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# Are All Contracts of Employment Exempt from the Provisions of the Federal Arbitration Act - The Supreme Court Settles the Matter

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# Are All Contracts of Employment Exempt From the Provisions of the Federal Arbitration Act? The Supreme Court Settles the Matter

*Circuit City Stores, Inc. v. Adams*[1]

## I. INTRODUCTION

Congress enacted the Federal Arbitration Act[2] ("FAA") in 1925 to reverse the longstanding hostility of courts toward agreements to arbitrate and to make such agreements specifically enforceable.[3] Section 1 of the FAA exempts the employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the Act's coverage.[4] The breadth of that exemption has been an issue with the courts of appeals for the past six decades, with the overwhelming majority of courts holding that Section 1 exempts only the contracts of employment of transportation workers from the FAA.[5]

In *Craft v. Campbell Soup Co.*,[6] the Ninth Circuit went against this authority and held that Section 1 excluded all contracts of employment from the terms of the FAA.[7] It applied this holding in *Circuit City Stores, Inc. v. Adams*,[8] the appeal of which brought the issue to the Supreme Court. Directly considering the issue for the first time, a divided Court agreed with the majority of the courts of appeals and held that Section 1 excludes only the employment contracts of transportation workers.[9] This Note argues that any ambiguity in the

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1. 532 U.S. 105 (2001).

2. 9 U.S.C. §§ 1-307 (2000).

3. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring).

4. 9 U.S.C. § 1 (2000).

5. *See, e.g.*, Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835-37 (8th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997); Signal-Stat Corp. v. Local 475, United Elec. Radio & Mach. Workers of Am., 235 F.2d 298, 302-03 (2d Cir. 1956), *overruled on other grounds by* Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union Local 812 Int'l Bhd., 242 F.3d 52 (2d Cir. 2001); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am. (U.E.), Local 437, 207 F.2d 450, 452 (3d Cir. 1953).

6. 177 F.3d 1083 (9th Cir. 1998), *overruled by* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

7. *Id.* at 1094.

8. 194 F.3d 1070 (9th Cir. 1999), *rev'd*, 532 U.S. 105 (2001).

9. *Circuit City Stores*, 532 U.S. at 119.

language of the exemption is only the result of the Court's expansion of Congress' Commerce Clause power, and that, faced with two arguably valid approaches, the Court chose the approach most consistent with its recent jurisprudence and which is potentially of benefit to both employers and employees.

## II. FACTS AND HOLDING

In October 1995, Saint Clair Adams applied for a job with Circuit City Stores, Inc., a national retailer of consumer electronics.[10] Like all Circuit City applicants,[11] included in Adams' application was a document entitled "Circuit City Dispute Resolution Agreement."[12] The agreement required Adams to arbitrate any employment-related disputes that might arise with Circuit City.[13] The application further stated that "Circuit City will not consider [the applicant's] application unless [the arbitration] agreement is signed."[14] Adams signed the agreement and was nired as a sales counselor at Circuit City's store in Santa Rosa, California.[15] Adams resigned from Circuit City in November 1996[16] and subsequently filed an employment discrimination claim in state court against Circuit City and three of his supervisors claiming that he was subjected to harassment and retaliation because of his sexual orientation.[17] Circuit City then filed suit in the United States District Court for the Northern District of California, making a motion to enjoin the state court proceedings and to compel arbitration of Adams' claims pursuant to the Federal Arbitration Act ("FAA").[18] Adams opposed the motion on several grounds, including that the arbitration

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10. *Id.* at 109. Circuit City is a Virginia corporation with retail stores throughout the United States. Brief for Respondent at 1.

11. Brief for Petitioner at 4.

12. *Circuit City Stores*, 194 F.3d at 1071.

13. *Circuit City Stores*, 532 U.S. at 109-10. Specifically, a portion of the agreement provides: "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator." *Id.* at 109-10.

14. Joint Appendix at 12.

15. *Circuit City Stores*, 532 U.S. at 110.

16. Brief for Petitioner at 5.

17. Brief for Respondent at 1. Adams' claims were based on the California Fair Employment and Housing Act, CAL. GOVT. CODE ANN. § 12940 (West 1992 and Supp. 2002), and other tort theories under California law. *Circuit City Stores*, 532 U.S. at 110.

18. *Circuit City Stores*, 532 U.S. at 110. Circuit City also motioned the district court for Rule 11 sanctions. Circuit City Stores, Inc. v. Adams, No. C98-0365 CAL, 1998 U.S. Dist. LEXIS 6215, at *2 (N.D. Cal. Nov. 18, 1999), *rev'd*, 532 U.S. 105 (2001); *see also* FED. R. CIV. P. 11.

agreement was an unconscionable contract of adhesion and lacking in mutuality.[19] Adams did not argue to the district court, however, that the FAA did not apply to his arbitration agreement with Circuit City.[20] Noting the strong state and federal policy favoring arbitration, the district court rejected Adams' arguments and granted Circuit City's motion.[21]

Adams appealed to the Ninth Circuit.[22] While Adams' case was pending, the Ninth Circuit decided *Craft v. Campbell Soup Co.*,[23] in which it held, contrary to every other circuit to consider the issue, that Section 1 of the FAA, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"[24] exempts all contracts of employment from the Act's coverage.[25] In the present case, the Ninth Circuit applied its decision in *Craft* and reversed the district court, holding that because the FAA did not apply to contracts of employment the district court lacked authority to compel arbitration.[26]

The Supreme Court reversed in a 5-4 ruling.[27] The Court held that Section 1 of the FAA only excludes employment contracts of transportation workers from the provisions of the FAA.[28]

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19. Brief for Respondent at 2, *Circuit City Stores*, 532 U.S. 105 (2001) (No. 99-1379).

20. Brief for Petitioner at 6.

21. Circuit City Stores, Inc. v. Adams, No. C98-0365 CAL, 1998 U.S. Dist. LEXIS 6215, at *7 (N.D. Cal. Nov. 18, 1999), *rev'd*, 532 U.S. 105 (2001).

22. *Circuit City Stores*, 532 U.S. at 110.

23. 177 F.3d 1083 (9th Cir. 1998), *overruled by* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

24. 9 U.S.C. § 1 (2000).

25. *Craft*, 177 F.3d at 1094.

26. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999), *rev'd*, 532 U.S. 105 (2001). Circuit City argued unsuccessfully to the Ninth Circuit that the arbitration agreement with Adams was not a contract of employment because the agreement expressly disclaimed it as such. Brief for Petitioner at 7, *Circuit City Stores*, 532 U.S. 105 (2001) (No. 99-1379). Circuit City made the same argument to the Supreme Court in its certiorari petition, but the Court declined to hear that issue. *Id.* The treatment of employment arbitration agreements which disclaim that they are contracts of employment raises interesting issues, and courts considering the matter have reached differing conclusions. *See infra* note 44.

27. *Circuit City Stores*, 532 U.S. at 124. Circuit City's success at the Supreme Court was short-lived. On remand, the Ninth Circuit found the "Dispute Resolution Agreement" an unconscionable contract of adhesion and again reversed the district court's order compelling arbitration of Adams's claims. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892-95 (9th Cir. 2002), *cert. denied*, 122 S.Ct. 2329 (2002).

28. *Circuit City Stores*, 532 U.S. at 119.

## III. LEGAL BACKGROUND

The United States Congress enacted the Federal Arbitration Act ("FAA") in 1925.[29] Its purpose in passing the Act was to overcome the longstanding hostility of American courts toward agreements to arbitrate.[30] That hostility was noted by the Supreme Court in *Red Cross Line v. Atlantic Fruit Co.*[31] a year prior to the FAA's enactment. In *Red Cross Line*, the Supreme Court considered the Arbitration Law of New York,[32] a law which served as the model for the FAA.[33] The Court explained that agreements to arbitrate were limited by the courts' refusal to specifically enforce them, to allow them to be plead as a bar to an action, and to allow them to support a motion to stay a court action.[34] "The federal courts—like those of the states and England," the Court noted, "have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes."[35]

In order to overcome that hostility, the FAA made written arbitration agreements specifically enforceable[36] and gave courts and aggrieved parties power to take action against those who failed to comply with their own arbitration agreements.[37]

Section 2 of the FAA explains the Act's scope and provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy [arising out of such a contract] . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[38]

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29. Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2000). At the time of its passage the Act was referred to as the "United States Arbitration Act." David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 102 n.131 (1999).

30. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring). This hostility has been traced to the courts of England and the efforts of those courts to expand their jurisdiction while at the same time opposing "anything that would altogether deprive every one of them of jurisdiction," in particular, agreements to arbitrate. *Id.* (Frankfurter, J., concurring).

31. 264 U.S. 109 (1924).

32. Currently N.Y. C.P.L.R. 7501-14 (1997 & Supp. 2001).

33. Nicholas J. Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223, 223 (1982).

34. Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 118 (1924).

35. *Id.* at 120-21.

36. 9 U.S.C. § 4 (2000).

37. 9 U.S.C. §§ 1-4 (2000).

