
THE SUBSTANTIVE WAIVER DOCTRINE IN EMPLOYMENT ARBITRATION LAW

The Supreme Court will soon decide whether the National Labor Relations Act¹ (NLRA) prohibits the enforcement of mandatory, predispute agreements to individually arbitrate statutory employment claims.² Two circuits and the National Labor Relations Board (NLRB) have held that the NLRA does just that³: they maintain that employees' section 7 right "to engage in other concerted activities for the purpose of . . . mutual aid or protection"⁴ includes the right to resolve employment disputes through at least some form of concerted action, such as collective arbitration, class action, or joinder.⁵ According to these rulings, section 7 rights are "substantive," and substantive statutory rights are nonwaivable under the Federal Arbitration Act⁶ (FAA).⁷ Three other circuits disagree, holding that class and collective actions are instead waivable "procedural device[s]."⁸ Even if section 7 rights were substantive, these courts would reject the legal relevance of the procedure-substance distinction. They argue that collective action waivers do not fall into the FAA's "saving clause"⁹ and that the NLRA

¹ 29 U.S.C. §§ 151–169 (2012).

² See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). For the sake of concision, when this Note refers to individual arbitration clauses, it also means to refer to collective action waivers, and vice versa. The two types of clauses can be treated together since they are different sides of the same coin. Both attempt to foreclose collective dispute resolution; one positively, by requiring individual arbitration, and the other negatively, by forbidding class and collective actions. See Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 767 n.1 (2012).

³ See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983–84 (9th Cir. 2016); *Lewis*, 823 F.3d at 1160–61; *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (Jan. 3, 2012).

⁴ 29 U.S.C. § 157.

⁵ See, e.g., *Lewis*, 823 F.3d at 1154; Recent Case, *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), 130 HARV. L. REV. 1032, 1039 (2017) (explaining the differences between class and collective actions).

⁶ 9 U.S.C. §§ 1–14 (2012).

⁷ *Lewis*, 823 F.3d at 1160.

⁸ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) (quoting *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643 (5th Cir. 2012)); see *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.6 (2d Cir. 2013) (per curiam); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013). This Note does not address the argument that section 7 of the NLRA does not grant *any* right to collective adjudications. The weight of scholarly authority clearly disagrees with such an argument. See, e.g., Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of D.R. Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 179 (2014); Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L.J. 75, 77 (2015); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 237 (2003). Instead, this Note's interest is in courts' treatment of the right to collective proceedings once they find it or assume it arguendo.

⁹ The FAA requires the enforcement of arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

contains no clear “contrary congressional command”¹⁰ to enforce individual arbitration agreements.

For employers and employees alike, the stakes of the question are high. Individual arbitration clauses risk undermining the role of private attorneys general in enforcing employment statutes.¹¹ By requiring employees to waive their right to join together to resolve workplace disputes with employers, such agreements prevent employees from overcoming collective action problems endemic to nonunion workplaces and thereby kill off certain classes of claims.¹²

The circuits’ confusion over the reach of the procedure-substance distinction in arbitration law is understandable. For decades, the Court has supplemented many of its consistently pro-arbitration decisions with statements of what this Note terms the “substantive waiver doctrine”: the principle that while parties to arbitration agreements may contractually waive most *procedural* rights granted to them by federal statutes, courts will not enforce waivers of *substantive* statutory rights.¹³ At the same time that the Court enunciated the substantive waiver doctrine, it also developed a prophylactic corollary to the doctrine meant to foreclose end runs around its protections. Known as the “effective vindication of statutory rights” rule, the Court declared that waivers of *procedural* rights that prevent litigants from “effectively . . . vindicat[ing]” their substantive rights are also unenforceable.¹⁴

¹⁰ Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987).

¹¹ See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377–78 (2005). Employment statutes rely heavily on citizen suits for enforcement. See David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13, 16 (Richard B. Freeman et al. eds., 2004) (noting, for example, that “[t]he annual probability of receiving an inspection for one of the 6.5 million establishments covered by OSHA is well below .001”).

¹² See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 885–86 (2016); William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 142 (2013) (noting that defendants “resist aggregation” because in its absence “no individual [may have] sufficient incentive to pursue a lawsuit against them”). For example, an employer might deliberately misclassify employees as exempt from the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2012), but escape liability if the cost of proving each claim exceeds expected damages for individual employees. See also generally Weil, *supra* note 11 (explaining how the “public goods problem,” *id.* at 28, and the cost of exercising statutory rights stifle individual suits to enforce employment laws in nonunionized workplaces).

¹³ *E.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009) (“[A] substantive waiver of federally protected civil rights will not be upheld”); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”). Lower courts have treated the doctrine as a “ground on which a mandatory arbitration agreement can be voided.” McMullen v. Meijer, Inc., 355 F.3d 485, 491 (6th Cir. 2004) (per curiam).

¹⁴ *Mitsubishi*, 473 U.S. at 637.

The Court has since narrowed the effective vindication rule in ways that cast doubt on its continued vitality.¹⁵ But for all the contention over the effective vindication rule, the substantive waiver doctrine has proved relatively noncontroversial, frequently asserted by the Court but rarely challenged or justified. Having escaped extensive analysis in commentary and case law, the precise meanings of “substance” and “procedure” in arbitration law are not clearly defined — nor is the very purpose of the distinction.

In an effort to clarify the doctrine’s role in deciding the enforceability of employment collective action waivers, this Note takes up the task of evaluating the doctrinal and normative basis of the substantive waiver doctrine in arbitration law. It finds that the doctrine serves to reconcile the FAA with equally binding federal statutes by expressing two separate theories of statutory interpretation, one pertaining to the scope of the FAA’s mandate and the other interpreting the competing employment statute. The doctrine skews underprotective of employment laws, since even the waiver of certain procedural rights in non-union workplaces through boilerplate contracts of adhesion may systematically privilege the FAA above statutes like the NLRA. Even so, it better effectuates congressional policies than its alternative — a presumption in favor of waivability of all statutory rights absent an especially clear textual statement to the contrary. The Court should continue to classify as “substantive” those rights that arbitration’s processes cannot replace without negating the employment statute’s core, textually evident, “rule of decision”-altering policies. Employees’ section 7 right to assert workplace grievances through collective procedures is exactly such a right.

