.¹⁰ In *D.R. Horton*, these two laws clashed with one another.¹¹ The Fifth Circuit held that the FAA trumps the NLRA to the extent the two statutes conflict.¹² Such rationale adheres to a long line of Supreme Court precedent favoring the enforcement of arbitration agreements generally.¹³ While adhering to *stare decisis*, this interpretation ignores the historical context and purpose of the NLRA, and the core pro-

1. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

2. 29 U.S.C. § 157 (1935).

3. See *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

4. *Id.* at 75 (“But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views . . .”); see also *infra* notes 57-59 & accompanying text.

5. Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 568 (2012).

6. *D.R. Horton, Inc.* 737 F.3d at 344.

7. 29 U.S.C. § 157 (2012).

8. *Id.*

9. 9 U.S.C. § 2 (2012).

10. *Id.*

11. *D.R. Horton, Inc.* 737 F.3d at 349.

12. *Id.* at 364.

13. See *Wilko v. Swan*, 346 U.S. 427, 431 (1953); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

tections created by the NLRA stand at risk of being washed away under the tide of the Court's FAA interpretation.¹⁴

II. FACTS & HOLDING

D.R. Horton, Inc. (Horton) brought suit against a former employee, Michael Cuda, to enforce an arbitration agreement.¹⁵ Horton is a Delaware corporation that buys and sells homes, and conducts its business principally in Deerfield Beach, Florida.¹⁶ In January of 2006, Horton initiated a policy requiring all of its current and new employees to sign a mutual arbitration agreement as a condition of employment.¹⁷ The arbitration agreement contained an explicit class arbitration waiver.¹⁸ This waiver effectively forced employees to seek individual remedies and disallowed any sort of class proceeding or concerted legal effort.¹⁹ When the policy was implemented, Horton also issued a Frequently Asked Questions document (FAQ) and "proper responses" to company supervisors.²⁰ One of these instructions directed supervisors to explain to concerned employees that the arbitration agreement extended to relief sought through the courts, but did not extend to other avenues such as grievances filed with the Equal Employment Opportunity Commission (EEOC) or the National Labor Relations Board (NLRB).²¹ Horton did not circulate the FAQ to all employees.²²

Michael Cuda (Cuda) was a Horton employee when the policy change was implemented in 2006.²³ Cuda's attorney contacted Horton in 2008 to notify the company Cuda had retained counsel to represent him and similarly situated current and former employees in a class action suit against Horton.²⁴ Counsel for Cuda argued the NLRA²⁵ had been violated for unduly restricting workers' rights under Title VII.²⁶ Horton filed an action to enforce the arbitration agreement and alleged Cuda had waived any right to bring suit or class action.²⁷ Cuda then petitioned the NLRB for review of the enforceability of the arbitration agreement, and the NLRB took his case.²⁸

The administrative law judge (ALJ)²⁹ who presided over the case agreed with Cuda and found Title VII had been violated.³⁰ Specifically, the ALJ found the arbitration agreement was invalid because it would cause employees to "reasona-

14. *Id.*

15. *In re* D.R. Horton, Inc., 12-CA-25764, 2011 WL 11194 (N.L.R.B. Jan. 3, 2011).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *In re* D.R. Horton, Inc., 12-CA-25764, 2011 WL 11194 (N.L.R.B. Jan. 3, 2011).

22. *Id.*

23. *In re* D.R. Horton, Inc., 357 N.L.R.B. No. 184, at *1 (Jan. 3, 2012).

24. *Id.*

25. 29 U.S.C. § 157 (2012).

26. *In re* D.R. Horton, Inc., 357 N.L.R.B. No. 184, at *2 (Jan. 3, 2012).

27. *Id.*

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

29. 29 U.S.C. § 160(f) (1935) (the "trial stage" of the NLRB proceeding is headed by an administrative law judge or "ALJ," and decisions made by the ALJ are appealable to a 3-member panel of judges appointed by the NLRB; the 3-member panel decision is then appealable to the respective federal circuit).

30. *In re* D.R. Horton, Inc., 12-CA-25764, 2011 WL 11194 (N.L.R.B. Jan. 3, 2011) (ALJ decision).

bly believe" they could not file an unfair labor practice charge with the NLRB.³¹ Horton appealed to the NLRB.³² A three-judge panel for the NLRB affirmed the ALJ's decision.³³ Additionally, the 3-judge NLRB panel found the FAA and the NLRA did not conflict, and even if they did, the FAA would have to give way to the NLRA.³⁴

Horton appealed the 3-judge NLRB decision to the Fifth Circuit.³⁵ The Fifth Circuit found the FAA and NLRA were to be interpreted together.³⁶ First, the Fifth Circuit addressed some procedural concerns Horton raised.³⁷ The Fifth Circuit then addressed the merits of the case and found two different ways the arbitration agreement could be invalid.³⁸ First, the arbitration agreement could have been invalid under the savings clause of the FAA.³⁹ Alternatively, the NLRA might have contained a congressional command to override the FAA.⁴⁰ The Fifth Circuit reversed the NLRB, finding a party can in fact waive the right to pursue collective action arbitration; therefore, the NLRA's concerted activity protections are not substantive rights and cannot be invoked under the savings clause of the FAA.⁴¹

