ARBITRATION OF WORKER CONTRACTS: *NEW PRIME'S* PROPER STATUTORY INTERPRETATION OF THE 1925 FEDERAL ARBITRATION ACT

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I. INTRODUCTION

The U.S. Supreme Court has been expanding the scope of arbitration under the 1925 Federal Arbitration Act ("FAA" or "the Act") since the 1980's.[1] It was therefore somewhat unexpected when the Court, in its recent unanimous decision in *New Prime v. Oliveira*,[2] decided to limit the application of the statute, even though it did so in a very minor way. The Court's opinion focused on the scope of the exemption found in Section 1 of the FAA, which provides that the Act does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[3] One of the questions presented was "[w]hether the FAA's Section 1 exemption, which applies on its face only to 'contracts of employment,' is inapplicable to independent contractor agreements."[4]

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1 This has been well documented in the literature. *See generally* Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction,* 1996 SUP.CT. REV. 331; *Linda R. Hirshman, the Second Arbitration Trilogy: The Federalization of Arbitration Law,* 71 VA. L. REV. 1305 (1985); IAN R. MCNEIL, AMERICAN ARBITRATION LAW (1992); Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration,* 93 NW. U.S. L. REV. 453 (1999); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. UNIV. L. REV. 99 (2006); David S. Schwartz, *Enforcing Small Print to Protect Big Business Employee and Consumer Rights Claims in an Age of Compulsory Arbitration*, 1997 WIS. L. REV. 33; Thomas Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration,* 23 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, 2012.

2 *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019). *See, e.g.*, Ronald Mann, *Opinion analysis: Justices uphold arbitration exemption for transportation workers in rare victory for arbitration opponents*, SCOTUSBLOG (Jan. 15, 2019), https://www.scotusblog.com/2019/01/opinion-analysis-justices-uphold-arbitration-exemption-for-transportation-workers-in-rare-victory-for-arbitration-opponents.

3 9 U.S.C. § 1 (1947).

4 Petition for Writ of Certiorari, *New Prime*, 139 S.Ct. 532 (No. 17-340). The second question presented was whether a court or an arbitrator should decide the question of whether the

The dispute in *New Prime* was between an interstate trucking company, New Prime, and one of its drivers, Dominic Oliveira, over whether New Prime paid its drivers lawful wages.[5] When Mr. Oliveira filed a class action suit, New Prime asked the court to compel arbitration. Mr. Oliveira objected on the ground that he could not be compelled to arbitrate because he was not subject to the FAA as a transportation worker covered in Section 1's exemptions. In response, New Prime asserted that the exemption only covered trucking company *employees*, and that Mr. Oliveira was an independent contractor rather than an employee. Therefore, he could not benefit from the exemption and would need to proceed to arbitration.

To resolve this dispute, the Court focused on the meaning of the term "contract of employment." Justice Gorsuch, delivering the unanimous decision, stated that the proper canon of statutory construction is "that words generally should be 'interpreted as taking their ordinary. . .meaning. . . at the time Congress enacted the statute."[6] Justice Gorsuch further stated that,

> After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered procedure" the Constitution commands. *INS v. Chadha*, 462 US. 919, 951 (1983). We would risk, too, upsetting reliance interests in the settled meaning of a statute. CF. 2B N. Singer & J. Singer, Sutherland on Statutes and Statutory Construction §56A:3 (rev. 7th ed. 2012).[7]

Thus, the original meaning of the statute in 1925, according to Justice Gorsuch, "holds the key to the case."[8] After examining that meaning at the time of the adoption of the Act in 1925, Justice Gorsuch concluded that "contract of employment" usually meant simply an agreement to perform work, and therefore, independent contractors such as Mr. Oliveira were covered by the exemption and could not be compelled to arbitrate.[9]

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exemption under Section 1 applied. *See id.* The Court decided that a court should make this determination. *New Prime*, 139 S.Ct. at 537.

[5] Oliveira alleged that defendant New Prime violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., and Missouri and Maine labor laws, by failing to pay its truck drivers minimum wage. *Oliveira v. New Prime Inc.*, 141 F.Supp.3d 125 (D. Ct. Mass. 2015).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See id.*

There is enormous irony in Justice Gorsuch's stated reasoning that the proper way to interpret the FAA is to determine how the statute was understood as of its drafting in 1925. Since 2001 the statute has been understood quite differently from its original meaning in 1925. In its decision in *Circuit City Stores, Inc. v. Adams*,[10] the Supreme Court did not share the unanimous view of the current Supreme Court that the meaning of the statute at the time the statute was adopted should prevail. Rather, the *Circuit City* Court refused to consider the original meaning of the FAA in 1925—that all workers were exempted from the statute's coverage—and in direct contrast, judicially amended the statute by holding that all workers were covered under the FAA except workers in interstate transportation.[11]

In reaching its decision, the *Circuit City* Court not only ignored the understanding of the 1925 Congress that no workers' contracts were covered by the FAA, but also that this had been the understanding of courts for decades following 1925.[12] In the 1990's, however, some courts began to hold that workers were covered by the FAA, except for workers specifically excluded under the exemption of Section 1. The courts determined that the FAA exemption applied only to transportation workers.[13] In 1999, the Ninth Circuit decided differently, holding that no employment contracts were covered by the FAA.[14] This circuit split led to the Supreme Court's 2001 *Circuit City* decision[15] that all workers were covered by the FAA except workers in the transportation industry, who were excluded under the exemption of Section 1.[16]

To reach its decision, the *Circuit City* Court necessarily adopted an interpretative approach fundamentally different from the approach endorsed by the unanimous decision of the Court in *New Prime* that the proper way to interpret the FAA is to deter-

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

11 *Id.* at 119 ("Section 1 exempts from the FAA only contracts of employment of transportation workers.").