Part I introduces the substantive waiver doctrine, explaining its development in the Supreme Court’s arbitration jurisprudence. This Part also demonstrates that the Court’s recent narrowing of the effective vindication rule leaves the substantive waiver doctrine formally untouched, if functionally vulnerable. Part II justifies the procedure-substance distinction as a necessary reading of two seemingly conflicting federal statutes. Part III raises, and then responds to, objections to the doctrine. The Note concludes by applying the substantive waiver doctrine to the question of whether collective action waivers are en-

¹⁵ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013) (calling the effective vindication of substantive rights doctrine “dictum,” *id.* at 2310, and limiting its application to waivers of the “right to pursue statutory remedies,” *id.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis added)), as opposed to waivers that increase “the expense involved in proving a statutory remedy,” *id.* at 2311); Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 179 (2013) (characterizing the future of the effective vindication rule as in doubt).

forceable under the FAA and NLRA, and it concludes that they are not.

I. THE SUBSTANTIVE WAIVER DOCTRINE'S BASIS IN LAW

A. *The Rise of the Substantive Waiver Doctrine*

The FAA makes agreements to arbitrate “valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*”¹⁶ For six decades after its enactment in 1925, the FAA required the enforcement of predispute waivers of only contractual, but not statutory, employment rights,¹⁷ and it applied primarily to disputes between companies.¹⁸ In *Brooklyn Savings Bank v. O'Neil*,¹⁹ the Court refused to enforce the written release of claims for liquidated damages under the Fair Labor Standards Act²⁰ (FLSA).²¹ Private waivers of statutory rights were allowed only if “Congress . . . manifested in the particular statute” the intent to allow contractual waiver.²² The Court found no such intent in the FLSA, since Congress passed the Act out of “a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency.”²³ Public regulation of wages and hours was necessary precisely to correct problematic features of private employment contracts, where inequality in bargaining power tainted the presumption that the agreement reflected the parties’ *ex ante* intentions, and therefore risked imposing negative externalities on the public.²⁴ To enforce employees’ private waivers of their FLSA rights “would nullify the purposes of the Act.”²⁵

¹⁶ 9 U.S.C. § 2 (2012) (emphasis added).

¹⁷ See *infra* Part III; see also Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 495–96 (2001).

¹⁸ Stone, *supra* note 15, at 167.

¹⁹ 324 U.S. 697 (1945).

²⁰ 29 U.S.C. §§ 201–219 (2012).

²¹ *O'Neil*, 324 U.S. at 702–04.

²² *Id.* at 705; see also *id.* at 704 (“It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.”).

²³ *Id.* at 706.

²⁴ See *id.* at 706–07.

²⁵ *Id.* at 707; see also *Wilko v. Swan*, 346 U.S. 427 (1953) (treating arbitration agreements as inconsistent with the enforcement of statutory rights under the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012)), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Dunlop v. Gray-Goto, Inc.*, 528 F.2d 792 (10th Cir. 1976) (invalidating agreement between employer and employees to substitute overtime pay for certain fringe benefits). In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that “there can be no pro-

In the 1980s, the Court rewrote decades of its arbitration precedents and “transformed the [FAA] almost beyond recognition.”²⁶ For the first time, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁷ the Court enforced an agreement to arbitrate statutory claims.²⁸ In compelling arbitration of antitrust claims, the Court stated: “[W]e find no warrant in the [FAA] for implying . . . a presumption against arbitration of statutory claims.”²⁹ Noting that not “all controversies implicating statutory rights are suitable for arbitration,”³⁰ the Court limited its holding in two ways. First, it held that Congress may foreclose arbitration of statutory rights by “evin[ing] an intention to preclude a waiver of judicial remedies” that is “deducible from text or legislative history.”³¹ Second, in what this Note terms the “substantive waiver doctrine,” the Court held that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”³²

The *Mitsubishi* Court dismissed decades of concerns with the adjudication of public statutory rights in private fora as antiquated “judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals.”³³ To the Court, the FAA established a “liberal federal policy favoring arbitration agreements,”³⁴ one fully reconcilable with other federal laws when used to enforce private waivers of procedural, but not substantive, rights.³⁵ In other words, the Court viewed the substantive waiver doctrine as more faithful to the FAA’s mandate than forbidding arbitration of all statutory rights. Derived from statutory interpretation of both the FAA and the competing federal stat-

spective waiver of an employee’s rights under Title VII,” 42 U.S.C. §§ 2000e to 2000e-17 (2012), including the right to a judicial forum. *Alexander*, 451 U.S. at 51.

²⁶ Stone, *supra* note 15, at 167; *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42–43 (1991) (Stevens, J., dissenting) (accusing the Court of having “effectively rewritten” the FAA, *id.* at 43 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting))).

²⁷ 473 U.S. 614 (1985).

²⁸ *Id.* at 640; *see id.* at 646 (Stevens, J., dissenting) (“Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims.”).

²⁹ *Id.* at 625 (majority opinion).

³⁰ *Id.* at 627.

³¹ *Id.* at 628.

³² *Id.*

³³ *Id.* at 627.

³⁴ *Id.* at 625 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

³⁵ Two years after *Mitsubishi*, the Court reiterated this principle in compelling arbitration under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78aa–78pp (2012), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2012). *See* *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (enforcing arbitration agreement because “the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights” under the statutes).

ute,³⁶ the substantive waiver doctrine functions as a legislative rule. Lower courts have concluded that the *Mitsubishi* language “is as much prescriptive as it is descriptive” in that it “disallows forms of arbitration that in fact compel claimants to forfeit certain substantive statutory rights.”³⁷ Thus, lower courts routinely invalidate agreements that purport to waive substantive statutory rights.³⁸

In 1991, the Court extended its *Mitsubishi* holding to the arbitration of claims under federal antidiscrimination statutes. In *Gilmer v. Interstate/Johnson Lane Corp.*,³⁹ the Court held that the FAA required enforcement of an agreement to arbitrate an age discrimination claim signed by a securities representative with the New York Stock Exchange.⁴⁰ The representative, Gilmer, objected that the agreement constituted an unenforceable waiver of his statutory rights, since the Age Discrimination in Employment Act⁴¹ (ADEA) specifically provided individuals with the right to adjudicate their claims in court,⁴² and because procedural inadequacies inherent to arbitration would jeopardize his ultimate right to be free from age discrimination.⁴³ The Court rejected both arguments: “[P]rotection against waiver of the right to a judicial forum” is not itself a “substantive protection afforded [by the ADEA]” unless Congress makes that intention clear in the statute.⁴⁴ And Gilmer’s challenges to the adequacy of arbitral procedures contradicted the Court’s recent rejection of the “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.”⁴⁵

Ten years later, the Court applied *Gilmer* to nearly all employment contexts in *Circuit City Stores, Inc. v. Adams*.⁴⁶ Central to its conclu-

³⁶ See *infra* Part II.

³⁷ *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 680 (Cal. 2000); see also *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (“Statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute.”).

