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RECONSIDERING THE EMPLOYMENT CONTRACT EXCLUSION IN SECTION 1 OF THE FEDERAL ARBITRATION ACT: CORRECTING THE JUDICIARY'S FAILURE OF STATUTORY VISION

Jeffrey W. Stempel*

I. INTRODUCTION

The Federal Arbitration Act (the Act),¹ seeks to eliminate centuries of perceived judicial hostility toward arbitration agreements.² The Act made written arbitration agreements involving interstate commerce specifically enforceable.³ It also provided a procedural structure for enforcing awards,⁴ which were protected through deferential judicial review.⁵ The Act intended to have a wide reach,⁶

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1. 9 U.S.C. §§ 1-15 (1988). The Act was passed on February 12, 1925 and took effect January 1, 1926. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925). It has not been amended in substance since that time although slight wording changes occurred in 1948. 9 U.S.C. §§ 1-15. The 1988 amendments, which took affect March 1, 1989, strengthened the Act by making immediately appealable judicial orders refusing to stay litigation or compel arbitration. *Id.* at § 15. At common law, such orders were regarded as interlocutory and not immediately appealable. See *Neal v. Hardee's Food Sys.*, 918 F.2d 34, 36-37 (5th Cir. 1990).

2. See *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959); Cohen & Dayton, *The New Federal Arbitration Act*, 12 VA. L. REV. 265, 270 (1926); Stempel, *Pitfalls of Public Policy: The Public Policy Exception to Arbitrability*, 22 ST. MARY'S L.J. 261, 271-74 (1991); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 134 (1934).

3. 9 U.S.C. § 2 (section 2 also states that arbitration agreements may be challenged and set aside upon grounds available at law or equity for the revocation of contracts generally).

4. See *id.* § 3 (providing for stay of judicial proceedings where subject matter of dispute is within scope of arbitration clause); *id.* § 4 (providing for court orders enjoining recalcitrant party to participate in arbitration).

5. See *id.* § 9 (providing means for having court enter judgment upon arbitration award so that arbitration winner may utilize full range of judgment creditor remedies); *id.* § 10 (permitting arbitration award to be set aside only on basis of narrow grounds of evident bias, fraud, or decision exceeding

employing a broad definition of commerce⁷ that has presumably grown in breadth along with the expansion of judicial notions of commerce.⁸ Although courts applied the Act in tentative and cautious fashion⁹ until the 1960's,¹⁰ arbitration

scope of submission). In addition, the Act sets forth more technical procedural requirements and also provides means for judicial aid of an arbitration proceeding should the parties disagree. *See, e.g., id.* § 7 (subpoena of witnesses); *id.* § 5 (selection of arbitrators). For a brief comparison of arbitration and litigation see Stempel, *supra* note 2, at 263-69.

6. However, the Act does not itself provide a basis for federal jurisdiction. *See* *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Consequently, most federal cases invoking the Act are based on diversity jurisdiction. However, suit in state court over a contract touching sufficiently upon interstate commerce also triggers application of the Act as substantive law. *See generally Southland Corp.*, 465 U.S. at 10-15. *But see* *Volt Information Servs., Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 472 (1989) (choice of law clause selecting state law includes state law inconsistent with the Act).

7. Section 1 of the Act defines "commerce" as:

[C]ommerce 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.

8. *Compare* *United States v. E.C. Knight Co.*, 156 U.S. 1, 9 (1895) (holding federal commerce power not to reach manufacturing); *Hammer v. Dagenhart*, 247 U.S. 251, 269-70 (1918) (federal child labor law invalid exercise of Congress' commerce power as manufacturing of goods not "commerce" unless involving transportation); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-51 (1935) (federal regulation of poultry grown intrastate not within commerce power as effect on commerce was indirect) *with* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-31 (1937) (commerce power permits federal regulation of labor relations in steel production industry); *United States v. Darby*, 312 U.S. 100, 116 (1941) (upholding federal minimum wage under commerce power, effectively overruling *Hammer*); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (federal agricultural regulations valid exercise of commerce power because wheat grown would eventually cross state lines).

Although the greatest expansion of the notion of interstate commerce occurred during the New Deal era as public opinion and the Roosevelt presidency reshaped the Court, the more expansive notion of interstate commerce has continued to dominate. *See, e.g.,* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (motel/restaurant in mid-state involved in interstate commerce because of patrons from other states and intrastate obtainment of supplies); *Katzenbach v. McClung*, 379 U.S. 294, 300-05 (1964) (same for mid-state barbecue); *see also* G. STONE, M. SEIDMAN, C. SUNSTEIN, M. TUSHNET, *CONSTITUTIONAL LAW* 125-200 (1986) [hereinafter STONE & SEIDMAN].