38. 9 U.S.C. § 2 (2000). Grounds for the revocation of any contract would include, for example, fraud, duress, or mistake. *See* RICHARD A. LORD, WILLISTON ON

Section 3 requires a court to stay any action which involves an issue subject to an arbitration agreement until the issue has been arbitrated.[39] Section 4 makes arbitration agreements specifically enforceable, providing that a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" under a written arbitration agreement may petition a United States district court for an order directing the party in default to "proceed to arbitration in accordance with the terms of the [arbitration] agreement."[40]

Section 1 defines "maritime transactions" and "commerce" under the Act[41] and concludes by stating that nothing in the FAA shall apply to "contracts of employment of seamen, railroad employees, or any other class or workers engaged in foreign or interstate commerce."[42] This exemption from the FAA's coverage has been a source of dispute for the past six decades. The principal questions have been what constitutes a "contract of employment" under the Act and what is the extent of "any other class of workers engaged in foreign or interstate commerce"? The Supreme Court decided the latter issue in *Circuit City Stores, Inc. v. Adams*.[43]

What constitutes a "contract of employment" under the Act first became an issue with regard to the collective bargaining agreements of unions and their members.[44] During the 1940s and 1950s, a number of the federal circuit courts

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CONTRACTS § 1:20, at 49-50 (4th ed. 1990).

39. 9 U.S.C. § 3 (2000). Section 3 also provides, however, that the party requesting the stay must not be in default in proceeding with the arbitration. 9 U.S.C. § 3 (2000).

40. 9 U.S.C. § 4 (2000). Sections 3 and 4 were the basis for Circuit City's suit in the federal district court. *See* Circuit City Stores, Inc. v. Adams, No. C98-0365 CAL, 1998 U.S. Dist. LEXIS 6215, at *2 (N.D. Cal. Nov. 18, 1999), *rev'd*, 532 U.S. 105 (2001).

41. 9 U.S.C. § 1 (2000).

42. 9 U.S.C. § 1 (2000).

43. 532 U.S. 105 (2001).

44. More recently, it has also become an issue in the non-union context with regard to employment-related documents such as employment applications and employee handbooks that contain an arbitration provision but expressly disclaim that they are a contract of employment. *See* Stuart H. Bompey, Michael Delikat & Lisa K. McClelland, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 53 (1997). In *Brown v. KFC National Management Co.*, the Supreme Court of Hawaii found an arbitration agreement enforceable, even though it was contained in an employment application that expressly disclaimed that it was a contract of employment. 921 P.2d 146, 148 (Haw. 1996). Conversely, the Michigan Supreme Court, in *Heurtebise v. Reliable Business Computers*, found that an arbitration provision in an employee handbook expressly stating that it did not create a contract of employment was not enforceable. 550 N.W.2d 243, 247 (Mich. 1996). The Michigan court said that because the employer did not intend to be bound by the provisions of the handbook it could not enforce the arbitration agreement. *Id.*

considered that issue, with the Third, Fourth, and Fifth circuits holding that collective bargaining agreements are contracts of employment within the FAA,[45] while the First and Sixth circuits held that they are not.[46] The issue was largely mooted by the Supreme Court's opinion in *Textile Workers Union v. Lincoln Mills of Alabama*,[47] in which the Court authorized the creation of a body of federal common law of labor arbitration under Section 301 of the Labor Management Relations Act.[48] While some of these cases alluded to the second question posed by Section 1 of the FAA—the breadth of the exemption for workers "engaged in commerce"—none of the cases squarely addressed the issue. Some courts such as the Fourth Circuit simply concluded that the FAA did not apply to any contracts of employment.[49]

*Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437*[50] was the first case to address squarely the breadth of the Section 1 exemption. Tenney Engineering filed suit against the defendant union for breach of contract alleging that the union had violated the parties' collective bargaining agreement by striking.[51] Pursuant to Section 3 of the FAA, the union moved the trial court to stay the proceedings until the parties had arbitrated the matter.[52] The issue before the Third Circuit was whether Section 3 applied to the parties' collective bargaining agreement, which the court said in turn depended upon "the construction which is to be placed" upon the exemption clause in Section 1.[53] According to the majority, the issue was whether the exemption clause was "intended to include only those employees actually engaged in the channels of interstate or foreign commerce or did it comprehend all those

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45. *See* Lincoln Mills of Ala. v. Textile Workers Union, 230 F.2d 81, 84 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957); Amalgamated Ass'n St. Elec. Ry. & Motor Coach Employees, Local 1210 v. Penn. Greyhound Lines, 192 F.2d 310, 313 (3d Cir. 1951); Int'l Union United Furniture Workers of Am. v. Colonial Hardwood Flooring Co., 168 F.2d 33, 35 (4th Cir. 1948).

46. *See* Local 205, United Elec., Radio & Mach. Workers v. Gen. Elec. Co., 233 F.2d 85, 100 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957); Hoover Motor Express Co. v. Teamsters, Local Union No. 327, 217 F.2d 49, 52-53 (6th Cir. 1954).

47. 353 U.S. 448 (1957).

48. *Id.* at 453-57; *see* Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1994); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 894-99 (2000).

49. *See Int'l Union United Furniture Workers*, 168 F.2d at 36. "Labor contracts are specifically excluded from the federal arbitration act." Mercury Oil Ref. Co. v. Oil Workers Int'l Union, 187 F.2d 980, 983 (10th Cir. 1951).

50. 207 F.2d 450 (3d Cir. 1953).

51. *Id.* at 451.

52. *Id.*

53. *Id.*

engaged in activities affecting such commerce, such as the production of goods destined for sale in it?"[54]

After noting the sparseness of the legislative history on the point, the court mentioned objections to the bill made by Andrew Furuseth, the president of the International Seamen's Union of America, who argued that the wages of seamen were within admiralty jurisdiction and should not be subject to arbitration.[55] The court then explained that the drafters of the FAA had chosen to exempt seamen as well as railroad employees, both of which were classes of workers "engaged directly in interstate or foreign commerce."[56] The *Tenney* court then stated that the phrase "any other class of workers engaged in foreign or interstate commerce" was intended by Congress to be interpreted under the rule of ejusdem generis,[57] "to include only those workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."[58] Thus, the court concluded that the Section 1 exemption extended only to the contracts of workers engaged in the transportation industry.

In arriving at its decision, the *Tenney* court noted that "[i]t must be remembered that the Arbitration Act of 1925 was drawn and passed at a time when the concept of Congressional power over individuals whose activities affected interstate commerce had not developed to the extent to which it was expanded in the succeeding years."[59] The court concluded that Tenney's employees, who were engaged in the production of goods for subsequent sale, while undoubtedly affecting interstate commerce, were not directly involved in the "channels" of commerce itself; that is, they were not involved in transportation, and, therefore, their collective bargaining agreement was not included in the Section 1 exemption.[60]

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54. *Id.* at 452.

55. *Id.*

56. *Id.*

57. Ejusdem generis is "[a] canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999).

58. *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437*, 207 F.2d 450, 452 (3d Cir. 1953).

59. *Id.* at 453.

60. *Id.* The majority distinguished its decision in *Tenney* from its decisions in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Local Division 1210 v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3d Cir. 1951) (Greyhound I), and *Pennsylvania Greyhound Lines v. Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 1063*, 193 F.2d 327 (3d Cir. 1952) (Greyhound II) by explaining that in those cases the bus line employees were directly engaged in interstate transportation. *Tenney*, 207 F.2d at 453.

In a dissenting opinion, Judge McLaughlin criticized the majority's narrow reading of the Section 1 exemption and argued that the better reading was a broad one exempting all contracts of employment.[61] Judge McLaughlin argued that the legislative history showed that the FAA was enacted to "provide solely for arbitration in commercial disputes" and was not intended to apply to labor at all.[62] Therefore, the majority's use of ejusdem generis in construing Section 1 was misapplied because it would "defeat the obvious purpose" of the FAA.[63] Finally, Judge McLaughlin noted that construing Section 1 "[t]o suggest that the 1925 concept of interstate commerce should restrict the exclusionary language of the Act in 1953 is unrealistic."[64]

*Tenney* was followed by the Fourth Circuit Court's decision in *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*[65] The Fourth Circuit stated that it was "not impressed" by the Third Circuit's holding in *Tenney*.[66] The court stated that when Congress enacted the FAA, it had intended to exercise the full extent of its Commerce power.[67] Like the dissent in *Tenney*, the Fourth Circuit concluded that the contracts of employment exemption in Section 1 should also reach to the full extent of the Commerce power, and, thus, the exemption would apply to all contracts of employment.[68] The court limited its holding, however, to the collective bargaining context.[69]

Two years later, the Second Circuit added its voice to the debate in *Signal-Stat Corp. v. Local 475, United Electrical Radio & Machine Workers of America*.[70] In this case, the court agreed with both the decision and reasoning

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61. *Id.* at 455 (McLaughlin, J., dissenting).

62. *Id.* (McLaughlin, J., dissenting).

63. *Id.* at 458 (McLaughlin, J., dissenting) (quoting Gooch v. United States, 297 U.S. 124, 128 (1936)).

64. *Id.* (McLaughlin, J., dissenting). "[E]ven if it be agreed, as it must be, that the concept of interstate commerce was much narrower then than now, we need not be bound by the older view." *Id.* (McLaughlin, J., dissenting).