³⁸ See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding unenforceable arbitration provision limiting damages under federal antitrust law); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (same under Title VII); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (en banc) (same); *Paladino v. Avnet Comput. Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (same).

³⁹ 500 U.S. 20 (1991).

⁴⁰ *Id.* at 23–24, 35.

⁴¹ 29 U.S.C. §§ 621–634 (2012).

⁴² *Gilmer*, 500 U.S. at 29.

⁴³ *Id.* at 30.

⁴⁴ *Id.* at 29 (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁴⁵ *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

⁴⁶ 532 U.S. 105 (2001). For the argument that “the FAA was never intended to force employees into arbitration,” see Imre Stephen Szalai, *More than Class Action Killers: The Impact of*

sion that the FAA requires enforcement of most employees' agreements to arbitrate statutory claims against employers was *Mitsubishi's* articulation of the substantive waiver doctrine. The Court invoked the doctrine as support for its holding that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."⁴⁷ Thus, the steady growth of the FAA's reach, from commercial contractual claims to statutory claims between employers and employees, has been accompanied by repeated assertions that parties do not waive substantive statutory rights.⁴⁸

B. *The Decline of the Effective Vindication Rule*

From its very origins in *Mitsubishi*, the substantive waiver doctrine has been buttressed by a separate but related doctrine: the effective vindication of statutory rights exception.⁴⁹ This rule invalidates waivers of procedural rights that prevent a "prospective litigant [from] effectively . . . vindicat[ing] [his or her] statutory cause of action in the arbitral forum."⁵⁰ The rule is a logical outgrowth of the substantive waiver doctrine, as it "invalidates arbitration provisions that are the functional equivalent of express waivers of federal statutory rights."⁵¹ If parties cannot waive substantive rights, then they cannot waive procedures that "foreclose a party . . . from effectively vindicating the *substantive* rights the statute provides."⁵² Without the effective vindication rule, parties could easily evade the substantive waiver doctrine's protection of substantive rights. For example, rather than require employees to agree not to bring FLSA claims as a condition of employment, an employer could require employees to adjudicate those claims in a forum with procedures designed to ensure that the employees always lose — or never bring the claims in the first place. The latter strategy kills off FLSA claims as surely as the pure exculpatory clause, with the added vice of doing so less transparently. Thus, the "effec-

Concepcion and *American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 33 (2014).

⁴⁷ *Circuit City*, 532 U.S. at 123.

⁴⁸ See also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

⁴⁹ See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

⁵⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); see also, e.g., *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (upholding arbitration agreement on the basis that "[t]he [plaintiffs] may effectively vindicate their RICO claim in an arbitral forum").

⁵¹ David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 726 (2012).

⁵² *Italian Colors*, 133 S. Ct. at 2319 (Kagan, J., dissenting) (emphasis added).

“essential to the rationale for” enforcing agreements to arbitrate statutory rights.⁵³

Despite the tight connection between the effective vindication rule and the protection of substantive rights, the Court recently narrowed its formulation of the rule. In *American Express Co. v. Italian Colors Restaurant*,⁵⁴ merchants who accepted American Express cards, and who had signed arbitration agreements that waived their right to class proceedings in disputes with American Express, brought an antitrust class action against the company.⁵⁵ The plaintiffs argued that the class waiver prevented them from effectively vindicating their rights under federal antitrust law since the cost of expert analysis necessary to proving their underlying antitrust claim made individual arbitration economically infeasible.⁵⁶ Writing for the Court, Justice Scalia enforced the agreement and directly addressed *Mitsubishi’s* expression of the effective vindication rule. The rule’s purpose, he said, was to prevent “prospective waiver of a party’s *right to pursue* statutory remedies,”⁵⁷ not waiver of the *ability* to prove them.⁵⁸ According to Justice Scalia, “[t]hat would certainly cover a provision . . . forbidding the assertion of certain statutory rights.”⁵⁹ It might also preclude agreements to “filing and administrative fees” so high as to make access to the arbitral forum unattainable, but it did not forbid provisions that make it economically irrational to prove one’s claim once in the forum’s door.⁶⁰

After *Italian Colors*, the effective vindication rule does not invalidate collective action waivers on the grounds that they foreclose plaintiffs’ abilities to afford the evidentiary costs of adjudicating substantive claims. This limitation frustrates much of the effective vindication rule’s value as a guard against procedural abuses of the substantive waiver doctrine.⁶¹ Still, not even Justice Scalia ever took issue with the substantive waiver doctrine itself.⁶² The entire Court

⁵³ Stone, *supra* note 15, at 171.

⁵⁴ 133 S. Ct. 2304.

⁵⁵ *Id.* at 2308.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (emphasis added)).

⁵⁸ *Id.* at 2311.

⁵⁹ *Id.* at 2310.

⁶⁰ *Id.*

⁶¹ See *id.* at 2315 (Kagan, J., dissenting) (describing the value of the effective vindication rule).

⁶² See Transcript of Oral Argument at 46, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-133.pdf [<https://perma.cc/LPP6-JGR8>] (Scalia, J.) (“I’m not even talking about a pure exculpatory clause.”). Not even American Express claimed that the law would allow it to require waiver of substantive claims. At oral argument, Justice Kagan asked counsel for American Express: “[D]o you think that if in your arbitration agreement you had a clause which just said, I hereby agree not to bring any Sherman Act claim against American Express, could . . . your arbitration agreement do that?” *Id.*

would likely invalidate a provision that purported to waive an employee's right to sue her employer for sex discrimination under Title VII,⁶³ for example. While an obvious end run around the doctrine's protections now exists, the *Italian Colors* Court considered it "certain[]" that a provision "forbidding the assertion of certain statutory rights," presumably those that are substantive, would be unenforceable.⁶⁴ Likewise, in *CompuCredit Corp. v. Greenwood*,⁶⁵ the Court took care to note that parties may not contractually waive every type of statutory right; rather, arbitration agreements would be enforced only "so long as . . . the guarantee of the legal power to impose liability . . . is preserved."⁶⁶ Thus, restrictions on the effective vindication rule do not foreclose the possibility that collective proceedings might be nonwaivable substantive rights under the NLRA.