One of the defects in current Section 1 jurisprudence is that the court's view of the employment contract exception in Section 1 has not kept pace with the expanding judicial notions of interstate commerce. *See infra* notes 183-205 and accompanying text.

9. *See, e.g.,* *Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet*, 252 U.S. 313, 315 (1920), *aff'g* 250 F. 935 (2d Cir. 1918), *aff'g* 232 F. 403 (S.D.N.Y. 1916) (giving absurdly narrow reading to textually broad arbitration in order to avoid arbitration of dispute); *Wilko v. Swan*, 346 U.S. 427, 434-38 (1953) (refusing to enforce arbitration clause in customer brokerage agreement on basis of jurisdictional language in 1933 Securities Act); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202-04 (1956) (permitting state law to control and prevent arbitration); *see also*, Stempel, *supra* note 2, at 283-334 (reviewing and criticizing "public policy" exceptions to arbitration, especially n.54 concerning *Korn-og*); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 507-08 (1981) (reviewing and approving public policy exceptions).

gained momentum during the 1970's¹¹ and the 1980's.¹² Despite growing judicial enthusiasm for arbitration and enhanced development of arbitrability doctrine,¹³ several oddities remain: the continued presence of non-statutory "public policy" exceptions to arbitrability;¹⁴ the neglected development of the

10. See *Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 395, 406-07 (1967) (ordering arbitration of claim of fraudulent inducement to contract); *United Steelworkers v. American Mfg.*, 363 U.S. 564, 569 (1960); *United Steelworkers v. Warrior & Gulf Naval Co.*, 363 U.S. 574, 583-85 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598-99 (1960) [hereinafter *Steelworkers Trilogy*]. *Warrior & Gulf* and *American Mfg.* dealt principally with compelling arbitration; *Enterprise Wheel* focused on review of union-management arbitration awards. 363 U.S. at 598-601. Although the *Steelworkers Trilogy* involved arbitration compelled pursuant to Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1988), the *Steelworker's Trilogy's* preference for arbitration influenced adjudication under the Federal Arbitration Act as well. In fact, the *Steelworkers Trilogy* is annotated under Title 9 (the Act) as well as Title 29 (the LMRA). Courts constantly commingle the jurisprudence of labor arbitration pursuant to Section 301 and commercial or other contractual arbitration under the Act, much to the consternation of some commentators. See, e.g., Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 514 (1990).

11. See, e.g., *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-20 (1972) (giving strong endorsement of enforceability of forum selection clauses, characterizing arbitration agreement as specialized forum selection clause); *Scherk v. Alberto-Culver*, 417 U.S. 506, 510-20 (1974) (compelling arbitration of contract between U.S. company and foreign nationals notwithstanding claim of *Wilko* securities exception).

12. See, e.g., *Moses H. Cone*, 460 U.S. at 29 (compelling arbitration, rejecting argument for judicial abstention); *Southland Corp.*, 465 U.S. at 10-14 (characterizing Act as substantive federal law applicable in either state or federal court, overriding contrary state law); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 216-17 (1984) (compelling arbitration of arbitrable claims despite presence of some non-arbitrable claims in dispute); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628-40 (1985) (refusing to find public policy exception to arbitration of antitrust claims); *Shearson/American Express v. McMahon*, 482 U.S. 220, 227-38 (1987) (compelling arbitration of 1934 Securities Exchange Act claim notwithstanding *Wilko*); *Perry v. Thomas*, 482 U.S. 483, 489-91 (1987) (refusing to allow specific state law to displace application of Act to wage dispute); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 479-85 (1989) (overruling *Wilko v. Swan*, see *supra* note 9, and permitting arbitration of 1933 Securities Act claims).

13. See, e.g., *Prima Paint*, 388 U.S. at 402-04 (permitting courts to separate defenses to arbitration clause from defenses to remainder of contract); see *Furnish, Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CALIF. L. REV. 317, 330 (1979) (finding *Prima Paint* significant advance for treatment of commercial arbitration clauses). But see *Stempel, A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1456-59 (1991) (arguing for revision of *Prima Paint* to permit initial court consideration of selected defenses challenging contract formation or unconscionable arbitration mechanism).