III. LEGAL BACKGROUND

In Horton's suit, he sought enforcement of an arbitration clause, and thus opened the question of how courts are to interpret the FAA and the NLRA when they appear to conflict.⁴² The FAA was originally enacted in 1925.⁴³ At the FAA's core is a presumption of validity for arbitration agreements.⁴⁴ Years of jurisprudence require the FAA to be interpreted liberally in favor of arbitration.⁴⁵ The NLRA provides workers' "concerted" activities are protected, providing employees the right to work together, bargain collectively, and to engage in "other concerted activities."⁴⁶ When the NLRA was introduced in the Senate in 1934,

31. *D.R. Horton, Inc.*, 737 F.3d at 349.

32. *Id.*

33. *Id.*

34. *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at *11.

35. *D.R. Horton, Inc.*, 737 F.3d 344 at 349.

36. *Id.* at 357.

37. *Id.* at 352-54 (holding the NLRB did not lack a quorum and therefore had the authority to issue the decision).

38. *Id.* at 358.

39. *Id.*; 9 U.S.C. § 2 (1925) (the savings clause allows traditional contract defenses to remain in full force under the FAA: "[a] written provision . . . to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

40. *D.R. Horton, Inc.*, 737 F.3d at 358; *see also* Act of Feb. 12, 1925, Pub. L. No. 68-401, 43 Stat. 883 (1925) (if the FAA were displaced to any extent under the NLRA, arbitration agreements that violated the NLRA would not be enforceable).

41. *D.R. Horton, Inc.*, 737 F.3d at 349 (additionally, the 5th Circuit held the NLRA does not contain a congressional command to override the FAA).

42. *Id.*

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

44. *Moses H. Crone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

45. *Id.* ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . [t]he effect of the Section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

46. 29 U.S.C. § 157 (1935) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain *collectively* through representatives of their own choosing, and to

the sponsor Robert Wagner of New York stated the NLRA purported to “level the playing field” between workers and employers.⁴⁷ Legislative history often plays a key part in the interpretation of how two statutes interact.⁴⁸ The interaction of the two statutes turns mostly on whether the rights created by the NLRA are substantive rights, and then upon how those rights interact with the framework of the FAA.⁴⁹ The NLRA and the FAA each govern different specialized areas of the law, but prior to *D.R. Horton*, the rights granted by federal labor law have never clashed with the FAA as forcefully as they do now.⁵⁰

A. FAA and Labor Law History

When the FAA was enacted in 1925,⁵¹ interpreting courts found that the *purpose* of the bill was to “reverse the longstanding judicial hostility” towards arbitration, and even to put arbitration agreements on the “same footing” as other contracts.⁵² Two other labor laws came shortly thereafter: the Norris-LaGuardia Act passed in 1932,⁵³ and the NLRA of 1935.⁵⁴ The FAA was passed during a period somewhat distastefully remembered as the “Lochner Era.”⁵⁵ The Lochner Era lasted from roughly the end of the 19th century to the 1930s, and its zenith was highlighted by the Court’s decision in 1905 in *Lochner v. New York*.⁵⁶ This era came to an end when the Great Depression struck America in the late 1920s, allowing newly elected Franklin Delano Roosevelt to pass his “New Deal” legislation.⁵⁷ Some have argued the New Deal legislation contained rights for the working-class employee.⁵⁸ The Norris-LaGuardia Act, the NLRA, and the NLRB were created in the midst of this stormy legislative reform, and the Lochner Era was swept away⁵⁹; new rights were granted to employees, and new duties were assigned to employers. The Norris-LaGuardia Act has a specific section appointed to describe the public policy of the act.⁶⁰ In relevant part, it states:

[T]he individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore,

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”) (emphasis added).

47. Brief for Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioner/Cross-Respondent, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (2013) (No. 12-60031), 2012 WL 2245129, at *14.

48. *Id.* at *7.

49. See *infra* Parts III.B, C.

50. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

51. 9 U.S.C. § 1 (1925).

52. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

53. 29 U.S.C. § 102 (1932).

54. 28 U.S.C. § 157 (1935).

55. *Lochner v. New York*, 198 U.S. 45, 64 (1905); Jack M. Balkin, “*Wrong the Day it was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 678 (2005) (asserting that the Lochner era was characterized by full freedom of contract, and contracts between consenting parties were rarely invalidated).

56. *Id.*

57. *Id.*

58. *Id.* at 688.