II. THE NORMATIVE BASIS OF THE SUBSTANTIVE WAIVER DOCTRINE: RECONCILING EQUAL FEDERAL STATUTES

Standing bare with only thin protection from the effective vindication rule, the substantive waiver doctrine provides one of the last remaining limits on the arbitrability of statutory claims.⁶⁷ Yet the Court has offered little guidance on how to distinguish procedural rights from substantive ones for FAA analysis. Substantive rights for FAA purposes clearly include statutory remedies,⁶⁸ the ultimate right to impose liability,⁶⁹ and the burden of proof in at least some contexts,⁷⁰ while rights to a particular forum are often procedural.⁷¹ But the case

at 6–7. Counsel responded: "Under this Court's decision in *Mitsubishi*, I believe not." *Id.* at 7. Counsel later stressed: "This is not an exculpatory clause." *Id.* at 58.

⁶³ 42 U.S.C. §§ 2000e to 2000e-17 (2012).

⁶⁴ *Italian Colors*, 133 S. Ct. at 2310.

⁶⁵ 565 U.S. 95 (2012).

⁶⁶ *Id.* at 102.

⁶⁷ See *Horton*, *supra* note 51, at 724; see also *id.* ("[T]he Court has nearly concluded its slow march toward universal arbitrability.").

⁶⁸ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("[If] choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."); see also *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (holding arbitration agreement limiting punitive damages under Title VII unenforceable); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (same); *Paladino v. Avnet Comput. Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (invalidating arbitration provision "because it completely proscribes an arbitral award of Title VII damages").

⁶⁹ See *CompuCredit Corp.*, 565 U.S. at 102.

⁷⁰ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (deeming "substantive" a provision of the Securities Act of 1933 "placing on the seller the burden of proving lack of scienter when a buyer alleges fraud").

⁷¹ See *id.* at 481–82 (referring to a statutory grant of jurisdiction in federal and state courts as "procedural"); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[W]e have con-

law has only implied, rather than expressly stated, the theory that justifies those classifications. This Part aims to clarify the procedure-substance distinction's role and purpose in arbitration law.

A. Step One: The Doctrine Interprets the Scope of the FAA

The substantive waiver doctrine attempts to effectuate congressional policies with respect to competing federal statutes of equal authority. One statute — the FAA — requires courts to enforce arbitration agreements in the same manner that they enforce other contracts, in order to overcome “widespread judicial hostility to arbitration.”⁷² Others grant employees specific workplace rights that they need not bargain for by contract, such as a minimum wage,⁷³ freedom from status-based discrimination in the workplace,⁷⁴ and the right to organize collectively to resolve workplace disputes.⁷⁵ When an arbitration agreement purports to waive positive rights granted by an employment statute, enforcing the contract under the FAA appears to conflict with the employment statute.⁷⁶

The substantive waiver doctrine assures that no such conflict occurs. When an employment statute conflicts with an arbitration agreement, the *substantive* employment rights win out under the FAA's saving clause, but the *procedural* ones do not. In dissent in *Italian Colors*, Justice Kagan defended the effective vindication rule and, in so doing, articulated the justification for the substantive waiver doctrine. She explained that “[t]he effective-vindication [of substantive rights] rule furthers the [FAA's] goals by ensuring that arbitration remains a real, not faux, method of dispute resolution.”⁷⁷ Congress passed the FAA to encourage private dispute resolution through arbitration, not to confer “*de facto* immunity” from other statutes on companies.⁷⁸ The FAA's purpose is to enable private parties to choose between arbitration and litigation as legitimate fora for resolving their disputes, but it provides no basis for altering the content of the statu-

cluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.”)

⁷² *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–09 (2013).

⁷³ *See* 29 U.S.C. § 206 (2012).

⁷⁴ *See* 42 U.S.C. § 2000e-2(a) (2012).

⁷⁵ *See* 29 U.S.C. § 157.

⁷⁶ Failing to enforce a class arbitration waiver, for example, seems to violate the FAA, but enforcing it violates the NLRA, as section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for employers to require employees to waive a section 7 right. *See, e.g., J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

⁷⁷ *Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

⁷⁸ *Id.*; *see also id.* (arguing that the FAA “reflects a federal policy favoring actual arbitration — that is, arbitration as a streamlined ‘method of resolving disputes,’ not as a foolproof way of killing off valid claims” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989))).

tory rights disputed in those fora.⁷⁹ The procedure-substance inquiry therefore distinguishes between those statutory rights that are the subject of adjudication (the substantive ones) and those that govern how a plaintiff adjudicates the disputed right (the procedural ones).

Since the FAA compels enforcement of arbitration agreements, the scope of the FAA's mandate depends on what it means by "arbitration." The Court conceives of an arbitration agreement as "a specialized kind of forum-selection clause,"⁸⁰ in contrast to "a judicial forum for the resolution of claims."⁸¹ Enforcement of arbitration agreements "serve[s] to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes."⁸² Agreements to arbitrate, according to the Court, "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."⁸³ Such qualities relate only to procedure — "the manner and the means" by which the litigants' rights are "enforced" — and not to substantive law — "the rules of decision by which [the] court will adjudicate [those] rights."⁸⁴ In other words, enforcing only procedural waivers does not contradict the FAA since the Court reads the FAA as compelling enforcement of only private agreements governing the means of deciding disputes.

This understanding of the FAA's mandate aligns with commonly recited definitions of "procedure" and "substance." According to an influential civil procedure casebook, substantive law deals with "rights and duties that regulate the everyday relationships among individuals and between individuals and institutions."⁸⁵ Procedural law "explore[s] the procedures used by courts to resolve disputes about those

⁷⁹ Cf. Jacob Spencer, Note, *Arbitration, Class Waivers, and Statutory Rights*, 35 HARV. J.L. & PUB. POL'Y 991, 999 (2012) ("Arbitration is a matter of forum selection, not remedies, and the purpose of the FAA is to make an arbitral forum available, not to favor some remedies over others.")

⁸⁰ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); see also Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1353 (1997) ("[A]rbitration involves a change in the forum only It does not involve the waiver of substantive rights.")

⁸¹ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

⁸² *Rodriguez de Quijas*, 490 U.S. at 483 (addressing the rights of securities buyers).

⁸³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Courts (and arbitration's proponents) cite as arbitration's primary benefits its ability to expedite dispute resolution and save costs through its "streamlined proceedings." *Id.* at 633; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1560 (2005).

⁸⁴ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (alterations in original) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

⁸⁵ JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 2 (11th ed. 2013).

substantive rights and duties.”⁸⁶ Put another way, “[a] rule is procedural if its function is to regulate adjudication-related conduct. A rule is substantive if its function is to regulate conduct that occurs outside the context of adjudication.”⁸⁷ Thus, interpreting the FAA as pertaining only to procedural statutory rights accords with the Court’s understanding of the FAA as requiring enforcement of agreements to utilize particular dispute resolution systems. The best reading of the FAA’s requirement that courts enforce arbitration agreements is therefore that courts enforce procedural, but not substantive, waivers.