12 *See, e.g.*, *American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Serv.*, 861 F.2d 211, 215 (9th Cir. 1988) ("Neither the Supreme Court nor this court has ever expressly held the Federal Arbitration Act applicable to arbitration of labor disputes.").

13 *See, e.g. McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575–76 (10th Cir. 1998); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.,* 87 F.3d 745, 747–48 (5th Cir. 1996); *Asplundh Tree Co. v. Bastes*, 71 F.3d 592, 596–601 (6th Cir. 1995).

14 *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

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

16 *Id*. *See also infra* text accompanying notes 28–35.

mine how the statute was understood in 1925. However, among the justices who formed the majority in *Circuit City* in 2001, only one, Justice Clarence Thomas, is still on the Court.[17] Moreover, if one were starting with this issue on a clean slate, Justice Thomas would probably not support the view that the FAA governs employment contracts. His strong and consistent history of dissents over the years in FAA cases, which reflect his view of the narrow scope of the commerce clause, suggest that for him, a proper interpretation of the statute as it was understood in 1925 would exclude all workers.[18] Thus, despite the pull of *stare decisis*, if, in fact, the FAA was wrongly construed with respect to contracts of employment, the unanimous view of the Supreme Court in *New Prime* might signal a possible new perspective on the issue of worker coverage under the FAA.

This article will discuss how, in a future case, if the Court applied the reasoning of its unanimous opinion in *New Prime*—that the language of the statute should be interpreted consistent with the meaning it had to the Congress that adopted it—no worker would be covered by the FAA. Part I will consider the scope of the Commerce Clause, and the expansion in the Court's understanding of Congress' power under the Clause that occurred post-1925. In Part II, the article will deal with the purpose of the FAA as understood at the time of its adoption, as well as the meaning and purpose of the exemption found in Section 1. In Part III, the *Circuit City* case will be examined with respect to how the Supreme Court judicially amended the statute by finding that ordinary workers were covered by the FAA. Part IV will consider why *Circuit City* should be overruled. Part V concludes the article.

II. The Meaning of the Commerce Clause in 1925

Section 2 of the FAA provides in pertinent part that an arbitration agreement will be "valid, irrevocable and enforceable" when an agreement to arbitrate is contained in writing in "a contract evidencing a transaction involving commerce."[19] In 1925,

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17 Justices Rehnquist and Scalia are deceased, and Justices Kennedy and O'Connor have retired. Only Justice Thomas remains on the Court of the justices in the majority.

18 *See generally* Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act,* 22 Harv. Neg. L. Rev. 33 (2016). *See also* discussion *infra* at 3–5.

19 9 U.S.C. § 2 (1947). The complete section is as follows:

> Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs

most workers were not considered to be in interstate commerce. According to the courts at the time, Congress' power to regulate commerce applied in interstate transactions, but not to transactions that took place only in one state.[20]

The history of the interpretation of the Commerce Clause makes this clear. Courts and Congress in 1925 had a narrow understanding of Congress' power under the clause.[21] From the late nineteenth century through around 1936, the Court tended to apply a theory of "Dual Federalism," which relied on the Tenth Amendment to define and limit the powers of Congress.[22] Under this theory, the regulation of certain activities was reserved to the states.[23] As an example, the Supreme Court, in *Howard v. Illinois Cent. R. Co.*,[24] found the Employer's Liability Act unconstitutional because its application was not limited to employees who actually functioned in interstate commerce. Instead, the Act applied both to employees who were in interstate commerce, for example, a fireman on a locomotive, as well as to employees of the company who were not functioning in interstate commerce, such as secretaries and accountants. According to the Court, this made the Act unconstitutional because Congress had no power to exercise authority over employees who were not actually acting in interstate commerce. The Court cited with approval the view of Justice Marshall, in *Gibbons v. Ogden*,[25] that the exercise of the commerce power

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to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means 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, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

20 *See, e.g.*, *Howard v. Illinois Cent. R. Co.*, 207 U.S. 463, 501–03 (1908).

21 *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 106 (2001) (Souter, J. dissenting) ("When the Act was passed (and the commerce power was closely confined), our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce.").

22 JOHN NOWAK AND RONALD ROTUNDA, CONSTITUTIONAL LAW, 8th edition, §4.5.

23 *Id.* The Tenth Amendment to the U.S. Constitution provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

24 *Howard*, 207 U.S. at 504.

25 *Gibbons v. Ogden*, 22 U.S. 1 (1824).

> is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government.[26]

Thus, according to the Court in *Howard*, Congress did not have the power to regulate employees of a railroad who worked in "shops for repairs, construction work. . .accounting and clerical."[27] In other words, ordinary employees were not considered to be functioning in interstate commerce, but rather were within the boundaries of one state, and therefore not subject to regulation by Congress. They were, according to the Court, "subjects wholly beyond [Congress'] power to regulate."[28]

Justice Thomas has taken a highly restrictive view of the Commerce Clause.[29] To him, based on the understanding at the time of the founding, "the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines."[30] He has also noted the limitation that "Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture."[31] Although the Supreme Court dramatically expanded that view of commerce toward the end of the 1930s,[32] when the FAA was passed in 1925 the Commerce Clause power could only regulate employees who actually transported people or goods in interstate commerce. Thus, when Congress adopted Section 2 of the FAA,[33] it was generally understood by everyone—courts,

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26 *Id*. at 74.