65. 215 F.2d 221 (4th Cir. 1954). Like *Tenney*, *Miller Metal Products* considered the Section 1 exemption in the context of a collective bargaining agreement which the court concluded was excluded from the FAA by the Section 1 exclusion for "contracts of employment." *Id.* at 224.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* Even so, the court's reasoning would seem to apply to individual contracts as well. *See id.*

70. 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957), *overruled on other grounds by* Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union Local 812 Int'l Bhd. of Teamsters, 242 F.3d 52 (2d Cir. 2001). *Signal-Stat*, like *Tenney* and *Miller Metal Products*, involved a collective bargaining agreement rather

of *Tenney*.[71] Adding to *Tenney's* reasoning, the court referred to "the present, almost universal," approval of arbitration and stated that a construction exempting only transportation workers was in accord with that approval as well as supporting what the court deemed to be the intention of Congress in enacting the FAA.[72]

Following *Signal-Stat*, the courts of appeals were silent on the issue for almost a decade, until the Seventh Circuit decided *Pietro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150*.[73] Referring to *Tenney* and *Signal-Stat*, the Seventh Circuit concluded that the Section 1 exemption applied only to transportation workers, and, thus, the parties' collective bargaining agreement fell within the scope of the FAA.[74]

Six years later, in *Dickstein v. duPont*, the First Circuit reached the same conclusion regarding the breadth of the Section 1 exemption.[75] The First Circuit summarily rejected the argument of Dickstein, a stockbroker for duPont, that he fell within the Section 1 exemption.[76] Citing *Tenney* and *Signal-Stat*, the First Circuit determined that the exemption was limited to employees involved in or related to the actual movement of goods.[77]

The Second Circuit then had the opportunity to revisit the issue in *Erving v. Virginia Squires Basketball Club*.[78] Citing *Tenney* and its own decision in *Signal-Stat*, and noting the recent decision in *Dickstein*, the Second Circuit

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than an individual contract of employment. *See id.*

71. *Id.* at 302-03. The court also referred to its interpretation of "workers" as used in Section 1 of the FAA in *Bernhardt v. Polygraphic Co. of America*. *See* Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948, 951-52 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956). In dicta, the court stated that the plaintiff in *Bernhardt*, a plant superintendent with managerial duties and a $15,000 annual salary (in 1955), was not a "worker" under the FAA. *Id.*

72. *Signal-Stat*, 235 F.2d at 302-03.

73. 351 F.2d 576 (7th Cir. 1965).

74. *Id.* at 579-80. The court did not mention the Fourth Circuit's decision to the contrary in *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954). The Seventh Circuit reiterated this holding in *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984).

75. 443 F.2d 783 (1st Cir. 1971). Unlike the previous circuit cases considering the Section 1 exemption, *Dickstein* involved an individual contract of employment rather than a collective bargaining agreement. *See id.*

76. *Id.* at 785.

77. *Id.*

78. 468 F.2d 1064 (2d Cir. 1972). This case arose from the departure of basketball great Julius Erving (a.k.a. "Dr. J") from the Virginia Squires to play for the Atlanta Hawks. *Id.* at 1067. Like *Dickstein*, *Erving* considered an individual contract of employment rather than a collective bargaining agreement. *See id.*

reaffirmed its holding that the Section 1 exemption applied only to transportation workers.[79] Thus, after *Dickstein*, the First, Second, Third, and Seventh Circuits had all limited the exemption to transportation workers, and the Fourth Circuit had held that the exemption applied to all contracts of employment, but limited its holding to the collective bargaining context. The issue would not arise again in the courts of appeals for over a decade.

The Sixth Circuit's decision in *Asplundh Tree Expert Co. v. Bates*[80] followed in the wake of several Supreme Court decisions regarding other aspects of the FAA but not reaching the scope of the Section 1 exemption.[81] *Asplundh* considered an employment contract between Asplundh Tree Expert Company ("Asplundh") and Bates, an employee.[82] The contract contained an arbitration provision calling for the arbitration of any dispute arising from the parties' contract.[83] When Asplundh filed suit against Bates in federal district court, Bates demanded arbitration of Asplundh's claims.[84] Relying on the Sixth Circuit decision in *Willis v. Dean Witter Reynolds, Inc.*,[85] the district judge concluded that all employment contracts were exempt from the FAA.[86]

On appeal, Asplundh argued that the arbitration clause was unenforceable because it was contained in a contract of employment.[87] The court began its consideration of this argument by discussing the *Willis* decision, relied on by the district court, in which another panel of the Sixth Circuit stated that Congress intended to exclude all employment contracts from the FAA.[88] The *Asplundh*

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79. *Id.* at 1069.

80. 71 F.3d 592 (6th Cir. 1995).

81. *See infra* notes 256-62. In *Gilmer v. Interstate/Johnson Lane Corp.*, the majority recognized the Section 1 issue in a footnote but declined to address it. 500 U.S. 20, 25 n.2 (1991). Writing in dissent, Justice Stevens stated that the Court should have addressed the issue and argued at length for a broad reading of Section 1 to exempt all contracts of employment. *See id.* at 36-43 (Stevens, J., dissenting).

82. *Asplundh*, 71 F.3d at 593. The complete underlying facts are considerably more complicated. *See id.* at 593-94.

83. *Id.* at 593.

84. *Id.*

85. 948 F.2d 305 (6th Cir. 1991).

86. *Asplundh*, 71 F.3d at 594. The district judge initially granted Bates' motion to compel arbitration and denied Asplundh's motion for a preliminary injunction to stay arbitration. *Id.* After Asplundh filed an appeal of the district court's order, the district court took note of *Willis v. Dean Witter* and, concluding that all contracts of employment were exempt from the FAA, invited Asplundh to dismiss its appeal, which Asplundh declined to do. *Id.*

87. *Id.*

88. *See id.* at 596-97.

court concluded that the statement in *Willis* was dicta which it was not required to follow.[89]

The *Asplundh* court then reviewed the previous decisions considering the breadth of the Section 1 exemption, stating that it was "incline[d] to agree" with the decision and reasoning of *Tenney* that limited the exemption to the employment contracts of transportation workers.[90] Such an interpretation, the court reasoned, comported with the language of the FAA and the "apparent intent" of Congress in enacting it.[91] This intent was illustrated by the difference between the broad language in Section 2 defining the Act's coverage and the narrower language of Section 1.[92] The court concluded by stating that a narrow interpretation of the Section 1 exemption was consistent with the FAA's policy favoring arbitration and the Supreme Court's "clear disposition" to expand the Act's application.[93]

Soon after *Asplundh*, the Fifth Circuit addressed the issue in *Rojas v. TK Communications, Inc.*,[94] and also concluded that Section 1 should be given a narrow reading, limiting the exemption to transportation workers.[95] Reasoning that if Congress had intended to exempt all contracts of employment, it could have expressly done so, the court stated that "it is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance."[96]

The D.C. Circuit considered the issue for the first time and reached the same conclusion in *Cole v. Burns International Security Services*.[97] The court supported its conclusion with two canons of statutory interpretation.[98] The first canon relied on was that a court should avoid reading statutory language in a way that makes some words in the statute completely redundant.[99] Thus, the court would not read "any other class of workers engaged in foreign or interstate commerce" to exempt all contracts of employment, because doing so would make the inclusion of seamen and railroad employees unnecessary.[100] The court

89. *Id.* at 597.

90. *See id.* at 597-600.

91. *Id.* at 601.

92. *Id.* "[H]ad Congress intended the exclusion to be as broad as the coverage, it would have used the same language in the exclusion clause." *Id.*

93. *Id.*

94. 87 F.3d 745 (5th Cir. 1996).

95. *Id.* at 748.

96. *Id.* (quoting Albert v. Nat'l Cash Register Co., 874 F. Supp. 1324, 1327 (S.D. Fla. 1995)).

97. 105 F.3d 1465 (D.C. Cir. 1997).

98. *Id.* at 1470.

99. *Id.*

100. *Id.*

also relied on the canon of ejusdem generis, as the Third Circuit had in *Tenney*, concluding that "any other class of workers" only included workers similar to seamen and railroad employees.[101]

Beyond the canons, the *Cole* court noted that its decision was supported by the decisions of the other circuits reaching the same conclusion.[102] Further, the court noted the distinction drawn by the Supreme Court in *Allied-Bruce Terminix Cos. v. Dobson*[103] between the meanings of "involving commerce" used in Section 2 of the FAA and "in commerce" used in Section 1.[104] "Involving commerce" extends to the limits of the Commerce Clause and is broader than "in commerce."[105] The court stated that it recognized, as Justice Stevens had argued in his *Gilmer* dissent,[106] that the legislative history of the Section 1 exemption could be read to indicate Congress intended to exempt all contracts of employment.[107] Nevertheless, because the statute was unambiguous and the case law was "clear" on the meaning of the exemption, "legislative history is, at best, secondary, and, at worst, irrelevant."[108]

The Seventh Circuit revisited the issue in *Pryner v. Tractor Supply Co.*[109] In an opinion by Judge Posner, the court noted the argument of Professor Matthew Finkin that the legislative history showed Congress' intent to exclude all employment contracts.[110] The court further noted, however, that the "impetus" for the exemption came from the seafarer's union and that seamen and railroad employees were, at the time the FAA was enacted, already heavily regulated by federal law.[111] Although motor carriers were not yet heavily regulated by federal law, the court reasoned it may have seemed at the time that they would also eventually be similarly regulated.[112] The Seventh Circuit felt that this history supported, rather than undermined, limiting the exemption to transportation workers.[113] Finally, the court noted that "[t]o impress the modern

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101. *Id.* at 1471.

102. *Id.*

103. 513 U.S. 265 (1995).