14. See *Stempel, supra* note 2, at 283-334; *Sterk, supra* note 9, at 507-08. In its most recent Arbitration Act decision, the Supreme Court appears to have continued its strong (and in my view correct) movement away from finding any public policy exceptions to arbitrability. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1652-55 (1991) (rejecting contention that Age Discrimination in Employment Act (ADEA) implicitly prohibits enforcement of pre-dispute arbitration agreements to age discrimination claim). However, *Gilmer* erred badly in adopting an unrealistically formalist view of contract consent and in implicitly restricting the employment contract exception contained in Section 1 of the Arbitration Act. See *infra* notes 82-108 and accompanying text.

common law bases for avoiding defective arbitration agreements;¹⁵ procedural excesses;¹⁶ and sometimes insufficient standards of review.¹⁷

Perhaps the most serious but infrequently discussed glitch in Arbitration Act jurisprudence, however, involves the employment contract exception to the reach of the Act. Section 1 of the Act, in addition to defining commerce and "maritime transactions" encompassed by the Act, provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁸

This short, superficially simple passage is seldom examined at length in the reported cases and continues to produce unsatisfying results concerning what constitutes "any other class of workers engaged in foreign or interstate commerce."¹⁹

15. Stempel, *supra* note 13, at 1397-1425. In *Gilmer*, the Court continued its tendency to overlook or give short shrift to contract defenses based on lack of consent, unequal bargaining power, adhesion, or unconscionability. 111 S. Ct. at 1655-56. The *Gilmer* Court (by a depressing 7-2 majority) essentially took the view that a signed adhesion contract was binding on an individual employee who was required to sign if he wanted to work. *Id.* Although some of the Court's coldness to the defense may stem from an inadequately developed record by the employee and his misplaced emphasis on unequal bargaining power (the issue is not the employer's bargaining power but the adequacy of plaintiff's alternatives; see Stempel, *supra* note 13, at 1438-42) the *Gilmer* Court nonetheless sends a strong message of contract formalism.

16. For example, Section Four of the Act requires a jury trial on the question of the making of an agreement to arbitrate where the resisting party can create a sufficient factual dispute. 9 U.S.C. § 4.

17. The narrow grounds of section 10 do not permit courts to overturn or refuse to enforce a clearly erroneous arbitration award. 9 U.S.C. § 10.

18. 9 U.S.C. § 1.

19. *Id.* Most recently, in *Gilmer*, the Court avoided a forthright discussion of the impact of Section 1 by construing the required New York Stock Exchange application that must be completed in order to work at a member firm (and which contains a broad arbitration clause) not to be a "contract of employment" since the document is not bilateral between employer and employee. 111 S. Ct. at 1651-52 n.2. Although the *Gilmer* majority saw this as flowing from the "plain language" of the statute, 111 S. Ct. at 1651-52 n.2, this holding seems more grounded in the Court's excessive contract formalism. Justice Stevens' dissent better describes what happened. See *Gilmer*, 111 S. Ct. at 1659 ("the Court too narrowly construes the scope of the exclusion").

A brief historical example further illustrates the traditionally weak jurisprudence surrounding Section 1. Some courts once held that the interstate commerce provisions of Sections 1 and 2 had no bearing on Section 3 of the Act, which authorizes courts to stay litigation pending the completion of arbitration concerning the matter at issue. See, e.g., *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297, 298 (2d Cir. 1934), *aff'd on other grounds*, 293 U.S. 449 (1935); *Watkins v. Hudson Coal Co.*, 151 F.2d 311, 321 (3d Cir. 1945); *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364, 377 (D. Neb. 1948). These courts took the extraordinary position that Section 3, which speaks of court power in "any suit" is not subject to the Section 1 employment exception because Section 3 does not contain the word "commerce". See *Watkins*, 151 F.2d at 321; *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851, 854 (S.D.N.Y. 1951). This position also authorized courts to stay litigation even where the contract containing the arbitration clause bore no relation to interstate commerce, the constitutional anchor legitimizing the Act. *Lewittes & Sons*, 95 F. Supp. at 854. Mercifully, this seemingly daft view was persuasively rejected by other circuit courts. See, e.g., *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 882 (6th Cir. 1944) (Section 1 is a definitional section that must apply to a entire act to have any meaning); *International Union of United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 35 (4th Cir. 1948). It was not finally laid to rest