27 *Howard*, 207 U.S. at 498.

28 *Id*. at 499. *See also* from 1924, *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924) (Court held that an illegal strike of leather workers did not impact interstate commerce, because it concerned manufacture of goods and not transport and delivery of the products.).

29 *See* Farkas, *supra* note 18, at 49.

30 *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (the dissent cites his earlier concurring decision in *United States v. Lopez*, 514 U.S. 549 (1995)).

31 *Gonzales*, 545 U.S. at 58.

32 *See Circuit City,* 532 U.S. at 116. The Court noted that "Supreme Court decisions beginning in 1937 'ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.'" (Citation omitted).

33 9 U.S.C. § 2. Section 2 provides in full: "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." (9 U.S.C. §2).

members of Congress, proponents, and ordinary citizens—that the Commerce Clause did not give Congress the power to adopt laws regulating the employment of ordinary employees in manufacturing, agriculture and service jobs.

III. The Purpose of the FAA and its Exemption

The FAA never had any purpose to cover worker contracts.[34] No organization or individual spoke at any of the hearings in favor of applying the Act to workers. Rather, the drafters and promoters of the FAA, who were businessmen and lawyers, sought to make arbitration agreements enforceable between businesses.[35] They were frustrated by the fact that even though two businesses might have a written arbitration agreement in place, when a dispute arose a party could decide that it no longer wanted to arbitrate and a court would not enforce the agreement.

The business community strongly supported passage of the FAA. At the joint hearings, one of the major proponents, Charles Bernheimer, who chaired the arbitration committee of the Chamber of Commerce, told the Members of Congress, "[t]he statement I make is backed up by 73 commercial organizations in this country who have, by formal vote, approved of the bill before you gentlemen."[36] He then offered the practical business case for passage:

> [A]rbitration saves time, saves trouble, saves money. . . It preserves business friendships. . .it raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts."[37]

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34 *See* Matthew W. Finkin, *Employment Contracts Under the FAA – Reconsidered,* 48 Labor L. J. 329, 330 (1997) (hereinafter "Finkin, *Workers' Contracts Reconsidered*"). Professor Finkin noted that when an objection was raised to the legislation by labor organizations, which wanted to ensure that workers' contracts were not covered by the bill, their concern was swiftly "rendered moot because the proponents were pressing a commercial arbitration law wholly unconcerned with employment. The unions' objection to including employment contracts was an unanticipated and extraneous obstacle to achieving their objective. That obstacle was swiftly removed by the simple expedient of the exemption."

35 The main concept behind the Act was to provide for enforceability of arbitration agreements between merchants–parties assumed to be of equal bargaining strength–enabling them to resolve their disputes promptly and efficiently. *See* testimony of Charles Bernheimer, Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 16, 37 (1924) [hereinafter Joint Hearings] at 3, 7.

36 *Id.* at 7–8.

37 *Id.*

Thus, the purpose of the FAA was to provide for the enforceability in federal courts of arbitration agreements between merchants, simplify the process and provide speedy justice, reduce the congestion of court calendars and legal costs, and reduce technicality and formality to a minimum.[38] The only objection ever raised to the Act was that it should not cover workers.[39] This objection had been made by organized labor, in particular by the International Seamen's Union of America, and by the American Federation of Labor ("AFL").[40] The labor organizations believed that because seamen and other workers functioned in interstate commerce, the Act would cover them and unfairly compel arbitration of various matters between such workers and their employers, and that it would undermine existing labor protective laws that the workers had fought to secure.[41] Moreover, their objection focused not just on seamen and railroad workers, but on all workers in the transportation trades.[42] At the International Seamen Union's convention in 1924, the convention resolved to continue cooperation with the AFL "in preventing the enactment of any measure designed to fasten any species of compulsory arbitration *upon any group of workers in America*."[43]

In response, the proponents explained to the labor organizations that the Act's only purpose was to cover merchant-to-merchant transactions. They also testified in the 1923 Hearings that "[i]t is not intended that this shall be an act referring to labor disputes, at all."[44] Rather, they assured members of Congress that the statute would only apply to contracts between merchants. W.H.H. Piatt, the chairman of the Committee of Commerce,

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38 *Id.* at 27, 34, 35.

39 *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 283–290 (1996).

40 *See id.*

41 *See id.* at 284–89.

42 *See* Finkin, *supra* note 40, at 289.

43 *Id.* (citing 27 Proc. Ann. Convention Int'l Seamen's Union Am. 100 (1924)).

44 *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Arbitration: Hearing Before the Subcomm on* S. 4213 and S. 4214 of the S. Comm. on the Judiciary, 67th Cong. 9 (1923) [hereinafter 1923 Hearings]. Moreover, Bernheimer testified in this same hearing on behalf of the business associations he represented that "[t]he bill on the one hand aims to eliminate friction, delay, and waste, and on the other to establish and maintain business amity. . .if inexpensive but dependable arbitration were possible instead of costly, time-consuming and troublesome litigation, the risk [of doing business] would be correspondingly smaller and the price made to conform therewith. Not only will the suggested law accomplish all of this, but it will help to conserve perishable and semi-perishable food products, and save many millions of dollars in foodstuffs, now wasted because of the lack of legally binding arbitration facilities. . .The merchants want this very badly." *Id.* at 3, 7.