104. *Cole*, 105 F.3d at 1471-72.

105. *Id.* at 1472.

106. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36 (1991) (Stevens, J., dissenting).

107. *Cole*, 105 F.3d at 1472.

108. *Id.*

109. 109 F.3d 354 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997).

110. *Id.* at 359; *see generally* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996).

111. *Pryner*, 109 F.3d at 358.

112. *Id.*

113. *Id.*

meaning" of commerce on that word in the exemption would make the specific inclusion of "seamen" and "railroad employees" superfluous and would give the exemption "a breathtaking scope."[114] Such an interpretation would make an arbitration clause in an employment agreement between "a giant multinational corporation and its chief executive officer" unenforceable in federal court.[115]

Within little more than a year, the Fourth, Eighth, and Tenth Circuits addressed the Section 1 issue for the first time, and each of those courts also concluded that Section 1 exempted only transportation workers from the FAA.[116] In a footnote in its *O'Neil v. Hilton Head Hospital* opinion, the Fourth Circuit noted the apparent conflict with its earlier decision in *Miller Metal Products*,[117] but stated that the new decision was not to the contrary.[118] "To begin with, [*Miller Metal Products*] predates the substantial body of Supreme Court precedent supporting utilization of the arbitration process. Even if we were to assume that *Miller Metal Products* had any remaining vitality, however, it clearly does not apply to individual employment contracts."[119]

Thus, after the Tenth Circuit decided *McWilliams* in 1998, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits had all considered the scope of the FAA Section 1 exemption, and all of those circuits had concluded that only the employment contracts of transportation workers were exempt from the Act's coverage. The Fourth Circuit had reached the same conclusion for individual contracts of employment, although arguably it still held all collective bargaining agreements exempt from the FAA, a holding which it had strongly questioned in *O'Neil*. The other circuits had not considered the issue, nor had the Supreme Court.

The next circuit to consider the Section 1 exemption was the Ninth Circuit in *Craft v. Campbell Soup Co.*[120] In this case, the court ruled, in a 2-1 opinion, that all contracts of employment were exempt from the FAA.[121] The dispute before the court arose from a non-discrimination provision in a collective bargaining agreement between Craft's union and Campbell Soup, Craft's

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114. *Id.*

115. *Id.*

116. *See* McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835-37 (8th Cir. 1997).

117. United Elec., Radio & Mach. Workers of Am. v. Miller Metal Prods., Inc., 215 F.2d 221 (4th Cir. 1954); *see supra* notes 65-69.

118. *O'Neil*, 115 F.3d at 274 n.1.

119. *Id.*

120. 177 F.3d 1083 (9th Cir. 1999).

121. *See id.* at 1094.

employer.[122] The provision provided that disputes arising under it would be subject to a "grievance and arbitration procedure."[123]

Craft filed a grievance alleging, inter alia, racial discrimination.[124] His grievance was not resolved and was eventually referred to arbitration.[125] In the meantime, Craft filed suit in district court alleging claims under Title VII of the Civil Rights Act of 1964 and other state law claims.[126] The district court granted summary judgment for Campbell Soup on the state law claims, but did not grant summary judgment compelling arbitration of the Title VII claims.[127]

The Ninth Circuit determined that it did not have jurisdiction to hear Campbell Soup's interlocutory appeal unless the FAA and its interlocutory appeal provision[128] applied to Craft's collective bargaining agreement.[129] Thus, the court determined that the issue was whether the FAA applied to employment contracts at all.[130]

The court noted that two interpretations were given to the Section 1 exemption: one holding that Congress did not intend for the FAA to apply to any employment contracts and the other holding that Congress intended for the FAA to apply to all employment contracts, except for the contracts of employees actually transporting people or goods in interstate commerce.[131] The Ninth Circuit stated that courts following the second view were applying a contemporary meaning to the terms used in the FAA, whereas a true understanding of Congress' intent could only come from an understanding of the commerce power as it was known when the FAA was enacted in 1925.[132]

Quoting *Hammer v. Dagenhart*,[133] the court illustrated that, at the time, Congress' power under the Commerce Clause extended "to interstate transportation, [and] its incidents," but not to the mere production of goods, even

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122. *Id.* at 1084.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* The Ninth Circuit noted that "[b]oth parties assume that Campbell Soup's motion for summary judgment was a *de facto* petition under 9 U.S.C. § 4 for an order to compel arbitration. Although Campbell Soup's motion does not mention this section, we agree that it was functionally equivalent to a motion to compel arbitration." *Id.* at 1084 n.4.

128. 9 U.S.C. § 16(a)(1)(B) (2000). Specifically, the section provides that an appeal may be taken from an order denying a petition under Section 4 of the FAA. 9 U.S.C § 16(a)(1)(B) (2000).

129. *Craft*, 177 F.3d at 1085.

130. *See id.*

131. *Id.*

132. *Id.* at 1086.

133. 247 U.S. 251, 272 (1918).

though intended for interstate commerce.[134] Similarly then, Congress' Commerce Clause power in 1925 was limited to employees transporting people or goods in interstate commerce.[135] Thus, when Congress drafted Section 2, extending the scope of the FAA to "any maritime transaction or a contract evidencing a transaction involving *commerce*,"[136] it only had the power to reach those kinds of employees.[137] The court reasoned, however, that Congress then exempted those same employees in Section 1.[138]

The court next turned to the legislative history of the FAA, stating that the history demonstrated that the purpose of the Act was solely to bind merchants in commercial dealings.[139] The court noted the Senate committee hearing testimony of W.H.H. Piatt, the chair of the American Bar Association committee that drafted the bill that became the FAA.[140] When some voiced concern that the bill would apply to workers' contracts, Piatt had said it was not intended "that this shall be an act referring to labor disputes *at all*."[141] Further, the Secretary of Commerce, Herbert Hoover, had told the same committee that to ensure that employment contracts were excluded from the FAA, the phrase "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce" could be added.[142] This, the court concluded, showed that the FAA was never intended to apply to employment contracts "of any sort."[143]

The court then criticized the approaches taken by other courts holding that the exemption extends only to transportation workers. Many courts, it noted, focused on Section 1, the exemption provision, instead of Section 2, the coverage provision.[144] Section 1 extends the exemption only to the employees over which Congress actually then had power under the Commerce Clause.[145] The court stated that "[r]eading § 2 and § 1 together . . . demonstrates that Congress did not intend for the FAA to apply to any employment contracts .... Other circuits (and the dissent here) have refused to follow that approach, which is why they have reached the wrong result."[146] The court also criticized

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134. *Craft*, 177 F.3d at 1086.
135. *Id.* at 1087.
136. 9 U.S.C. § 2 (2000) (emphasis added).
137. *Craft*, 177 F.3d at 1087.
138. *Id.*
139. *Id.* at 1089.
140. *Id.*
141. *Id.* at 1090.
142. *Id.*
143. *Id.*
144. *Id.* at 1091.
145. *Id.* at 1092.
146. *Id.* (citation omitted).

those courts for relying on the distinction between "in commerce" as used in Section 1, and "involving commerce," as used in Section 2[147] by stating that "[c]ourts that have made these kinds of textual distinctions have relied entirely on post-New Deal cases" that were decided after Congress' power under the Commerce Clause was expanded by the Supreme Court.[148]

In conclusion, the majority stated that courts applying Congress' full commerce power to Section 2 of the FAA, while not similarly extending the exemption for employment contracts contained in Section 1, created a "disharmony" between the two provisions that "did not exist when Congress enacted the FAA."[149] Because the court found all employment contracts exempt from the FAA, it held that it was without jurisdiction to hear Campbell Soup's interlocutory appeal.[150]

In his dissent, Judge Brunetti noted that the majority's holding went against the "great weight" of circuit authority.[151] The dissent argued that the plain language of Section 1 was clear in limiting the exemption to transportation workers, and that, because the language was clear, the majority's "rather complex exercise in statutory interpretation" was in error.[152] Furthermore, the dissent argued, the majority's reading violated the "cardinal principle" of statutory construction that a court should give effect to every clause and word of a statute.[153] Extending the exemption to all employment contracts was in error because it robbed the inclusion of "seamen and railroad employees" of any meaning.[154]

Shortly thereafter, the Ninth Circuit applied its *Craft* holding in *Circuit City Stores, Inc. v. Ahmed*[155] and *Circuit City Stores, Inc. v. Adams*.[156] The appeal from the latter decision finally brought the issue to the Supreme Court.

147. *Id.* at 1092-93.

148. *Id.* at 1093.

149. *Id.*

150. *Id.* at 1094.

151. *Id.* (Brunetti, J., dissenting).

152. *Id.* (Brunetti, J., dissenting).

153. *Id.* (Brunetti, J., dissenting) (quoting Bennett v. Spear, 520 U.S. 154, 173 (1997)).

154. *Id.* (Brunetti, J., dissenting).

155. 195 F.3d 1131 (9th Cir. 1999), *vacated*, 532 U.S. 938 (2001).

156. 194 F.3d 1070 (9th Cir. 1999), *rev'd*, 532 U.S. 105 (2001).