59. *Id.*

60. 29 U.S.C. § 102 (1932).

though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he 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.⁶¹

B. Whether Section 7 of the NLRA Creates a Substantive Right

Keeping the historical context and purpose of the two statutes in mind, the analysis turns on whether Section 7 of the NLRA creates a "substantive right" to proceed collectively as a unit.⁶² If it does, such a right cannot be waived.⁶³

The difference between a procedural right and a substantive right has been the subject of much discourse.⁶⁴ In *Shady Grove Orthopedic Associates, P.A., v. Allstate Ins. Co.*,⁶⁵ the test that the United States Supreme Court used to ascertain whether a right was procedural or substantive depended on whether the modification was one that "really regulates procedure."⁶⁶ The Court has held that altering discovery rules is a procedural right.⁶⁷ Altering the rules of evidence is also procedural.⁶⁸ These can be altered because the substance behind the procedure is not being adjudicated, i.e., if the contracted-for-result seeks to extinguish the right altogether, or purports to remove an available remedy, this would alter the substance of the right.⁶⁹ The Court has held that a party does not forego any substantive rights simply by entering into an arbitration agreement.⁷⁰ Instead, any substantive rights are protected and cannot be waived.⁷¹

The NLRB is charged with administering the NLRA and interpreting any ambiguous provisions contained therein.⁷² Judicial deference is usually given to these administrative decisions.⁷³ All NLRB interpretations must acknowledge other relevant laws and interpret the NLRA in compliance with other federal

61. *Id.*

62. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

63. *Id.*

64. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010).

65. *Id.*

66. *Id.* at 407 ("if it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not").

67. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("procedures might not be as extensive as in the federal courts").

68. *Id.*; *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932).

69. *Shady Grove*, 559 U.S. at 407.

70. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

71. *Id.* ("a party does not forgo the substantive rights afforded by the statute It trades the procedures . . . for the simplicity, informality, and expedition of arbitration").

72. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

73. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

law.⁷⁴ The NLRA must also be applied in harmony with other relevant laws.⁷⁵ Because the NLRB is the agency charged with interpreting labor disputes, *In re Horton* sets precedent via the *Chevron*⁷⁶ doctrine that Section 7 of the NLRA would create a substantive right to proceed collectively as a unit. In *In re 127 Restaurant Corp.*,⁷⁷ the parties stipulated, and the NLRB affirmed, that formation of a class constituted concerted activity under Section 7 of the NLRA.⁷⁸ In *Brady v. National Football League*,⁷⁹ the Eighth Circuit affirmed the NLRB's finding that the policy and purpose of the NLRA permitted the formation of a class action under federal labor law.⁸⁰ In *NLRB v. Stone*,⁸¹ a negotiation contract between an employer and employee was held invalid because it unduly restricted the employees' rights to collectively bargain and be mutually protected.⁸²

The right to certify a class action has been held not to be a substantive right under Federal Rule of Civil Procedure (FRCP) 23.⁸³ While class actions under FRCP 23 are not exactly the same as the right to "concerted activity" under the NLRA,⁸⁴ the Supreme Court's treatment of FRCP 23 may be helpful in shedding light on the issue.⁸⁵ In *Amchem Products, Inc. v. Windsor*,⁸⁶ the Supreme Court stated formation of a class action under FRCP 23 was a procedural right only, not substantive.⁸⁷ In *Deposit Guaranty National Bank v. Roper*,⁸⁸ the Court found use of FRCP 23 involved procedure, and did not affect substantive rights.⁸⁹

The only Supreme Court decision to address substantive rights to certify a class under a statute appears in *Gilmer v. Interstate/Johnson Lane Corp.*⁹⁰ *Gilmer* involved an analysis surrounding the Age Discrimination in Employment Act (ADEA).⁹¹ The Court held class actions under the ADEA were subject to arbitration and the plain language allowing collective suits did not create a substantive right to proceed collectively.⁹² The Plaintiffs in *Gilmer* argued arbitration could not fulfill the purpose of the ADEA because arbitration does not allow for "broad equitable relief" or for class actions.⁹³ The Supreme Court did not agree with this

74. S.S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

75. *Chevron*, 467 U.S. at 842.

76. *In re 127 Rest. Corp.*, 331 N.L.R.B. No. 269, at *15 (2000); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *NLRB v. Stone*, 125 F.2d 752, 757 (7th Cir. 1942); *In re Extencicare Homes, Inc.*, 348 N.L.R.B. No. 70, at *19 (2006).

77. *In re 127 Rest. Corp.*, 331 N.L.R.B. No. 269, at *15 (2000).

78. *Id.*

79. *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011).

80. *Id.*

81. *NLRB v. Stone*, 125 F.2d 752, 757 (7th Cir. 1942).

82. *Id.*

83. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).

84. *Id.*

85. *Id.*

86. *Amchem Prods.*, 521 U.S. at 613.

87. *Id.* (citing 28 U.S.C. § 2072(b), "[the ADEA] must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'").

88. 445 U.S. 326 (1980).

89. *Id.* at 332 ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

90. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

91. 29 U.S.C. § 621 (1967).

92. *Gilmer*, 500 U.S. at 32.