Trade, and Commercial Law of the American Bar Association, testified that the Act was "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is to this."[45]

In addition to their explanations to the labor organizations and their testimony before Congress, the FAA proponents suggested including additional language in the Act to ensure that workers in interstate commerce would not be covered. Piatt proposed adding the following language: "nothing herein contained shall apply to seamen or any other class of workers engaged in foreign or interstate commerce."[46] This amended language was strongly supported by Herbert Hoover, then Secretary of Commerce, who sent a letter to Congress, incorporated in both the 1923 Hearings and the 1924 Joint Hearings, which emphasized that the legislation would not apply to workers.[47] Hoover proposed adding essentially the same language as Piatt, with the addition of "railroad employees." This language was adopted almost verbatim in the Act's exemption.[48] Thus, the purpose of adding this language was to satisfy the objection of labor organizations that some employees, in particular seamen and railroad employees, might fall within the Act because they were conceivably acting in interstate commerce.[49] The catchall clause at the end "or any other class of workers engaged in foreign or interstate commerce" was meant to capture any other workers, such as interstate truck and bus drivers who also functioned in interstate commerce.[50] At the time, this clause would not have been understood to apply to ordinary workers because they were not considered to be in interstate commerce and were therefore beyond Congress' power to regulate.

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45 *Id.* at 9.

46 *Id.*

47 *See id*. at 14; Joint Hearings, *supra* note 35, at 21.

48 The only difference was that Hoover's language referenced "any other class of workers engaged in INTERSTATE OR FOREIGN COMMERCE," and the language adopted reversed the terms to read "FOREIGN OR INTERSTATE COMMERCE."

49 As a result, the bill passed without objection. In 1925, immediately after the bill's passage, the ABA Committee on Commerce, Trade and Commercial Law noted in an article published in the ABA Journal, "not a single dissenting vote was registered in either House or Senate." THE UNITED STATES ARBITRATION LAW AND ITS APPLICATION, 11 A.B.A. J. 153 (1925).

50 *See* Finkin, *Workers' Contracts Reconsidered*, *supra* note 35, at 330.

IV. The Supreme Court Interprets the FAA in *Circuit City* to Cover Ordinary Workers

A. *Rejecting Legislative History and History of the Commerce Clause*

In *Circuit City*, the Supreme Court appeared to ignore the concern that the unanimous Court in *New Prime* considered critical that a court should not "freely invest old statutory terms with new meanings."[51] Instead, the Court rejected the original meaning of the statute in 1925 that the FAA did not cover ordinary workers, and proclaimed that no workers were excluded from the FAA except transportation workers. In reaching this decision, the Supreme Court had to ignore or deny the legislative history of the FAA that set forth the purpose of the exemption, and more surprisingly, the legal history of the development and expansion of the Commerce Clause.

With respect to the legislative history, Justice Kennedy, writing for the majority, stated that it was not necessary to consider legislative history because the Court's conclusion was "directed by the text of § 1."[52] However, he then went on to address the legislative history, noting that "the legislative record on the § 1 exemption is quite sparse."[53] Justice Kennedy's opinion in *Circuit City* completely ignored the reason the legislative history of this provision was not more developed. The obvious reason is that the exemption was uncontroversial because no one thought any workers were intended to be covered by the act.[54] One would expect that if Congress were considering whether or not most workers should be covered by the FAA, there would have been significant policy discussions about how arbitration of worker-employer disputes would impact the labor field and the economy.[55] What the "sparse" legislative history shows, however, is that Congress did not think it nec-

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51 *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539, 586 (2019).

52 *Circuit City*, 532 U.S. at 119.

53 *Id.*

54 *See id.*, (J. Stevens, dissenting) "History amply supports the proposition that [the exemption] was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts."

55 *See* Finkin, *Workers' Contracts Reconsidered*, *supra* note 35, at 332 (commenting that there was no notice of the FAA in any of the labor law journals or other publications at the time, because "[l]ike the dog who didn't bark, the total want of any mention of the Act by close contemporary observers, advocates, and students of labor legislation speaks eloquently: there

essary to have such policy discussions. Rather, it dealt with this issue quite simply and easily by excluding all workers and enacting a statute that dealt only with merchant disputes.[56]

In addition to disparaging the legislative history because it was "sparse," Justice Kennedy asserted that any legislative history was problematic, expressing doubt that the particular intent of a group can be determined.[57] The opinion in *Circuit City* represents what may be a high point in the Court's use of textualism. Textualists assert that legislative intent is virtually impossible to ascertain because most members of Congress may not be aware of a particular issue or how it was resolved.[58] However, there has been a resurgence of interest in the importance of legislative history and a deepening understanding of how the legislative process can be understood as the collective intent of Congress. Solid scholarly support for using the history of the legislative process as a valid and reliable concept of collective intent has emerged from the fields of analytic philosophy of language and political science.[59]

Legislative history, as well as legal history, can be valuable in ascertaining the meaning of a statute at the time it was enacted. However, contrary to the *New Prime* Court's view that a proper interpretation of the FAA must focus on the meaning of the statute at the time it was adopted in 1925, the Court in *Circuit City* disconnected the text of the exemption from the understanding of the

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was no need for them to mention a commercial arbitration law from which employment contracts had been altogether excluded.")

56 *See* Finkin, *supra* note 40 at 299. "Whether or not individual employment disputes should be swept into unilaterally promulgated arbitration plans, whether these arbitration systems should include not only federal labor protective laws but also claims deriving from state statutes and common law, and just what the federal interest is in the latter instance, are large questions of public policy. Congress chose at the time to avoid dealing with them by exempting employment."

57 *Circuit City*, 532 U.S. at 120.

58 Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 32 (1997). In contrast, Justice Stevens has noted that "[l]egislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute. . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the view of the committee members in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress." *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring).