The clouded case law of Section 1's employment contract exception presents an opportunity to improve the fairness and function of the Arbitration Act, an opportunity the bench has failed to grasp for nearly a half-century. Part II of this article reviews the case law surrounding the judicial construction of what constitutes a "class of workers engaged in interstate commerce," with courts generally holding that the employment contract exception affects only workers directly involved in interstate movement of objects. This view fails to further the overall goals of the Act and undermines the judicial goal of fairness. Recently, the Supreme Court perpetuated the poor judicial performance interpreting Section 1 by giving the term "contract of employment" an unduly narrow construction.²⁰ Part III briefly reviews the major approaches to statutory interpretation and then demonstrates the persuasiveness, according to virtually each approach, of a construction of Section 1 that defines a broader group of workers "engaged in commerce" and a more realistic notion of what constitutes a "contract of employment." Part IV discusses the advantages of this interpretation over the currently prevailing view. In short, Section 1 has been and continues to be poorly interpreted. This shortcoming I attribute to the judiciary's lack of statutory vision in failing to grasp opportunities for more pragmatic construction that furthers both the objectives of the Arbitration Act and the overall goals of the legal system.

II. SECTION 1 CASE LAW ON THE EXCEPTION FOR "WORKERS ENGAGED IN COMMERCE"

A. *The Restrictive Commerce Test*

The issue of defining the types of workers which come within Section 1's exclusion from the Arbitration Act commerce clause was contested until the mid-1950's. Since then, the bulk of opinion has applied the exception only to workers directly involved in interstate movement of physical objects.²¹ Two circuit courts

until *Bernhardt* where the Supreme Court stated:

Sections 1, 2, and 3 are integral parts of a whole. To be sure, Sec. 3 does not repeat the words "maritime transaction" or "transaction involving commerce", used in Secs. 1 and 2. But Secs. 1 and 2 define the field in which Congress was legislating. Since Sec. 3 is a part of the regulatory scheme, we can only assume that the "agreement in writing" for arbitration referred to in Sec. 3 is the kind of agreement which Secs. 1 and 2 have brought under federal regulation. There is no intimation or suggestion in the Committee Reports that Secs. 1 and 2 cover a narrower field than Sec. 3. On the contrary, [the legislative history] states that Sec. 1 defines the contracts to which 'the bill will be applicable.'

350 U.S. 198, 201 (references omitted).

20. See *Gilmer*, 111 S. Ct. at 1651-52.

21. See *infra* notes 28-81 and accompanying text.

revisited but did not disturb the issue during the 1970's.²² The 1980's saw several decisions interpreting the exception, most adopting the traditional view.²³

Initial application of the exclusion was implicit. For example, in *International Union of United Furniture Workers v. Colonial Hardwood Flooring Co.*,²⁴ the court applied the Section 1 exception to a union of woodworkers who were themselves not crossing state lines but were making products that entered the stream of interstate commerce.²⁵ In a Tenth Circuit case, the Act was found inapplicable to a union of oil production workers.²⁶ Another case denied compulsory arbitration of a textile workers' dispute.²⁷

The first prominent case to take the more restrictive, now dominant, view of the "engaged in commerce" language was *Tenney Engineering, Inc. v. United Electronic Radio & Machine Workers of America*.²⁸ The *Tenney* Court denied benefit of the employment contract exception to a union at a manufacturing plant, finding that the group of manufacturing employees was not a class of workers engaged in interstate commerce, notwithstanding the planned entry of their products into interstate distribution.²⁹ The court placed substantial weight on the apparent role of the International Seamen's Union of America (the "Sailors Union")³⁰ in successfully promoting the exception, the text of which specifically mentioned only seamen and railroad employees.³¹ Against this backdrop, *Tenney* saw the phrase "any other class of workers engaged in foreign or interstate commerce" as necessarily meaning workers like sailors and railway workers, who were engaged in the physical movement of goods in interstate commerce.³²

22. See *infra* notes 69-74 and accompanying text.

23. See, e.g., *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984) (manufacturing workers' collective bargaining agreement a contract within Section 1 but not one involving interstate commerce); *Malison v. Prudential Bache Secs.*, 654 F. Supp. 101, 104 (W.D.N.C. 1987) (broker frequently making interstate phone calls and securities transactions not engaged in interstate commerce under Section 1); *Great N. Nekoosa Corp. v. ASEA, A.B.*, 657 F. Supp. 1253, 1256 (1987) (repairers of equipment used to manufacture goods entering stream of commerce not within Section 1).

24. 168 F.2d 33; see *infra* notes 211-17 and accompanying text (discussion regarding status of collective bargaining agreements).

25. *Colonial Hardwood Flooring Co.*, 168 F.2d at 36.

26. *Mercury Oil Refining Co. v. Oil Workers Int'l Union*, 187 F.2d 980, 982 (10th Cir. 1951).

27. *Ludlow Mfg. & Sales Co. v. Textile Workers Union*, 108 F. Supp. 45, 49 (D. Del. 1952).