## IV. THE INSTANT DECISION

### A. The Majority

In *Circuit City Stores, Inc. v. Adams*,[157] a majority of the Supreme Court held that Section 1 of the FAA exempts only the contracts of employment of transportation workers from the provisions of the Act.[158] The majority began its analysis by noting that all but one of the federal courts of appeals had reached that conclusion, while the Ninth Circuit adopted a different approach exempting all contracts of employment as "beyond the FAA's reach, whether or not the worker is engaged in transportation."[159]

The Court first referred to several of its earlier decisions considering the FAA. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[160] the Court concluded that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty.[161] In *Southland Corp. v. Keating*,[162] the Court held that the FAA created substantive federal law that was applicable in both state and federal courts and preempted state laws hostile to arbitration.[163] In *Allied-Bruce Terminix Cos. v. Dobson*,[164] the Court held that the use of "involving commerce" in Section 2 of the FAA evidenced an intent by Congress to "exercise [its] commerce power to the full."[165]

Turning to Adams' arguments, the Court addressed Adams' contention that, regardless of the breadth of the Section 1 exemption, an employment contract was not within Section 2 of the Act,[166] the coverage provision, because an employment contract was not a "contract evidencing a transaction involving

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157. 532 U.S. 105 (2001). Justice Kennedy authored the opinion, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined. *Id.* at 107.

158. *Id.* at 119.

159. *Id.* at 109.

160. 388 U.S. 395 (1967).

161. *Id.* at 405.

162. 465 U.S. 1 (1984).

163. *Id.* at 16.

164. 513 U.S. 265 (1995).

165. *Id.* at 277.

166. 9 U.S.C. § 2 (2000). Section 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

interstate commerce."[167] The Court rejected this argument, saying that such an interpretation would make the Section 1 exclusion "pointless."[168] Therefore, the Court concluded that if arbitration agreements in employment contracts were to be excluded from the FAA, it would have to be under Section 1.[169]

Turning to Section 1, the Court considered Adams' argument that the Section 1 exemption should reach to the full extent of the Commerce power, and, thus, exempt all contracts of employment.[170] Adams argued that Section 1 and Section 2 were "coterminous," with Section 2 extending the FAA's coverage to all employment contracts within the Commerce power, and the language of Section 1, "engaged in . . . commerce," then exempting all of those employment contracts.[171] This argument, however, ran into "an immediate, and in [the Court's] view, insurmountable textual obstacle."[172] Unlike "involving commerce" in Section 2, the Court reasoned, "any other class of workers engaged in . . . commerce" was a residual phrase following the express terms "seamen" and "railroad employees."[173] Interpreting "engaged . . . in commerce" to exclude all employment contracts from the FAA would not "give independent effect" to the inclusion of "seamen" and "railroad employees" and would make the inclusion of those specific categories unnecessary.[174] Thus, like the court in *Tenney*, the majority concluded that the Section 1 exemption was to be interpreted under the ejusdem generis canon.[175] As a result, the Court found that the meaning of the residual clause was controlled by reference to the categories of workers referred to just before it, and could not extend to *all* employment contracts.[176]

Futhermore, the Court concluded that even if "engaged in commerce" stood alone in Section 1, it still would not exclude all contracts of employment from the FAA.[177] The Court noted that, unlike "affecting commerce" and "involving commerce," which indicate a reach to the full extent of the Commerce Clause power, "in commerce," and specifically "engaged in commerce," have a more

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167. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113 (2001).

168. *Id.*

169. *Id.* at 113-14.

170. *Id.* at 114.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* "The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* at 114-15.

176. *Id.* at 115.

177. *Id.*

limited reach.[178] Referring to its decision in *Allied-Bruce*, the Court stated that the words "in commerce" were "words of art" which did not express a congressional intent to legislate to the full extent of its Commerce Clause authority.[179]

The Court also disagreed with the argument that "engaged in commerce" should be read differently in the present case because the FAA was enacted when the Commerce Clause power was narrower that it is today.[180] Adams argued that in 1925, "engaged in commerce" would have approached the outer limits of the Commerce Clause power.[181] The Court rejected this argument, saying that it would contradict earlier cases "and bring instability to statutory interpretation."[182] In support of its decision, the Court noted other cases where it had declined to read "engaged in commerce" differently where the phrase was used in a statute predating the expansion of the Commerce Clause power.[183] "It would be unwieldy," the Court stated, "for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment."[184] While the Court recognized that statutory jurisdictional formulations do not always have a uniform meaning whenever used by Congress, it stated that a narrow reading of the Section 1 exemption was supported by the statutory context in which it was found and also by the FAA's purpose.[185]

After noting that a narrow reading of Section 1 was directed by the text of the FAA itself, thus obviating the need for reference to the legislative history, the Court noted that, in any case, that history was sparse and what did exist was not persuasive.[186] The Court referred to the testimony of Andrew Furuseth, the president of the International Seamen's Union of America, before a Senate subcommittee hearing, objecting to the FAA.[187] Noting the problematic nature of such history, the Court stated that it "ought not attribute to Congress an

178. *Id.*
179. *Id.* at 115-16.
180. *Id.* at 116-17.
181. *Id.* at 116.
182. *Id.* at 117.
183. *Id.*
184. *Id.* at 118.
185. *Id.* at 118-19.
186. *Id.* at 119-20.
187. *Id.* Supporters of a broad reading of the Section 1 exemption frequently rely on this testimony. *See id.* at 126-27 (Stevens, J., dissenting); *see also* David E. Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 262-63 (2000); Finkin, *supra* note 110, at 291-92.

official purpose based on the motives of a particular group that lobbied for or against a certain proposal."[188]

The Court also rejected Adams' argument that a narrow reading of Section 1 would attribute an "irrational intent" to Congress by exempting the employment contracts of those workers most clearly within the Commerce Clause power in 1925, while extending the Act's coverage to employment contracts which were not as directly connected with interstate commerce and thus less certain to be within the Commerce Clause power as it then existed.[189] The Court saw "no paradox" in this reading, concluding that it was a permissible inference that Congress would exclude transportation workers from the FAA because of its "undoubted authority" to enact statutes specific to those groups.[190] Specifically, the Court noted that when the FAA was enacted, federal legislation already provided for the arbitration of disputes between seamen and their employers and that, at that time, grievance procedures were in place for railroad employees, with a statute calling for arbitration and mediation of those disputes forthcoming.[191] The Court stated that it was reasonable to assume that Congress did not want to disturb those procedures and that was the reason Congress exempted those workers from the FAA.[192] The further exclusion of "any other class of workers engaged in foreign or interstate commerce," the Court reasoned, could exhibit Congress' intent that the FAA cover workers in general while allowing for specific legislation for transportation workers.[193]

The Court noted the arguments of "[v]arious *amici*, including the attorneys general of 22 States" that a narrow reading of Section 1 would pre-empt state laws limiting the use of arbitration agreements in employment contracts, thus intruding upon the States' "traditional role in regulating employment relationships."[194] The Court stated that this argument was better directed at *Southland Corp. v. Keating*,[195] in which the court held that the FAA applied in state court and pre-empted state law.[196] The Court also noted that it had recently reconsidered that issue in *Allied-Bruce* and had chosen not to overrule it.[197]

The majority concluded its analysis by pointing to the benefits of arbitration of disputes and noting its prior rejection of the idea that those benefits were not

188. *Circuit City Stores*, 532 U.S. at 120.
189. *Id.*
190. *Id.* at 120-21.
191. *Id.* at 121.
192. *Id.*
193. *Id.*
194. *Id.* at 121-22.
195. 465 U.S. 1 (1984).
196. *Circuit City Stores*, 532 U.S. at 122.
197. *Id.*

present in the employment context.[198] One of the benefits discussed by the Court is avoiding the costs of litigation, a fact which the Court noted was particularly important in employment disputes, due to the typically smaller amounts of money involved as compared to commercial disputes as well as the problems presented by choice-of-law issues in the context of employment disputes.[199] Further, the Court found that the enforcement of arbitration was acceptable because it would not conflict with the policies of federal anti-discrimination statutes.[200] Quoting familiar language from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[201] the Court stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[202]

Relying on the ejusdem generis construction, and averring to the FAA's purpose to overcome the hostility of the courts toward agreements to arbitrate, the Court concluded that the text of the FAA foreclosed the Ninth Circuit's broad reading exempting all contracts of employment.[203]

> While it is of course possible to speculate that Congress might have chosen a different jurisdictional formulation had it known that the Court would soon embrace a less restrictive reading of the Commerce Clause, the text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts. Section 1 exempts from the FAA only contracts of employment of transportation workers.[204]

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198. *Id.* at 122-23.

199. *Id.* at 123.

200. *Id.*

201. 473 U.S. 614, 628 (1985).

202. *Circuit City Stores*, 532 U.S. at 123.

203. *Id.* at 119.