59 *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206–07, 251–71 ("Individuals have a collective intention when they act together with an aim, especially in institutions. . . In sum, legislative history consists of the stepwise progress of legislation, in which the text is adjusted by the decisions of a collective intention."); *id.* at 256, 262.

statute in 1925 and made a decision based on its own policy preference, which was for the statute to cover ordinary workers.

Although it may not be surprising that a Supreme Court strongly influenced by textualism would denigrate legislative history, it is nonetheless curious that the unequivocal history of the interpretation of the Commerce Clause would not weigh more heavily in the *Circuit City* Court's interpretation of the exemption in Section 1. It was known to the Supreme Court that the power of Congress under the Commerce Clause was viewed quite narrowly in 1925, and that the Congress of 1925 would have believed that regulation of ordinary workers' contracts was wholly beyond its power.[60] Yet, this basic fact—that in 1925, no ordinary workers were covered by the FAA—was not considered by the Court in its contrary determination in 2001 that all workers were covered by the FAA except transportation workers. Rather, in its interpretation of the exemption in *Circuit City*, the Court maintained that workers were covered because the language "engaged in,"[61] found in the exemption in Section 1, was not as broad as the language "involved in," found in the coverage provisions of Section 2.

In her concurrence to *New Prime*, Justice Ginsburg agreed that "words generally should be interpreted as taking their ordinary. . .meaning. . .at the time Congress enacted the statute."[62] However, she noted that sometimes it was proper for a statute to expand or contract its scope in light of changes in the law or the world. Such changes might "require [the] application [of words in statutes] to new instances or make old applications anachronistic."[63]

Thus, in accordance with Justice Ginsburg's view, the Court in *Circuit City* could quite properly have said that consistent with the circumscribed Commerce Clause in 1925, no ordinary workers were covered by the FAA. Yet because the Commerce Clause power expanded post-1925 to include regulation of ordinary workers' contracts, the Court should find that the exemption, by excluding all workers in interstate commerce, now meant that consistent with the intent of the 1925 Congress all workers—ordinary workers

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60 *See Circuit City*, 532 U.S. at 116 (majority view of narrow scope of Commerce Clause in 1925); *see also id.* at 136 (dissent's view of narrow scope of Commerce Clause in 1925).

61 Section 2 provides that the FAA applies to "a contract evidencing a transaction *involving* commerce" (emphasis added) (9 U.S.C. § 2). Section 1 provides that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers *engaged* in foreign or interstate commerce" (emphasis added) (9 U.S.C. § 1).

62 *New Prime*, 139 S.Ct. at 544, 586 (Ginsburg, J. concurring) (citations omitted).

63 *Id.*

as well as railroad workers and seamen—were excluded. In other words, even though ordinary workers were not originally considered to be in interstate commerce, the expanded conception of interstate commerce would now encompass them, but, nonetheless, the exemption would exclude them.

Thus, if the Court had recognized the meaning understood by the Congress in 1925 to be that ordinary workers were not covered by the Commerce Clause, an interpretation consistent with that meaning would be that today, under the expanded Commerce Clause, ordinary workers would be excluded from the FAA by the language of the exemption. As Justice Souter noted in dissent in *Circuit City*, "[t]he statute is. . .entitled to a coherent reading as a whole by treating the exemption for employment contracts as keeping pace with the expanded understanding of the commerce power generally."[64]

B. *Restricting the Construction of the Exemption*

In order to disregard the purpose of the 1925 Congress to exclude all workers, the *Circuit City* Court had to justify why the last phrase of the exemption, which excluded "any other class of workers engaged in foreign or interstate commerce," did not, contrary to its plain meaning, apply to all workers, since in modern times all workers would be considered to be in interstate commerce. Its anomalous construction resulted in a fossilized exemption despite a greatly expanded Commerce Clause. To try to justify this anomaly, the *Circuit City* Court had several strategies, none consistent with the *New Prime* Court's interpretive standard requiring a court to consider the meaning of the provision at the time it was adopted.

First, the Court engaged in an extensive Jesuitical analysis of why "involving commerce"—the term used in the coverage language of Section 2—provided a more extensive reach under the Commerce Clause than "engaged in commerce"—the term used in the exemption language of Section 1. The Court found that "involving commerce" indicated "Congress' intent to regulate to the outer limits of its authority under the Commerce Clause."[65] In its view, "engaged in commerce" had a more limited reach.[66] Thus, it

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64 *See Circuit City*, 532 U.S. at 137 (Souter, J. dissenting) (citations omitted).

65 *Id.* at 115 (citations omitted).

66 *Id.*

viewed the coverage provisions of Section 2 as far broader than the exemption in Section 1.

This analysis, with respect to interpreting the meaning of the exemption, is not persuasive for a number of reasons. For one, there is no indication that Congress in 1925 considered these terms to be different.[67] Furthermore, none of the cases cited by the *Circuit City* Court in support of a more restricted meaning for "engaged in commerce" dealt with the question that was before the Court: "whether exemption language is to be read as petrified when coverage language is read to grow."[68]

In addition, the Court not only rejected respondent's arguments in *Circuit City* that the terms "involving commerce" and "engaged in commerce" were coterminous, but it also came up with another justification for changing the meaning of the FAA. The exemption of Section 1 provides that the Act "shall not apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[69] The Court asserted the last clause ("any other class of workers engage in foreign or interstate commerce") is a "residual clause," and therefore the wording of Section 1 calls for the application of the maxim *ejusdem generis.*[70] This is the Court's second strategy to try to shore up its unorthodox interpretation of the exemption. *Ejusdem generis* is a canon of construction that says that when you have one or more definite terms followed by a general term, the general term should be limited to the same category as the terms previously listed. Thus, because seamen and railroad workers were mentioned specifically, the Court is using this canon to assert that "workers in foreign or interstate commerce" are limited to "transportation workers."

