A Critical Perspective on the Interplay between Our Federal Labor and Arbitration Laws

Kenneth T. Lopatka
A CRITICAL PERSPECTIVE ON THE INTERPLAY
BETWEEN OUR FEDERAL LABOR AND ARBITRATION LAWS

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      In Gilmer v. Interstate/Johnson Lane Corp.,¹ the United States Supreme Court ruled that an employer’s agreement with an employee providing for the arbitration of statutory discrimination claims is enforceable under the Federal Arbitration Act (FAA)² and thus precludes a lawsuit under such a statute,³ in this

*Adjunct Professor of Law, Charleston School of Law. © 2011 Kenneth T. Lopatka. All rights reserved.
3. Gilmer, 500 U.S. at 23, 26, 35.
case the Age Discrimination in Employment Act (ADEA). In *U-Haul Co. of California*, the National Labor Relations Board (NLRB or the Board) essentially took for granted, with only a footnote explanation, that a claim under the National Labor Relations Act (NLRA) alleging an unfair labor practice is not governed by *Gilmer*. The issue that divided the Board panel in *U-Haul* was whether employees reasonably would understand the language of the arbitration agreement to cover unfair labor practice claims. Although the arbitration provision named other statutes, which are enforceable by filing an action in court, but not NLRA claims, which are not so enforceable; and although an explanatory memo stated that the arbitration provision covered claims that courts are authorized to entertain, the panel majority was convinced that employees reasonably would not interpret the memo’s language literally. They ruled that the arbitration agreement itself was unlawful. Part I of this Article examines the issue that the Board in *U-Haul* gave the back of its hand—whether it is entitled to an exemption from the FAA and if so, why?

In that connection, Part I also explores whether the Board should take account of the FAA’s strong pro-arbitration policy, even if it is not strictly within its grip, and what is the basis for the Board’s refusal to do so. The answers to these questions inform the answer to a question that the Board and the courts have not yet confronted. The lesson from *U-Haul* is that an employer must make an exception for NLRA claims from an arbitration agreement that covers all other statutory claims in order to save it from condemnation at the hands of the Board. Part II of this Article examines whether even that exception saves the arbitration agreement. More specifically, because an arbitration agreement that covers claims under labor and employment statutes apart from the NLRA explicitly or implicitly bars class actions and, perhaps, class grievances, does that bar run afool of employees’ NLRA right to engage in “concerted activities” for their mutual aid or protection?

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6. 347 N.L.R.B. at 378 n.11.
9. Id. at 377.
10. Id. at 377–78.
11. Id.
12. Id. at 377.
I. ARBITRATION AGREEMENTS COVERING UNFAIR LABOR PRACTICE CLAIMS

A. The Board’s Dispatch of Gilmer

Relying on the Supreme Court’s statement in Gilmer that employees who have agreed to arbitrate their statutory discrimination claims remain free to file a charge with the Equal Employment Opportunity Commission (EEOC),16 the Board in U-Haul concluded that employees are unable to waive their right to file unfair labor practice charges.17 That reliance overlooks a significant difference between the two kinds of charges. An EEOC charge simply triggers an investigation and, perhaps, a conciliation effort, but does not begin the adjudicatory process, which the EEOC lacks the authority to conduct.18 An unfair labor practice charge does begin that process before the NLRB, an agency that does have adjudicatory power.19 Apart from the minuscule number of cases in which the EEOC files suit in its own name,20 an EEOC charge results in an adjudication of an employee’s Title VII, Americans with Disabilities Act (ADA) or ADEA claim only if the employee files suit in federal or state court.21 Gilmer held, however, that the FAA precludes the maintenance of such a suit on the theory that if a party has clearly and unmistakably made an agreement to arbitrate a statutory claim, “the party should be held to it unless Congress itself

21. See supra note 18 and accompanying text. Federal and state courts have concurrent jurisdiction over suits for the violation of these federal antidiscrimination statutes. See Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 825–26 (1990) (finding concurrent jurisdiction in Title VII actions, similar to the ADEA); Krouse v. Am. Sterilizer Co., 872 F. Supp. 203, 205 (W.D. Pa. 1994) (explaining that federal and state courts have concurrent jurisdiction over ADA suits); Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 216(b), 626(c)(1) (2006). However, the FAA, enacted under and reaching to the full extent of Congress’s commerce clause power, preempts state law except insofar as 9 U.S.C. § 2 permits arbitration agreements to be invalidated under state contract law principles applicable to any contract. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 272, 278, 281 (1995) (citing Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984)). How far a state can go in refusing to enforce arbitration agreements in the name of its general contract law principles and still avoid FAA preemption is a complex question. In general, if such a contract principle sufficiently frustrates arbitration’s informality advantage, it is preempted. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (explaining that the FAA preempts California law conditioning enforceability of adhesion contracts on the availability of class arbitrations).
has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." An unfair labor practice charge, in contrast, does result in the adjudication of an employee’s statutory claim. Thus, an unfair labor practice charge serves a function similar to a complaint in federal court. From this perspective, the Board would be obliged to treat the agreement to arbitrate as a reason to stay its adjudicative process.

B. The Uncertainty of Congressional Intent Regarding NLRB Forum Waivers

With respect to the exception for statutory claims for which Congress intended to preclude waivers of the usual forum, the indicia of congressional intent regarding the NLRA are inconclusive. As sources of this often illusive legislative intent, the Court has pointed to the text of a statute and its legislative history, as well as any inherent conflict between arbitration and the statute’s underlying purpose. Section 10(a) of the NLRA provides that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” This language may—but need not—be interpreted to preclude a forum waiver. Giving effect to a waiver of recourse to the Board in favor of arbitration is not synonymous with depriving the Board of the power to adjudicate the very same unfair labor practice claims that would be presented to an arbitrator. Although the Supreme Court has observed that the Board depends upon charges filed with it to be able to adjudicate unfair labor practices, unlike EEOC charges, which can be filed only by “a person claiming to be aggrieved,” there is no standing requirement or other eligibility limitation on

23. See U-Haul Co. of Cal., 347 N.L.R.B. 375, 381 (2006) (Battista, Chairman, dissenting in part) (stating that an unfair labor practice claim is made exclusively to the NLRB, an agency with adjudicatory powers), enforced, 255 F. App’x 527, 528 (D.C. Cir. 2007).
24. See id.
26. See supra text accompanying note 22.
30. Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. § 2000e-5(b) (2006). The ADA incorporates this provision of Title VII regarding who can file a charge that the EEOC is authorized to investigate, and also uses the phrase “person alleging discrimination on the basis of disability.” Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12117(a) (2006). In reference to who may bring a civil action, the ADEA refers to “[a]ny person aggrieved,” but
who can file unfair labor practice charges. Surprising as it may seem, the Board’s rules do not even require charging parties to have first-hand knowledge of what they allege. The EEOC is authorized to file its own charges, though it infrequently does so, and the NLRB cannot. Nevertheless, since anyone can file an unfair labor practice charge, holding a party to his agreement to arbitrate unfair labor practice claims does not disempower the Board from adjudicating the unfair labor practice claim that goes to arbitration.

As indicative of congressional intent, the Board surely will point to Congress’s painstakingly crafted administrative enforcement mechanism. That mechanism includes the separate General Counsel, who has the same political qualifications as Board members, acts as the prosecutor, and is guided by the public interest, the five Board members, who serve staggered terms, are nominated by the President, and, except for recess appointees, must be confirmed by the Senate according to a bygone era’s political compromise; and, the administrative adjudication scheme, which is peculiar in various respects including one-sided General-Counsel-only prehearing discovery, separate trial and Board review stages, a standard notice-posting remedy, and requires that a person must first file a charge with the EEOC indicating “the alleged unlawful practice.” Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 626(c)(1)–(d)(1) (2006).

31. The NLRA contains no limitation on who can file a charge, providing instead, “[w]henever it is charged.” NLRA § 10(b), 29 U.S.C. § 160(b) (2006). It is therefore not surprising that the Board has found no standing requirement for filing a charge. See Alfred M. Lewis, Inc., 229 N.L.R.B. 757, 765 (1977), enforced in relevant part, 587 F.2d 403, 413 (9th Cir. 1978).

32. See 29 C.F.R. § 101.2 (1988); Green Valley Manor, L.L.C, 353 N.L.R.B. 905, 907 (2009). Of course, a party to an arbitration agreement may not evade the agreement simply by enlisting an agent to file a charge with the Board. See Hammontree v. NLRB, 925 F.2d 1486, 1494 n.15 (D.C. Cir. 1991) (quoting Consol. Freightways Corp., 288 N.L.R.B. 1252, 1255 (1988)). Presumably, therefore, anyone except an agent of an employee contractually obligated to arbitrate could bring the same issue to the Board, so the universe of potential charge filers remains expansive.

33. See supra note 20.

34. Hosp. & Serv. Emps. Union, Local 399 v. NLRB, 798 F.2d 1245, 1249 (9th Cir. 1986) (citing NLRB v. Inland Empire Meat Co., 611 F.2d 1235, 1237 (9th Cir. 1979)). See also NLRA § 10(b), 29 U.S.C. § 160(b) (providing that the NLRB may issue a complaint when an unfair labor practice has been charged).


41. See NLRA § 10(b), 29 U.S.C. § 160(b).
the availability of judicial review in—coupled with the Board’s need for enforcement of its orders by—an appellate court.\textsuperscript{42} In sum, Congress could not have intended unfair labor practice claims to be submitted to arbitration, which is a different sort of proceeding hallmarked by informality, greater procedural neutrality, and lack of a political mission, or so the argument goes.

The Supreme Court, however, necessarily and repeatedly has rejected similar arguments regarding procedural protections attendant on a judicial forum prescribed for enforcing statutory rights, including more extensive discovery, jury trials, and far more rigorous judicial review, all of which are sacrificed by enforcing agreements to arbitrate.\textsuperscript{43} The Court has also rejected the argument that arbitration would frustrate an administrative agency’s role in the statutory enforcement scheme.\textsuperscript{44} For example, the Securities and Exchange Commission’s (SEC) role in enforcing the Securities Act of 1933 and the Securities Exchange Act of 1934 is critical to effectuating the congressional design, yet the SEC’s key policy-making function does not preclude enforcement of agreements to arbitrate claims under those statutes.\textsuperscript{45} The Board probably perceives its role in the NLRA scheme as more critical than that of the SEC, but that perception is counterbalanced by its willingness to defer to a collectively bargained arbitration process, as explained below.

The Taft-Hartley amendment of the NLRA embodies a strong pro-arbitration policy, albeit for arbitration provisions contained in collective bargaining agreements.\textsuperscript{46} In the so-called \textit{Steelworkers} trilogy and its progeny, the Supreme Court repeatedly emphasized the strength and breadth of this policy.\textsuperscript{47} The

\begin{itemize}
  \item \textsuperscript{42} See NLRA § 10(c)-(f), 29 U.S.C. § 160(c)-(f); \textit{NLRB Process}, supra note 40.
  \item \textsuperscript{44} See \textit{Gilmer}, 500 U.S. at 28–29.
  \item \textsuperscript{45} See \textit{id.} at 29.
  \item \textsuperscript{46} Labor Management Relations (Taft-Hartley) Act §§ 206(d), 301(a), 29 U.S.C. §§ 173(d), 185(a) (2006).
\end{itemize}
Board itself has long recognized the strong statutory policy reasons for deferring unfair labor practice claims to arbitration, even when filed by individuals complaining of unlawful reprisals. The Board also defers to arbitrators' awards, even when it would have decided the underlying statutory issue, which often turns on motive, differently. These cases involve collectively bargained arbitration procedures, but they militate against a conclusion that there is an inherent contradiction between arbitration and the NLRA's underlying purpose.

C. The FAA's Judicial, Not Administrative, Focus

Despite the uncertainty of congressional intent, for several reasons the Board almost certainly is not bound to honor an individual employee's agreement to arbitrate unfair labor practice claims. Preliminarily, these reasons have nothing to do with any assessment of the relative importance of the Board's statutory mission or the indispensability of its supposed "cumulative institutional expertise in administering the Act." It would be unprincipled and irreducibly subjective—if not arrogant—for the Board to suggest that although an arbitrator is capable of resolving Title VII, Section 1981, ADEA, ADA, Fair Labor Standards Act (FLSA), Employee Retirement Income Security Act (ERISA), Family and Medical Leave Act (FMLA), and other statutory claims in the employment arena—not to mention, among others, Sherman Act, Securities

48. See United Techs. Corp., 268 N.L.R.B. 557, 559 (1984) (explaining that where the parties have a collectively bargained arbitration agreement, "it is contrary to the basic principles of the Act for the Board to jump into the fray" before an attempt to arbitrate); Hammond v. NLRB, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (discussing the NLRB's deferral policy).

49. Olin Corp., 268 N.L.R.B. 573, 577 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). The NLRB's Acting General Counsel (AGC) announced that he will urge the Board to tighten the deferral standard articulated in Olin so that an arbitrator's award will warrant deferral only if: (a) the contract term at issue incorporates the relevant statutory right or the parties present the statutory issue to the arbitrator, and (b) "the arbitrator correctly enunciated the applicable statutory principles and applied [those principles] in deciding the [statutory] issue." Memorandum GC 11-05 from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to all Reg'l Dirs., Officers-in-Charge, and Resident Officers, Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases 6-7 (Jan. 20, 2011), available at https://www.nlrb.gov/publications/general-counsel-memos. That does not mean that the arbitrator's application of the statutory principles must yield the same outcome the Board itself would have reached. The AGC will not urge any change in the existing standard, whereby the arbitrator's award warrants deferral so long as it is not "clearly repugnant" to the Act or "palpably erroneous." Id.


Exchange Act of 1934, Securities Act of 1933, Truth in Lending Act, and civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims, all claims fraught with public policy and ones that Congress commissioned the judiciary to resolve with full discovery and procedural protections, including jury trials—arbitrators are not equal to the task of resolving unfair labor practice issues because they occasionally feature important social implications.

The first reason why an arbitration agreement does not preclude the filing of unfair labor practice claims resides in the text and purpose of the FAA. The FAA's procedural dictates focus on the relationship of the courts to private parties' agreements to arbitrate. For example, § 3 requires a stay, upon application of one of the parties, "of any suit or proceeding . . . brought in any of the courts of the United States upon any issue referable to arbitration." The FAA does not authorize stays of administrative proceedings or give federal courts a jurisdictional basis to do so. Section 4 authorizes the federal district courts to compel delinquent parties to honor agreements to arbitrate. Section 9 empowers federal courts to confirm arbitration awards, and §§ 10 and 11 authorize those courts to vacate and to modify or correct such awards, albeit on


53. In Green Tree, 531 U.S. at 90 (quoting Gilmer, 500 U.S. at 28), the Court stated that "even claims arising under a statute designed to further important social policies may be arbitrated [provided] . . . 'the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" Id. (second alteration in original).


58. Id. § 9.
very limited grounds. These provisions do not address what a federal court can do vis-à-vis an administrative agency or what an administrative agency can or must do in relation to an arbitration agreement or award. The Supreme Court’s comment in Gilmer—that an employee who is a party to an arbitration agreement remains free to file an EEOC charge—simply may reflect the FAA’s focus on the federal courts’ relationship to private parties’ arbitration agreements.

Second, although an unfair labor practice charge triggers the NLRA’s adjudicatory process, it is not the exact equivalent of a complaint filed with a court. A private individual’s filing of an unfair labor practice charge does not result in the Board’s adjudication of issues framed by the charge unless the General Counsel, a statutorily separate part of the NLRB, decides after an investigation to issue a complaint, which he has unreviewable discretion whether or not to do. From this perspective, an unfair labor practice charge resembles an EEOC charge because it precipitates an investigation and a possible settlement effort. It is unlike an EEOC charge, which the aggrieved person virtually always must follow by initiating a lawsuit to obtain relief. Here, the filer of an unfair labor practice charge need not initiate another proceeding to obtain relief; instead, the General Counsel will initiate an unfair labor practice proceeding by issuing a complaint, and the General Counsel is not a party to the agreement to arbitrate. The Supreme Court has held that the EEOC may sue in its own name under the federal antidiscrimination statutes and obtain even monetary relief on behalf of an individual bound by an agreement to arbitrate because the EEOC is not a party to that agreement. The NLRB General Counsel would seem to stand on the same footing when he issues a complaint and seeks relief from the Board.