204. *Id.* Circuit City's success at enforcing the agreement to arbitrate was short-lived. On remand, the Ninth Circuit found the "Dispute Resolution Agreement" between Circuit City and Adams an unconscionable contract of adhesion and, therefore, unenforceable under California law. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892-95 (9th Cir. 2002), *cert. denied*, 122 S.Ct. 2329 (2002). Citing the Supreme Court's decision in *Allied-Bruce*, the court offered that "[t]he FAA was enacted to overcome courts' reluctance to enforce arbitration agreements." *Id.* at 892 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995)). The court noted, however, that the FAA, while providing that agreements to arbitrate are "valid, irrevocable, and enforceable," allows for general contract defenses such as fraud, duress and unconscionability against such agreements. *Id.* (quoting 9 U.S.C. § 2 (2000)). The court explained the California test for unconscionability as one determining whether the contract is both *procedurally* unconscionable (considering "the equilibrium of bargaining

### B. Justice Stevens' Dissent

In his dissent,[205] Justice Stevens criticized the majority's "heavy reliance" on the courts of appeals decisions in the decade before *Circuit City*.[206] Noting the phrases "maritime transaction" and "contract evidencing a transaction involving commerce," Justice Stevens remarked, "were [the court] writing on a clean slate, there would be good reason to conclude that neither . . . phrase . . . was intended to encompass employment contracts."[207] Justice Stevens argued that the history of the FAA clearly showed that its purpose was simply to provide for the enforcement of arbitration provisions in commercial and admiralty contracts.[208] Nothing in the history of the Act's drafting by the American Bar Association or the congressional records contained any evidence that it was intended to apply to employment contracts,[209] and despite references to the bill describing it as applying only to "commercial contracts" and "business men,"[210] organized labor opposed its original version.[211] Specifically, Justice Stevens referred to the objections of Andrew Furuseth, the president of the International Seamen's Union of America.[212] In response to these objections, the chairman of

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power between the parties and the extent to which the contract clearly discloses its terms") and *substantively* unconscionable (whether "the terms of the contract are unduly harsh or oppressive"). *Id.* at 893.

Finding the contract procedurally unconscionable, the court noted that the Dispute Resolution Agreement was a standard-form contract "drafted by the party with superior bargaining power." *Id.* The court also found the contract substantively unconscionable, noting that the agreement did not allow recovery of damages to the extent otherwise available, and that the agreement, while requiring employees to arbitrate any employment-related disputes with Circuit City, did not require Circuit City to arbitrate any claims it might make against its employees. *Id.* at 893-94. The Ninth Circuit referred to a California Supreme Court case considering a similar contract in which it had held that some "modicum of bilaterality" was required. *Id.* at 894 (quoting Armendariz v. Found. Health Pschycare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000)) (internal quotation marks omitted). Because it could not sever the objectionable provisions without "rewriting" the Dispute Resolution Agreement, the Ninth Circuit found "the entire arbitration agreement unenforceable" and again reversed the district court's order compelling arbitration. *Id.* at 896.

205. *Circuit City Stores*, 532 U.S. at 124 (Stevens, J., dissenting) (joined by Justices Ginsberg and Breyer; joined in part by Justice Souter).

206. *Id.* (Stevens, J., dissenting).

207. *Id.* (Stevens, J., dissenting).

208. *Id.* at 125 (Stevens, J., dissenting).

209. *Id.* at 126 (Stevens, J., dissenting).

210. *See id.* at 126 n.2 (Stevens, J., dissenting).

211. *Id.* at 126-27 (Stevens, J., dissenting).

212. *Id.* The majority also addressed Furuseth's objections but did not find them persuasive. *See supra* notes 187-88.

the ABA committee that drafted the bill and Secretary of Commerce Herbert Hoover both suggested that Congress adopt language identical to the now-existing exemption language in Section 1.[213]

Justice Stevens argued that this history showed the FAA was not intended to apply to employment contracts.[214] Thus, it was "ironic" that the majority used the exemption clause as a basis to include employment contracts within the FAA's coverage.[215] While the majority said that the Section 1 exemption would be "pointless" if Section 2 did not bring employment contracts within the FAA's coverage at all, Justice Stevens argued that it was "not 'pointless' to adopt a clarifying amendment in order to eliminate opposition" to the bill.[216] Further, Justice Stevens stated that the majority's broad reading of Section 2 was incongruous with its narrow reading of Section 1.[217]

Justice Stevens noted that the early courts of appeals decisions generally assumed that all contracts of employment were intended to be excluded from the FAA.[218] The narrow reading was not adopted until 1954, by the *Tenney* court.[219] Furthermore, when the Supreme Court in *Lincoln Mills*[220] ruled that Section 301 of the Labor and Management Relations Act granted the authority to compel arbitration under a collective bargaining agreement, its failure to rely on the FAA for that authority implied that the Court did not think that the FAA applied to employment contracts.[221] Justice Stevens noted Justice Frankfurter's dissenting opinion in *Lincoln Mills* which explicitly said so.[222]

Justice Stevens also criticized the Court's recent cases, which he felt went beyond overcoming judicial prejudice and instead pushed "the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration."[223] Thus, when the Court pointed to the recent decisions of the courts of appeals holding that Section 1 should be given a narrow reading, the Court was "standing on its own shoulders."[224]

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213. *Circuit City Stores*, 532 U.S. at 127 (Stevens, J., dissenting).
214. *Id.* at 128 (Stevens, J., dissenting).
215. *Id.* (Stevens, J., dissenting).
216. *Id.* (Stevens, J., dissenting).
217. *Id.* (Stevens, J., dissenting).
218. *Id.* at 129-30 (Stevens, J., dissenting).
219. *Id.* at 130 (Stevens, J., dissenting).
220. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957).
221. *Circuit City Stores*, 532 U.S. at 130-31 (Stevens, J., dissenting).
222. *Id.* at 131 (Stevens, J., dissenting).
223. *Id.* at 131-32 (Stevens, J., dissenting).
224. *Id.* at 132 (Stevens, J., dissenting).

### C. Justice Souter's Dissent

Justice Souter[225] began by stating that there were two ways of reading Sections 1 and 2 of the FAA.[226] The first would read the language only as it would have been understood in 1925 when the FAA was enacted.[227] This reading, according to Justice Souter, would "result in a statutory ambit frozen in time, behooving Congress to amend the statute whenever it desired to expand arbitration clause enforcement beyond its scope in 1925."[228] The second approach would be to read the language in a manner consistent with the modern conception of the Commerce Clause power.[229] This approach would produce an "elastic reach," understanding that Congress would have wanted to go as far as it could, "whatever that might be over time."[230] Justice Souter stated that the Court applied such an elastic reading to Section 2 in *Allied-Bruce*, holding that Section 2 reached to the full extent of the modern Commerce Clause power.[231] Thus, the issue was whether Section 1 should be given "a correspondingly evolutionary reading, so as to expand the exemption for employment contracts to keep pace with the enhanced reach of the general enforceability provision."[232] While such an elastic approach seemed the natural result to Justice Souter, he noted that most of the courts of appeals and the majority had decided to the contrary.[233]

Justice Souter stated that a broad reading of the Section 1 exemption faced only "two hurdles," neither of which was a bar.[234] The first was the difference between "engaged in commerce" in Section 1, and "involving commerce" in Section 2.[235] When Congress passed the FAA, the only employees over which Congress had Commerce Clause power were those employees actually engaged in interstate commerce, such as transportation employees.[236]

> Thus, by using "engaged in" for the exclusion, Congress showed an intent to exclude to the limit of its power to cover employment

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225. *Id.* at 133 (Souter, J., dissenting) (joined by Justices Stevens, Ginsberg, and Breyer).

226. *Id.* (Souter, J., dissenting).

227. *Id.* at 133-34 (Souter, J., dissenting).

228. *Id.* (Souter, J., dissenting).

229. *Id.* (Souter, J., dissenting).

230. *Id.* at 134 (Souter, J., dissenting).

231. *Id.* (Souter, J., dissenting).

232. *Id.* (Souter, J., dissenting).

233. *Id.* (Souter, J., dissenting).

234. *Id.* at 135 (Souter, J., dissenting).

235. *See id.* (Souter, J., dissenting).

236. *Id.* at 136 (Souter, J., dissenting).

> contracts in the first place, and it did so just as clearly as its use of "involving commerce" showed its intent to legislate to the hilt over commercial contracts at a more general level.[237]

Furthermore, Justice Souter continued, none of the cases relied on by the majority when it concluded that "engaged in" directed a narrow reading of the exemption "dealt with the question here, whether exemption language is to be read as petrified when coverage language is read to grow."[238]

The second hurdle Justice Souter recognized was the inclusion of "any other class of workers engaged in . . . commerce" after the specific inclusion of "seamen" and "railroad employees," to which the majority had applied ejusdem generis.[239] Justice Souter stated that ejusdem generis is only a fallback, however, and that where, as in the present case, there were good reasons to, it should be ignored.[240] Justice Souter also addressed the majority's reliance on the fact that Congress excluded the employment contracts of those groups of workers over which it had already enacted legislation.[241] According to Justice Souter, "the explanation for the catchall is not *ejusdem generis*; instead, the explanation for the specifics is *ex abundanti cautela*, abundance of caution."[242]

## V. COMMENT

When the Supreme Court reversed the Ninth Circuit and held that Section 1 of the Federal Arbitration Act exempts from the Act only the contracts of employment of transportation workers, the Court did not adopt a new or unique rule. Instead, the Court merely approved the approach adopted by ten of the eleven circuit courts of appeals to reach the issue and which dates back to 1954.[243] Given the overwhelming weight of authority in favor of the majority's holding (even the Ninth Circuit, the only court of appeals to hold otherwise, was split 2-1 with the dissent arguing for the rule adopted by the majority in the instant case), it is perhaps surprising that the Supreme Court decided the issue on as close a vote as it did, the Court splitting 5-4. On the other hand, given the strong arguments available to both sides of the debate, perhaps a close decision should have been expected.