28. 207 F.2d 450 (3d Cir. 1953).

29. *Id.* at 452-53.

30. At the risk of being slightly inaccurate (the union called itself a union of "Seamen"), I have made the short reference for the union into "Sailors Union" to make the term nonsexist. Both women and men may work as sailors.

31. 9 U.S.C. §1.

32. *Tenney*, 207 F.2d at 452. Said the court:

We think that the intent of the latter language was, under the rule of *eiusdem generis* [the latin term for the canon of statutory construction "it is known from its associates"], to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to

In particular, the court relied on the latin canon of statutory construction *ejusdem generis* ("it is known by its associates")³³ elevating it to the status of a "rule."³⁴ The *Tenney* court's fixation on the *ejusdem generis* tool illustrates the low level of interpretative insight that has plagued Section 1. Although perhaps more revered during the 1950's, rigid application of any of the latinized canons of construction has long troubled informed lawyers. As the authors of a leading casebook bluntly observe "almost everybody thinks the canons are bunk."³⁵ However, these same authors also note that "almost everybody—judges, lawyers, law professors—seems to use the canons to support their interpretations."³⁶ As one critic of the canons has noted, by use of the canons, "judicial opinions continue to pretend far more often than they should that the interpretation of statutes is the mechanical application of well understood interpretative principles—the canons—to legislative materials."³⁷

The contradiction undoubtedly results from a tendency to marshal all possible arguments, even the weak ones, in support of a position. Under apt circumstances, the canons, or more precisely, the notions underlying the canons, can assist interpretation.³⁸ However, the canons can also operate in aid of dangerous subterfuge, especially when elevated to a mechanical formula for decision. The crucial moment attending their use is selection of the canon. Usually, a diametrically opposed canon or argument is available for application.³⁹ Consequently, use of a canon as anything more than a rebuttable presumption to form a trial hypothesis can easily lead to error by drawing courts away from a careful reading of statutory text, legislative history, social context, and congressio-

be in practical effect part of it.

Id.; accord *Engineers Ass'n v. Sperry Gyroscope Co.*, 148 F. Supp. 521, 523 (S.D.N.Y. 1957) ("The workers involved in this case are not in a transportation industry. Accordingly, the United States Arbitration Act is properly applicable.").

33. See *supra* note 32.

34. *Tenney*, 207 F.2d at 452.

35. W. ESKRIDGE & P. FRICKEY, *LEGISLATION AND STATUTORY INTERPRETATION: CASES AND MATERIALS* 639 (1988).

36. *Id.*

37. Posner, *Classroom Statutory Interpretation: In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 801, 805-06 (1983).

38. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 228 (1975) (canons serve as "useful presumptions of supposed actual legislative intent . . . modestly useful [for determining] legislative meaning.").

39. See Llwellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (*ejusdem generis* canon can always be countered, at least in theory, because "[g]eneral words must operate on something." Further, *ejusdem generis* is only an aid in getting the meaning and does not warrant "confining the operations of a statute within narrower limits than were intended.").

nal purpose.⁴⁰ Even when rendering correct results, decision by canon rote is a primitive approach to statutes.⁴¹

The *Tenney* court also placed substantial emphasis on the slight differences in language between the Section 1 employment exclusion and other portions of the Act.⁴² The employment exclusion refers to workers "engaged" in interstate commerce while Section 2 makes the Act applicable to transactions "evidencing a transaction involving" interstate commerce.⁴³ *Tenney* read Section 2 as broader in that one can be part of something involving commerce while stopping short of being engaged in commerce.⁴⁴ The court then implicitly concluded that since the Section 1 language was seemingly narrower than that of Section 2, Congress must have intended that the Section 1 employment exception not reach every employee involved in transactions otherwise covered by the Act.⁴⁵ This view, of course, ignores the legislature's often random choice of roughly synonymous language⁴⁶ and completely overlooks the broad purpose of the Act, which sought to achieve judicial enforcement of commercial arbitration but was at best leery of similarly relentless enforcement of labor arbitration agreements.⁴⁷ The court also referred to the restrictive definition of interstate commerce prevailing in 1925.⁴⁸

40. Even scholars who found Karl Llewellyn's realist sarcasm overstated and defended the canons, cautioned that the canons were at best indicators of correct interpretation rather than a formula for rendering interpretation. For example, Hart & Sacks stated:

[Llewellyn's criticism] involves a misunderstanding of the function of the canons Of course, there are pairs of maxims susceptible of being invoked for opposing conclusions. Once it is understood that meaning depends upon context and that contexts vary, how could it be otherwise? Maxims should not be treated, any more than a dictionary, as saying what meaning a word or group of words must have in a given context. They simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it.