Because Board orders are not binding unless and until they are enforced by a United States Court of Appeals, the Board must enlist the aid of the courts to enforce a decision that disregards the parties’ agreement to arbitrate the issues the decision resolves. Nevertheless, the FAA does not apply to this enforcement decision. The FAA’s procedural provisions are addressed to federal district courts not courts of appeals. Section 3 of the FAA refers to “any suit or

59. Id. §§ 10–11.
60. See generally id. §§ 3–4, 9–11 (focusing on the relationship of courts to parties’ arbitration agreements).
64. See NLRA § 3(d), 29 U.S.C. § 153(d) (describing the General Counsel’s powers and duties); Vaca v. Sipes, 386 U.S. 171, 182 (1967).
67. See NLRA § 10(e)–(f), 29 U.S.C. § 160(e)–(f).
proceeding brought in any of the courts of the United States," and the NLRB’s petition for enforcement filed in a court of appeals is a proceeding brought in a court of the United States. However, § 3 goes on to say that if the issue is arbitrable, the court "shall on application of one of the parties stay the trial of the action until such arbitration has had." Courts of appeals do not try actions, and by the time the Board petitions such a court for enforcement of its order, a stay of the arbitration would come far too late to serve the intended purpose of giving the parties the benefit of their agreement to avoid litigation in favor of more expeditious arbitration. More importantly, the Board is not a party to the agreement to arbitrate, so when, through the General Counsel, it files a petition for enforcement, it stands in the same nonparty posture as the EEOC.

Third, from a broader policy perspective, the purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Although, perhaps also deserving of attention, administrative agencies’ hostility toward arbitration was not one of the evils at which Congress was aiming. No such hostility existed under English common law, and the few administrative agencies that existed in 1925, when the FAA was first enacted, could not have manifested any hostility to arbitration worthy of congressional attention.

D. The Board and the FAA’s Strong Pro-Arbitration Policy

Although the indicia of congressional intent whether to preclude waiver of the NLRB as a forum in favor of arbitration are not conclusive, the FAA’s failure to address the arbitration of claims to be litigated before administrative agencies, like the NLRB, means that the Board almost certainly is not required to honor an agreement between an employer and an employee to submit unfair labor practice claims to arbitration. The absence of a requirement, however, does not mean that the Board must or should ignore the “liberal federal policy

69. Id.
70. See supra text accompanying note 66.
72. See generally Dean Witter Reynolds, 470 U.S. at 220 (“[P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.”).
74. Gilmer, 500 U.S. at 24.
favoring arbitration agreements." Section 10(a) of the NLRA authorizes the Board to cede its jurisdiction to adjudicate unfair labor practice cases, except in certain industries, to state or territorial labor agencies that apply statutes and interpretive standards consistent with those of the NLRA. An arbitrator authorized to decide unfair labor practice claims similarly would apply the standards the Board applies, vacillating though some of those standards may be. The jurisdictional cession portion of § 10(a), like the ADEA’s provision for concurrent jurisdiction of federal and state courts—mentioned in Gilmer as supportive of the arbitration of ADEA claims—suggests that deference to arbitration is compatible with the NLRA’s statutory scheme.

The procedural provisions of the FAA address the relationship between federal courts and parties to an arbitration agreement, but § 2, the FAA’s “primary substantive provision,” mandates that written arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Section 2 of the FAA bespeaks federal policy no less than the Norris-LaGuardia Act’s § 3, which makes so-called “yellow dog” contracts unenforceable and contrary to public policy. Nearly seventy years ago, the Supreme Court cautioned that “the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”

When the agreement to arbitrate unfair labor practice claims is contained in a collective bargaining agreement, as noted above, the Board has decided that it will not resolve the unfair labor practice claim itself but will defer the claim to arbitration even when the claim alleges the unlawful discharge or discipline of an employee. When the arbitrator renders an award on the merits of such a claim, the Board will defer to the award even if the Board would have decided the issue

78. See Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(c)(1).
82. Id. at 24–25 (quoting 9 U.S.C. § 2) (internal quotation marks omitted).
85. See United Techs. Corp., 268 N.L.R.B. 557, 559 (1984). The Board, however, will not defer § 8(a)(1) or (a)(3) claims to arbitration when they are joined with a § 8(a)(4) claim that alleges retaliation for initiating or participating in a Board proceeding. Int’l Harvester Co., 271 N.L.R.B. 647, 647 (1984); see also Filmation Assocs., 277 N.L.R.B. 1721, 1721–22 (1977) (allowing no deference to arbitration if the alleged violations of § 8(a)(3) and (a)(1) are “closely intertwined” with § 8(a)(4) allegations). But see Equitable Gas Co. v. NLRB, 966 F.2d 861, 865 (4th Cir. 1992); NLRB v. Wilson Freight Co., 604 F.2d 712, 721–22 (1st Cir. 1979).
Arguably, the pro-arbitration policy of the FAA warrants a similar deferential approach to employer agreements with individual employees to arbitrate unfair labor practice claims.

Instead, the Board takes a radically different approach. It declares such agreements to be unlawful. This approach is extraordinary in comparison both to judicial treatment of agreements to arbitrate other statutory claims and to the traditional standards for what constitutes, and is the effect of, an illegal contract. Under the FAA, if an agreement to arbitrate statutory claims satisfies state law standards of unconscionability, fraud, or duress, which are applicable to any contract, it becomes unenforceable—not unlawful. Similarly, if the agreement does not permit effective vindication of the statutory rights, such as by limiting the remedies available under the statute, it may be found unenforceable, not illegal. It does not violate the underlying statute to enter into or maintain in effect such a contract. Under traditional contract law principles, a contract typically is illegal if it calls for the performance of an unlawful act or results from an illegal act, such as collusive bidding. There is nothing unlawful about taking a statutory claim to arbitration, and the agreement to do so is not the result of any illegal conspiracy. Under the same contract principles, an agreement's illegality does not always mean that it is unenforceable; depending on the remedy sought and on equitable considerations, it still may be enforceable.

86. Olin Corp., 268 N.L.R.B. 573, 574 (1984) (stating that an arbitrator’s award will not be disturbed unless it is “clearly repugnant” to the Act).
88. See, e.g., Laster v. AT&T Mobility L.L.C., 584 F.3d 849, 853 (9th Cir. 2009) (holding that the agreement was unenforceable because it was unconscionable under California law), rev’d on other grounds sub nom. AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Alexander v. Anthony Int’l, L.P., 341 F.3d 256, 270 (3d Cir. 2003) (holding an arbitration agreement unenforceable because it was unconscionable under Virgin Islands law); Ticknor v. Choice Hotels Int’l, Inc., 265 F.3d 931, 941–42 (9th Cir. 2001) (holding an arbitration agreement unenforceable because it was unconscionable under Montana contract law).
89. See, e.g., Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 672–73 (6th Cir. 2003) (holding an arbitration agreement provision limiting remedies unenforceable because it undermines Title VII’s remedial and deterrent purposes); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002) (same); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (same). If a damages limitation is ambiguous, however, whether it actually curbs an arbitrator’s authority to award statutory damages is a determination to be made by an arbitrator. PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 407 (2003); Soto-Fonalledas v. Ritz-Carton San Juan Hotel Spa & Casino, 640 F.3d 471, 476–78 (1st Cir. 2011).
90. See Morrison, 317 F.3d at 675 (explaining that because the remedies provision was severable from the contract, the entire contract was not unenforceable or unlawful).
91. See, e.g., Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77–79 (1982) (“There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.”); McMullen v. Hoffman, 174 U.S. 639, 649 (1899) (discussing the illegal nature of a collusive bidding contract); Fitzsimons v. Eagle Brewing Co., 107 F.2d 712, 713 (3d Cir. 1939) (same).
92. See, e.g., Bassidji v. Goe, 413 F.3d 928, 938 (9th Cir. 2005) (explaining that California courts may give force to contracts that are illegal in some aspects).
The Board is not content with unenforceability, invariable or circumstantial. Nothing short of illegality and a sanction suffices.\textsuperscript{93} 

\textit{E. The Board’s Rationale for Condemning Agreements to Arbitrate Unfair Labor Practice Claims}

The Board’s quite different approach, whereby the making of an agreement to arbitrate unfair labor practice claims is unlawful, rests on three premises. First, the filing of unfair labor practice charges with the Board is a substantive right, contained in § 7 of the NLRA,\textsuperscript{94} not simply the initial procedural step in the enforcement process. Second, because § 8(a)(1) prohibits coercion, restraint or interference with employees’ exercise of § 7 rights,\textsuperscript{95} it reaches further than § 8(a)(4), which, like other statutory bans on retaliation or discrimination for recourse to the statutory enforcement mechanism, outlaws employer reprisals for instituting or participating in the Board’s enforcement process.\textsuperscript{96} That further reach extends the scope of illegality to employer rules or policies that are “overbroad” and thereby “chill” employees in their exercise of § 7 rights. Third, when an employer conditions employment on an individual employee’s agreement to arbitrate unfair labor practice claims, the Board may disregard the agreement and treat the arbitration requirement like any chilling rule or policy the employer implements.\textsuperscript{97} Each of these premises deserves careful examination.

\textit{1. The § 7 Right to File Charges with the Board, § 8(a)(4)’s Ban on Retaliation, and the Derivative Violation of § 8(a)(1)}

With regard to the first premise—that § 7 contains the right to file an unfair labor practice charge—§ 7 mentions no such right.\textsuperscript{98} Section 10(b) describes the filing of an unfair labor practice charge as the first step in the Board’s

\begin{footnotesize}
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\item \textsuperscript{94} NLRA § 7, 29 U.S.C. § 157 (2006).
\item \textsuperscript{95} Id. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1).
\item \textsuperscript{96} Id. NLRA § 8(a)(4), 29 U.S.C. § 158(a)(4). Section 8(a)(4) makes it an unfair labor practice for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony” under the Act. Id. This prohibition understandably has been interpreted to ban other kinds of reprisals for other forms of employee participation in Board enforcement proceedings. See, e.g., NLRB v. Scrivener, 405 U.S. 117, 125 (1972) (finding that § 8(a)(4) prohibits retaliation for giving a statement at the request of Board agent investigating someone else’s charge); Romar Refuse Removal, Inc., 314 N.L.R.B. 658, 670–71 (1994) (finding that § 8(a)(4) prohibits reduction in work schedule as well as physical battery); Isla Verde Hotel Corp., 259 N.L.R.B. 496, 509–10 (1981) (finding that § 8(a)(4) prohibits revocation of an agreement condoning misconduct), enforced, 702 F.2d 268, 273 (1st Cir. 1983).
\item \textsuperscript{97} See NLRB v. Indus. Union of Marine & Shipbuilding Workers, 391 U.S. 418, 425 (1968).
\item \textsuperscript{98} NLRA § 7, 29 U.S.C. § 157.
\end{itemize}
\end{footnotesize}
enforcement process, but § 7 is the NLRA's repository of employee rights. Section 8(a)(4) prohibits an employer from taking out any reprisal against an employee for filing a charge with the Board or participating in enforcement proceedings. Employment statutes of more recent vintage contain provisions, like § 10(b), describing employees' opportunity to initiate the enforcement proceedings by filing a charge, and like § 8(a)(4), forbidding discrimination for initiating or participating in enforcement proceedings. In the other statutes, however, these two provisions are sufficient to prevent the full range of reprisals Congress intended to condemn, and no purpose would have been served by adding another provision to make filing a charge a substantive right.

The peculiar structure of the NLRA presented the Board with the opportunity to go further and create a substantive right in § 7. The prohibitions on employer unfair labor practices in § 8(a) are framed as different species of employer conduct that violate rights lodged in § 7; the more particularized species of employer conduct described in § 8(a)(2)–(a)(5) also fall within the broad general language in § 8(a)(1), thereby constituting so-called "derivative violations" of § 8(a)(1). The pertinent structural key is that all proscribed employer conduct is condemned because it infringes on the substantive employee rights housed in § 7. From this perspective, it is consistent with the Act's structure for the Board to find a § 7 right to file unfair labor practice charges that § 8(a)(4), and derivatively § 8(a)(1), forbid employers from retaliating against employees for filing.

The § 7 right to file charges with the Board is not surprising from another perspective. It is well established that the general language in § 7 includes employees' right to file charges with the EEOC and other agencies, and their right to file a lawsuit so long as the requirements of concertedness and mutual aid or protection are satisfied. It would be difficult to treat the filing of an unfair labor practice charge less favorably.

99. Id. NLRA § 10(b), § 160(b).
100. Id. NLRA § 8(a)(4), § 158(a)(4).
104. See id. NLRA § 8(a)(1), (a)(4), § 158(a)(1), (a)(4).
105. See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 565–66 (1978) ("[T]he 'mutual aid or protection clause' [of § 7] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . . ."); Frank Briscoe, Inc. v. NLRB, 637 F.2d 946, 950, 952 (3d Cir. 1981) (under the circumstances filing of EEOC charge was protected, concerted activity, and Title VII does not provide the exclusive remedy for retaliation), aff'd 247 N.L.R.B. 13 (1980); U Ocean Palace Pavilion, Inc., 345 N.L.R.B.
If filing an unfair labor practice charge were treated the same way as filing EEOC charges and lawsuits related to workplace treatment, it would not necessarily qualify as protected, concerted activity. Under the constructive concert theory adopted in Alleluia Cushion Co.,\textsuperscript{106} the Board found concerted activity when a single employee acted alone in filing a charge or lawsuit if the statute invoked was enacted to benefit workers generally,\textsuperscript{107} as all employment-related statutes are. When the Board overruled Alleluia Cushion Co. and its progeny in Meyers Indus., Inc. (Meyers I),\textsuperscript{108} it adopted on remand, following judicial disagreement that the overruling was statutorily required rather than permitted, the traditional standard for concertedness\textsuperscript{109} framed by the Third Circuit in Mushroom Transportation Co. v. NLRB.\textsuperscript{110} Under that traditional standard, a single person's filing a charge with an administrative agency or a lawsuit in court does not qualify as concerted unless it was filed with or on the authority, even if implicit, of other employees.\textsuperscript{111}

Unlike a charge filed with the EEOC or some other agency, or a complaint filed in federal court, however, an unfair labor practice charge may constitute concerted activity irrespective of whether more than one employee collaborates in its framing or filing, whether it is filed with the implicit authorization of at least one other employee, or whether the filer is simply seeking a financial


\textsuperscript{111}Id. In Parexel International, L.L.C., 356 N.L.R.B. No. 82 (Jan. 28, 2011), and Continental Group, Inc., 357 N.L.R.B. No. 39 (Aug. 11, 2011), the Board created two exceptions to the principle that an individual's solitary action does not meet the concerted activity threshold for § 7 protection. In Parexel, one employee had discussed the subject of a wage increase with a coworker—obviously concerted activity—although perhaps not for mutual aid or protection. 356 N.L.R.B. No. 82, slip op. at 1. The Board went out of its way to assume that the individual was not engaged in concerted activity, but found her discharge unlawful anyway on the theory that the employer's motivation was to prevent future instances of protected, concerted activity. Id., slip op. at 4. It remains to be seen how far the Board will use this so-called "preemptive strike" theory to erode the Myers II/Mushroom Transportation analytical framework. See id., slip op. at 3. In Continental Group, the Board avowedly embraced the notion that conduct can be "protected but not "concerted." 357 N.L.R.B. No. 39, slip op. at 5. According to the Board, if an employee's solitary conduct "touches the concerns animating Section 7 (e.g. conduct that seeks higher wages) but is not protected by the Act because it is not concerted," the Board will confer protection nonetheless in cases where the employer disciplines that employee for breaching an overbroad rule. Id. The scope of "concerns animating Section 7" is uncertain, but it doubtfully can be confined to quests for higher wages and may well extend to any sought-after improvement in compensation or working conditions.
benefit for herself alone. Rather, when a single employee acting on his own accord files an unfair labor practice charge, the charge will meet the § 7 concerted activity requirement if the allegation claims some form of reprisal or disadvantage for engaging in protected concerted activity. Presumably the underlying theory posits that such a charge—the statutorily prescribed method of vindicating the right to engage in the underlying protected, concerted activity—becomes a remedial extension of such activity. To be sure, this approach may smack of a constructive concert theory akin to that the Board espoused in Alleluia Cushion Co. but rejected in Meyers I & II. Its application, however, is limited to unfair labor practice charges, and it conforms to the language of § 8(a)(4), which forbids retaliation "against an employee because he has filed charges or given testimony under this subchapter."