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237. *Id.* (Souter, J., dissenting).
238. *Id.* at 137 (Souter, J., dissenting).
239. *Id.* at 137-38 (Souter, J., dissenting).
240. *Id.* at 138 (Souter, J., dissenting).
241. *Id.* at 139 (Souter, J., dissenting).
242. *Id.* at 140 (Souter, J., dissenting).
243. *See* Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437, 207 F.2d 450 (3d Cir. 1953).

The problem in interpreting Section 1, however, arises not from the language of the FAA, but from the Supreme Court's expansion of the Commerce Clause power in the years following the FAA's enactment.[244] When Congress passed the FAA, its Commerce Clause power was limited to the traditional understanding of "commerce," which meant the exchange of goods and services through buying, selling and bartering, and transportation related thereto.[245] Likewise, Congress' Commerce Clause power over employment relationships extended only to workers actually engaged in interstate commerce, that is, transportation workers.[246] Even supporters of a broad interpretation accept this fact.[247]

Given that at the time of the FAA's passage Congress knew it only had the power under the Commerce Clause to reach employees such as seamen, railroad workers, and other workers engaged in transportation, the exclusion in Section 1 seems clear; only that category of employees was exempted from the Act. Thus, the majority's use of ejusdem generis produces the reading of the exclusion most consistent with the extent of Congress' Commerce Clause power when it enacted the FAA. It seems unreasonable that Congress would try to extend an exemption to employment contracts over which it had no reach.[248] Further, reading the phrase to exempt all employment contracts produces a reading that is essentially "seamen, railroad employees, *or* everyone else." Obviously, clearer language would have been "all contracts of employment" had Congress in fact wanted to be sure to exclude all contracts of employment. Because Congress could have used clear language to exclude all employment contracts but did not do so, the more appropriate reading is that Congress intended the exclusion to apply only to transportation workers, with "any other

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244. *Compare* Hammer v. Dagenhart, 247 U.S. 251 (1918) *with* United States v. Darby, 312 U.S. 100 (1941).

245. *See* United States v. Lopez, 514 U.S. 549, 585-87 (1995) (Thomas, J., concurring). "Commerce" has also been defined by comparison to activities which are not "commerce," particularly manufacturing and agriculture, even though those activities produce goods which are ultimately exchanged in commerce. *See id.* BLACK'S LAW DICTIONARY defines "commerce" as "[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations." BLACK'S LAW DICTIONARY 263 (7th ed. 1999).

246. *Circuit City Stores*, 532 U.S. at 136 (Souter, J., dissenting).

247. *Id.* (Souter, J., dissenting); *see also* Craft v. Campbell Soup Co., 177 F.3d 1083, 1087 (9th Cir. 1999); Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329, 331-33 (1997).

248. This creates a problem for those supporting a narrow reading of Section 1 as well. The coverage provision, Section 2, reaches all employment contracts only after the Court expanded the Commerce Clause power. Thus, Congress would not need to have exempted those contracts had it wanted to because they would not have fallen within the Act's coverage in the first place. *See supra* text accompanying notes 180-85.

class of workers engaged in . . . commerce" merely rounding out the category, of which seamen and railroad employees were the principal parts.

The majority, however, fails to reconcile or explain its broad reading of Section 2 as approved in *Allied-Bruce*,[249] with its narrow reading of Section 1. If the Commerce Clause power extended only to the employment contracts of transportation workers, then it would not have been necessary to exempt all other employment contracts from the FAA had that been Congress' intent. The majority's suggestion that seamen and railroad employees were exempted because specific legislation had already been enacted regarding them is not very convincing and wholly fails to address the residual "any other class of workers engaged in . . . commerce," which is the root of the problem in the first place.[250]

But the need to reconcile the two sections only arises from the Court's expansion of federal power under the Commerce Clause in ways that the 1925 Congress could not have expected. Whereas the meaning of "involving commerce" in Section 2 could be, and was, expanded without obvious problem or contradiction, the restrictive language used in Section 1, which should create no problem when the entire Act is interpreted in light of the Commerce power as it was understood to be when the Act was written, created the issue decided by the Court. Unlike Section 2, which simply used "involving commerce," the express language of Section 1 recognized Congress' limited power under the Commerce Clause in 1925 by enumerating the specific types of employees over which Congress' power reached—transportation workers such as seamen and railroad employees.[251] In contrast, Section 2 simply uses the phrase "involving commerce," without delineating the term by making specific references such as "the selling and buying of goods or services" or "the transportation of goods."[252] So while Section 2 was susceptible to expansion by the Court and maintained a

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249. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

250. Judge Posner explained in *Pryner* that motor carriers were generally the remaining transportation workers after seamen and railroad employees and that they would soon also be federally regulated. Pryner v. Tractor Supply Co., 109 F.3d 354, 358-59 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997).

251. One can imagine that Congress could have simply excluded "all contracts of employment of workers engaged in commerce," which would more clearly suggest that *all* employment contracts were excluded. This would of course still run into the argument that "engaged in" reflects a more restricted assertion of Commerce Clause power than "involving commerce." *See supra* notes 161-63.

252. Section 1 defines "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." 9 U.S.C. § 1 (2000). This does little to explain what "commerce" is other than stating between which bodies it takes place.

clear meaning, Section 1 did not. The problem is not in the language, but in the great expansion of the Commerce Clause power from the 1930s forward.[253]

One solution to the problem, arguably adopted by the majority, is to apply the 1925 meaning rather than the "modern" meaning to "commerce" in the Section 1 exemption, thus clearly limiting the exemption to transportation workers. This approach gives the most coherent reading to the exemption and recognizes the FAA's policy favoring the arbitration of disputes. One author has said that Judge Posner in *Pryner*[254] essentially adopted this approach.[255] The author wrote that the approach had "candor" although it was lacking in "principle." This approach, however, is no more lacking in principle than is extending the overall scope of the FAA beyond anything the 1925 Congress reasonably could have imagined while construing Section 1 to give it a meaning it certainly did not have in 1925. Limiting the Section 1 exclusion to transportation workers, and thereby allowing for the specific enforcement of arbitration agreements in all other employment contracts, also accords best with the Supreme Court's recent jurisprudence favoring arbitration.[256] Beginning with its opinion in *Moses H. Cohn Memorial Hospital v. Mercury Construction Corp.*,[257] the Court has held that the FAA created a body of federal substantive law[258] that pre-empts state law,[259] including state laws which in any way do not place arbitration agreements "upon the same footing as other contracts."[260] The Court has further held that the FAA's coverage extends to the limits of Congress' Commerce Clause power[261] and that statutory claims are fully arbitrable unless Congress has evinced an intention otherwise.[262] The Court clearly gives strong approval to agreements to arbitrate. Given the Court's

253. *See* United States v. Lopez, 514 U.S. 549, 599 (1995) (Thomas, J., concurring). Justice Thomas noted that when "[w]hen asked at oral argument [in that case] if there were *any* limits to the Commerce Clause, the Government was at a loss for words. . . . Likewise, the principal dissent insists that there are limits, but it cannot muster even one example." *Id.* at 600.

254. Pryner v. Tractor Supply Co., 109 F.3d 354, 359 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997).

255. Finkin, *supra* note 247, at 334.

256. For a review of that jurisprudence, *see generally* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996).

257. 460 U.S. 1 (1983).

258. *Id.* at 24.

259. *See* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

260. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

261. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995).

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

expansive reading of the FAA,[263] the Court's decision to include most employment contracts within the Act's coverage produces the result most consistent with that approval.

Beyond being consistent with the Court's recent decisions regarding the FAA, the Court's decision in *Circuit City* has the potential of considerable benefit to overburdened federal courts and, more importantly, to employers and employees. Arbitration would lessen the burden on an already strained federal court system. Employment litigation is currently a "growth industry."[264] During the 1980s and 1990s, employment litigation increased by four hundred percent.[265] Between 1991 and 1995, employment-related civil rights lawsuits increased by 128%.[266] Employment-related cases are estimated to occupy ten to twenty percent of the federal district court dockets.[267] Furthermore, once an employment-related civil rights case is on a federal district court docket, the court can expect it to be there, as a median, for slightly less than two years.[268] Arbitration of many of these disputes could lessen the log-jam of cases in an already strained court system and free up resources to consider other problems.

Employers also stand to benefit from arbitration of employment disputes, a fact which many employers appear to have recognized in the last ten years. Eight to ten percent of employees in the United States are parties to binding arbitration agreements, eighty-five percent of which have become so since the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*[269] The most obvious reason for employers to implement arbitration programs is to avoid the costs associated with litigation of disputes with their employees. Defending a suit, whatever its merits, can cost an employer hundreds of thousands of dollars.[270] Simply filling out paperwork for an investigatory agency when an employee files a complaint can cost thousands of dollars in attorney's

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263. Professor Jean Sternlight argues that the Court's reliance on the FAA for its broad support of binding arbitration is in error and goes far beyond Congress' intent in drafting the Act. *See generally* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

264. Sherwyn, *supra* note 29, at 76-77.

265. Stuart H. Bompey, Michael Delikat & Lisa K. McClelland, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 21 (1997).

266. *Id.* at 22.

267. *Id.* (ten percent). Jay S. Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes*, 13 LAB. LAW. 87, 87 (1997) (twenty percent).

268. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998).

269. 500 U.S. 20 (1991); *see* David E. Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 253 (2000).

270. Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 92 (2001).

fees.[271] Employers who lose a case can expect to pay considerable damages, possibly including punitive damages in the millions.[272] Whereas an employee's damage award in a discrimination case at one time generally consisted only of backpay, thus promoting settlement, many employees now pursue a case hoping to win a large punitive damages award.[273] Even where an employee's allegations appear to be frivolous, the relative ease with which an employee can file a complaint with an investigative organization such as the Equal Employment Opportunity Commission ("EEOC"), as compared to the employer's costs in answering such a claim, can lead employers simply to settle meritless claims rather than try to defend them. This has aptly been referred to as "de facto severance."[274]

Little wonder then that employers would look for an alternative to litigation. Arbitration is generally cheaper than litigation, a fact aided by typically limited discovery and motions. Arbitration is also less formal than full-blown litigation and arbitration cases are typically resolved more quickly and confidentially than those that are litigated.[275]

Arbitrating disputes rather than litigating them can be advantageous for employees as well. The EEOC, charged with protecting employees from discrimination, is overwhelmed with complaints, the majority of which it will not be able to actively pursue on an employee's behalf. Because most employees cannot afford to pursue their claims in court, they must hope to find plaintiff's attorneys willing to take cases on contingency. As a matter of economics, most employees will not be able to find such representation. Those who do may be fortunate enough to win a large damages award, but the losers and those who are unable to find an attorney willing to take their case, whatever the merits, will get nothing. Arbitration could provide relief for many of these employees who otherwise get none.

The EEOC, however, strongly opposes mandatory arbitration of employment disputes and has openly refused to accept the Court's decision in *Gilmer*.[276] Given its current inability to deal effectively with the discrimination

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271. Sherwyn, *supra* note 29, at 81.

272. Bompey, *supra* note 265, at 22 (referring to punitive damage award against Wal-Mart of $50 million dollars, later reduced by the court).

273. Sherwyn, *supra* note 29, at 79-80. "[P]laintiffs and their attorneys may turn down what had once been full relief [backpay] in the hopes of winning the employment discrimination lottery—an exorbitant jury award." *Id.* at 80.

274. Sherwyn, *supra* note 29, at 82.

275. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001).

276. Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 2-3 (1999).

complaints it receives, the EEOC should reconsider its position. Even as the number of complaints the EEOC receives has increased sharply, the agency's staffing has decreased.[277] The way the agency handles those complaints is cause for concern. The EEOC no longer investigates every complaint it receives and when it does investigate, the investigation may last as long as two years before any action is taken.[278] The investigation is normally conducted entirely from a desk, with the investigator examining documents obtained from the employer and the employee.[279] A General Accounting Office study found that forty-one to eighty-two percent of the EEOC's cases were inadequately investigated.[280] Inadequate investigation of complaints could explain why findings of "no cause" increased from 28.5% of cases closed in 1980 to 61% in 1992.[281] If so, employees with legitimate grievances against their employers are not being protected.

Further, the number of complaints the EEOC actually resolves on the merits has declined in each of the past few years. In 1996 for instance, only 9.1% of cases were resolved on the merits, a figure that includes cases where the employer agreed to a settlement; 90.8% of employees filing with the EEOC received neither relief from their employer or a finding of cause.[282] Stated otherwise, they got nothing. Perhaps most startling is how few cases the EEOC actually files in court on behalf of employees, and the ultimate outcome for the majority of employees who file claims with the agency. While the EEOC strongly opposes mandatory arbitration, presumably favoring litigation, it does little real litigation of its own. In 1994 the EEOC received 173,465 complaints but filed only 425 lawsuits.[283]

Moreover, when the EEOC declines to pursue a case and instead issues a right-to-sue letter, the employee's outlook does not improve. Only ten percent of employees who receive a right-to-sue letter actually ever file suit in court.[284] The vast majority of workers do not have the resources to pursue a lawsuit so

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277. Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 281-82 (1996).

278. *Id.*

279. Maltby, *supra* note 268, at 61.

280. Sherwyn, *supra* note 29, at 86.

281. Sherwyn, *supra* note 29, at 86. The other possibility is that more and more employees are filing frivolous claims. If that is the case, employers should not be burdened with having to answer them.

282. Sherwyn, *supra* note 29, at 87-88.

283. Maltby, *supra* note 268, at 62.

284. Maltby, *supra* note 268, at 60. Of those, 1 in 4 file pro se. *Id.* "In a complex adversarial system such as ours, only those who are represented by an attorney have any reasonable expectation of success." *Id.*

they must rely on attorneys willing to take a case on a contingency basis. Unfortunately, attorneys are driven by economics as much as anyone else, and they need to be assured of winning enough cases to offset the losses from unsuccessful cases. Further, the employee's claimed damages must be sufficient to cover the costs of pursuing the claim in court. As a result, even where an employee has a very strong case and would likely recover, but has not suffered sufficient damages, an attorney must decline the case.[285] This is especially true for low wage earners whose damages, while real and pressing for them, cannot economically justify a costly lawsuit.[286] Worst of all, the success rate for employees who are able to make it all the way to court adjudication is not great. Of the employment discrimination cases in federal district court in 1994, employees won an abysmal 14.9% of the time.[287]

On the other hand, the mean damages awarded to those employees was in excess of $500,000.[288] Mean damages awarded to successful employee claimants in arbitration cases decided by the American Arbitration Association from 1993 to 1995 was a mere $49,030; however, employees won in sixty-three percent of arbitrations.[289] Thus, while awards were typically smaller than in litigation, employees who arbitrated were far more likely to obtain relief. These statistics bear out the observation by one author that litigation is a system that provides "Cadillacs" for the few employees fortunate enough to win large verdicts while providing "rickshaws" to the many who get nothing.[290] A fair arbitration system could provide reasonable compensation to a greater number of injured employees while protecting employers from the high costs of litigation.

Certainly, no one is likely to argue that arbitration of employment disputes as it now stands is a perfect system, and as the journey is made to a better system bumps in the road are to be expected. Steps certainly need to be taken to protect employees from being presented with unfair arbitration agreements, for

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285. Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 2-3 (1994).

286. Sherwyn, *supra* note 29, at 94.

287. Maltby, *supra* note 268, at 48. As if the low success rate at trial were not discouraging enough, the record on appeal only makes the picture worse for employees. A review of federal appellate decisions from 1988 to 1997 showed that employee-plaintiffs who were successful at trial lost their verdict forty-four percent of the time when their employer appealed as compared to thirty-three percent for all defendant appeals. Jess Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, WALL ST. J., July 16, 2001, at A2.

288. Maltby, *supra* note 268, at 48.

289. Maltby, *supra* note 268, at 48.

290. Estreicher, *supra* note 276, at 563.

example.[291] After all, employees generally need a particular job far more often than employers need a particular employee. Many other issues remain, such as who must pay the costs of the arbitration and whether an agreement to arbitrate can limit an employee's recovery to an amount less than provided in statutes. None of those concerns, however, change the fact that, given sufficient safeguards to ensure fairness, arbitration, and other forms of alternative dispute resolution ("ADR") could be of benefit to everyone involved in the employment relationship.

Congress has apparently considered the benefits of ADR and has included provisions allowing the use of ADR in two recent civil rights statutes: the Americans with Disabilities Act[292] and the 1991 amendments to Title VII of the Americans with Disabilities Act.[293] The Court in *Circuit City* was, after all, merely interpreting a statute of Congress, and whatever the Court's opinion, Congress could have the last word. In fact, a bill was introduced in the House of Representatives that would have overruled *Circuit City*.[294] Given the failings of the EEOC and the costs and problems posed by litigation for all involved, employers and employees would be better served if the members of Congress, rather than rejecting a viable alternative to a bad system, embraced arbitration and focused their legislation on improving that alternative by ensuring fairness and consistency.

## VI. CONCLUSION

In *Circuit City*, the Supreme Court settled the circuit split regarding the proper interpretation of Section 1 of the FAA, holding that only the employment contracts of transportation workers were exempt from the FAA's provisions. Faced with two possible interpretations, both of which were supported by strong

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291. For a case involving such an agreement, *see Hooters of Am. Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). In very strong language, the court noted the unfairness and complete one-sidedness of Hooters' arbitration program. *Id.* at 941. "By promulgating [a] system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word." *Id.*

292. *See* Americans with Disabilities Act, 42 U.S.C. § 12212 (2000).

293. *See* Pub. L. No. 102-66, § 118 (reprinted in notes to 42 U.S.C. § 1981). The Ninth Circuit, however, has interpreted the provision as Congress' intent to *prohibit* compulsory arbitration of Title VII claims. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1195 (9th Cir. 1998), *cert. denied*, 525 U.S.982 (1998), *cert. denied*, 525 U.S. 996 (1998).

294. *See* Preservation of Civil Rights Protections Act, H.R. 2282, 107th Cong. (2001). The act would have amended 9 U.S.C. § 1 by striking "of seamen" and everything following through "commerce." *Id.* at § 2. The act would also have explicitly made executory agreements to arbitrate between employees and employers unenforceable. *Id.* at § 3.

arguments, the Court chose the interpretation which accorded most with its current support of arbitration and which could benefit both employers and employees. While the Court has made its choice, the debate among courts and academics as to the proper role of ADR in the employment context will undoubtedly continue, and Congress might still have the last word on the issue. Rather than rejecting arbitration out of hand, Congress should consider its merits as compared to the current system and focus on making arbitration of employment disputes better, rather than making arbitration of employment disputes extinct.

B. MATTHEW STRUBLE