B. Step Two: The Doctrine Interprets the Mandate of the Statutory Source of the Asserted Right

Still, this rationale for the substantive waiver doctrine presents a puzzle on its own. Even if the FAA does not *require* judicial enforcement of private waivers of substantive statutory rights, what source of law *forbids* judges from enforcing such agreements? Any interpretation of “procedure” and “substance” for arbitration purposes must proceed from a theory about which statutory rights Congress intended to make inalienable.⁸⁸ The answer lies not in the FAA, but in the Court’s interpretation of the statutory source of the disputed right.⁸⁹ The Court reads every statute to allow the private exchange of certain statutory rights — those deemed procedural — and to disallow the private exchange of others.⁹⁰ The substantive waiver doctrine helps the Court determine those statutory rights that Congress made presumptively waivable and those it did not.

The theory appears rooted in basic logic and first principles of statutory interpretation — Congress impliedly forbids private parties from contractually defeating its statutes’ core public policies.⁹¹ It is an

⁸⁶ *Id.*

⁸⁷ Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 205 (2004).

⁸⁸ See Horton, *supra* note 51, at 746–65 (describing the substantive waiver rule as expressing a theory of inalienability with respect to certain statutory rights); see also Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 735 (1975) (arguing that courts have a “responsibility to justify substantive impact in terms of substantive values”).

⁸⁹ See Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 918 (2015) (demonstrating that the determination of which rights are substantive “is made by analyzing the nature of the rights in the statutory scheme”).

⁹⁰ See *supra* section I.A, pp. 2208–11. Like the rest of the Note, this discussion focuses on *predispute* waivers of statutory rights. Postdispute waivers are “settlements” entered into at a stage when employees are more likely to “appreciate the value of the legal entitlements they are being asked to trade away.” ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 261–62 (Samuel Estreicher & David Sherwyn eds., 2004). They thus present a different, and potentially lesser, risk of interference with statutory policies than do predispute waivers, see *id.* at 260–63, and are therefore not the subject of this Note.

⁹¹ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

elemental principle of legal hierarchy that statutes supplant private contracts when the two sources of law conflict.⁹² When Congress attempts to identify, remedy, and deter specific harms by statute, it necessarily displaces private agreements that thwart the statute’s “remedial and deterrent function[s].”⁹³ Hence, if an agreement required “waiver of a party’s right to pursue statutory remedies . . . , [the Court] would have little hesitation in condemning the agreement.”⁹⁴

At times, the Court has appeared to describe this inquiry as a purposivist endeavor.⁹⁵ Congressional intent to preclude enforcement of arbitration clauses can be found in any of “the text, history, *or purposes* of the statute.”⁹⁶ In *Gilmer*, the Court explained that a plaintiff can show Congress “intended to preclude a waiver of a judicial forum for [statutory] claims” when there is “an ‘inherent conflict’ between arbitration and the [statute]’s underlying purposes.”⁹⁷ Certainly, for the remaining purposivists in the legal community,⁹⁸ it is possible to conceptualize the substantive waiver doctrine as a purposive inquiry; determining which rights are substantive from the perspective of a given statutory regime requires analysis of the statute’s remedial and deterrent purposes.

The substantive waiver doctrine, however, may also be understood as a textualist rule of statutory interpretation. Like purposivists,

⁹² See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 632 (1936) (Stone, J., dissenting) (“[N]o one has ever denied that it is freedom [of contract] which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable . . .”).

⁹³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). The Court has explained that the FLSA, for example, “was not designed to codify or perpetuate [industry] customs and contracts” but “to achieve a uniform national [compensation] policy” for covered employees. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167 (1945). Thus, “[a]ny . . . contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements,” is unenforceable. *Id.*

⁹⁴ *Mitsubishi*, 473 U.S. at 637 n.19.

⁹⁵ It is also possible to view the Court as conducting a purposive inquiry into the FAA’s requirements. See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 13 (2013) (explaining that in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), “[t]he Court found in the FAA in general (rather than in any particular textual provision) a purpose of resolving disputes speedily and informally”).

⁹⁶ *McMahon*, 482 U.S. at 227 (emphasis added).

⁹⁷ 500 U.S. at 26 (citing *McMahon*, 482 U.S. at 227).

⁹⁸ See generally Stephen Breyer, Lecture, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending inquiries into a statute’s purposes as relevant to interpreting unclear language). But see John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (explaining that “the Court has shifted toward a new textualism”).

textualists have been known to speak in terms of “legislative intent.”⁹⁹ But while “[p]urposivists give priority to policy context” in divining legislative intent, textualists focus on “semantic context”¹⁰⁰ to discern an “objectified intent.”¹⁰¹ The inquiry is thus whether the words of the competing statute forbid waiver of its enumerated rights. For instance, it is not necessary to “anthropomorphize the legislature,”¹⁰² or “allow sufficiently pressing policy cues to overcome . . . semantic evidence,”¹⁰³ to conclude that the FLSA forbids private bargaining over minimum wages, even absent a nonwaiver clause.¹⁰⁴ Necessarily inherent in the words “minimum wage” is a prohibition on contracting for wages below the minimum. The FLSA need not contain any greater specificity on this point — by, say, textually instructing courts to set aside contractual waivers of the minimum wage — in order for courts to “meaningfully trace [the] decision to Congress”¹⁰⁵ that such agreements must be invalidated. Allowing private waiver of minimum wage benefits would defeat the purposes of the FLSA based on semantic reasoning. For the purpose of arbitration waivers, such a right is “substantive” in the Court’s view and thus nonwaivable.¹⁰⁶

A statute that grants plaintiffs the right to sue in court would seem to represent a textually committed legislative purpose to allow litigation of statutory rights, the waiver of which would undermine that purpose. However, the substantive waiver doctrine assumes that arbitral procedures can replace statutorily granted procedural rights and maintain legislative design in most cases.¹⁰⁷ The theory is that Congress legislates against a background understanding that arbitra-

⁹⁹ See, e.g., *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (unanimous opinion) (“[W]e focus first on the statutory language, ‘which necessarily contains the best evidence of Congress’ pre-emptive intent.” (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))); see also Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947) (arguing that “statutes . . . should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them,” *id.* at 378 (alteration in original) (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (L. Hand, J.)), and that such purposes should derive primarily from a statute’s text, *id.* at 374); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005).

¹⁰⁰ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) (emphases omitted).

¹⁰¹ Manning, *supra* note 99, at 424 (emphasis omitted).

¹⁰² *Id.* at 423.

¹⁰³ Manning, *supra* note 100, at 76.