There are three main reasons why *ejusdem generis* is inappropriately applied. First, in prior decisions, the Court has declared

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67 *See* Heidi M. Hellekson*, Taking the Alternative Out of Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N. DAK. L. REV. 435 at 445, note 89 (citations omitted). Hellekson also makes a simple grammatical argument against finding that "involving commerce" and "engaged in commerce" are different. They have different subjects. The statutory language refers to "*transactions* involving commerce" in section 2, and "*a class of workers* engaged in commerce" in section 1. One would not say that a *transaction* was "engaged in commerce" or that a *class of workers* was "involving commerce." She argues that Congress in 1925 most likely selected the different terms in order to be grammatically correct, not to indicate a different exercise of the commerce power.

68 *Circuit City*, 532 U.S. at 137 (Souter, J. dissenting).

69 9 U.S.C ¶ 1.

70 *See Circuit City*, 532 U.S. at 114.

that the canon is only triggered by an uncertain statutory text, and that it can be overcome by contrary legislative history.[71] Here, the Court turns this concept on its head by announcing that the text of the statute is so clear that legislative history is not needed, although *ejusdem generis* is.[72] Moreover, as the Ninth Circuit noted,

> Since the intention of congress manifestly was to confine the Act to commercial disputes, *ejusdem generis* has no possible relevance here. As said in *Gooch v. United States*, 297 U.S. 124 (1936), it [the rule of *ejusdem generis*] may not be used to defeat the obvious purpose of the legislation.[73]

In *Circuit City*, the Court seems to be using *ejusdem generis* for exactly the wrong reason, which is to defeat the obvious purpose of the legislation to exclude all workers contracts from the FAA.

Second, the Court's analysis of the text is simply not warranted under *ejusdem generis.* The maxim is supposed to help clarify intent when the general term is vague. However, this general term did not simply say "any other class of workers." Rather, it specifically said, "any other class of workers *engaged in foreign or interstate commerce*." This specificity makes clear the kind of workers to which Congress was referring and should eliminate any need to call upon *ejusdem generis* to understand the plain meaning of the terms.

This concept can perhaps be best understood by comparing the application of *ejusdem generis* in this case with another example. Assume a bill of sale for a farm included "cows, sheep and other animals." "Other animals" would probably not be interpreted to mean the pet puppy of the farmer's child.[74] Rather, *ejusdem generis* could be used to say that "other animals" only meant "other *farm* animals," and not a pet puppy. However, in the instant case, by providing the specific classification, "engaged in foreign or interstate commerce," the phrase needs no added clarity by

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71 *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 74–75 (1984); *Gooch v. United States*, 297 U.S. 124 (1936); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 44 (1983).

72 *See Circuit City*, 532 U.S. at 114, 115, 119.

73 *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1092 (9th Cir.1999). This case contained the Ninth Circuit's initial ruling that all employment contracts were excluded under the FAA. The Ninth Circuit's subsequent *Circuit City* decision, which was reversed by the Supreme Court, was a *per curiam* opinion that largely summarized the arguments that had been more fully made in the *Craft* case. Thus, *Circuit City,* at its core, is a review of the *Craft* decision; *See* Finkin, *supra* note 40, at 298 (footnotes omitted).

74 *See* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853 (1964).

the application of *ejusdem generis*. Comparing it to the farm bill example, if the bill of sale had actually provided the additional specificity of "other *farm* animals," suppose the farmer then tried to argue that under *ejusdem generis*, farm animals meant only animals that gave milk, like cows and sheep. This is a step too far. *Ejusdem generis* is not proper when the meaning of the general term is plain.

Finally, the third reason that the use of *ejusdem generis* is improper is explained by Justice Souter in his dissent in *Circuit City*, "*ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside."[75] He then concluded that there were good reasons in this case to put the canon aside. One of the reasons is that the assertion that the FAA only excludes transportation workers defies logic. Why would Congress in 1925 bar from FAA coverage only the class of employment contracts that it had the most obvious authority to regulate (transportation workers), while allegedly covering classes of ordinary workers that, in 1925, it did not have the power to regulate?

Nonetheless, as noted by the Supreme Court in *Circuit City,* by 1999, a majority of circuit courts had held that the FAA covered all workers except transportation workers, which were found to be excluded under the exemption.[76] However, as discussed by the Ninth Circuit, these courts were taking a contemporary view of a statute which is not a modern statute.[77] The circuit court decisions all ignored the obvious fact that in 1925, Congress did not have the power to regulate employment contracts of ordinary workers. As Matthew Finkin has explained:

> The [FAA] exempts contracts of employment, all contracts of employment, over which congress had constitutional authority. The scope of the commerce power when the [FAA] was enacted was quite narrow; in the employment setting, it was limited largely to transportation workers. Thus, in 1925, the [FAA] could not have applied to an arbitration provision in the employment contract of a neo-natal physician, a manufacturing manager, or a secretary in a law firm, because these employees would not have been considered as being in interstate commerce. As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it, leaving the status of employees' contracts in practical effect just as they were when the Act passed. The contrary

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75 *Circuit City*, 532 U.S. at 138 (Souter, J. dissenting).

76 *Id.* at 110–11.