93. *Id.*

argument, finding arbitration agreements and the ADEA were not fundamentally at odds with one another because arbitrators are able to fashion equitable relief.⁹⁴ The Court concluded arbitration does not preclude the EEOC or other labor law agencies from bringing an administrative suit against a corporation.⁹⁵

The dissent in *Gilmer* looked to the chronological development of the FAA and federal labor law (something the majority did not address) and forewarned of the danger of enforcing arbitration in the labor law context.⁹⁶ The majority holding in *Gilmer* was narrow—Section 1 of the FAA⁹⁷ applies only to laborers who work specifically in commerce that had to do with physical transportation across state lines.⁹⁸ Justice Stevens criticized the majority's reading of the FAA and stated if such an approach were used, it would snowball into a FAA jurisprudence far greater than he believed the court intended; thereby erasing much of the purpose and usefulness of federal labor law.⁹⁹ Justice Stevens opined that courts have the power to issue "broad injunctive relief," which is the "cornerstone to eliminating discrimination in society"—something arbitrators are not well suited to address.¹⁰⁰

The NLRB and several courts affirming NLRB decisions have found the right to proceed as a class (in the labor law context) to be a fundamental one, not merely a procedural one, and as recognized in *Gilmer*, there is a danger to interpreting certification of a class action in the labor context as a mere procedural right.¹⁰¹

C. FAA Jurisprudence and Recent Supreme Court Precedent

In the last several decades, the strength of the FAA has waxed, while other statutes that appear to conflict with the FAA have waned.¹⁰² This waxing of FAA influence is highlighted by the Court's recent cases.¹⁰³

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹⁰⁴ the Supreme Court decided that when parties enter into an arbitration agreement, the agreement is between only the two parties.¹⁰⁵ If the agreement does not explicitly mention otherwise, individual arbitration is the default method under the FAA for settling disputes, and collective action is precluded.¹⁰⁶ This highlights the Supreme Court's preference for the enforceability of the FAA and arbitration, even when

94. *Id.*

95. *Id.*

96. *Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting) ("[T]he Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other. Until today, however, the Court has not read § 2 of the FAA as broadly encompassing disputes arising out of the employment relationship. I believe this additional extension of the FAA is erroneous.")

97. 9 U.S.C. § 1 (1945) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.")

98. *Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting).

99. *Id.*

100. *Id.* at 41.

101. See *infra* notes 200-202.

102. William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1260 (2001).

103. *Id.*

104. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684-85 (2010).

105. *Id.*

106. *Id.* at 684.

the contractual arrangement does not explicitly mention individual arbitration.¹⁰⁷ In *AT&T Mobility LLC v. Concepcion*,¹⁰⁸ the Court invalidated a California state statute prohibiting class action waivers.¹⁰⁹ The Court reasoned the California statute disfavored and discouraged arbitration,¹¹⁰ inconsistent with the FAA's purpose and meaning, and the liberal policy favoring arbitration.¹¹¹

Stolt-Nielson and *Concepcion* both involved state laws that attempted to circumvent the FAA by carving out exclusions via the savings clause.¹¹² The claims in both cases were rejected, and the Court held that the state laws must fall to the strength of the FAA.¹¹³ The state laws interfered with the FAA's objectives and the pro-arbitration scheme that the FAA created.¹¹⁴ To-date, the Court has developed an expansive reading of the FAA: the FAA trumps state statutory schemes that treat arbitration agreements unfavorably in any way.¹¹⁵

D. Does the NLRA Contain a Congressional Command to Override the FAA?

If the NLRA does not create substantive rights to proceed collectively, the only method of upholding the NLRA's protections would be to construe the NLRA as containing an implicit command to override the FAA.¹¹⁶ This can happen only if the command is clear.¹¹⁷ The burden of demonstrating a contrary congressional command rests with the party alleging the existence of the command.¹¹⁸ The contrary congressional command must be demonstrable through the text of the bill, or the legislative history of the bill itself.¹¹⁹

In the case of *Shearson/American Express, Inc. v. McMahon*,¹²⁰ the Supreme Court considered various rules that were applicable to understanding whether or not the FAA should be overridden.¹²¹ In *Shearson*, plaintiff customers brought suit against the defendant brokerage firm.¹²² Plaintiffs alleged the firm had violat-

107. *Id.*

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

109. *Id.* at 1753.

110. *Id.* at 1750 (“[T]here is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.”).

111. *Id.*

112. *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010); *Concepcion*, 131 S.Ct. at 1748.

113. *Id.*

114. *Id.*

115. *Concepcion*, 131 S.Ct. at 1758 (Breyer, J., dissenting) (“The majority’s contrary view . . . rests primarily upon its claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.”).

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

117. *Id.*

118. *Id.*

119. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (citing *Wilko v. Swan*, 346 U.S. 427 (1953) (“We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”)).