2. The Independent and Different Violation of § 8(a)(1)

At this juncture in the analysis, the structure of the NLRA and the impossibility of differentiating in terms of coverage between the filing of EEOC charges and federal lawsuits, on the one hand, and unfair labor practice charges, on the other, support the inclusion of the latter among § 7's rights. That proposition, however, does not, without more, lead to the conclusion that agreements to arbitrate unfair labor practice claims are per se unenforceable,
much less unlawful.\textsuperscript{120} Section 8(a)(4) plainly prohibits virtually any conceivable form of employer reprisal for exercising the § 7 right to file an unfair labor practice charge.\textsuperscript{121} An agreement to arbitrate such charges, however, is not a form of reprisal. By its terms, § 8(a)(4) forbids discharging or otherwise discriminating against an employee "because he has filed charges or given testimony under this subchapter."\textsuperscript{122} The phrase "because he has filed," makes the employer's motive for the adverse action, and the causal connection between the adverse action and the employer's hostile motive, essential elements of the violation.\textsuperscript{123} The Board's dialectic for finding agreements to arbitrate unfair labor practice claims unlawful depends on constructing an independent and different violation of § 8(a)(1), even though § 8(a)(4) specifically addresses the filing of unfair labor practice charges.\textsuperscript{124} Interestingly, the Supreme Court specifically reserved the question of whether a violation of § 8(a)(4) also constitutes a violation of § 8(a)(1).\textsuperscript{125} Under the derivative violation theory, the

\textsuperscript{120} See supra text accompanying notes 88–92.

\textsuperscript{121} See, e.g., Romar Refuse Removal, Inc., 314 N.L.R.B. 658, 669–70 (1994) (prohibiting change of status, reduction in work schedule, assault, or discharge); Key Food Stores Coop., 286 N.L.R.B. 1056, 1057 (1987) (prohibiting the threat to discharge and an employer's retaliation of initiating an arbitration proceeding); Clark & Hinojosa, 247 N.L.R.B. 710, 710 n.1 (1980) (reneging on post-termination promise to pay additional severance pay in response to employee threat of filing charge); Pinter Bros., Inc., 233 N.L.R.B. 575, 575 (1977) (prohibiting the denial of bonuses and wage increases, layoffs, refusal to reinstate, and offer of reemployment in more onerous jobs); Burris Indus., Inc., 217 N.L.R.B. 91, 91 n.2, 96 (1975) (reprimand).

\textsuperscript{122} NLRB § 8(a)(4), § 158(a)(4).

\textsuperscript{123} See, e.g., Grand Rapids Die Casting Corp. v. NLRB, 831 F.2d 112, 116–18 (6th Cir. 1987) (stating that the "critical issue is the employer's actual motivation" and that the burden of proof is on the employer to show permissible motivation (quoting NLRB v. Price's Pic-Pac Supermarkets, Inc., 707 F.2d 236, 240 (6th Cir. 1983); NLRB v. Overseas Motor, Inc., 721 F.2d 570, 571 (6th Cir. 1983)); Vokas Provision Co. v. NLRB, 796 F.2d 864, 871 n.10 (6th Cir. 1986) ("[A] section 8(a)(4) violation ordinarily requires a finding of adverse action plus discriminatory intent . . . ."); Gould, Inc. v. NLRB, 612 F.2d 728, 734 (3d Cir. 1979) (citation omitted) (insufficient basis for finding § 8(a)(4) violation that discharge was "motivated in part" by charge filing; violation requires finding supported by substantial evidence that proffered permissible reason was pretext and that "real motive" was charge filing). Western Clinical Laboratory, 225 N.L.R.B. 725, 726 (1976), enforced in part, 571 F.2d 457, 462 (9th Cir. 1978), may be the only decision finding a violation of § 8(a)(4) irrespective of an employer's motive, but it contains no explanation for that linguistic \textit{tour de force} and seems to be aberrational. In this case, the employer, without knowledge of the underlying reason for the employee's absence, charged an employee vacation time, or at least failed to give the employee a sufficient opportunity to use unpaid leave time, when he was absent pursuant to a subpoena to testify in a Board hearing. \textit{Id.} at 725. The Board concluded that this employer action amounted to coercion or restraint—the language used in § 8(a)(1)—regardless of the employer's motive, and branded the violation as one of § 8(a)(4) as well. \textit{Id.} at 726. The Ninth Circuit enforced the Board's order, but did not explain how the employer could have violated § 8(a)(4) absent a retaliatory motive or even knowledge of the reason for the employee's absence. Western Clinical, 571 F.2d at 459.


\textsuperscript{125} NLRB v. Scrivenen, 405 U.S. 117, 125 (1972); see NLRB v. Retail Store Emps. Local 876, 570 F.2d 586, 588 n.1 (6th Cir. 1978).
answer seems to be that it does, but only if the § 8(a)(1) transgression mirrors the § 8(a)(4) violation. If no § 8(a)(4) violation arises because the employer has not retaliated or threatened to retaliate, the violation of § 8(a)(1) depends on whether that subsection has a broader and independent scope in relation to filing unfair labor practice charges.

The proposition that § 8(a)(1) applies independently to the filing of unfair labor practice charges gains support, once again, from the structure of the Act. The subsections in § 8(b) prohibit a series of union unfair labor practices, but they do not include a counterpart to § 8(a)(4). Consequently, unless union retaliation independently violates § 8(b)(1)(A)—which makes it unlawful for a union “to restrain or coerce...employees in the exercise of the rights guaranteed in section [7],” the counterpart to § 8(a)(1) (“interfere with, restrain, or coerce”)—the Act would not prohibit union reprisals against employees for filing unfair labor practice charges against the unions. That result is obviously intolerable, and the Supreme Court so ruled long ago in NLRB v. Industrial Union of Marine & Shipbuilding Workers (Marine & Shipbuilding Workers). If retaliation for filing an unfair labor practice charge violates § 8(b)(1)(A), it also must violate the similar and somewhat broader language in § 8(a)(1). Because, however, the violation of § 8(b)(1)(A) consisted of retaliatory conduct, no more than a violation of counterpart § 8(a)(1)—which is derivative of a violation of § 8(a)(4)—is needed to reach such conduct when committed by an employer.

The Board may argue that a hypothetical rule that flatly forbids filing unfair labor practice charges has to violate § 8(a)(1) and that § 8(a)(1), therefore, necessarily has a broader purview than § 8(a)(4). However, that argument is flawed and does not justify condemning arbitration agreements on any theory that § 8(a)(1) goes beyond § 8(a)(4) in relation to the filing of unfair labor practice charges. A flat ban on filing unfair labor practice charges with the

127. See Bill’s Electric, Inc., 350 N.L.R.B. 292, 295 (2007). In Bill’s Electric, the Board found that an attorney’s letter to noncompliant employees regarding their obligation under a mandatory arbitration policy was unlawful and violated § 8(a)(4), even though it permitted the employees to file unfair labor practice charges, because it also required them to arbitrate such claims. Id. at 296. The letter qualified as a threat of retaliation because the policy was attached to it, and the policy included the reprisal of having to reimburse the employer for its litigation expenses if it obtained a stay of the Board proceeding in favor of arbitration. Id.
129. Id. NLRA § 8(b)(1)(A), § 158(b)(1)(A).
130. Id. NLRA § 8(a)(1), § 158(a)(1).
134. See id. (“[A]ny violation of Section 8(a)(3) and (4) of the Act is also a derivative violation of Section 8(a)(1) of the Act.”).
Board is unlawful because it carries an implicit threat of discipline for recourse to the Board, and for that reason easily violates § 8(a)(4).\textsuperscript{135} If it also violates § 8(a)(1), it does so on a derivative basis,\textsuperscript{136} and there is no need to expand the scope of § 8(a)(1) to embrace an agreement to arbitrate that does not implicitly threaten loss of employment or other discipline.

3. The "Chilling Effect" Theory

Nevertheless, \textit{Marine & Shipbuilding Workers} probably provides the strongest case law support for the Board’s condemnation of an arbitration agreement that covers unfair labor practice claims as a non-derivative violation of § 8(a)(1).\textsuperscript{137} The Supreme Court upheld the Board’s position that a union violated § 8(b)(1)(A) when it expelled a member for filing an unfair labor practice charge without having exhausted the union’s internal remedies.\textsuperscript{138} The Court explained that applying the exhaustion requirement to unfair labor practice charges contravened the policy of unimpeded access to the Board due to the exhaustion rule’s "chilling effect."\textsuperscript{139} This chilling effect rationale is the Board’s theory for declaring a wide variety of employer rules to be unlawful.\textsuperscript{140}

The exhaustion requirement at issue in \textit{Marine & Shipbuilding Workers} was different from an arbitration agreement in two respects. First, the exhaustion requirement was a disciplinary requirement that the union actually enforced by expelling the member involved,\textsuperscript{141} but an agreement to arbitrate statutory claims of any sort is not a disciplinary rule. To the extent that the exhaustion requirement chilled the member, it diminished his enthusiasm for filing unfair labor practice charges by the threat of discipline,\textsuperscript{142} whereas an arbitration agreement holds no threat of discipline over the employee's head. Employers propose agreements to arbitrate statutory claims so that they have a contractual defense to an employee who ignores the agreement and files the claim in another forum.\textsuperscript{143} Second, unlike an arbitration agreement, an exhaustion requirement does not yield an impartial or final resolution of the issues.\textsuperscript{144} In the Court's words, "[i]f the member becomes exhausted" during the process of the interested

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} See infra text accompanying notes 156–161.
\textsuperscript{141} Marine & Shipbuilding Workers, 391 U.S. at 421.
\textsuperscript{142} Id. at 425.
\textsuperscript{143} See Matthew T. Bodie, Questions About the Efficiency of Employment Arbitration Agreements, 39 GA. L. REV. 1, 3 (2004).
\textsuperscript{144} See Marine & Shipbuilding Workers, 391 U.S. at 425; Julie R. Vacura, Arbitration and NLRB Deferral: From Spielberg to Suburban Motor Freight and Beyond, 20 WILAMETTE L. REV. 785, 786 (1984) ("An arbitral award is the final resolution to a dispute.").
party's reconsideration of its own actions, "the issues of public policy are never reached and an airing of the grievance never had." In contrast, the arbitration process leads directly to a resolution of the issues and an airing of the grievance, and it typically does so far more quickly and less exhaustingly than the Board's processes. In the end, although Justice Douglas's opinion refers to the exhaustion rule's chilling effect, the Court's holding was not that an exhaustion rule untied to disciplinary enforcement was itself unlawful, but rather that failure to comply with such a rule, which does not lead to an impartial resolution of the issues, is not a defense to discipline for filing an unfair labor practice charge.

The chilling effect theory, like public policy, is "a very unruly horse." The Board once invoked the chilling effect theory to condemn a proposal, advanced during collective bargaining negotiations, that employees must exhaust a grievance procedure before they could have recourse in the courts or administrative agencies, including the Board. The Board apparently no longer subscribes to that position and condemns grievance-arbitration exhaustion requirements only if they import, at least implicitly, some kind of penalty for noncompliance. The chilling effect theory, however, semantically can fit a rule or agreement untethered to discipline, and constitutes an imprecise instrument that may be pressed into service to condemn a wide variety of neutral rules or policies.

The Board in *U-Haul* relied on *Martin Luther Memorial Home, Inc.*, which reaffirmed and perpetuated a series of fairly contemporary chilling effect cases that had condemned behavioral rules employees would reasonably understand to prohibit or restrict § 7 rights. Often, ambiguous rules in such cases chilled employee rights to make false statements when criticizing management actions or policies, to utter abusive statements when trying to convince coworkers to sign union authorization cards, to harass coworkers

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145. 391 U.S. at 425.

146. See Vacura, supra note 144, at 786 (citing Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979)) (discussing the benefits of arbitration as compared to litigation).

147. See 391 U.S. at 428.


150. See, e.g., Bills Electric, Inc., 350 N.L.R.B. 292, 296, 307 (2007) (describing a penalty that required reimbursement of employer's litigation expenses if a court dismissed or stayed either court or agency proceeding due to an arbitration agreement).

151. See 391 U.S. at 425.


155. *Martin Luther*, 343 N.L.R.B. at 647; *see also Lafayette Park Hotel*, 326 N.L.R.B. at 829.

156. *See Martin Luther*, 343 N.L.R.B. at 646; *Lafayette Park Hotel*, 326 N.L.R.B. at 829.

into supporting a union without being mandatorily reported,\textsuperscript{158} to contact the media about employment-related complaints without having to obtain prior management approval,\textsuperscript{159} to disclose compensation to and discuss working conditions with coworkers,\textsuperscript{160} to wear union insignia and employer-critical messages on apparel,\textsuperscript{161} among many and various others. The rationale in such cases was relevant in \textit{U-Haul} because it was far from clear that the arbitration agreement actually covered unfair labor practice claims. The chilling effect theory is an unruly horse due to its inherent subjectivity.\textsuperscript{162} Whereas the Board majority in \textit{U-Haul} found that employees reasonably would interpret the arbitration agreement to cover unfair labor practice claims on the hypothesis that they would not interpret an accompanying explanatory memo literally,\textsuperscript{163} in other cases the Board found a chilling effect only on the hypothesis that employees would interpret the rule according to its literal terms.\textsuperscript{164}

More basically, the employer rules declared unlawful in these chilling effect cases differ from a rule requiring the arbitration of statutory claims, including unfair labor practice claims, in two respects. First, the chilling effect, which the Board inferred,\textsuperscript{165} is predictable because the rules plainly were disciplinary rules,\textsuperscript{166} but an arbitration requirement is not a disciplinary rule. Second, once the Board indulged in the literal or nonliteral hypothesis to find that the rule covered a § 7 right,\textsuperscript{167} the restriction or abridgement of that right was straightforward—employees simply could not exercise the § 7 right involved at all or at least as vigorously as they wished—but an arbitration requirement does not prevent employees from pressing with the same zeal the identical underlying unfair labor practice claims they otherwise would bring to the Board. Indeed, in arbitration, employees can control their own cases with their own counsel or

\begin{itemize}
\item \textsuperscript{158} See UAW v. NLRB, 520 F.3d 192, 197 (2d Cir. 2008); Battle Creek Health Sys., 341 N.L.R.B. 882, 895, 899 (2004).
\item \textsuperscript{159} See Crowne Plaza Hotel, 352 N.L.R.B. 382, 386 (2008).
\item \textsuperscript{160} See Inter-Disciplinary Advantage, Inc., 349 N.L.R.B. 480, 503 (2007), \textit{enforced}, 312 F. App'x 737, 751 (6th Cir. 2008).
\item \textsuperscript{162} U-Haul Co. of Cal., 347 N.L.R.B. 375, 377 (2006), \textit{enforced}, 255 F. App'x 527, 528 (D.C. Cir. 2007).
\item \textsuperscript{163} See John Raudabaugh, Overbroad or Ambiguous Employer Rules and Policies: Organized Labor's Toxic Tactic 3 (2009) (unpublished monograph) (on file with author). This former Board member's study of Board decisions applying the chilling effect standard revealed split decisions on nearly 40% of the cases at issue with the outcome dependent on the political allegiance of the majority. \textit{Id.}
\item \textsuperscript{164} \textit{U-Haul}, 347 N.L.R.B. at 377-78.
\item \textsuperscript{165} See, \textit{e.g.}, Cintas Corp., 344 N.L.R.B. 943, 946 (2005), \textit{enforced}, 482 F.3d 463, 465 (D.C. Cir. 2007).
\item \textsuperscript{166} See, \textit{e.g.}, NLRB v. Indus. Union of Marine & Shipbuilding Workers, 391 U.S. 418, 425 (1968).
\item \textsuperscript{167} See supra text accompanying notes 152-161.
\item \textsuperscript{168} See Cintas Corp., 344 N.L.R.B. at 946.
\end{itemize}
other representatives, and they will be able to press their claims even more vigorously than the General Counsel may choose to prosecute their claims before the Board—if the General Counsel decides to prosecute them at all.