H. HART & A. SACKS, *THE LEGAL PROCESS* 1221 (tent. ed. 1958).

41. The *Tenney* dissent characterized, probably unfairly, the use of the ejusdem generis canon as the "sole reason advanced for this attempted construction" (that workers manufacturing goods for interstate shipment were not within Section 1's employment contract exception). 207 F.2d at 458. In fact, the *Tenney* majority made use of (poor) textual analysis, (overdrawn) legislative history, and (misplaced) congressional purpose arguments as well. Nonetheless, the dissent as well as the majority illustrate the undue importance attached to the ejusdem generis canon in *Tenney*. *Id.*

42. *Id.* at 454.

43. 9 U.S.C. § 2.

44. See *Tenney*, 207 F.2d at 453.

45. *Id.*

46. See W. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 23-46 (2d ed. 1984) (noting effect of role in drafting by different committees, staff, floor amendment in fostering use of different words in legislative text); see also J. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (1984); Cohen, March & Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. L.Q. 1 (March 1972) (describing Congress as an organized anarchy, where power, tasks, and quality control is widely dispersed).

47. See Stempel, *supra* note 13, at 1380-83; *infra* note 175 and accompanying text.

48. *Tenney*, 207 F.2d at 453. On this point, at least, the *Tenney* court was clearly applying what one scholar has termed the "archeological" approach to statutory construction by attempting to "unearth and enforce the original intent or expectations of the legislature that created the statute." Eskridge,

The *Tenney* dissent noted contrary case law and argued that Congress sought the Act to apply only to commercial arbitration matters.⁴⁹ The dissent's use of legislative history is at least as plausible as that of the majority. The dissent is most powerful in implicitly criticizing the majority as belonging to an originalist school of statutory construction rather than one that permits evolution of the statute according to other changes in the legal topography.⁵⁰ Persuasively, the dissent argued that "[t]o suggest that the 1925 concept of interstate commerce should restrict the exclusionary language of the Act in 1953 is unrealistic . . . we need not now be bound by the older view."⁵¹

Despite some division of the *en banc* Third Circuit and substantial arguments on both sides of the dispute, the approach of the *Tenney* majority gained favor, aided substantially by its adoption in the Second Circuit case of *Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers*.⁵² In *Signal-Stat* Judge Jerome Frank, writing for the majority, cast something of a tiebreaking vote bringing a majority of circuits clearly to the *Tenney* view.⁵³ However, the *Signal-Stat* opinion is terse, merely reiterating the *Tenney* rationale and citing to

Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275, 275 (1988); see *infra* notes 124-51 and accompanying text (discussing various schools of statutory interpretation). The *Tenney* majority did not explain, of course, its preference for an archeological approach to Section 1 but apparently not for Section 2.

49. *Tenney*, 207 F.2d at 455 (McLaughlin, J., dissenting).

50. *Id.* at 458-59 (McLaughlin, J., dissenting); see Eskridge, *supra* note 48, at 275 (describing archeological approach); Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1385 (1988) [hereinafter Eskridge, *Overruling Statutory Precedents*] (describing evolutive approach, which Professor Eskridge has also championed as "dynamic" statutory interpretation). See generally Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Interpretation*].

51. *Tenney*, 207 F.2d at 458. The dissent also argued that the employment exclusion had been implicitly updated by Congress when it re-enacted the Act and codified it in 1947 without providing for a narrower definition of interstate commerce than that prevailing after the post-New Deal Supreme Court cases. *Id.* at 459.

52. 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957), *reh'g denied*, 355 U.S. 852 (1957).

53. *Id.* at 302. Judge Frank, without benefit of citation, characterized the Fifth Circuit as taking a broad view of the "engaged in interstate commerce" language shared by the Fourth and Tenth Circuits, see *supra* notes 24-26 and accompanying text, but saw the First, Third, and Sixth Circuits as adopting a more restrictive view. *Signal-Stat*, 235 F.2d at 302. My own count as of 1956 (including *Signal-Stat*) was two circuits (the Fourth and the Tenth) favoring a broad construction with perhaps four circuits (the First, Second, Third, and Sixth) taking the narrow view. See *supra* notes 24-27 and accompanying text; *Hoover Motor Express Co. v. Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327*, 217 F.2d 49, 53 (6th Cir. 1954); *Local 205, United Electrical, Radio and Machine Workers v. General Electric Co.*, 233 F.2d 85, 98 (1st Cir. 1955). I can find no reported Fifth Circuit precedent as of 1956 on the "engaged in commerce" point. When the First Circuit most squarely took the restrictive view in *Dickstein v. duPont* it relied upon *Tenney* and *Signal-Stat*. 443 F.2d 783, 785 (1st Cir. 1971); see *infra* notes 69-70 and accompanying text.