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

121. *Id.*

122. *Id.* at 222-23.

ed the Securities Exchange Act (SEC) and the Racketeer Influenced and Corrupt Organizations Act (RICO).¹²³ Defendant moved to compel an arbitration agreement between the parties.¹²⁴ Plaintiffs claimed the SEC and RICO contained an implicit Congressional command to override the FAA.¹²⁵ The Court noted that there were only two ways to determine if a command to override existed: (1) the legislative history or plain meaning of the statute would contain the command, or (2) there would be an irreconcilable "implementation" between the two acts.¹²⁶ The Court noted that there was no legislative history on the issue, and the plain meaning did not support an override.¹²⁷ On the issue of "irreconcilable implementation," Plaintiffs argued that RICO claims were too complex to be decided by arbitration.¹²⁸ The Court did not agree with this reasoning, holding nothing in RICO pointed to override the FAA and that Plaintiffs had not carried their burden of demonstrating the contrary.¹²⁹

Interpreting the FAA and the NLRA together may also require looking at the date of the enactment of the statutes.¹³⁰ Later-enacted statutes may modify earlier statutes.¹³¹ Where the first statute is broad, and the second is narrow on the issue, the later statute is held to have modified the first.¹³² As a rule of statutory interpretation, the act passed later in time should prevail.¹³³ The FAA was originally enacted in 1925,¹³⁴ whereas the NLRA came later in 1935.¹³⁵ Congress then later reenacted the FAA in 1947.¹³⁶

Taken together, these significant parts illuminate the question of how courts should analyze labor law under the FAA and the NLRA.¹³⁷ The first question is whether "concerted activity" under the NLRA includes a substantive right to collectively proceed in court.¹³⁸ Secondly, if a substantive right has been created, the FAA must be applied to determine if the statute fits within the savings clause of the FAA—but as demonstrated from recent jurisprudence, the Court has been hesitant to apply the savings clause, at least in accords with state law, in this manner.¹³⁹ Alternatively, even if the statutory right does not fit within the savings clause, a statute may contain a congressional override command.¹⁴⁰

123. *Id.* at 223.

124. *Id.*

125. *Id.* at 224.

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

127. *Id.* at 239-40.

128. *Id.*

129. *Id.* at 242.

130. *Chi. & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 (1971) ("In the meantime we have no choice but to trace out as best we may the uncertain line of appropriate accommodation of the two statutes with purposes that lead in opposing directions.")

131. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

132. *Id.*

133. *Chi. & N.W. Ry. Co.*, 402 U.S. at 583 (the Court noted that Section 2 of the Railway Labor Act had been enacted later in time than an applicable portion of the Norris-Laguardia Act).

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

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

136. Act of July 30, 1947, 61 Stat. 669 (1947).

137. *See supra* notes 41, 45, 77, and 90.

138. *See supra* Part III.B.

139. *See supra* notes 90-100 and accompanying text.

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

IV. INSTANT DECISION

In *D.R. Horton* the Fifth Circuit took up the issue of whether a class arbitration waiver was valid in the federal labor law context.¹⁴¹ First, Defendant Horton claimed some procedural hurdles had not been met by the NLRB.¹⁴² The court found for the NLRB on these issues and declared all of the procedural hurdles had been satisfied.¹⁴³ At the core of its decision, the Fifth Circuit analyzed the existence of a conflict between the NLRA and the FAA.¹⁴⁴ The court found that although the NLRA granted employees the right to proceed collectively, class actions were not a substantive right.¹⁴⁵ Because the right to pursue a class action is not a substantive right, the court held the NLRA did not fit within the savings clause of the FAA and the court then moved to apply the liberal federal policy favoring arbitration to the NLRA.¹⁴⁶ The court noted the two statutes seemed facially at odds, but the NLRA did not carry a clear enough congressional command to override the FAA, so the FAA superseded the NLRA to the extent they clashed.¹⁴⁷

The NLRB argued that under Section 7 of the NLRA, employees have a right to join together in concerted action and this encompasses the right to pursue arbitration collectively.¹⁴⁸ The NLRB further contended that wide deference should be given to the agency interpretation of such issues.¹⁴⁹ The Fifth Circuit did not agree with this argument, looking instead to the plain language of both of the statutes.¹⁵⁰ The NLRA gives employees the right to proceed collectively against an employer, but the court found this does not encompass class arbitration because formation of a class of plaintiffs is not a substantive right.¹⁵¹ Instead, formation of a class is a procedural right subject to waiver.¹⁵² Looking to other areas of substantive law such as the ADEA and the Fair Labor Standards Act (FLSA), the court held the right to form a class—even class arbitration—has always been characterized as procedural and subject to waiver.¹⁵³

Because the concerted activity provision of the NLRA did not bar the waiver of class arbitration, the court then considered whether the NLRA fit within the savings clause of the FAA.¹⁵⁴ A “detailed reading” of *Concepcion* answered this question for the court.¹⁵⁵ The facts and analysis of *Concepcion* led the Fifth Circuit to believe the NLRA was not a ground which “exist[ed] in law or equity” to

141. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013).

142. *Id.* at 352-54 (the 5th Circuit held the NLRB did not lack quorum and therefore had the authority to issue a decision).

143. *Id.*

144. *Id.* at 356.