The pertinence of the chilling effect theory to an arbitration agreement that unambiguously includes unfair labor practice claims among the statutory claims it covers is open to question, but Justice Douglas’s opinion in *Marine & Shipbuilding Workers* used the theory, and it has become the rationale the Board now uses routinely to condemn as independent violations of § 8(a)(1) the mere maintenance of certain rules or policies. Consequently, it is worthwhile to explore how an arbitration agreement is supposed to accomplish the chill.

One hypothesis is that the chilling effect of an agreement to take unfair labor practice claims to arbitration inheres in the employees’ reluctance to file charges with the Board because they would not understand that the agreement is subject to challenge. The Board once used this theory to declare an agreement that waived employees’ right to file unfair labor practice charges unlawful and not simply invalid. Indeed, the Board asserted that employees could not learn about grounds for challenge from the Board’s agents working in its regional offices because they are not authorized to dispense legal advice. Apart from the dubiousness of that observation and the absence of an arbitral forum in that case, the Board’s approach is noteworthy for its contrasts with surrounding law and with related Board law. Agreements to arbitrate Title VII, ADA, ADEA, FLSA, § 1981, and other statutory claims are voidable if employees successfully challenge them on state contract law grounds, but agreements to arbitrate NLRA claims are flatly unlawful. Whereas employees are expected

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169. See Getman, supra note 146, at 926.
170. National Labor Relations Act (NLRA) § 3(d), 29 U.S.C. § 153(d) (stating that the General Counsel has the “final authority” to prosecute claims).
171. 391 U.S. at 425.
172. See supra text accompanying notes 152–161.
174. Id. The Board ruled that a proposed no strike clause that did not allow employees to contest discipline for violating the clause with the Board or in any other tribunal was an unlawful, and thus a nonmandatory, bargaining subject. Id.
175. Id.
176. Id. The Board, albeit probably unwittingly, has abandoned this position. Indeed, it emphasizes that the invitation on the NLRA rights notice—which employers now must post—to contact the Board’s regional offices or headquarters via hotline is meant to encourage employees to obtain advice from the Board on issues such as statutory coverage, what conduct is prohibited, whether they have rights in specific factual circumstances, and how to exercise their rights, among others. See Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,021–27, 54,031 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).
177. Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (refusing to compel arbitration of plaintiff’s Title VII and ADA claims because the employer gave no consideration for the agreement); see supra text accompanying notes 88–89.
to obtain advice on their own—perhaps from the EEOC or the Department of Labor—regarding the grounds on which agreements to arbitrate all these other statutory claims may be challenged, the NLRB makes a paternalistic assumption that employees covered by the NLRA are incapable of or disinterested in discovering grounds for challenge on their own.

A more straightforward chilling effect hypothesis posits that an arbitration agreement would induce employees to go to arbitration instead of the Board to present their substantive statutory claims, or induce those who do not feel strongly enough about their chances of success in arbitration, or their chances of successfully challenging the arbitration agreement at the Board, to let their claims expire. Of course, only the subset of such employees that, despite their lack of confidence in prevailing in arbitration, would have sufficient confidence in prevailing at the Board to file a charge are candidates for concern and of those employees, a chilling effect would be worth worrying about only for the fraction whose charges the Board would find meritorious. The size of this population is unknown and quite speculative. Whatever its size, for this group and for the entire employee population, however, fear of discipline or other penalty is not a motivation, and in case there is any doubt, virtually any employer would be willing to make explicit in the arbitration agreement what already is implicit—that the agreement to arbitrate is not a disciplinary rule, that employees have the opportunity to mount a legal challenge to the agreement, and that anyone who seizes that opportunity will not be disciplined or otherwise penalized for doing so. Although the Board relies on chilling effect case law where fear of discipline is the rationale, it should be apparent that an explicit assurance of safety from discipline would not beget a different result. This virtual certainty suggests that the real rationale for the Board’s position lies in doctrines or practical considerations that explain a basic unwillingness to allow arbitrators to decide unfair labor practice claims.

4. The Unlawful Condition Theory

The Board undoubtedly will contend that although an arbitration agreement is not a disciplinary rule, it suffices to make out a violation in that it is extracted from employees as a condition of employment. In other words, there is no difference between making continued employment conditional on compliance and obtaining a job conditional on entering into an agreement with which one need not comply in order to keep the job. That contention beckons an examination of the case law.

179. Cf. Gibson, 121 F.3d at 1131 (noting relevance of employee knowingly entering into arbitration agreement without mentioning employee cognizance of grounds for challenge).
180. See Reichhold, 288 N.L.R.B. at 72.
181. See id.
Preliminarily, in the seminal decision underlying this argument, the Supreme Court referred to the obvious impossibility of permitting employers to extract agreements from their employees "not to demand performance of the duties which [the NLRA] imposes." The term "duties" suggests that the Court was not contemplating agreements to substitute arbitration as the forum for claims that the employer breached duties, which the agreements leave completely unmodified.

In support of the proposition that agreements extracted as a condition of employment to waive § 7 rights are unlawful, the Board, of course, can point to plentiful precedent involving the § 7 rights to join or support a union, to engage in a strike, to enlist media and public support, and so forth. Only a few cases involve the § 7 right to file unfair labor practice charges, but those cases are distinguishable. In some cases, the employees were entitled to their jobs, as in the case of unfair labor practice strikers, as to whom any condition would have been unlawful. In other cases, employees would have suffered a penalty for filing a charge with the Board, such as a forfeiture of contractual or statutory rights, as the price for recourse to the Board.

Even where there is no right to the job and no continuing threat of reprisal, it is fair to assume that a condition of employment whereby an employee waives the right to file charges with the Board would be unlawful. In this situation and in all the decided cases, the agreement does not simply give employees another forum in which to press their claims. Instead, the agreement leaves the employees with no forum at all and thus, completely helpless to vindicate their underlying statutory rights. Such agreements are the functional equivalent of the waivers of substantive rights and duties that obviously are impermissible. An agreement to arbitrate unfair labor practice claims provides an alternative forum for vindicating those claims and does not exact any forfeiture of substantive rights or relaxation of substantive duties—statutory or contractual, actual or hoped for—as the price for vindicating those claims.

Finally, with respect to the unlawful condition theory, the unlawfulness of an agreement that substitutes arbitration for recourse to the NLRB for claims arising

184. Id. at 364.
186. See, e.g., Am. Cyanamid Co. v. NLRB, 592 F.2d 356, 359, 363–364 (7th Cir. 1979) (holding as unlawful a waiver of recourse to the Board as a condition on an unfair labor practice strikers' reinstatement); Isla Verde Hotel Corp., 259 N.L.R.B. 496, 503 (1981) (same), enforced, 702 F.2d 268, 273 (1st Cir. 1983).
188. See, e.g., Am. Cyanamid, 592 F.2d at 359, 363–64 (discussing an agreement that required employees to forfeit any right to seek redress); Isla Verde Hotel, 259 N.L.R.B. at 503 (finding an agreement required employees to waive rights of redress).
after the agreement is entered into stands in stark contrast to the NLRB's treatment of agreements not to file unfair labor practice charges in exchange for employment or reinstatement when the claim arises before the agreement is entered into. That is, it is quite lawful for an employer to obtain a complete release, including the withdrawal of an already filed unfair labor practice charge which is being investigated, in a settlement of a contestable discharge or discipline even if the employer proposes, and the agreement provides for, reinstatement only in exchange for the release.\(^\text{189}\) It also is lawful for employers and employees to agree in advance that the employees will be entitled to a benefit, such as a special severance payment or presumably reinstatement, only if they sign a release after a termination that may generate a potential claim.\(^\text{190}\) There is nothing wrong with conditioning employment on a waiver of recourse to the Board in this setting, even though the waiver is not coupled with an alternative forum.\(^\text{191}\) The only difference is that the employee makes this waiver after the employer's challengeable action already has occurred, whereas an arbitration agreement covers challengeable actions that may or may not occur in the future.\(^\text{192}\) Although the Board historically has adopted paternalistic assumptions about employee intelligence and vulnerability,\(^\text{193}\) nothing in the statute requires these assumptions, much less the "more-nice-than-obvious" distinction between intellectual capacity to assess whether an absolute post facto waiver is worthwhile but not a pre facto forum waiver. After all, that distinction does not justify condemning forum waivers under Title VII or other employment statutes.

The instruction is twofold: (1) there is nothing inherently wrong with conditioning employment on a waiver of recourse to the Board, and (2) finding the arbitration agreement, but not the settlement, unlawful has another explanation rooted in policy choices, not wooden dogmas.

189. See, e.g., Mahon v. NLRB, 808 F.2d 1342, 1346 (9th Cir. 1987) (finding that the Board did not abuse its discretion in deciding not to reach the merits of an unfair labor practice claim due to a settlement that reinstated sympathy strikers without back pay in exchange for release of all claims); Coca-Cola Bottling Co. of L.A., 243 N.L.R.B. 501, 503 (1979) (holding that it was not unlawful to include in a settlement of disputed suspension, an agreement to withdraw pending unfair labor practice charges and not to file any future charges over suspension).


191. See id.

192. See generally Bodie, supra note 143, at 18 ("Predispute employment arbitration agreements, however, are signed at the beginning of employment, well before any disputes arise.").


194. See, e.g., Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668, 672–73 (6th Cir. 2003) (holding arbitration agreement unenforceable if its provisions do not permit adequate vindication of statutory rights but effective to waive judicial forum for pursuing prospective statutory claims if knowingly and voluntarily executed).
F. The Alternative Analytical Framework

The Board’s chilling effect and unlawful condition theories rely on the premises that the opportunity to file charges with the Board is a § 7 right and that this right is indistinguishable from other § 7 rights, but that framework is not the only analytical path. Nor is it the way in which agreements to arbitrate claims under virtually all other statutes are analyzed. Once again, in Gilmer as in its FAA predecessors and its progeny, the Supreme Court selected a quite different analytical framework for agreements to arbitrate statutory claims. These agreements do not relinquish substantive statutory rights but simply waive the usual forum in which an employee attempts to establish a violation of those rights. Moreover, because all that is being waived is a forum, not substantive rights, an employer’s conditioning employment on a forum waiver agreement is not unenforceable simply because the employer has considerable bargaining leverage over an applicant for employment, or incumbent employee, and the bargain seems to be a contract of adhesion. Rather, as explained in Part I.D, under the FAA, an agreement to arbitrate statutory claims is unenforceable—not unlawful—only if generally applicable state contract law would make any contract unenforceable for the same reasons or if remedial or other restrictions in the agreement make that particular arbitration procedure ineffective for vindicating the statutory rights.

The Board could have adopted Gilmer’s analytical framework. It was not required either to perpetuate the notion that itself as forum is a § 7 right indistinguishable from substantive § 7 rights when another forum is afforded, or to extend doctrines developed for disciplinary rules and policies or employment conditions that abrogate substantive § 7 rights or remove any forum to vindicate them. As explained above, in order to preserve statutory symmetry, it makes sense to find that § 7 embraces the right to file an unfair labor practice charge, but the structure of the Act does not require any more than protecting the right to file a charge against reprisal or against removal without an adequate arbitral substitute. Although the broad language of § 8(a)(1) literally encompasses any

195. See supra text accompanying notes 22, 43–45, and 51–52.
197. Id.; see 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.”); see also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483 (1989) (explaining that arbitration agreements “like the provision for concurrent jurisdiction [within the Securities Act], serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise”).
198. See Gilmer, 500 U.S. at 33; Seus v. John Nuveen & Co., 146 F.3d 175, 184 (3d. Cir. 1998).
199. See discussion supra Part I.D.
200. See discussion supra Part I.E.
restriction that may be deemed interference, that language obviously cannot be and has not been interpreted literally.

In defense of the Board’s position, it may be argued that the forum versus substantive rights distinction the Supreme Court drew in Gilmer and other FAA decisions is viable only when the substantive right is the right not to be victimized by an employer’s discriminatory practices or conduct (as in Title VII, the ADEA, or the ADA), but not in the case of § 7 where all rights are variations of the employees’ right to engage in self help. The argument essentially posits that it is impossible to separate forum from substance when filing a charge with the Board is simply one form of self help among other forms, such as strikes, recourse to a union or the media, or circulation of protest petitions, which are indisputably substantive § 7 rights.

That argument is unpersuasive for two reasons. First, it overlooks the right of self help that Title VII, the ADEA, the ADA, the FMLA, and other statutes confer. Sections 704(a) of Title VII, 4(d) of the ADEA, 503(a) of the ADA, and 105(a)(2) of the FMLA all protect employees who have either participated in formal enforcement proceedings or otherwise “opposed” discriminatory employment practices, yet the distinction between either form of self help and the choice of forum is still easily drawn. Second, the Board’s deferral to

203. See supra notes 30 and 51 and accompanying text.
207. Thus, enforcement of arbitration agreements as to both kinds of retaliation claims under federal statutes and state statutes modeled on Title VII is routine. See, e.g., Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 79 (2d Cir. 1998) (“[Employee’s] claim of retaliatory discharge, pursuant to 12 U.S.C. § 1831j, was within the scope of the broad arbitration clause in [employee’s] employment agreement.”); McQueen-Starling v. United Health Grp., Inc., 08 Civ. 4885(JGK), 2011 WL 104092, at *5 (S.D.N.Y. Jan. 11, 2011) (upholding an arbitration award in favor of employers in a claim of retaliation and discrimination under New York State’s Human Rights Law and New York City’s Human Right’s Law); Briede v. 24 Hour Fitness, USA, Inc., No. 10-649-HA, 2010 WL 4236929, at *3 (D. Or. Oct. 21, 2010) (holding that an employee’s post-employment retaliation
collective bargaining agreements' arbitration process confirms that it is quite possible to distinguish between recourse to the Board as forum and other § 7 rights.208

G. Balancing

The Board's unarticulated assumption about the equivalency and purpose insensitivity of § 7 rights does not compel its conclusion that agreements to arbitrate unfair labor practice claims violate § 8(a)(1).209 A § 8(a)(1) violation at least depends on a proverbial—and at the margin a very subjective—"balancing" test.210 In some contexts, the employer's justification simply prevails unless its motive is impermissible, but a balancing test otherwise is required.211 According to this test, the extent of the restriction on the particular § 7 right involved and the employer's justification for the rule or policy are weighed in the balance.212 The Board in U-Haul did not engage in that balancing, apparently believing that any justification the employer could offer would be outweighed by the impact on an employees' § 7 right to file unfair labor practice charges with the Board.213 A careful examination of the particular right involved, the impact on employees, and the employer's justification makes this a closer question.