Signal-Stat was important in that the Second Circuit was then the most prestigious appeals court in the country. The stature of Judges Frank and former Yale Law School dean and principal author of the Federal Rules of Civil Procedure Charles Clark, who joined the *Signal-Stat* majority, added to the decision's influence and aided the narrow construction of the employment contract exception.

the Second Circuit's *Bernhardt v. Polygraphic Co.*⁵⁴ opinion, which was reversed on other grounds.⁵⁵

The Second Circuit's discussion of the scope of the "any other class of workers in commerce" language of Section 1 also utilized what might be styled the "Marxist-Leninist" interpretation of Section 1. Writing for the court, Judge Frank stated that *Bernhardt*, a salesman, was not a "worker"⁵⁶ (something that would have surprised Willie Loman and others who have labored in the vineyard of sales work).⁵⁷ Said the court:

The words "any other class of workers", read in connection with the immediately preceding words show an intention to exclude contracts of employment of a "class" of "workers" like "seamen" or "railroad employees." Plaintiff was not hired as a "worker" but as a plant superintendent, at a salary of \$15,000 a year, with managerial duties fundamentally different from those of "workers."⁵⁸

The court attempted to buttress this strained analysis by noting that plaintiff *Bernhardt*, who was also held to be ineligible for the employment contract exception, might have shouldered management responsibilities for the defendant company,⁵⁹ and that the California courts had taken a similar approach to interpreting the exception in that state's arbitration law for "contracts pertaining to labor."⁶⁰

Judge Frank's view that there existed a bright line between management ("bosses") and labor ("workers") could be justified by reference to the National Labor Relations Act (NLRA)⁶¹ and its attempt to categorize employees according to their primary loyalties in the event of a workplace dispute.⁶² There is, in such

54. *Bernhardt v. Polygraphic Co.*, 218 F.2d 948 (2d Cir. 1955).

55. *Bernhardt*, 350 U.S. at 201-02 (holding right to court access substantive rather than procedural under *Erie* doctrine and holding Section 3 stay proceedings subject to Section 1 employment contract exclusion); see also *supra* notes 5-10, 20 and accompanying text; cf. *Southland Corp.*, 465 U.S. at 12 (implicitly overruling *Bernhardt* in holding Act to create substantive federal law not subject to *Erie* considerations).

56. *Bernhardt v. Polygraphic*, 218 F.2d at 951.

57. See A. MILLER, *DEATH OF A SALESMAN* (1952).

58. *Bernhardt v. Polygraphic*, 218 F.2d at 951-52 (citations omitted).

59. *Id.* at 952 n.3.

60. *Id.* at 952 (citing *Kerr v. Nelson*, 7 Cal. 2d 85, 88, 59 P.2d 821, 823 (1936) (sales manager's contract is not one pertaining to labor); *Levy v. Superior Court*, 15 Cal. 2d 692, 697, 104 P.2d 770, 773 (1940) (collective bargaining agreement between garment workers union and garment manufacturer not contract pertaining to labor); *Universal Pictures Corp. v. Superior Court*, 9 Cal. App. 2d 490, 495, 50 P.2d 500, 501 (1935) (movie actor's contract not one pertaining to labor)). The California courts have a somewhat stronger textual claim for distinguishing among types of workers. The word "labor" connotes to most people a more physical activity. "Employment" or "work", the nouns actually touched upon the text of Section 1, lack such physical connotations. While active laborers are almost always employed or working, not all employed persons are laborers.

61. 29 U.S.C. §§ 151-52 (1988).

62. *Id.* § 152.

instances, a difference between labor and management.⁶³ However, the Arbitration Act is a separate statute, applies in different circumstances, and was designed for a purpose quite distinct from that of the NLRA.⁶⁴ In addition, the legislative history of the Act gives no support to the suggestion that the term "workers" in the Act should be construed congruently with the connotation acquired in NLRA cases.⁶⁵ Since the Act preceded the NLRA, there could be no evidence of congressional support for this view. Judicial support like that of Judge Frank is simply an inapt analogy: a middle manager may identify with the company during a strike but she is just as likely to have an individual employment dispute with the company over pay, benefits, promotion, discrimination or working conditions.