145. *Id.* at 359.

146. *Id.*

147. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

148. *Id.* at 355.

149. *Id.*

150. *Id.* at 355-56.

151. *Id.* at 355.

152. *Id.*

153. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 355 (5th Cir. 2013); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting).

154. *D.R. Horton, Inc.*, 737 F.3d at 359.

155. *Id.*

revoke the contract between Horton and its employees.¹⁵⁶ This was because the gist of *Concepcion* rested on the idea that statutes or laws that purport to make arbitration agreements generally unenforceable cannot withstand the strength of the FAA.¹⁵⁷ The court held this analysis was congruent with Supreme Court jurisprudence and the liberal federal policy supporting arbitration.¹⁵⁸ The Court did not make a distinction between state and federal laws for purposes of their analysis.

Finally, the Fifth Circuit determined the NLRA did not contain a congressional command to override the FAA.¹⁵⁹ In order for such a command to exist, it must be found in the plain language of the statute, the legislative history of the bill, or by an irreconcilable difference between the two statutes.¹⁶⁰ To the court, no such plain language existed in the NLRA to override the FAA, the legislative history of the bill did not reveal an override command, and the FAA was *reenacted* at a later point than the NLRA, thereby superseding the NLRA.¹⁶¹ As such, the court concluded that nothing in the NLRA commanded the FAA be overridden.¹⁶² In holding for Horton, the Fifth Circuit applied the liberal policy favoring arbitration agreements to federal labor laws.¹⁶³

V. COMMENT

In his book, "Horton Hears a Who,"¹⁶⁴ Dr. Seuss relays a tale of an elephant named Horton, who hears a cry of help coming from a small clover leaf.¹⁶⁵ Horton has a belief, later proven true, that there is a tiny world of very small people called "the Whos" living in a microscopic ecosystem on the leaf.¹⁶⁶ Horton realizes the tiny ecosystem is vulnerable and needs the protection of a bigger, external source.¹⁶⁷ Horton takes on the responsibility of protecting the Whos from those who might cause them harm.¹⁶⁸ Labor laws work much the same way as Horton worked to protect the cloverleaf world—these laws protect employees and workers by giving them "something larger" (class procedures) to use in their fight against overreaching corporations and employers. One key feature of federal labor laws is they allow plaintiff employees to band their voices together in concerted activity—giving them bargaining power and leverage. Without the ability to band together in arbitration, individual employees lose their ability to bargain on the same playing field as their employers. Without access to concerted activity, workers recede to a vulnerable state.

156. *Id.* at 358.

157. *Id.*

158. *Id.*

159. *Id.* at 362.

160. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

161. *Id.* (emphasis added).

162. *Id.*

163. *Id.* (the Fifth Circuit analyzed the claim in much the same way as other circuits did, and were "loathe" to create a split on the issue).

164. DR. SEUSS, *HORTON HEARS A WHO* (Random House, Inc. N.Y. 1982).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

First, this Note explains that an all-powerful FAA preemption has broad-reaching practical implications for the landscape of labor law. Next, this Note argues preemption of federal labor law by the FAA ignores the purpose and protections federal labor laws were designed to create.

A. Practical Implications of an FAA Override Against Labor Law

If the FAA is allowed to override the NLRA and other labor laws, several harsh implications emerge for employees. General contract notions of fairness will be ignored, colorable claims by employees may never reach the ears of an attorney, and the NLRB may lose much of its purpose.

A first concern revolves around the difference between employment and consumer contracts.¹⁶⁹ Consumer contracts happen quickly, and the consumer receives some finite good with which she walks away. The consumer often has other options to choose from and other places to do business. The face-to-face time between the parties is limited, and the whole process is fairly short. Consumers consent to the contract during a purchase.¹⁷⁰

Arbitration clauses within the employment context are vastly different than consumer contracts. The formation of the employment contract is usually brief, but the negotiations concern a realm of substantive implications, and employers effectively control much of the day-to-day of their employees' lives.¹⁷¹ Reviewing courts in the employment context often ask: "is the process too 'one-sided?'"¹⁷² When the employer modifies the employment contract, the employee will usually lack the power to say no—she may either say "yes," or forfeit her employment.¹⁷³ No new consideration is introduced in these situations except for continued employment.¹⁷⁴ Due to issues like imbalance of power, employees often consent to these clauses without any negotiation between the parties. For too many employees, resolving any employment dispute through arbitration becomes an automatic term of employment.¹⁷⁵

These notions of fairness are aggravated by the fact that attorneys have great incentive to take a class action, but very little incentive to represent a single em-

169. See Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 435-458 (2006) (in-depth discussion on issues of contract formation).

170. *Id.*

171. *Id.*

172. Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 AZ. L. REV. 637, 648 (2007) (citing *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 26, (1991) ("[T]he enforceability . . . turns principally on the quality and fairness of the arbitral process selected. If the process is too one-sided, it might be viewed as a violation of the employee's underlying substantive rights.")).