¹⁰⁴ See *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (explaining that the Court has “frequently emphasized the nonwaivable nature of an individual employee’s right to a minimum wage and to overtime pay”).

¹⁰⁵ Meltzer, *supra* note 95, at 8.

¹⁰⁶ *Barrentine*, 450 U.S. at 734–35.

¹⁰⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (“[A]rbitration is consistent with Congress’ grant of concurrent jurisdiction over ADEA claims to state and federal courts.”).

tion is ordinarily “an adequate substitute for adjudication as a means of enforcing the parties’ statutory rights.”¹⁰⁸ As such, it is possible for arbitration agreements to “be enforced under the FAA without contravening the policies of congressional enactments”¹⁰⁹ even when the statute grants a positive right to the judicial forum.¹¹⁰

But the importance of the right to the statutory scheme may bear on whether Congress manifested “objectified intent” to impliedly prohibit its waiver. The procedure-substance dichotomy has functioned as a proxy for courts’ determinations of which rights are so important to the statutory scheme that Congress forbade their waiver. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹¹¹ the Court found the procedural statutory provisions at issue, as opposed to the substantive ones, to be not “so critical that they cannot be waived.”¹¹² Courts have understood substantive rights as “the essential, operative protections of a statute” and procedural rights as “ancillary” statutory rights.¹¹³ The substantive waiver doctrine thus functions as a means for courts to identify those rights that are so essential to the statutory scheme that Congress objectively meant to protect them from prospective waiver.

III. OBJECTIONS TO THE SUBSTANTIVE WAIVER DOCTRINE

The substantive waiver doctrine suffers potentially serious flaws, as both a workable doctrine and as a theory of statutory interpretation. The failure to clearly define “procedure” and “substance” in arbitration law presents difficult classification questions with respect to rights — like the right to bring a collective action — that blur the borderline. Most troublingly, it is not clear that the exchange of even many procedural statutory employment rights in nonunion workplaces through adhesive contracting harmonizes the FAA with employment statutes. The doctrine may lead courts to enforce waivers of a greater range of statutory rights than the FAA requires and employment law allows.

A. *Problems with the Substantive Waiver Doctrine*

Any benefits that the substantive waiver doctrine may promise by functioning as a rule rather than as a standard, such as its potential to “reduce uncertainty for litigants” and lower “decision costs for lower

¹⁰⁸ *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 229 (1987).

¹⁰⁹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

¹¹⁰ See *Gilmer*, 500 U.S. at 29.

¹¹¹ 490 U.S. 477 (1989).

¹¹² *Id.* at 481.

¹¹³ *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 985 (9th Cir. 2016); see also *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (describing procedural rights as those “ancillary to the litigation of substantive claims”).

courts,”¹¹⁴ may be impeded by its very terms.¹¹⁵ The defining characteristics of “substance” and “procedure” are difficult, perhaps impossible, to isolate with absolute clarity.¹¹⁶ In other areas of the law that rely on the distinction, one court’s procedure is often another’s substance.¹¹⁷

The source of the confusion is that procedure inevitably affects what most people generally consider as “substance.” Take statutes of limitations, for example. These rules are procedural in that they govern *how* disputes are adjudicated, but also are “a product of public policy, and will affect the plaintiff’s ability to recover, as [much as] any purely ‘substantive’ provision of the jurisdiction’s law.”¹¹⁸ The same might be said of *any* procedural rule. Rules of evidence, pleading, discovery, and joinder regulate primary conduct between individuals outside of adjudication by shaping their expectations of the likelihood of recovery from adjudication.¹¹⁹ Rules of procedure “determine how much substance is achieved, and by whom,”¹²⁰ and “particularize abstract and general substantive rules.”¹²¹ Attempts to categorize class actions as “*procedural* mechanism[s] to litigate or arbitrate disputes collectively”¹²² as simply a matter of definition therefore lack necessary justification.

¹¹⁴ Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 356 (2003) (describing these, and other, benefits of rules over standards).

¹¹⁵ See 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509 (3d ed.), Westlaw (database updated Apr. 2017). For a concise intellectual history of the process-substance distinction in legal theory, see Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1018–27 (2008), describing “[t]he elusive relationship between substantive and procedural law” as “one of the recurring and unresolved debates in legal theory,” *id.* at 1019.

¹¹⁶ See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (describing an “uncertain area between substance and procedure” where matters “are rationally capable of classification as either”); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (noting that “in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (“The line between procedural and substantive law is hazy . . .”); see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 77 (1985) (“[T]he sharp distinction between substantive and procedure is arbitrary from a normative standpoint . . .”).

¹¹⁷ Compare *Dixon Ticonderoga Co. v. Estate of O’Connor*, 248 F.3d 151, 160–61 (3d Cir. 2001) (“Statutes of limitations are substantive . . .”), with *Corinthian Mortg. Corp. v. ChoicePoint Precision Mktg., LLC*, No. 1:07cv832, 2008 WL 2776991, at *2 (E.D. Va. July 14, 2008) (understanding statute of limitations to be procedural).

¹¹⁸ FRIEDENTHAL ET AL., *supra* note 85, at 2.

¹¹⁹ See Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 403–04 (1977) (identifying statutes of frauds, the parol evidence rule, and notarization requirements as examples of rules that both affect primary activity and are designed to achieve procedural purposes).

¹²⁰ Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13.

¹²¹ Solum, *supra* note 87, at 225 (explaining that the application of abstract legal rules to concrete cases necessarily requires “entanglement” of substance and procedure).

¹²² *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 995 (9th Cir. 2016) (Ikuta, J., dissenting).

Courts may find it tempting to determine which rights are substantive based on their extensive discussion of procedure and substance in other contexts.¹²³ Constitutional due process,¹²⁴ contract law's unconscionability doctrine,¹²⁵ the Rules Enabling Act,¹²⁶ and the *Erie* doctrine¹²⁷ all distinguish between procedure and substance, each for their own purposes. The prevalence of the procedure-substance distinction in other areas of the law heightens the potential that courts will engage in "doctrinal borrowing" that will distort the substantive waiver doctrine's analysis.¹²⁸ In those other areas of law that rely on the distinction, courts' unprincipled line drawing too often leads them to apply "the same key-words to very different problems,"¹²⁹ which causes "confusion and a barren and misleading conceptualism."¹³⁰

When they address the procedure-substance distinction,¹³¹ the courts that have upheld class waivers under the NLRA tend to make a similar error, finding section 7 rights to be procedural as a matter of doctrinal classification. In *D.R. Horton, Inc. v. NLRB*,¹³² for example, the Fifth Circuit held that class proceedings were procedural under the NLRA because *Gilmer* had suggested they were procedural under the ADEA and because "numerous courts have held that there is no substantive right to proceed collectively under the FLSA."¹³³ But the ADEA and FLSA are entirely different statutory regimes than the NLRA; they do not grant a right to "engage in concerted activities for

¹²³ See *In re Fresh & Easy, LLC*, No. 15-12220, 2016 WL 5922292, at *7 (Bankr. D. Del. Oct. 11, 2016) (invoking the Rules Enabling Act test — dictating that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b) (2012) — in holding that section 7 of the NLRA provides a substantive right). See generally Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 *FORDHAM L. REV.* 2945, 2977-84 (2013) (arguing for an application of the Court's Rules Enabling Act procedure-substance test to the FAA).