With respect to the particular § 7 right involved, once again characterizing recourse to the Board as a substantive right invites the bestowal of more weight than it deserves as a forum choice. A balance that does not bias the outcome by means of an a priori characterization focuses more on the extent of the restriction

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claim was subject to arbitration pursuant to a state statute that is “patterned after Title VII, which prohibits employment-related discrimination” (citing A.L.P. Inc. v. Bureau of Labor & Indus., 984 P.2d 883, 885 (Or. Ct. App. 1999)); Nunez v. Citibank, N.A., No. 08 CV. 5398 (BSJ), 2009 WL 256107. at *4 (S.D.N.Y. Feb. 3, 2009) (holding that all claims involved in an action by an employee alleging that an employer discriminated and retaliated against the employee in violation of city, state, and federal law were arbitrable); Fisher v. Sutton Place/Pinnacle A.M.S., No. 1:07-CV-1537-DFH-WTL, 2008 WL 2095417 (S.D. Ind. May 16, 2008) (holding that claims of race discrimination and retaliation under Title VII must be arbitrated).

209. See supra Part I.E.
212. Int'l Bus. Machs., 265 N.L.R.B. at 642 (citing Jeannette Corp. v. NLRB, 532 F.2d 916, 918–19 (3d Cir. 1976)).
that an arbitration agreement places on employees’ opportunity to obtain remedial vindication of their rights under the NLRA.

That restriction should not be overestimated. Preliminarily, an employee who has agreed to arbitrate statutory claims would not completely lose the opportunity to have those NLRA or other statutory claims adjudicated by the Board or a court. As noted above, under § 2 of the FAA, an arbitration agreement does not foreclose litigation if it is unenforceable under generally applicable state contract law principles. Although virtually all states’ contract law principles make unenforceable contracts that are, among other grounds, procedurally and substantively unconscionable, the standards for determining what constitutes unconscionability vary, especially when outlier states are included in the comparison. The Board, of course, is not interested in using state law standards, but if it were to look at the standards of the states, such as California, which has broadest opportunity to escape an arbitration agreement due to unconscionability, relatively few arbitration agreements would pass muster.

As also noted above, if restrictions in a particular arbitration agreement deprive employees of an opportunity effectively to vindicate their statutory rights, the arbitration agreement is unenforceable. The Board would be free to adopt its own standards for the enforceability of arbitration agreements, just as it adopted standards for deferral to collectively bargained arbitration agreements. In the end, arbitration agreements need not always foreclose employees from having the Board adjudicate their unfair labor practice claims; and when employees are foreclosed, they still do not lose the opportunity for vindication of their NLRA rights because they can present the claims in arbitration.


215. See supra text accompanying notes 82 and 88.

216. See supra cases cited in notes 88–91.

217. Compare, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072, 1075, 1084 (9th Cir. 2007) (finding a Dispute Resolution Program to be procedurally and substantively unconscionable under California law), with Caley, 428 F.3d at 1377–79 (rejecting claim by employees that dispute resolution policy was unconscionable), and Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 301 & n.5 (5th Cir. 2004) (finding that the arbitration agreement was not unconscionable using Texas law while acknowledging a similar agreement would be unconscionable under California law (citing Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 788 (9th Cir. 2002))).

218. See, e.g., Laster v. AT&T Mobility L.L.C., 584 F.3d 849, 853 (9th Cir. 2009) (California statute makes class grievance ban in certain arbitration agreements unconscionable), rev’d on other grounds sub nom. AT&T Mobility, L.L.C. v. Concepcion, 131 S.Ct. 1740, 1753 (2011) (FAA preempts statute); Davis, 485 F.3d at 1084.


221. See United Techs., 268 N.L.R.B. at 559–60.
From the employee's perspective, the real difference between the pursuit of an unfair labor practice claim at the Board and the pursuit of that claim in arbitration is that the former is undertaken at taxpayer expense, whereas, the latter may involve paying some of the arbitration costs and footing the bill for an attorney or going without legal representation.\textsuperscript{222} Under the FAA, if a party to an arbitration agreement covering statutory claims seeks to invalidate the agreement on the ground that the arbitration costs are prohibitive, that party bears the burden of showing the likelihood of having to absorb such costs, and the agreement's silence does not satisfy that burden.\textsuperscript{223} This principle leaves a number of questions unresolved, including whether it applies to provisions for the splitting or shifting of attorneys' fees when the statute at issue, like Title VII, the ADA, or the ADEA, provides for the recovery of attorneys' fees by successful plaintiffs;\textsuperscript{224} and whether a court should make that determination as a threshold question of enforceability or an arbitrator ought to resolve the apparent conflict between the agreement's attorneys' fee provision and its coverage of claims under such statutes.\textsuperscript{225} The NLRA differs from statutes like Title VII, the ADA, and the ADEA in that it does not provide for the award of attorneys' fees to the successful employee, but instead eliminates the need to spend money on attorneys' fees for those employees whose charges the General Counsel decides to prosecute.\textsuperscript{226} In other words, unlike under more contemporary employment statutes, taxpayers fund the prosecution of such charges. The issue becomes the impact of the costs that an employee must or may have to pay in order to bring an unfair labor practice claim to arbitration.\textsuperscript{227}

When the Board defers to the arbitration process under a collective bargaining agreement,\textsuperscript{228} the individual grievant usually is represented by the union. Therefore, the grievant does not bear the cost alone, but shares it with fellow colleagues who pay dues and even then, ordinarily not beyond the regular

\textsuperscript{222} See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant... from effectively vindicating her federal statutory rights in the arbitral forum.").

\textsuperscript{223} Id. at 91–92.


\textsuperscript{225} See, e.g., Musnick v. King Motor Co., 325 F.3d 1255, 1259 (11th Cir. 2003) (quoting Green Tree, 531 U.S. at 90) (stating that an arbitration agreement is not unenforceable merely because it involves "fee-shifting," when it does not deny statutory rights under Title VII); Blair v. Scott Specialty Gases, 283 F.3d 595, 610 (3d Cir. 2002) (citing Green Tree, 531 U.S. at 90) (same). Compare Thompson v. Irwin Home Equity Corp., 300 F.3d 88, 91–92 (1st Cir. 2002) (holding that an arbitrator must first decide attorneys' fees issue), with Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 & n.5 (9th Cir. 2002) (finding that the mere presence of an arbitration cost shifting provision invalidated the agreement).


\textsuperscript{227} See Green Tree, 531 U.S. at 90.

amount of dues.\(^{229}\) Does the Board declare individual agreements to arbitrate unfair labor practice claims unlawful because it is unwilling to let the cost of arbitration stand in the way of vindicating claims under a statute that, unlike more contemporary employment statutes, features taxpayer funded prosecution of alleged wrongdoers?

Although a seemingly plausible rationale, the cost difference is not the Board's reason for outlawing agreements to arbitrate unfair labor practice claims. Preliminarily, in recent years unions, which generally can afford counsel, have filed between 53% and 58%, and individuals only between 36% and 43%, of the charges the Board received annually.\(^{230}\) The Board does not stay its hand in deference to arbitration when charges are filed by a union rather than an individual employee who is a party to an arbitration agreement, or even inquire whether a union is financing the costs of arbitration.\(^{231}\) When the arbitration agreement is collectively bargained, the Board's deferral criteria do not include whether the union wants to spend its limited funds on the arbitral process.\(^{232}\)

More importantly, an arbitration agreement that does not mention attorneys' fees but covers claims under various statutes,\(^{233}\) including the NLRA, probably would not preclude an arbitrator from awarding fees on a complete remediation theory to an employee who successfully pursues an unfair labor practice claim. Just as the arbitrator can award fees on that theory to employees who successfully pursue claims under statutes authorizing the recovery of such fees,\(^{234}\) the arbitrator would not seem to be barred from awarding fees to the successful unfair labor practice grievant, who would not have paid for an attorney if the General Counsel had prosecuted his claim before the Board.

If the arbitration agreement explicitly, or implicitly, provided for the award of attorneys' fees to the extent a grievant is successful in prosecuting a statutory claim, the only chilling effect that coverage of unfair labor practice claims would produce is limited to two sets of employees: (1) those who do not have good claims, but want a free ride at the taxpayers' expense anyway, and (2) those who have good claims, but lack confidence in their ability to succeed in arbitration.

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\(^{230}\) See 74 NLRB ANN. REP. 91 tbl.1 (2009); 73 NLRB ANN. REP. 77 tbl.1 (2008); 72 NLRB ANN. REP. 119 tbl.1 (2007); 71 NLRB ANN. REP. app. at 117 tbl.1 (2006); 70 NLRB ANN. REP. app. at 104 tbl.1 (2005).

\(^{231}\) See U-Haul Co. of Cal., 347 N.L.R.B. 375, 377 (2006), enforced, 255 F. App'x 527, 528 (D.C. Cir. 2007). Compare NLRB v. City Disposals Sys., Inc., 465 U.S. 822, 827, 841 (1984) (noting individual had right to act alone in filing a charge with the Board absent union support), with United Techs., 268 N.L.R.B. at 557, 559–60 (holding that where a union filed a grievance for an employee, the claim was best suited for arbitration as agreed in collective bargaining).

\(^{232}\) See United Techs., 268 N.L.R.B. at 559–60.


while having enough confidence to file a charge with the Board. The first set
deserves no concern. With regard to the second set, because only about 35% of
the unfair labor practice charges have sufficient merit for the General Counsel to
prosecute (and the merit percentage is probably lower for charges filed by
individuals rather than unions or employers), the psychological disincentive
due to loss of the free ride is worth worrying about only in relation to that
portion of the 35% for whom the recovery of attorneys' fees would be
insufficient to overcome their fear of losing in arbitration despite their belief
that they have a good claim, but for whom the General Counsel would be successful.
Even that group has to be reduced by the number of employees who are willing
to go to arbitration if they can find an attorney to pursue their claim on a
contingent fee basis. It is doubtful that solicitude for the hypothetical and
probably small remaining subset of employees tips the balance in favor of
condemning all agreements to arbitrate.

Lest the cost difference still seems critical to the Board's condemnation of
agreements to arbitrate unfair labor practice claims, two considerations militate
against this hypothesis. First, the 65% of persons who file non-meritorious
charges with the Board get no therapeutic value out of the process because
they do not get their day in court, but everyone who files a charge in the form of
a grievance gets his or her day in court, so to speak. An employee need not
hire an attorney to obtain the therapeutic value of being able to confront and
cross-examine the employer at a hearing and obtain an impartial arbitrator's
decision on the merits. The taxpayer funded NLRB process does not offer that
therapy to claimants in the 65% majority, and that difference may offset, to a
degree, the cost differential. Second, and more poignantly, if an employer were
to agree that the arbitration process is completely cost free to employees who use
it with their own counsel, that would eliminate the cost difference as the possible
rationale for the Board's position. Yet, the Board still would brand the
agreement unlawful. In sum, the Board's dogmatic position does not rely on a
cost rationale, and its adherence to that position when there is no cost difference
bespeaks a different rationale.

With respect to the employer's justifications, what is not at issue is an
arbitration agreement that covers only unfair labor practice claims. Such
discrimination against unfair labor practice claims could not reasonably be
justified. As the Board construed it, however, the arbitration agreement at issue

235. Memorandum GC 11-03 from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Emps.,
publications/general-counsel-memos (stating that the preliminary figure for fiscal year 2010 is
35.6%, consistent with fluctuation between 32% and 40% since 1980).
236. Id. at 3.
F.2d 403, 413 (9th Cir. 1978).
238. Solomon, supra note 235, at 3.
239. See U-Haul Co. of Cal., 347 N.L.R.B. 375, 377 (2006), enforced, 255 F. App'x 527, 528
(D.C. Cir. 2007).
in *U-Haul*, like any arbitration agreement an employer is likely to propose, covered virtually all statutory, employment-related claims. The employer’s reasons for such an agreement are litigation related. Arbitration almost always reduces the potentially enormous time and commensurate costs of litigation. The savings are not limited to attorneys’ fees. The litigation process consumes more of the time managers and support personnel must spend away from their primary responsibilities on discovery, witness preparation, and testimony than arbitration does.

Litigation before the NLRB often is nearly as expensive in terms of attorneys’ time and fees and management distraction as litigation in court. Like the pretrial and trial phases in federal district court, Board litigation includes prehearing document production during the investigatory stage, albeit only to and not from the NLRB General Counsel. Board litigation also includes not infrequent prehearing motion practice, witness preparation, and an evidentiary hearing before an administrative law judge, followed by the filing of exceptions and posthearing briefs. Considerable time is saved in Board litigation by the absence of depositions and the replacement of full prehearing discovery with trial subpoenas, but that savings is offset by the addition of an extra layer of posthearing appeal in Board litigation. Whereas an employer who loses in federal district court has one appeal to a United States Court of Appeals, an employer who loses before an administrative law judge has two appeals: one to the Board and one to a United States Court of Appeals. The first involves filing with the Board exceptions to the administrative law judge’s decision and supporting briefs, as well as responses to the General Counsel’s and the charging party’s exceptions. The second involves the preparation of an appeal to a United States Court of Appeals if the Board’s decision is adverse. An employer who loses a case in federal district court can cut off additional litigation expense by complying with the adverse judgment, typically by reinstating or promoting the plaintiff and paying the damages, but that is not true

240. *Id.*
246. *See* FED. R. APP. P. 3(a).
248. *See* 29 C.F.R. § 102.46.
for an employer who loses before the Board, who still may face enforcement litigation on the appellate level. In sum, the employer’s time and resource conservation reasons for preferring arbitration are just as valid in the context of NLRA claims as they are in the case of claims under any other employment statute.

No genuine balancing would fail to take account of the advantages employees may obtain in the arbitral process. Every employee, not just the small minority whose cases the General Counsel decides to prosecute, obtains a hearing on the merits. Moreover, arbitrators typically issue awards earlier than administrative law judges decide cases and virtually always far earlier than a Board decision which is not self-enforcing. Finally, the arbitral process is less formal than Board proceedings, and that informality may increase the employees’ comfort level with the adversarial process.

When arbitration agreements cover unfair labor practice claims, the Board has eschewed the balancing process. The rejection of balancing, which is the traditional analysis for other § 8(a)(1) violations except where the employer acts from a hostile motive, is instructive. The employer’s reasons for preferring to arbitrate statutory claims are not any less legitimate or substantial when the claims are NLRA claims than when they invoke other employment statutes such as Title VII, ADEA, or ADA. Rather, the Board’s underlying reason for believing that balancing is unnecessary seems to have more to do with what is at stake in terms of the Board’s mission and function and with its perception that the employer’s interests are patently insufficient in relation thereto. As it turns out, the Board may be correct that balancing is unwarranted, but not because of the insufficiency of the employer’s interests.

250. Reinstatement or promotion of, and payment of lost compensation to, an unfair labor practice victim does not constitute full compliance with a Board’s remedial order because the cease and desist portion of the order typically also includes a ban on any like or related conduct that operates prospectively, so that the General Counsel can seek judicial enforcement of the Board’s order. See NLRB v. Mexia Textile Mills, 339 U.S. 563, 567 (1950); Mitchellance, Inc. v. NLRB, 90 F.3d 1150, 1159 (6th Cir. 1996) (quoting NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 890 (7th Cir. 1990)).

251. See supra text accompanying note 235.


253. NLRA § 10(e), 29 U.S.C. § 160(e).

254. See Laura J. Cooper, Discovery in Labor Arbitration, 72 MINN. L. REV. 1281, 1324 (1998) (“Over many years the practice of labor arbitration has evolved into a system that is reasonably inexpensive, informal, and efficient.”).