173. This occurred in *Cuda's* case. *In re D.R. Horton, Inc.*, No. 12-CA-25764, 2011 WL 11194 (N.L.R.B. Jan. 3, 2011).

174. Arnow-Richman, *supra* note 172, at 664 ("The common law of contract formation, as it has traditionally applied to employment relationships, may well recognize delayed terms as valid modifications in that they are accepted by the employee in exchange for continued employment. But surely the reality is different.").

175. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) ("[M]andatory arbitration is often imposed as a condition of employment, without any consent or bargaining. Thus, mandatory arbitration agreements operate as the new yellow dog contracts of the 1990s.").

ployee in arbitration.¹⁷⁶ This is further perpetuated in that attorneys are reluctant to take employment disputes in the first place.¹⁷⁷ Empirical studies show when attorneys have the incentive of a courtroom and formal litigation, they are hesitant to take employment cases, to the point that 95% of employment disputes are turned away.¹⁷⁸ These claims are often small wage and hour claims that attorneys obviously have less of an interest in litigating.¹⁷⁹ However, when all of these small claims add up and can be pursued as a class arbitration claim, attorneys are incentivized by the potentially large payoffs.¹⁸⁰ The fact attorneys have little incentive to take a single-arbitration dispute means many wronged employees may never have their claims vindicated and they will never reach the hands of a competent attorney who might have otherwise agreed to arbitrate for a whole class of plaintiffs. The ability to band together in class arbitration unifies the cries of trammelled employees to the point where an attorney may have incentive to litigate the claims.

Without access to an attorney, and without representing *pro se*, a plaintiff has few other options. One final avenue of relief is a labor agency like the NLRB. Courts have routinely stated nothing in an arbitration agreement will preclude a plaintiff from filing charges with such an agency.¹⁸¹ Despite this, the NLRB is often over-busy, extremely under-funded, and only takes on a very small fraction of the petitions it receives.¹⁸² The NLRB both investigates unfair practices by employers and takes individual claims.¹⁸³ If the FAA is allowed to override the NLRA, this may result in a new wave of individual petitions to the NLRB and a diminished NLRB capacity to investigate unfair practices.¹⁸⁴ Preclusion of right to proceed collectively under the NLRA may also cause a clutter of cases to be filed with the NLRB, slowing down the administration further.

Several giant implications exist for the employees who are forced to individually arbitrate their claims. General contract notions of fairness may be ignored, and employees may not be able to acquire legal counsel. The purpose of the NLRB may ultimately be frustrated, because it will be further swamped with claims, leaving the NLRB without the ability to employ the full use of its investigatory function.

176. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1750 (2011) (“[T]here is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process”); *see also* *Kristian v. Comcast Corp.*, 445 F.3d 25, 59, n.21 (1st Cir. 2006) (“In any individual case, the disproportion between the damages awarded to an individual . . . and the attorney’s fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court.”).

177. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998).

178. *Id.*

179. *Id.*

180. *Id.*

181. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002).

182. Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 270 (1995).

183. *Id.*

184. Theodore J. St. Antoine, *ADR In Labor and Employment Law During the Past Quarter Century*, 25 ABA J. LAB. & EMP. L. 411, 414-15 (2010).

B. The Creation of a Colossal FAA

William N. Eskridge, a renowned author in the field of statutory interpretation, coined the term “super-statute” to describe a statute that is sweeping in breadth.¹⁸⁵ Eskridge argues the FAA is an example of a super-statute that has made challenging arbitration nearly impossible. In part, this stems from the fact when two statutes appear to clash, the burden rests with the plaintiff to demonstrate why they clash and how they should be interpreted in light of one another.¹⁸⁶ Despite the FAA’s initial goal of placing arbitration agreements on equal footing with other contracts, the heavy presumption in favor of arbitration has consistently been used to invalidate other statutory regimes and thus has created a “super-statute.”¹⁸⁷ In applying this rationale, the Fifth Circuit has adhered to the liberal federal policy surrounding the FAA at the expense of invalidating other statutory schemes.¹⁸⁸

Horton argued because the FAA was passed later in time than the NLRA, it should control.¹⁸⁹ But the FAA was simply *reenacted* in 1947 as part of a series of congressional updates to the FAA and numerous other bills.¹⁹⁰ The “heart” of the bills—their true purpose—should be examined in their historical context.¹⁹¹ A true reading of the FAA and NLRA should be found to grant workers substantive, not procedural, concerted rights.¹⁹² Such an interpretation adheres to the context and chronological passage of the two statutory schemes.¹⁹³ Though the plain language of the statutes appear to conflict, they can be read in unity by interpreting Section 7 of the NLRA to create a substantive right to proceed collectively in arbitration, which cannot be waived.¹⁹⁴ This possibility exists by creating an exception to the FAA for the NLRA under the FAA’s savings clause, harmonizing the two statutes.