¹²⁴ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (applying substantive due process analysis); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing test for procedural due process).

¹²⁵ See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922-26 (9th Cir. 2013).

¹²⁶ See 28 U.S.C. § 2072.

¹²⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see 19 *WRIGHT ET AL.*, *supra* note 115, § 4508.

¹²⁸ Cf. Jennifer E. Laurin, Essay, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 *COLUM. L. REV.* 670, 704-10 (2011) (explaining, in the context of the exclusionary rule, the concept of "doctrinal borrowing" and evaluating its desirability).

¹²⁹ *Guar. Tr. Co. v. York*, 326 U.S. 99, 108 (1945).

¹³⁰ 19 *WRIGHT ET AL.*, *supra* note 115, § 4508.

¹³¹ Neither the Eighth Circuit nor the Second Circuit addressed the substantive waiver doctrine at all in upholding class waivers under the NLRA. See *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (*per curiam*); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

¹³² 737 F.3d 344 (5th Cir. 2013).

¹³³ *Id.* at 357.

the purpose of . . . mutual aid or protection.”¹³⁴ Whether the section 7 right to assert workplace grievances through collective procedures is “procedural” or “substantive” does not depend on the classification of collective procedures under other statutes — it depends on the importance of the right within the NLRA given that statute’s text, purpose, and history.¹³⁵

More troubling still, the claim that procedure and substance are inherently connected seems to threaten the substantive waiver doctrine’s animating assumptions. If statutory schemes can depend as strongly on procedural rights as they do on substantive ones,¹³⁶ then the assumption that Congress impliedly deems substantive rights inalienable and procedural rights exchangeable in private markets becomes suspect. The predispute waiver of procedural rights could very easily disrupt a statute’s purposes. In the employment context, the real problem with private waivers of statutory rights may be that inequality in bargaining power endemic to the employment relationship jeopardizes the voluntariness of employee waivers,¹³⁷ a problem that would seem to apply to both types of statutory rights.

B. *The Substantive Waiver Doctrine’s Solutions*

None of the objections raised here should deter the Court from continuing to enforce the substantive waiver doctrine. As Professor John Hart Ely has argued, the difficulty in establishing a comprehensively applicable definition of procedure and substance “need not imply that they can have no meaning at all.”¹³⁸ “[O]rdinary language and . . . the settled judgments of competent legal practitioners” display a reasonably stable understanding of procedural versus substantive rights.¹³⁹

¹³⁴ 29 U.S.C. § 157 (2012).

¹³⁵ See Note, *supra* note 89.

¹³⁶ Cf. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Commerce) (“I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.”).

¹³⁷ Cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73–75 (1990) (treating the employer’s power to withhold employment from applicants as coercion of constitutional magnitude, violating the First Amendment when the employment condition threatens freedom of political association); *Novosel v. Nationwide*, 721 F.2d 894, 899–900 (3d Cir. 1983) (explaining that the Court’s workplace political association cases turned on the coercive economic power of the employer, not state action); *Vegeahn v. Guntner*, 167 Mass. 92, 107–09 (1896) (Holmes, J., dissenting) (arguing that capitalist economies result in powerful concentrations of economic power on the side of employers that should be countered by equally strong “combination[s],” *id.* at 107, on the part of employees). *But see* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (requiring more than a showing of “[m]ere inequality in bargaining power” between employers and employees to invalidate arbitration agreements).

¹³⁸ John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974).

¹³⁹ Solum, *supra* note 87, at 195.

As a supplement to these sources of guidance, attention to “the background justification” for the rule would aid courts in its application.¹⁴⁰ After all, commentators have long argued in other areas of the law that the meaning of “procedure” and “substance” derives primarily from the purpose of the doctrinal inquiry¹⁴¹ — “the ‘line’ can be drawn only in the light of the purpose in view.”¹⁴² Arbitration law draws the line in order to effectuate congressional statutes. Where enforcing prospective waiver of a right would elevate a private contract above the text of statutes — such as an FLSA minimum wage requirement that workers and employers could contract out of — that right should be considered substantive for the purposes of that statute.¹⁴³

As for the risk that waivers of procedural rights may undermine a statutory scheme, the solution is not to abandon the substantive waiver doctrine as internally confused, but instead to reanimate the effective vindication rule, which mitigates the problem caused by the conceptual connection between procedural and substantive rights. Arbitration agreements that waive procedural rights in a manner that effectively relinquishes substantive rights should be invalid.

The procedure-substance distinction better reconciles the FAA’s mandate with other statutory regimes than its alternative — a presumption in favor of waivability of all statutory rights absent a clear contrary textual statement.¹⁴⁴ Part II has demonstrated that such a presumption would misread both the FAA, whose command to enforce arbitration agreements applies only to procedural statutory rights, and federal employment statutes, which override predispute waivers that contradict their remedial and deterrent schemata. Congress passed the major employment statutes, including the NLRA, because it distrusted individual contracting between employees and their employers, and in-

¹⁴⁰ Vermeule, *supra* note 114, at 356.

¹⁴¹ See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 26 (2010) (arguing that when it comes to the Rules Enabling Act’s procedure-substance distinction, “enlightened interpretation must be informed by attention to purpose”).

¹⁴² Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933).

¹⁴³ The analysis resembles “[p]reemption based on impossibility.” Meltzer, *supra* note 95, at 31. Professor Daniel Meltzer notes that the FAA preempts state statutes that require judicial adjudication “because it is not possible for the same dispute to be resolved both by arbitration (as the FAA prescribes) and by a court (as the state law requires).” *Id.* at 32. Although this analysis does not derive from any textual preemption clause in the FAA — the preemption is “implied” — the inquiry resembles textualism in that “the implication seems rather clear,” closely following from the text of the Supremacy Clause. *Id.*

¹⁴⁴ For a critique of clear statement rules in constitutional interpretation, see John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010), arguing that clear statement rules “impose something of a clarity tax upon legislative proceedings,” *id.* at 403.

tended to displace ordinary contract law in certain contexts.¹⁴⁵ Given Congress's goal of overriding private bargaining, courts should not read employment statutes as allowing private waivers of their most important regulatory provisions. To do so would abandon "the public meaning of the enacted text, understood in context (as all texts must be),"¹⁴⁶ and ascribe to Congress an implausible intent to render its statutory rights illusory. Indeed, the increase in prevalence of form arbitration agreements in consumer and employment contexts "may be seen as part of an overall campaign to reduce the effectiveness of federal regulatory law and public enforcement proceedings"¹⁴⁷ and to "replace the rule of law with nonlegal values."¹⁴⁸ Courts should avoid interpretations of statutes that contradict their textually discernible functions.