256. See id.
H. The Case for No Balancing

An employer's agreement with employees to use the arbitral process for resolving their statutory claims represents a choice of forum.257 The question is whether that choice of forum is subject to the balancing process at all. The employer's choice of forum seems to be the equivalent of a plaintiff's choice of whether to file suit in federal or state court258 or to file instead a nominally different but related claim with an administrative agency. Although a plaintiff's freedom depends in part on the facts, it also depends on choices such as which claims to assert, how to frame the allegations in the complaint, whether to exhaust internal or administrative avenues of relief, whom to recruit as co-plaintiffs, and how much in damages to seek, among others. These choices are afforded by the legislatively prescribed jurisdictional, venue, and procedural rules that regulate forum choice, and they are an essential part of how a plaintiff decides to pursue, most advantageously, claims against an employer.259 As such, these choices are the plaintiff's alone to make, a proposition that the law captures in the federal jurisdiction principle that the plaintiff is the master of his or her own complaint.260

The employer's preference for arbitration also is a choice afforded by the legislatively prescribed rules regarding available fora.261 Unlike a plaintiff's choices, the employer's choice of arbitration as forum has significance only if an employee agrees.262 Even then, the arbitration agreement must be capable of surviving a challenge under state or federal law.263 Moreover, if the employee agrees and the agreement meets state contract law and federal effective vindication thresholds, that agreement also binds the employer to arbitrate.264 Like a plaintiff's choice to forego a federal claim in order to litigate in state court,265 an employer's arbitration covenant is hardly inconsequential. The employer may have to defend both a much larger number of claims than employees would litigate, a possibility that mitigates the cost advantage, and face a more limited chance of overturning an adverse decision.266

260. See Caterpillar Inc., 482 U.S. at 392; Gully, 299 U.S. at 113 (citing Devine, 202 U.S. at 334; Fair, 228 U.S. at 23).
262. See Mitsubishi, 473 U.S. at 628.
263. See id.
265. See, e.g., Caterpillar, 482 U.S. at 392.
266. See 9 U.S.C. § 10. Section 10 of the FAA provides very limited grounds upon which an arbitration award may be vacated: procurement of the award by corruption, fraud or undue means, the arbitrator's partiality or corruption, the arbitrator's misconduct in refusing to postpone a hearing.
Under the FAA, when an employer's choice of arbitration instead of litigation is embodied in an agreement, it prevails so long as the arbitration agreement is enforceable under generally applicable state contract law principles and if it covers statutory claims, so long as it does not contain restrictions that would prevent effective vindication of those claims.\(^\text{267}\) Congress already has done the balancing. The employer's choice to arbitrate is afforded by the FAA, which is a part of the surrounding legal framework. Why, then, should the arbitration agreement not be dispositive and immune from balancing?

The substantive and procedural defenses an employer may decide to raise in unfair labor practice litigation are certainly not subject to any balancing test, even though they may defeat the General Counsel's claim and thereby leave an employee who has been discharged after, or even for, engaging in a §7 activity remediless.\(^\text{268}\) No one would claim, for example, that an employer's choice to assert a §10(b) limitations period bar or object to critical evidence on hearsay or other grounds should be balanced against the impact of that defense on the discharged employee's §7 rights or his coworkers' inclination to exercise those rights. It seems that forum choice, which does not have the same effect on outcome, should stand on the same footing.

The Board, of course, is less interested in giving the employer's forum choice dispositive effect than it is in weighing that choice in a balance. So long as the agreement can survive challenge,\(^\text{269}\) the FAA may require acceding to the employer's arbitral forum choice when other statutory claims are at issue, but not when it comes to the Board's role in deciding unfair labor practice claims.\(^\text{270}\)

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\(^{267}\) See 9 U.S.C. § 2; supra Part I.D.

\(^{268}\) The Board has claimed the authority to sanction the assertion of a frivolous defense to sufficiently egregious unfair labor practices, Alwin Mfg. Co., 326 N.L.R.B. 646, 648 (1998), enforcement granted on other grounds, 192 F.3d 133, 144 (D.C. Cir. 1999), but it has never found that advancing a frivolous defense is an unfair labor practice in and of itself, and even the Board's authority to award attorneys' fees as a sanction is questionable. Compare Unbelievable, Inc., 318 N.L.R.B. 857, 861–62 (1995), enforcement denied in pertinent part, 118 F.3d 795, 806 (D.C. Cir. 1997), with Alwin Mfg., 326 N.L.R.B. at 647 & n.6.


I. Collectively Bargained Agreements to Arbitrate Unfair Labor Practice Claims

Perhaps most indicative of the real rationale behind the Board’s condemnation of employer-employee arbitration agreements that cover unfair labor practice claims is how the Board would treat collective bargaining agreements that do the same thing. In 14 Penn Plaza LLC v. Pyett,271 the Supreme Court rejected the bulk of the reasoning in Alexander v. Gardner-Denver Co.,272 where it had opined that collectively bargained arbitration machinery was inapposite for statutory discrimination claims.273 With the benefit of a quarter century of precedent, during which it radically changed its view regarding the arbitration of statutory claims, the Court ruled that a union’s collectively bargained agreement to arbitrate statutory discrimination claims is enforceable under the FAA.274 Assimilating such union agreements to the individual employees’ agreements to arbitrate statutory claims it had enforced in Gilmer, the Court declared that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.”275

That declaration would call into question the quite different treatment the Board gives to collectively bargained and individual agreements to arbitrate. On the one hand, the Board is willing to defer processing unfair labor practice claims to collectively bargained arbitration agreements.276 On the other, it brands individual agreements to arbitrate unfair labor practice claims as per se unlawful.277 The easy explanation for the difference focuses on the union’s collective strength and status as exclusive bargaining representative and its ability to waive § 7 rights of the employees it represents.278 However, that explanation goes further than the Board is prepared to go in allowing itself to be replaced as forum.

Preliminarily, it should not escape the need for an explanation to simply observe that “the law” to which the Supreme Court referred was the FAA not the

273. See id. at 59–60.
274. 14 Penn Plaza, 129 S. Ct. at 1469, 1474. The premise of 14 Penn Plaza is that the collective bargaining agreement clearly must authorize the arbitrator to decide the statutory claim. Id. at 1469. See Mathews v. Denver Newspaper Agency LLP, 649 F.3d 1199, 1206–08 (10th Cir. 2011) (defining the ban on discrimination in an arbitration agreement by reference to federal law was insufficient to waive the right to a judicial forum where the agreement limited the arbitrator’s power to decide only the grievance submitted and where grievance did not refer to Title VII claims).
275. 14 Penn Plaza, 129 S. Ct. at 1465.
278. See generally 14 Penn Plaza, 129 S. Ct. at 1464 (“As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concession from the employer.”).
NLRA. The FAA is not as foreign to the NLRA as the observation assumes, for the FAA provides the same pro-arbitration impetus that the common law developed under § 301 has given to the Board's deference to collectively bargained arbitration agreements under the NLRA. It always has been an enigma why the Supreme Court in Textile Workers Union v. Lincoln Mills of Alabama neglected to base its enforcement of arbitration covenants in collective bargaining agreements on the FAA, and instead inventively interpreted the jurisdictional language in § 301 to authorize the creation of pro-arbitration common law. Although not the issue in 14 Penn Plaza, the Supreme Court's decision in that case should put to rest any doubt that the FAA applies to the enforcement of arbitration covenants in collective bargaining agreements generally. Since the FAA is an alternative basis for enforcing collectively bargained arbitration agreements and the FAA draws no distinction between individual and collectively bargained agreements to arbitrate statutory issues, the distinction between the NLRA and the FAA does not begin to explain the Board's deferral to arbitration of statutory NLRA issues in the context of collective bargaining agreements but not in the case of individual agreements.

279. Id. at 1465.
280. See supra Part I.D.
282. See supra text accompanying notes 46–49.
284. Id. at 451–52. Dissenting in Lincoln Mills, 453 U.S. at 466–67, Justice Frankfurter chided the majority for failing to mention the FAA, but he assumed the FAA would not apply to collective bargaining agreements due to the FAA's coverage exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. He noted, however, that the First Circuit took the position that the FAA does apply to collective bargaining agreements. 353 U.S. at 467–68 (quoting Local 205, United Elec. Workers v. Gen. Elec. Co., 223 F.2d 85, 96–98 (1st Cir. 1956)); accord Local 251 v. Narragansett Improvement Co., 503 F.2d 309, 311 (1st Cir. 1974). Although the Supreme Court did not decide that the FAA's coverage exclusion applied only to employment contracts of transportation workers until 2001, Circuit City Stores, Inc. v. Adams, 532 U.S. 102, 120–21 (2001), it had taken the position long before Lincoln Mills that collective bargaining agreements are not employment contracts but essentially trade agreements. J. I. Case Co. v. NLRB, 321 U.S. 332, 334–35 (1944). For that reason, the FAA's coverage exclusion should not have applied when Lincoln Mills was decided. Nevertheless, thirty years after Lincoln Mills, the Supreme Court assumed that the coverage exclusion applies to collective bargaining agreements so that the FAA had only a "guidance" function. See United Paperworkers v. Misco, Inc., 484 U.S. 29, 41 n.9 (1987) (citing 9 U.S.C. § 1; Lincoln Mills, 453 U.S. at 450–51). It noted the coverage issue, but left it unresolved in relation to transportation workers twelve years later. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 77 n.1 (1998). The application of the FAA to enforce arbitration provisions in collective bargaining agreements, however, does not furnish a basis for federal court jurisdiction, which § 301 clearly does. See Lincoln Mills, 453 U.S. at 451–52. With respect to enforcement of arbitration awards, the applicability of the FAA generates other issues, such as whether the three month time limit in FAA § 12 for motions to vacate or modify such awards is applicable when the jurisdictional basis is § 301. See, e.g., United Steel Workers v. Wise Alloys, L.L.C., 642 F.3d 1344, 1353 (11th Cir. 2011) ("Section 301 is silent on the time for filing a motion to vacate.").
Finally, although *14 Penn Plaza* involved the FAA, the Supreme Court almost certainly would enforce a collectively bargained agreement to arbitrate statutory claims under the § 301 common law so long as the arbitrator’s authority to resolve the statutory issue is sufficiently clear.286

Ironically, however, the Board probably will accept, albeit to reach a contrary result, the Court’s declaration in *14 Penn Plaza* about the law drawing no distinction between individual and collectively bargained arbitration agreements.287 Although the Board defers to collectively bargained arbitration mechanisms even when individual employees file unfair labor practice claims,288 deferral occurs when the unfair labor practice issue is either coincident with, or dependent upon resolution of, the contract issue.289 In the former category are cases where the contract issue—whether there is good cause for discharge or discipline—is essentially coincident with the unfair labor practice issue—typically whether the penalty was meted out for some § 7 activity, such as union stewardship, pursuit of a grievance, or protest of a work directive or condition of employment.290 In the latter category fall cases where the unfair labor practice issue of whether management acted in derogation of its bargaining duty depends on whether the agreement has authorized management to take, or the union has waived its bargaining rights over, such actions.291 In these circumstances, deference to the grievance machinery, which union and employer have committed to use for resolving their disputes during the contract term, serves two purposes. First, it recognizes that arbitration is the forum through which the union and employer carry out their bargaining function as it relates to midterm contract disputes and thereby furthers the avowed congressional preference for

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288. See, e.g., United Techs. Corp., 268 N.L.R.B. 557, 559 (1984) ("It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract.").  
289. See, e.g., San Juan Bautista Med. Ctr., 356 N.L.R.B. No. 102, slip op. at 2 (Feb. 28, 2011) ("A dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute.").  
290. See, e.g., NLRB v. Roswil, Inc., 55 F.3d 382 (8th Cir. 1995) (Board abused its discretion by failing to defer to arbitral process under *United Technologies*, where employee alleged discharge and disciplinary threat for complaining about new manager’s favoritism). That statutory and contract issues are coincident or "factually parallel," to use the even more expansive language the Board uses in relation to deferral to awards, Olin Corp., 268 N.L.R.B. 573, 574 (1984), is insufficient to require employees to arbitrate other statutory issues—even if the arbitrator would normally apply statutory principles in determining the meaning of the contract. The waiver of a judicial forum must be clear and unmistakable, and unless the agreement clearly authorizes the arbitrator to decide the statutory compliance issue, that waiver will not be found. See *Wright*, 525 U.S. at 80–82. From this perspective, the Board will find collectively bargained waivers of recourse to itself as forum more easily than a court would find a waiver of recourse to a judicial forum to enforce other statutory rights.  
291. See, e.g., Caritas Good Samaritan Med. Ctr., 340 N.L.R.B. 61, 61–63 (2003) (deferring to arbitration the question of whether the employer could unilaterally change the employees’ health insurance contributions without first bargaining with the union).
resolving such disputes through the arbitration process.\textsuperscript{292} Second, it preserves the integrity of the arbitral institution by not permitting the union, or the employees it represents, to evade the commitment to arbitrate contractual claims by simply styling them as unfair fair labor practice charges.

Consider, however, a collective bargaining agreement that clearly requires the arbitration of all statutory claims, including unfair labor practice claims. Although the agreement is enforceable under the FAA, the Board almost certainly will have a different view under the NLRA. In this circumstance, the agreement to arbitrate all unfair labor practice claims would go well beyond the arbitration agreements to which the Board historically has deferred because it would sweep in more unfair labor practice claims than those that are coincident with, or dependent upon, the contract claims. It would require the arbitration of claims, for example, that the employer violated § 8(a)(1) by questioning employees about who instigated circulation of a protest petition, or which employees are planning to file an FLSA suit for overtime pay, or by promulgating a rule barring unauthorized contact with the media.\textsuperscript{293} Deference here would serve neither the purpose of furthering the collective bargaining process nor the congressional preference for resolving midterm contract disputes through arbitration.

The question remains whether it would be sufficient for enforcing the agreement of a union and an employer to arbitrate all unfair labor practice claims when such enforcement would hold each party to the bargain it made.\textsuperscript{294} Unions, of course, can waive substantive § 7 rights of the employees they represent, including the archetype § 7 right to strike.\textsuperscript{295} So long as the union does not breach its duty of fair representation, its waiver authority is extensive.\textsuperscript{296} Since a union can waive the rights of the individuals it represents to file lawsuits to vindicate their rights under all of the antidiscrimination statutes, it doubtfully would breach its duty of fair representation by extending the agreement to arbitrate to all unfair labor practice claims.

The Board will not defer to arbitration in this circumstance. It predictably will treat collectively bargained agreements to arbitrate all unfair labor practice

\textsuperscript{292} See supra text accompanying notes 46–49; Labor Management Relations (Taft-Hartley) Act §§ 206(d), 301(a), 29 U.S.C. §§ 173(d), 185(a) (2006).


claims in exactly the way it treats individual employees' agreements to do so.\textsuperscript{297} In other words, the Board will agree with the Supreme Court's declaration in \textit{14 Penn Plaza} that the law draws no distinction between the two,\textsuperscript{298} although under the NLRA they both will be unenforceable—and unlawful.

From the premise that it is unlawful for a collectively bargained agreement to provide for the arbitration of statutory claims including all unfair labor practice claims,\textsuperscript{299} two conclusions would seem to follow. First, the difference in bargaining power between individuals and unions would not explain the Board's finding to be unlawful agreements between employers and individual employees to arbitrate unfair labor practice claims. Second, the explanation for condemning both collectively bargained and individual agreements that require the arbitration of all unfair labor practice claims cannot reside in an inherent inability to waive a § 7 right. In addition to these two conclusions, the Board's respect for collectively bargained agreements to arbitrate unfair labor practice claims that coincide with or depend upon the resolution of contract claims supports a third conclusion. For policy reasons that it considers to be sufficient, the Board is able to distinguish between itself as forum and other § 7 rights.