When two statutes govern one area of law and seem to conflict, courts will routinely look at the dates and the context of the two statutes to see if the later statute modified the first.¹⁹⁵ Because the NLRA was passed later in time, it should be interpreted as controlling when it comes to class arbitration. There is an inter-

185. Eskridge & Ferejohn, *supra* note 102, at 1216 (describing super statutes in the following elements: “(1) seeks to establish a new normative or institutional framework for state policy and (2) over time “sticks” in public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law-- including an effect beyond the four corners of the statute.”).

186. *Id.* at 1262.

187. *Id.*

188. *Id.* at 1260-61 (arguing the FAA has preempted state anti-arbitration laws, and has displaced federal securities, antitrust, and consumer protection laws).

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

190. Act of July 30, 1947, ch. 392, 61 Stat. 669 (1947); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg*, 64 ALA. L. REV. 1013, 1047 (2013).

191. Sullivan & Glynn, *supra* note 190, at 1043.

192. *Id.* at 1020.

193. *Id.*

194. *Id.* at 1021; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42 (1991) (Stevens, J., dissenting) (quoting C.J. Burger’s dissenting opinion in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 (1981) (“Plainly, it would not comport with the congressional objectives behind a statute . . . to allow the very forces that had practiced discrimination to contract away the right to enforce . . . in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.”)).

195. Sullivan and Glynn, *supra* note 190, at 1049.

pretive canon against implied repeal, so the courts should and do try to reconcile statutes in light of one another in a sensible way.¹⁹⁶ The canon against implied repeal states that later-enacted statutes will not "trump" an earlier statute unless expressly stated—this canon is applicable because the FAA was passed prior to the labor laws.¹⁹⁷ Even if the NLRA does not contain an "express repealer" as found in many federal labor laws,¹⁹⁸ the purpose and historical context of the NLRA is arguably sufficient to permit the NLRA to override the FAA and give way to concerted activity rights for employees under federal labor laws.¹⁹⁹

A way to make sense out of these statutes is to observe them together in their historical context. The congressional purpose underlying the NLRA was explained in the public policy section of the statute: "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor."²⁰⁰ Employment unfairness was pervasive in the 1930s, and this policy pinpoints the system the 74th Congress was attempting to remedy with the passing of the NLRA.²⁰¹ Much like the "Whos" in *Horton Hears a Who*, the workers who sign away rights to proceed collectively in arbitration are individuals who are vulnerable and need protection. Historically, when the rights of employees had been trammled, labor laws became the "something bigger" the "small people" turned to as an avenue of relief.²⁰²

In *D.R. Horton*, the Fifth Circuit held the NLRA did not create a substantive right, and must give way to the FAA.²⁰³ In light of recent precedent and FAA jurisprudence, if certiorari had been sought in *D.R. Horton*, the Court would have likely affirmed the decision of the Fifth Circuit and its sister circuits.²⁰⁴ If the Supreme Court follows the rationale of *D.R. Horton*, the ability of employees to proceed collectively under the NLRA will effectively be extinguished. While this reading of arbitration and labor laws pays deference to precedent and FAA jurisprudence, it largely ignores the historical context and overall purpose of labor laws—such a decision could in fact "effectively end the labor laws."²⁰⁵

VI. CONCLUSION

In *D.R. Horton* the Fifth Circuit decided the issue of whether the FAA precludes federal labor laws. The FAA has been interpreted in recent years with a liberal policy favoring arbitration. This policy has been ever widening since the

196. *Id.*

197. *Id.* at 1040.

198. 29 U.S.C. § 115 (2006) ("All acts and parts of acts in conflict with the provisions of this chapter are repealed.").

199. Sullivan and Glynn, *supra* note 190, at 1039.

200. 29 U.S.C. § 102 (1932).

201. Sam Simon, *How Statutes Create Rights: The Case of the National Labor Relations Act*, 15 U. PA. J. CONST. L. 1503, 1518 (2013).

202. NLRB v. Stone, 125 F.2d 752, 757 (7th Cir. 1942) ("Section 7 of the National Labor Relations Act . . . is a blanket provision which may include numerous unfair labor practices.").

203. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013).

204. See *supra* note 163 & accompanying text.

205. Sullivan and Glynn, *supra* note 190, at 1054 ("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.").

Supreme Court started hearing claims against arbitration waivers.²⁰⁶ Recent Supreme Court precedent in *Concepcion* and *Stolt-Nielson* highlight the zenith. The NLRA has historically always granted workers the right to proceed collectively in concerted action. If certiorari had been sought in *D.R. Horton*, the Court would likely have interpreted the FAA and NLRA as conflicting laws, affirming the position of the Fifth Circuit and holding the FAA trumps federal labor law on the issue of class arbitration waivers. Such a holding and interpretation might have ignored many of the facets of federal labor law—such as the history and purpose of federal labor law. Even without a Supreme Court ruling, the Fifth Circuit in *D.R. Horton* created far-reaching arbitration implications that will work to the detriment of employees who are forced to singly arbitrate their claims against powerful employers.

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206. See *Wilko v. Swan*, 346 U.S. 427, 431 (1953); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).