The doctrinal context in which Congress passed the major employment statutes further supports the conclusion that their substantive rights are presumptively nonwaivable. Congress passed these statutes, including the NLRA, during an era in which the Court persistently refused to enforce waivers of any statutory rights, whether procedural or substantive.¹⁴⁹ Had Congress wanted to allow parties to waive section 7 rights, for example, it would have had to expressly say so, or the courts would not have enforced the agreements. The substantive waiver doctrine therefore better reconciles the FAA with employment statutes by effectuating Congress's intent to insulate the core employment rights from mandatory, predispute waiver.

CONCLUSION

This Note has attempted to clarify the legal and functional foundations of the substantive waiver doctrine in anticipation of the Supreme Court's resolution of the circuit split over the enforceability of individual arbitration agreements. Assuming the Court finds, as it should, that section 7 includes employees' right to bring collective proceedings,¹⁵⁰ the analysis that follows should be relatively straightforward.

¹⁴⁵ See Silverstein, *supra* note 17, at 480; see also *id.* at 485 ("[T]he *raison d'être* for government intervention was dissatisfaction with practices in the workplace.").

¹⁴⁶ Manning, *supra* note 99, at 420.

¹⁴⁷ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 12–13 (2010).

¹⁴⁸ Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 677 (1986).

¹⁴⁹ See *supra* p. 2208.

¹⁵⁰ See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (citing numerous cases that hold section 7 includes the right to "resort to administrative and judicial forums" to improve working conditions); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (holding that a class or collective action filed by workers "to achieve more favorable terms or conditions of employ-

The substantive waiver doctrine would require the Court to hold that access to collective adjudication of employment disputes is a nonwaivable substantive right under the NLRA.

To hold otherwise would privilege private contracting above a clear federal statute. Before the NLRA, employers were free to require employees to abstain from collective action in the workplace. But in passing the NLRA and its subsequent amendments, Congress granted workers new rights designed to “encourag[e] employees to promote their interests *collectively*.”¹⁵¹ “The very purpose of providing by statute for” these section 7 rights was “to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.”¹⁵² To allow employers to condition employment on the waiver of the right to “collective activity” would return employment law to a pre-NLRA era in which Congress had never explicitly granted workers collective rights that “supersede” individual contracting.

Class actions may be procedural devices in certain contexts,¹⁵³ but the right to resolve workplace disputes collectively, rather than individually, is substantive under the NLRA.¹⁵⁴ In the ADEA and FLSA, class actions function as a procedural method for pursuing the substantive employment policies that those statutes grant individual workers — freedom from age discrimination and the right to a minimum wage and overtime benefits. The NLRA’s “central project,” however, is very different. It aims to facilitate “workers’ collective action, in its highly variable incarnations,”¹⁵⁵ primarily through the provision of the rights enumerated in section 7. These rights are the core of the NLRA, integral to the “balance of power between labor and management expressed in our national labor policy.”¹⁵⁶ Under the

ment is ‘concerted activity’ under § 7 of the National Labor Relations Act”); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296–97 (5th Cir. 1976) (same).

¹⁵¹ *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing the purpose of the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187 (2012))).

¹⁵² *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (describing the purpose of section 7’s right to collective bargaining).

¹⁵³ See generally Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

¹⁵⁴ See, e.g., Benjamin Sachs, *Arbitration and Labor Law: Where the Fifth Circuit Went Wrong in Horton*, ON LABOR (Dec. 5, 2013), <https://onlabor.org/2013/12/05/arbitration-and-labor-law-where-the-fifth-circuit-went-wrong-in-horton/> [<https://perma.cc/LU22-9KZU>] (“Section 7 of the NLRA contains the core substantive rights of federal labor law.”).

¹⁵⁵ Benjamin I. Sachs, Essay, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 400 (2007).

¹⁵⁶ *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964) (discussing the balance of power in the preemption context). If the NLRA displaces even state laws that grant workers additional labor rights, on the theory that such laws alter the balance of power the NLRA struck between workers and employers, see *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v.*

NLRA, collective action does not serve as a means of securing other NLRA rights — section 7 rights are “‘the rights themselves’ for which a party seeks relief from the NLRB or the courts.”¹⁵⁷ Because the NLRA could not serve its remedial function if employers could require employees to prospectively waive NLRA remedies as a condition of employment, it impliedly forbids such agreements as waivers of substantive rights.

The text of section 8(a)(1) supports the conclusion that section 7 is substantive. Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].”¹⁵⁸ Conditioning employment on the waiver of section 7 rights would, as a matter of logic and plain meaning, “interfere with, restrain, or coerce employees” in their ability to exercise those rights. Such a requirement would make it impossible for employees to both exercise their section 7 rights and remain employed, a result that section 8(a)(1) explicitly forbids.

The substantive waiver doctrine plays a crucial role in reconciling the FAA’s requirement that courts enforce arbitration agreements with Congress’s declaration of substantive regulatory policies in other statutes. In a constitutional system that vests primary lawmaking authority in the legislature,¹⁵⁹ courts should strive to be “honest agents of the political branches.”¹⁶⁰ While the judiciary has the power “to say what the law is,”¹⁶¹ it is “the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.”¹⁶² Should the Court abandon the substantive waiver doctrine and enforce waivers of substantive rights, it would unjustifiably expand the FAA’s mandate at the expense of equal federal statutes of enormous importance.

Wis. Emp’t Relations Comm’n, 427 U.S. 132, 149–51 (1976), then it surely displaces private agreements that fundamentally alter its carefully designed balance of power.

¹⁵⁷ Schwartz, *supra* note 123, at 2983 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407–08 (2010) (plurality opinion)).

¹⁵⁸ 29 U.S.C. § 158(a)(1) (2012).

¹⁵⁹ U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”); see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19–24 (1985) (arguing that separation of powers limits courts’ law-making discretion).

¹⁶⁰ Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962).

¹⁶¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁶² *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).