77 *Craft*, 177 F.3d at 1086 (1998).

> (though currently prevailing view [among circuit courts]) produces an anomaly.[78]

The anomalous result reached by the various circuit courts cited in *Circuit City* stemmed from anachronistic reasoning, because the courts' discussions of the meaning of "involving commerce" and "engaged in commerce" relied on post-1937 concepts of such terms.[79] The circuit courts seemed to have had no interest in ascertaining the meaning of the statute at the time it was enacted—contrary to the interpretive standard endorsed by the unanimous opinion of the Supreme Court in *New Prime*.[80] Rather, the federal appellate courts' focus on these terms served to avoid the logical and reasonable conclusion that in 1925, Congress was not concerned with the nuances of Commerce Clause terms because ordinary employees were wholly outside the power of Congress to regulate.

Judge Richard Posner engaged in another attempt to deal with the lack of logic in the theory that Congress only intended to exempt the workers it clearly could regulate, while including those it could not.[81] In *Taylor v. Pryner*, Judge Posner speculated that Congress

> soon noticed that the railroad industry's labor relations were also heavily regulated – by a statute (the Railway Labor Act) that included provisions for compulsory arbitration of many disputes. More carriers were not yet comprehensively regulated, but it may have seemed (and was) only a matter of time before they would be, hence, the expansion of the exclusion from seamen to railroad to other transportation workers. It seems to us . . . that this history supports rather than undermines limiting "engaged in foreign or interstate commerce" to transportation.[82]

Judge Posner's speculation was based on a clear error of fact. Congress in 1925 did not "notice" the Railway Labor Act, because it was not enacted until 1926, a year after the effective date of the FAA. The law governing railroad workers at the time of the hear-

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78 *See* Finkin, *supra* note 40, at 298 (footnotes omitted).

79 *See, e.g.*, *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (where Judge Edwards discusses difference in "involving commerce' and "in commerce," relying only on post 1950's interpretations of the terms).

80 The Supreme Court held that words generally should be "interpreted as taking their ordinary. . .meaning. . . at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019).

81 *See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997).

82 *Id.*

ings and adoption of the FAA, the Transportation Act of 1920, made no provision for compulsory arbitration.[83] Moreover, Congress cannot be deemed to have anticipated future regulation of truckers or busmen, whose contracts would only be regulated a full decade later through collective bargaining under the Wagner Act of 1935.[84] Thus, contrary to Judge Posner's conjecture, history in fact undermines any logical reason why Congress would intend that the FAA cover ordinary workers while excluding only transportation workers. Nonetheless, the *Circuit City* Supreme Court, citing favorably Judge Posner's decision in *Pryner,* opined that "[i]t would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation."[85] This determination of "rationality" completely ignores the original meaning of the statute. The legislative history of the FAA, as well as the history of the Commerce Clause, did not permit Congress in 1925 to "ensure that workers in general would be covered by the provisions of the FAA."

C. *Ignoring Congressional Concerns about Adhesion Contracts*

A final failure of the *Circuit City* Court to understand the meaning of the FAA enacted by the 1925 Congress stems from its lack of recognition of an important congressional concern. It was generally recognized at that time that compulsory arbitration would impermissibly upset the balance of power between the economically strong and the weak. At the joint hearings, Senator Walsh of Montana expressed concern about whether the legislation would apply to contracts which were not really voluntary, where one party had more bargaining power and would require a contract to be signed on a "take-it-or leave-it basis." He stated:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all . . . It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it.[86]

One of the proponents, W.H.H. Piatt, testified in response:

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83 *See* Finkin, *Workers' Contracts Reconsidered*, *supra* note 35, at 331.

84 *Id.*

85 *Circuit City*, 532 U.S. at 121 (citing *Pryner*, *supra* note 82 (Posner, C.J.)).

86 Joint Hearings, *supra* note 35, at 9.

> I would not favor any kind of legislation that would permit the forcing a man to sign that kind of [sic] contract.[87]

Although the *Circuit City* Court briefly mentions that the FAA was intended to "broadly overcome judicial hostility to arbitration,"[88] the decision does not focus on the fact that a good part of this hostility was based on concern by courts that arbitration would not sufficiently protect the rights of the ordinary citizen against the rich and powerful.[89] Julius Cohen, one of the primary drafters, explained during the Joint Hearings in Congress that one of the reasons judges had refused to enforce arbitration agreements in the past was a concern that the law would permit a party with greater economic strength to compel a weaker party to arbitrate. He testified as follows:

> [T]he real fundamental cause was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker and the courts had to come in and protect them. And the courts said, "if you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones." And that is still true to a certain extent.[90]

Cohen and his fellow proponents responded to congressional concerns over whether the FAA would compel arbitration in insurance, employment or other contracts imposed on a "take-it-or leave-it basis"[91] by emphasizing that the legislation would not apply in adhesion contracts because it was specifically aimed only at the resolution of disputes between merchants, and would only apply to their voluntary agreements.[92] There was testimony that arbitration under the FAA was "a purely voluntary thing. [The

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87 *Id.* at 10.

88 *Circuit City*, 532 U.S. at 118–19.

89 *See* Carrington & Haagen, *supra* note 1, at 340 ("[T]he existence of genuine mutual assent was suspect when parties agreed to arbitrate a future dispute, and . . . a dispute resolution clause could be a trap for the unwary. As one court put it: 'by first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.'" *Parsons v. Ambos*, 121 Ga 98, 48 SE 696 (1904); *See also* Handbook, National Conference of Commissioners on Uniform State Laws, 60–73 (1924). ("This view of commercial reality . . . led to the opinion that the best way to assure true assent to arbitration was to afford a party having promised to arbitrate a future dispute an opportunity to withdraw assent when a real dispute has arisen and the revoking party is at last likely to be attentive to the hazards of dispute resolution and well-advised.").