\textbf{J. The Real Rationale for Rejecting Gilmer}

From the preceding process of elimination emerges a hypothesis about the real explanation for the Board's refusal to accept the analytical framework that the Supreme Court has adopted in relation to the arbitration of other statutory claims. That explanation has both doctrinal and practical elements. On the doctrinal front, the Board can invoke numerous Supreme Court pronouncements stressing the Board's public, as opposed to private, mission and responsibility. For example, in 1940, the Supreme Court proclaimed that "[t]he Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices."\textsuperscript{300} The Supreme Court echoed the same refrain when it said that "[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern."\textsuperscript{301} As late as 1968, it again declared that "[a] proceeding by the Board is not to adjudicate private rights but to effectuate a public policy."\textsuperscript{302} The Board also can invoke the Supreme Court's statements that its public mission to enforce public rights means that Congress intended

\textsuperscript{297} See, e.g., San Juan Bautista Med. Ctr., 356 N.L.R.B. No. 102, slip op. at 2–3 (Feb. 28, 2011) (finding that deferral to arbitration was inappropriate because resolution of an unfair labor practice claim did not require interpretation of contract).
\textsuperscript{298} See \textit{14 Penn Plaza}, 129 S. Ct. at 1465.
\textsuperscript{299} See, e.g., U-Haul Co. of Cal., 347 N.L.R.B. 375, 377 (2006), enforced, 255 F. App'x 527, 528 (D.C. Cir. 2007) (interpreting such an agreement).
\textsuperscript{300} Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940).
\textsuperscript{301} Vaca v. Sipes, 386 U.S. 171, 182 n.8 (1967).
employees to be "completely free from coercion" against filing charges with it and that "the overriding public interest makes unimpeded access to the Board the only healthy alternative." Based on these public rights—unfettered access pronouncements—the Board concludes that its responsibility as a public institution enforcing public rights is not to tolerate, indeed to condemn, any private agreement to subject public right issues to arbitration—a dispute resolution mechanism designed to vindicate private rights.

The Supreme Court's pronouncements on which the Board relies should be placed in historical context. They were articulated in an era when "New Deal" agencies, like the NLRB, were in their nascent and undergoing a variety of challenges based on inconsistencies between agency rulings and private law principles. In the arbitration context, that dichotomy persisted and formed the basis of the Supreme Court's decision in Alexander v. Gardner-Denver Co. In that decision, the Court ruled that the public rights embodied in Title VII prevailed over the private law principles of election of remedies and waiver, as well as an arbitrator's determination of whether an employer had violated the private rights contained in the anti-discrimination provision of a collective bargaining agreement. More basically, arbitrators commissioned to decide private rights are not equipped to decide claims under Title VII because that statute's "broad language frequently can be given meaning only by reference to public law concepts."

306. See, e.g., J. I. Case Co. v. NLRB, 321 U.S. 332, 337–38 (1944) (reasoning that individual agreements enforceable under private law principles cannot survive Board decision that they conflict with the NLRA insofar as they limit or forestall collective bargaining rights, or waive benefits under collective agreement because the Board is a public body enforcing public rights, or waive obligations under collective agreement because the Board is a public body enforcing public rights in the public interest); SEC v. Chenery Corp., 318 U.S. 80, 91–93 (1943) (concluding that because the SEC acts in the public interest, it could have adopted a rule to protect investors and consumers that goes beyond the requirements of private law fiduciary obligations); Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 361–63 (1940) (explaining that the Board is not bound by private law requirements of in personam jurisdiction and party joinder that would bar courts from adjudicating contract rights in absence of the other party to the contract because it enforces public rights and thus may invalidate an employer's unlawfully procured contract with individual employees who were not parties to proceeding); see also FCC v. Nat'l Broad. Co., 319 U.S. 239, 248 (1943) (Frankfurter, J., dissenting) (noting the inherent dichotomy between the roles of courts and administrative agencies, with the former being primarily focused on enforcing private rights and the latter being primarily focused on enforcing public rights).
308. See id. at 49–51, 57.
309. Id. at 57.
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More recently, however, the Supreme Court has abandoned, indeed rejected as unsound, this dichotomy between public and private rights. If employees effectively can vindicate their statutory claims in arbitration—and that routinely occurs despite arbitration’s less expensive and more truncated process—then an arbitrator’s enforcement of an individual’s statutory right is the enforcement of a public right no less than a federal court’s enforcement of the same statutory right is. If the public–private rights dichotomy is unsound when the forum contest is between arbitration and the courts, it would be equally unsound when arbitration and the NLRB are the competing fora.

The Supreme Court rejected the public versus private rights dichotomy in the context of enforcing agreements to arbitrate statutory claims under the terms of the FAA. Because by its terms the FAA does not apply to administrative agencies, and the Court’s conceptual change emerged in cases that were decided under the FAA and addressed the judiciary’s relationship to arbitration, the Board has ignored that “radical change.” It thereby can cling to the public–private rights dichotomy, relying on the much older, but never overruled, Supreme Court pronouncements that the Board enforces public rights and has a public mission. From this perspective, the Board can characterize arbitration as a private mechanism for enforcing private rights—even when arbitrators are clearly commissioned to decide NLRA claims—and disregard the Court’s more recent observation that arbitrators deciding private grievances’ statutory claims necessarily enforce public rights. In sum, thus freed to rely on an otherwise outdated (if ever sound) dichotomy, the Board continues to envision itself to be the indispensable protector of public rights, and thus, the exclusive forum for resolving unfair labor practice claims. To put it another way, the Board’s public mission and reason for being are to resolve unfair labor practice claims, and it will not relinquish that role to a private arbitration process except in the

310. See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (recognizing that so long as a statutory right may be properly vindicated in an arbitral forum, the statutory purpose is served, even when the statute was designed to further important social policies); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–28 (1991) (recognizing that the arbitral forum is proper for resolving an ADEA claim because, like the judicial process, the arbitration process resolves specific disputes between parties and thereby can serve a broader public purpose); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (“And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”).


312. See supra text accompanying notes 300–304.

313. See supra text accompanying note 310.

limited circumstance when contract issues under a private collective bargaining agreement happen to overlap with unfair labor practice issues.\(^{315}\)

So much for the doctrinal basis for the Board’s position, but that position has an unarticulated practical dimension that may be especially important today. During the same decades when the Supreme Court was engaged in the process of radically revising its view of the adequacy of arbitration in relation to statutory issues, the Board’s caseload and impact, and in turn its relevancy, were eroding. After reaching a high of 44,063 in fiscal year 1980, the Board’s unfair labor practice case intake continually has shrunk, falling to 33,833 in 1990, 29,188 in 2000, and numbering only 23,523 in fiscal year 2010.\(^{316}\)

Far from taking up the slack, the Board’s other responsibility, to conduct union representation elections, has experienced a similar contraction. In fiscal year 1980, the Board conducted 7,296 representation elections—excluding decertification elections—involving 478,821 employees and had a total intake of representation cases—including decertification petitions—of 10,622.\(^{317}\) In fiscal year 1990, it conducted 3,623 such elections involving 231,069 employees and had a representation case intake of 6,005.\(^{318}\) In fiscal year 2000, the number of representation elections fell to 2,988, the number of eligible voters declined very slightly to 235,857, and the number of cases received dropped to 4,756.\(^{319}\) In fiscal year 2010, the Board appears to have conducted only 1,584 representation elections involving only about 98,180 eligible voters and had a representation case intake of 2,447.\(^{320}\) In sum, during the three decades between 1980 and

\(^{315}\) See supra text accompanying notes 288–298. In Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 146–47 (1980), overruled by Olin Corp., 268 N.L.R.B. 573 (1984), the Board abandoned a deferral position which “forces employees in [collectively bargained] arbitration proceeding[s] to seek simultaneous vindication of private contractual rights and public statutory rights or risk waiving the latter.” Although Suburban Motor Freight was overruled in Olin Corp., the quoted position presumably survives when the absence of overlap between contractual and statutory rights removes the opportunity for simultaneous vindication.

\(^{316}\) 65 NLRB ANN. REP. app. at 129 tbl.1 (2000); 55 NLRB ANN. REP. 134 tbl.1 (1990); 45 NLRB ANN. REP. 240 tbl.1 (1980). There is no Annual Report for fiscal year 2010 because the Board’s Seventy Fourth Annual Report, for fiscal year 2009 was its last; however, the Board advises that the statistical information that would have been reported in that Annual Report appears in the Graphs & Data section of its website, under the sub-heading Charges and Complaints. Annual Reports, NLRB, http://www.nlrb.gov/annual-reports (last visited July 7, 2011). The figure, 23,523, in the text for fiscal year 2010 appears in that website section. Graphs & Data, NLRB, http://www.nlrb.gov/chartsdata/chargeComp#chart1tag (last visited Aug. 5, 2011). However, a memorandum from the Office of the General Counsel reports that the number of charges filed in fiscal year 2010 was 23,381. Memorandum GC 11-03 from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Emps., Summary of Operations (Fiscal Year 2010) 2 (Jan. 10, 2011), available at http://www.nlrb.gov/publications/general-counsel-memos.

\(^{317}\) 45 NLRB ANN. REP. 242 tbl.1B, 270–72 tbl.13 (1980).


\(^{319}\) 65 NLRB ANN. REP. app. tbls.1B & 13 (2000).

\(^{320}\) There is no NLRB Annual Report for fiscal year 2010. See supra note 316. The figures, 1,584 and 2,447, in the text for the number of elections and representation case intake in fiscal 2010, respectively, are the sum of the numbers of RC and RM elections and petitions in the Graphs & Data section of the NLRB’s website. Graphs & Data, NLRB, http://www.nlrb.gov/chartsdata/
2010, the Board’s unfair labor practice function has declined by nearly 50% and its representation elections function has declined by 80% if measured by eligible voters, about 70% if measured by number of elections, and about 67% if measured by case intake.

Although the NLRA applies broadly in the nonunion workplace when no union organizing activity is ongoing, the decline in the Board’s unfair labor practice and election workloads parallels the shrinkage of union membership in the private sector workforce. From about 35% in 1955, to about 25% in 1975, to nearly 15% in 1985, to approximately 10% in 1995, and down to 7.8% in 2005, today, union density is only 6.9% percent of the private sector workforce.\footnote{321} That figure, which borders on statistical insignificance, approximates private sector union density at the turn of the twentieth century,\footnote{322} thirty-five years before the original NLRA—with its avowed Depression-combathe purpose to promote collective bargaining—was enacted.\footnote{323}

With regard to the Board’s relevancy, during that thirty-year period between 1980 and 2010 when the number of charges filed dropped by nearly 50%, and the number of petitions, representation elections, and voters declined by about 67%, 70%, and 80% respectively, the size of the private sector workforce in the

\footnote{321. US Private Sector Trade Union Membership, PUB. PURPOSE, http://www.publicpurpose.com/im-unn2003.htm (last visited March 31, 2011); Union Membership in the Private Sector, DATA360 (May, 16, 2008), http://www.data360.org/dsg.aspx?Data_Set_Group_Id=1387; Union Affiliation by Occupation and Industry, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, http://www.bls.gov/webapps/legacy/cpsluta3.htm (check the box corresponding to percent of union members in private sector; then follow “Retrieve data” hyperlink) (last visited Aug. 5, 2011). Because the first source does not have the private sector union density for 1975, an approximate of 28.5% is calculated from the 1974 and 1976 data. The second source shows a density of 21.5% for 1975. Averaging the figures from these two sources, the private sector union density in 1975 was approximately 25%.

322. See US Private Sector Trade Union Membership, supra note 321 (showing that the private sector union density in 1900 was 6.5%).

United States increased by about 45%.\textsuperscript{324} It may be too much to expect any administrative agency, even in the best of times, to cede any important public interest work to private alternative dispute resolution. But, the Board is fighting for its institutional life and its relevancy (or at least its budget) in contemporary society. In view of its survival mode, the Board cannot afford to permit arbitration agreements to have any impact on the number of cases it will have an opportunity to resolve. In other words, despite, or because of, the change in times, the Board cannot let go of the public rights–public mission doctrine or buy into the Supreme Court’s arbitration-supportive dissolution of the public rights–private rights dichotomy.

II. Arbitration Agreements Covering Other Statutory Claims

A. The Concerted Activity Right and Arbitration Agreements’ Class Action or Class Grievance Ban

1. The Concerted Activity Challenge

Even if an arbitration agreement that covers statutory claims makes an exception for NLRA claims, as the Board’s \textit{U-Haul} decision requires,\textsuperscript{325} that agreement still faces an NLRA challenge. The challenge’s dialectic starts with the major premise that employees are engaged in activity protected by § 7 when they act in concert to file lawsuits or grievances that seek to improve their compensation or terms or conditions of employment, including those invoking the FLSA, Title VII, Section 1981, the ADA, the ADEA, or other federal or state statutes related to employment.\textsuperscript{326} The minor premise posits that § 7 confers the right to bring class action, or in the case of the FLSA, “collective action” lawsuits, because these litigation modes are a form of concerted activity.\textsuperscript{327} Because agreements to arbitrate statutory claims necessarily preclude class action or collective action lawsuits, the dialectic concludes, they prevent employees from exercising their § 7 right to file suit on a class or collective basis and thus violate § 8(a)(1).\textsuperscript{328} Although an arbitration agreement may not mention class or collective actions, it still has an unlawful chilling effect because employees at least would reasonably understand the agreement to bar class and

\begin{itemize}
  \item \textsuperscript{324} See B-1. Employees on Nonfarm Payrolls by Major Industry Sector, 1961 to Date, BUREAU OF LABOR STATISTICS, http://www.bls.gov/opub/ee/2011/ces/tableb1_201110.pdf (last visited Nov. 7, 2011).
  \item \textsuperscript{325} See supra text accompanying notes 5–14.
  \item \textsuperscript{327} See id. (citing Harco Trucking, LLC, 344 N.L.R.B. 478 (2005); U Ocean Palace Pavilion, Inc., 345 N.L.R.B. 1162, 1173 (2005)).
  \item \textsuperscript{328} See id. at *4–5 (rejecting the argument).
\end{itemize}
collective litigation. If the agreement does expressly bar class or collective actions, as well as class grievances, it is unlawful for the additional reason that it precludes class-based challenges in any forum.

2. The General Counsel’s Dilemma and Equivocation

Although the foregoing argument has been advanced in the academic literature, in June 2010 the NLRB’s then General Counsel took a more nuanced, albeit somewhat equivocal, position. He observes, quite correctly, that a lawsuit styled as a class, or collective, action or even a grievance styled as class grievance, does not, without more, meet the concerted activity requirement for § 7 protection. Well aware that an employee acting alone may include a class allegation in order to gain litigation settlement leverage vis-à-vis the employer, the General Counsel notes that such an allegation does not necessarily bespeak concerted activity. (It also does not guarantee satisfaction of § 7’s “mutual aid or protection” requirement.) The General Counsel concedes that if an agreement clearly precludes class litigation, the Board could find that it is unlawful because it prohibits some class litigation that is concerted and protected activity. Under the chilling effect theory, if employees could reasonably interpret a mandatory arbitration agreement to bar class actions or grievances that constitute concerted activity, as they might, invalidity also would seem to follow. Nevertheless, the NLRB’s General Counsel opines that even an arbitration agreement that expressly precludes class actions and class grievances is not by its terms unlawful, so long as said ban covers only the “pursuit of purely personal individual claims.”

329. See id. (acknowledging and accepting the chilling effect argument only in relation to coverage of unfair labor practice claims).

330. This is the scenario in D. R. Horton, Inc., that is currently pending before the Board. See Notice & Invitation to File Briefs, Case 12-CA-25764, 2011 WL 2451721 (June 16, 2011).