90 Joint Hearings, *supra* note 36, at 15.

91 *Id.* at 9.

92 *Id.* at 9–15.

legislation] is only the idea that arbitration may now have the aid of the court to enforce these provisions which men voluntarily enter into."[93]

Moreover, in objecting to the FAA, the president of the International Seamen's Union, Andrew Fursuth, made clear that the ISU was concerned about an imbalance in power that would occur if the FAA could be imposed on workers by their employers:

> Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seamen, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in, "Interstate and Foreign Commerce."[94]

It is important to note that the ISU was concerned not only about forced arbitration affecting seamen and railroad workers, but also wanted to prevent enactment of any law that would impose "any species of compulsory arbitration upon any group of workers in America."[95]

The concern to protect workers from compulsory arbitration, which underlay the sole objection to the FAA, and which the 1925 Congress met by adding the exemption in section 1, was simply disregarded by the Supreme Court in *Circuit City*. Rather, the Court ignored congressional intent to exclude all workers from coverage under the FAA and proceeded to judicially amend the statute.

V. *CIRCUIT CITY* SHOULD BE OVERRULED

New Prime's conclusion that the FAA must be interpreted to reflect its original meaning at the time it was adopted is clearly the proper way to interpret the statute. The Supreme Court has emphasized that "it is always appropriate to assume that our elected representatives, like other citizens, know the law."[96] Furthermore, it is presumed that Congress legislates against this background.[97] It

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93 *See id.* at 26 (testimony of Alexander Rose).

94 *See* 26 Proc. Ann. Convention Int'l Seamen's Union Am. at 203–04 (1923).

95 *See id.* at 100.

96 *Merrill Lynch v. Curran*, 456 U.S. 353, 379 (1982); *Cannon v. Univ. of Chicago*, 441 U.S. 577, 696–97 (1979).

97 *Id.*

is beyond cavil that the 1925 Congress knew that ordinary workers were beyond its power to regulate. It also apparent from the legislative history of the Act that Congress wanted to appease labor, the only group that opposed the FAA at all, by making sure that workers who fell within interstate commerce and could be regulated by Congress were exempted in order to exclude ALL workers from the FAA's coverage. Thus, Congress' intent is clear and easily understood. Because the *Circuit City* Court ignored the 1925 Congress' understanding of the Commerce Clause, which was the background against which it legislated and which informed the legislation it adopted, *Circuit City* should be overruled.

VI. Conclusion

The legislative history demonstrating that Congress intended to exclude all workers' contracts from the FAA was not ambiguous. In fact, Justice O'Connor, in her dissent in another controversial Supreme Court decision, *Southland Corp. v. Keating*,[98] said "[o]ne rarely finds a legislative history as unambiguous as the FAA's."[99] Yet, the Supreme Court in *Circuit City* freely and deliberately ignored legislative history and the appropriate 1925 view of the Commerce Clause in order to give the FAA a meaning the 1925 Congress never intended and worked hard to avoid.

What might have motivated the Supreme Court to ignore well-accepted interpretive norms to reach a result that nullified the 1925 Congressional intent? One motivation may have been to preserve judicial resources by requiring worker disputes to be resolved by private means.[100] A second appears to be a desire to favor the freedom of those having sufficient economic strength to contract out of effective judicial enforcement of regulations adverse to their interests. Moving worker cases to arbitration avoids jury trials, permits the exclusion of class actions and the elimination of punitive damages, and places disputes before private arbitrators likely to come from the business community, less likely to be as well-trained as judges in the complexities of labor and discrimination law, and subject to being less than impartial because they may want the employer to choose them again for future arbitrations. Regardless of the Supreme Court's motivation, however, the result of

98 *Southland Corp.*, 465 U.S. 1 (1984).

99 *Id.* at 25.

100 *See* Carrington and Hagen, *supra* note 1, at 332.

its interpretation of the FAA exemption was to put workers in exactly the position Congress and labor organizations in 1925 had sought to avoid—permitting employers to impose take-it-or-leave-it requirements on workers to arbitrate disputes.

This could never have happened had the unanimous view of the proper way to interpret the FAA, expressed by the current Supreme Court in *New Prime*, held sway in earlier times. However, twenty years on, it may not be likely that today's Court will overturn its predecessors' faulty decision in *Circuit City* that amended the FAA to cover worker contracts. Nonetheless, the Court's current unanimous view that the FAA should be interpreted based on the meaning of the statute in 1925 is worthy of attention, and worthy of review by today's Congress.

Since 2001, a version of an act known as the Arbitration Fairness Act has been introduced a number of times in Congress.[101] The act would prevent pre-dispute arbitration agreements from being forced upon workers and consumers. If enacted, arbitration would still be a possible way to resolve disputes, but only if the parties freely chose arbitration over a court action once they knew what the dispute entailed. This would provide an incentive for employers to ensure that any arbitration process was fair and impartial, and to present workers with a desirable way to resolve a dispute. To date, the bill has not fared well, but depending on a future election cycle, there might be a better chance for another Congress to provide workers with protection of the rights that the 1925 Congress intended to protect when it enacted the FAA.

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101 The most recent version, Arbitration Fairness for Consumers Act, S.630, 116th Congress (2019-2020) was introduced in the Senate by Senator Sherrod Brown (D-OH) on February 28, 2019.