333. See id. at 3–4.

334. See id.


337. Id. at 4.

338. Id. at 6. Although the General Counsel includes as per se lawful, arbitration agreements that preclude class grievances, id., that proposition may be perceived to be a closer question because a prohibition on class grievances not only waives a judicial forum but also precludes a form of concerted activity to enforce employment-related rights in the only other forum available. It is eminently sensible, however, for arbitration agreements to preclude class grievances due to “the fundamental changes brought about by the shift from bilateral arbitration to class-action
Of course, virtually all Gilmer-type arbitration agreements that preclude litigation under employment statutes ban litigation in pursuit of both individual claims and class actions, without distinguishing between the two. When they specifically bar class litigation, they do not draw any distinction between class actions in pursuit of individual claims and other class actions. Similarly, a ban on class grievances presumably would not draw that distinction. The issue is whether every employer with a Gilmer-sanctioned arbitration agreement must recast the ban, so as to remove from its scope the prosecution of class actions or grievances that do constitute § 7-protected concerted activity.

On this issue, the NLRB’s General Counsel is equivocal. On the one hand, he cautions that “a mandatory arbitration agreement that prohibits all class action grievances and lawsuits necessarily inhibits some protected activity” and advises that “[p]ossible modifications for remedying an overly broad mandatory arbitration agreement would include” adding language specifying that the arbitration agreement “does not constitute a waiver of employees’ collective rights under Section 7 . . . concertedly to pursue any covered claim before a state or federal court on a class, collective, or joint action basis.” On the other hand, he opines that § 7 does not require a different outcome than the courts of appeals, which have held “that employment agreements that require the employee to waive the filing of class or collective claims both in court and in the employer’s arbitration procedure are not per se unenforceable.”

The General Counsel’s equivocation reflects an attempt to navigate between the Scylla of the Board’s unlawful-condition and chilling effect principles and the Charybdis of the courts’ predictable disinclination to permit those principles to condemn arbitration agreements enforceable under the FAA. That is, if the Board were to find an arbitration agreement unlawful on the ground that it precludes, or reasonably could be understood to preclude, some concerted class actions or class grievances to vindicate rights under Title VII, the ADA, the ADEA, or other statutes, the Board would eviscerate Gilmer and create a large exception to the FAA that it does not contain. It is one thing for the Board to declare arbitration agreements unlawful when they encompass claims under the NLRA, given that the FAA does not strictly apply to the Board and the public mission-public rights characterizations of the Board’s responsibilities remain on

arbitration.” Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1776 (2010). Because class arbitration radically changes the nature of a procedure hallmarked by informality, expedition, limited discovery, and relatively low cost, the impermissibility of class grievances is the default position when the agreement is silent. Id. at 1775–76.

339. See, e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1469 (D.C. Cir. 1997) (discussing an arbitration agreement between an employee and employer that banned litigation in court, but did not distinguish between individual and class action claims).

340. See, e.g., Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 980 (9th Cir. 2007) (discussing an arbitration agreement that specifically barred class litigation but did not distinguish between class actions in pursuit of individual claims and other class actions).


342. Id. at 5.
the books. However, it is quite another thing for the Board to declare unlawful all arbitration agreements, including those that cover any and all statutory claims the Board has no authority to entertain, because the agreements do not expressly permit class actions, the very kind of litigation over which arbitration is the most attractive alternative.

Regarding a Board rule requiring explicit allowance of class grievances in order to avoid unenforceability, the Supreme Court ruled that the FAA preempts a similar California law explicitly requiring the allowance of class grievances in order to avoid unenforceability on unconscionability grounds.343 “Requiring the availability of classwide arbitration,” the Court reasoned, “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”344 Although the FAA does not preempt a provision of another federal statute, the courts, including the Supreme Court, are unlikely to be any more tolerant of the Board using the § 7 concerted activity language, and the legal principles it has developed for other purposes, to accomplish a far broader interference with the FAA. In other words, from this perspective, the courts will be very reluctant to marginalize Gilmer by letting the NLRA tail wag the alternative dispute resolution dog. That reluctance is predictable for reasons more fundamental than any reasons the General Counsel seems to have had in mind.

B. The Right to Class Action Prophylaxis

Preliminarily, a semantic problem plagues the terms “concerted activities” and “class” or “collective” actions. Despite some linguistic similarity, these terms are neither synonymous nor equivalent. In their respective statutory schemes, the terms have quite different meanings, and using them interchangeably bespeaks a logical and legal fallacy. Employees have a § 7 right to act concertedly to file and try to prosecute lawsuits and grievances on a class or non-class basis to improve their lot as employees,345 but they have no more of a § 7 right to prevail on the class certification or class grievance issue than they have to win on the merits.346 More specifically, employees who sign Gilmer-authorized arbitration agreements that ban litigation, including class litigation as well as class grievances, have no § 7 right to a ruling by a court or arbitrator that they may maintain such class-based actions whenever they are pursued concertedly.347 As the General Counsel notes, they have a § 7 right not to be discharged, disciplined, or otherwise retaliated against for acting in concert to bring a class action lawsuit or a class grievance in the face of a contractual ban,

344. Id. at 1748.
347. Id.
and a § 7 right to challenge the enforceability of the ban. But, it is quite a different proposition to suggest that § 7 confers on employees any right to success before a court or arbitrator in their effort to be relieved from an otherwise enforceable arbitration agreement disallowing class actions and class grievances that do or may constitute protected, concerted activity.

From another perspective, an agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits. Section 7 would not seem to give employees any incremental advantage, much less a right to prevail, in a class certification proceeding governed by Rule 23 of the Federal Rules of Civil Procedure or state law counterparts, the opt-in procedure for collective actions under the FLSA, or an arbitration hearing on the contractual permissibility of class grievances.

It may be argued that although § 7 does not assure employees victory in a court contest, to determine whether they can maintain a class action under Rule 23 or an arbitration contest over whether they can maintain a class grievance, an employer should not be able to prevail by extracting an agreement barring class claims. This argument rests on three assumptions. First, it assumes that § 7 prescribes a litigation/arbitration default position wherein employees have an a priori right to choose the forum and prosecute the claims however they wish. Second, it assumes that the employer’s opportunity to avoid the default position is limited to the defenses prescribed by the Federal Rules of Civil Procedure or, in the case of grievances, to non-contractual arguments to the arbitrator. Third, it assumes that a contractual ban on class actions or grievances can be separated from the arbitration agreement of which it is a part and thereby be assimilated to the category of unlawful contractual waivers of § 7 rights. None of these assumptions seem well founded.

Section 7 creates a major exception to the employment-at-will doctrine, but it prescribes no default position for employees who become embroiled in

348. Id. at 6.
349. The General Counsel also acknowledged that an employer may defend against a class action or class grievance on the ground that it is impermissible under the arbitration agreement. Id. at 5. If the class action or grievance reflects concerted activity and the employer is nonetheless successful in its defense, the court’s or arbitrator’s ruling may be reasonably understood by employees to make future class actions or grievances not worth the candle; yet it would be difficult for the Board to conclude that the court’s or arbitrator’s decision is unlawful on chilling effect grounds unless the employer includes an addendum specifying that the ruling has no effect on the § 7 right to pursue concerted class actions. Passivity following a court’s or arbitrator’s ruling does not easily fall within the ambit of § 8(a)(1)’s ban on coercion, restraint or interference with the exercise of § 7 rights.
350. FED. R. CIV. P. 23.
351. See, e.g., Meisburg, supra note 332, at 4 (stating that for § 7 claims, employees may request class action status from a court, but they must still fulfill the class actions requirements of commonality, numerosity, etc.).
litigation or arbitration with their employer over claimed abridgements of rights conferred by other statutes. Although the right to engage in concerted activity for mutual aid or protection immunizes from discharge or other discipline two workers who jointly pressure their employer to rescind discretionary decisions by different supervisors not to promote them, § 7 does nothing to help them satisfy Rule 23’s numerosity or commonality requirements if they choose to file a class action under Title VII or another anti-discrimination statute.

Nor was the NLRA designed to reduce an employer’s defenses to class action allegations in litigation of non-NLRA claims to those available under the Federal Rules of Civil Procedure. The FAA is no less a part of the surrounding legal landscape and no less beyond the purview of §§(a)(1) than the jurisdictional and venue provisions, the civil procedure rules, or the employer’s defenses on the merits. Indeed, the original version of the FAA was enacted in 1925, a decade before the original NLRA, when its §§ 7 and 8(a)(1) became law and twelve years before Rule 23 was adopted in its original form. The Board’s exemption from the FAA is irrelevant. That exemption applies only when the agreement substitutes arbitration for the Board as the forum for resolving unfair labor practice claims and exists only because the FAA, by its terms, does not apply to administrative agencies’ adjudication of claims they were created to resolve and because the Board is unwilling (and cannot afford) to relinquish its public interest-public mission hold on the resolution of unfair labor practice claims.

Although a stand-alone agreement between an employer and individual employees that precludes class actions may be vulnerable to challenge, what is at issue is an arbitration agreement that bans class actions, class grievances, or both. As noted above, the Supreme Court recently held that a California law invalidating arbitration agreements’ ban on class grievances was incompatible with the FAA. The plaintiff had argued that the invalidation reflected an independent, consumer-protective principle of state contract law applicable to all contracts, not just arbitration agreements, and as such, should survive. The §§ 7 and 8(a)(1) challenge to a class action ban, class grievance ban, or both, similarly posits that the employee-protective § 7 right is free standing and that any restrictions are invalid, regardless of the kind of contract in which they are found. The Supreme Court, however, rejected the attempt to separate the class grievance ban from the arbitration agreement of which it is a part, explaining that “[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3 and 4, is to ensure the enforcement of arbitration agreements according to their terms so as

354. FED. R. CIV. P. 23 advisory committee’s notes.
355. See supra Part I.
357. Id. at 1746–47.
to facilitate streamlined proceedings." 358 Sections 2, 3, and 4 of the FAA fully apply to arbitration agreements covering claims under employment statutes other than the NLRA. 359 Separating out class action bans from the arbitration agreements, of which they are a functional part, in order to invalidate, or in the case of §§ 7 and 8(a)(1), outlaw them, seems to be the same kind of arbitration-frustrating contrivance that failed to persuade the Supreme Court.

The fact that an employer must act early and proactively to obtain an enforceable arbitration agreement in order to avail itself of an FAA defense to class litigation, no more impugns the validity of that defense than the employer’s acting proactively and early—for example to limit the number of employees subject to the arbitration agreement, or to create differences in the compensation scheme or terms and conditions of employment, or to make promotional decisions discretionary with local managers—undermines the validity of the defense such prophylactic action gives to the employer on Rule 23’s numerosity, commonality, typicality and, in the case of individualized monetary claims, predominance issues. 360 For the same reason, an employer’s prophylactic limitation of its dollar volume of business does not diminish the validity of its defense to the Board’s jurisdiction, and its prophylactic promotion of employees to supervisory status does not diminish its defense to the employees’ putative claims that they were disciplined for the exercise of § 7 rights.

All of these proactive defenses at the planning stage have obvious downsides. The arbitration agreement is no exception. It would be naïve to suppose that an agreement to arbitrate statutory claims is a costless equivalent to the promulgation of a disciplinary rule, such as a no-solicitation or no-insignia rule. An arbitration agreement binds the employer as much as the employee, and although arbitration is less expensive than litigation as a forum in which to resolve statutory claims, for this same reason, it also exposes the employer to many more grievances than the number of lawsuits it otherwise might face. If the arbitration agreement is sufficiently onerous and unfair to the employee, the employer risks a declaration of unenforceability on unconscionability grounds. The bottom line is that if the employer is willing to accept the disadvantages and the risks, an arbitration agreement the employer enters into under the auspices of the FAA is a litigation defense that is beyond the purview of §§ 7 and 8(a)(1).

C. Strikes over Arbitrable Claims

If an FAA-enforceable arbitration agreement covers statutory claims, a final issue remains under the NLRA—whether § 7 protection extends to a strike in

358. Id. at 1748 (emphasis added).
360. Cf. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547, 2552–53 (2011) (finding that the commonality requirement was not met for employees’ class action sex discrimination case where pay and promotional decisions were left to the broad discretion of local managers).
support of a statutory claim that employees are obliged to arbitrate. A union’s agreement to arbitrate implies a promise not to strike over arbitrable grievances. \(^{361}\) Is the same no-strike implication warranted in the case of an individual employee’s agreement to arbitrate?

The answer almost certainly is no. The implication of a no-strike clause from an agreement to arbitrate has an origin peculiar to specific enforcement of the arbitration and no-strike clauses in collective bargaining agreements. By its terms the Norris-LaGuardia Act would bar a federal court from specifically enforcing an employer’s promise to arbitrate union grievances as well as a union’s promise not to strike. \(^{362}\) The Supreme Court adopted the shorthand explanation that a no-strike clause is the quid pro quo for the agreement to arbitrate in order to limit the judicially created exception to the Norris-LaGuardia Act to what was necessary to further the pro-arbitration policy contained in the Taft-Hartley Act. \(^{363}\) Implied a non-existent no-strike clause from an arbitration provision, however, stretched that fictional quid pro quo construct beyond its original purpose and collided with the bedrock policy of free collective bargaining without government interference with the terms of the bargain. The implication can be explained only by a policy of resolving all doubts in favor of an interpretation that ensures industrial peace. \(^{364}\) That interpretation is peculiar to collective bargaining agreements and the policy of minimizing labor strife. There would seem to be little basis for inferring an agreement not to strike in employers’ agreements with individual employees to arbitrate statutory claims. After all, such agreements are designed to make arbitration the alternative to litigation, not to strikes.

What would be the result if the agreement to arbitrate statutory claims expressly included a no-strike clause? The Board’s approach to this question probably would start from the premise that an agreement between an employer and individual employees cannot bar the employees from exercising the basic § 7 right to strike and conclude that the addition of an agreement to arbitrate should not change that result. \(^{365}\) A no-strike ban, unlike a class arbitration ban, is difficult to characterize as an integral part of an arbitration agreement or as designed to further arbitration’s simplicity and inexpensiveness attributes. From

\(^{361}\) See, e.g., Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 381–82 (1974) (stating that absent an express agreement to the contrary, an arbitration agreement contains an implied obligation not to strike (citing Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962))).


\(^{364}\) See, e.g., Lincoln Mills, 353 U.S. at 455 (referring to the “federal policy that federal courts should enforce [arbitration] agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.”).

\(^{365}\) Cf: Meisburg, supra note 332, at 2 (noting that employees cannot waive their § 7 rights to concordely challenge the validity of the agreements through class or collective actions seeking to enforce their employment rights).
a different perspective, unions are able to waive employees’ right to strike because otherwise they could not negotiate meaningful concessions for the employees they represent. However, individual employees have no such collective bargaining authority or responsibility.

What about freedom of contract? Is that basic principle operative only for unions and employers, but not for individual employees who are unrepresented by a union? As long as employees can extricate themselves from their individual contracts by selecting a union to bargain for them, why should individual employees not be able to negotiate for themselves with their employer on the same subjects, including grievance and arbitration procedures and no-strike clauses? Isn’t unrepresented employees’ negotiation of individual contracts with their employer an exercise of the right to refrain from union activity and representation that the Taft-Hartley Amendment added to § 7 and placed on an equal footing with the right to opt for union representation and collective bargaining?

These issues are beyond the scope of this article, although they deserve careful re-examination on another day. For the present, it will have to suffice that the Board almost certainly will take the position that the issues are not presented when the employer extracts a promise not to strike as a condition of employment, for in that circumstance the employer essentially exacts the waiver of the archetype § 7 right as the price for employment or continued employment. The more difficult issue is whether in a bargained-for-exchange an employee who does not have to relinquish any § 7 right to obtain or keep a job should be able to promise not to strike for a reasonable and limited period of time—or by operation of law until an exclusive collective bargaining representative is selected—in exchange for something of value, such as a 10% salary increment. Adding an agreement to arbitrate statutory claims to the mix seems neither to create any policy tension between the FAA and the NLRA nor to change what is a rather different analysis.