In essence, Judge Frank, like Judge Maris in *Tenney*, applied the canon *ejusdem generis* as a rather rigid rule of decision. Frank, like Maris, saw Section 1 as setting forth a list of similar occupations. To both judges, sailors and railroad workers connoted laborers. Therefore, according to their implicit syllogism, the open-ended noun "workers" was confined to employees in occupations similar to those of sailors and railroad workers, *i.e.*, physical labor as part of physical interstate transit of materials. In my view, these distinguished judges committed several unforced errors. There was no reason (certainly no need) to attempt to harmonize the NLRA and the Arbitration Act; the language of Section 1 does not require such a narrow view of similarity, even when applying the *ejusdem generis* canon. They gave little reflection regarding the overall purpose of the employment contract exclusion, perhaps because they focused on textual similarity. Finally, use of the *ejusdem* canon naively assumes a congressional purpose in using particular text when the language may have in fact resulted from mere coincidence or a desire to accommodate a particular interest group (the Sailors Union in the case of the Section 1 exception).

Judge Frank's characterization of the exception suffers from a practical defect as well. In effect, *Signal-Stat* read the words exempting "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" in Section 1 as referring to the nature of the individual employee's activity at the job site rather than the type of work done by employees generally.⁶⁶ The fallacy of this view seems almost unavoidable: if Congress had intended this approach, ordinary sailors would be within the exception but the first mate would not, because he has some supervisory responsibility. Similarly, railroad foremen would be bound to arbitrate under the Act but their crews would not. Section 1's text and legislative history fail to support this differentiation.

63. See R. GORMAN, LABOR LAW § 7 (1976).

64. The NLRA sought to establish groundrules for the fair and orderly resolution of disputes between labor and management. 29 U.S.C. §§ 151-60. The Arbitration Act, passed primarily at the behest of commercial interests, sought to ensure the specific enforcement of consensual predispute arbitration agreements. See *infra* notes 185-87 and accompanying text.

65. See *infra* notes 171-76 and accompanying text (discussing slim legislative history of the Act).

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

For nearly twenty years after *Signal-Stat* and *Tenney*, cases lack significant discussion of the employment contract exception.⁶⁷ Although the courts of the 1970's that returned to the issue could have reached for precedent which took a broad definition of workers engaged in commerce, they did not, despite intervening legal developments that argued for a broader reading of the term.⁶⁸ The First Circuit's *Dickstein v. duPont*⁶⁹ opinion adopted the rationale of the *Tenney* majority in the case of a stockbroker seeking to avoid the arbitration clause of his individual employment contract.⁷⁰

Shortly thereafter, the Second Circuit reiterated its support for this view in *Erving v. Virginia Squires Basketball Club*,⁷¹ by briefly and unquestioningly citing the holding of *Signal-Stat* which states "[S]ection 1 applied only to those actually in the transportation industry"⁷² thereby the *Erving* court held that even the instant plaintiff, high-flying basketball star Julius Erving, did not qualify for the defined exception.⁷³ As in *Tenney* and *Signal-Stat*, the authors of *Dickstein* and *Erving* were well respected jurists, adding subtle weight to the precedent.⁷⁴

Thus emerged an apparent modern rule of Section 1 finding only interstate transit workers protected by the employment contract exception. No reported opinions since have forced serious rethinking of this view. Several late 1980's cases addressed Section 1, but most involved the United States Postal Service, a group viewed by most courts as sufficiently involved in interstate transportation to make the exception applicable.⁷⁵ As one court observed: "[i]f any class of

67. One circuit case from the 1960's approved the narrow construction of *Tenney* and *Signal-Stat* but gave the issue even less thoughtful review than the other cases taking the narrow view. See *Pietro Scalzitti Co. v. International Union of Optical Eng'rs, Local No. 150*, 351 F.2d 576, 579-80 (7th Cir. 1965).

68. See *infra* notes 183-205 and accompanying text.

69. 443 F.2d 783.

70. *Id.* at 785. The *Dickstein* court stated that "[c]ourts have generally limited this exception, to employees, unlike appellant, involved in, or closely related to, the actual movement of goods in interstate commerce" and cited only *Tenney* and *Signal-Stat* for support of this generality. *Id.*

71. 468 F.2d 1064 (2d Cir. 1972).

72. *Id.* at 1069.

73. *Id.* The *Erving* court also relied on the First Circuit's *Dickstein* opinion. *Id.* In addition, both district court opinions in *Dickstein* and *Erving* had followed *Tenney* and *Signal-Stat* in rejecting plaintiff's claims of an employment contract exception. *Dickstein*, 320 F. Supp. at 152-53; *Erving v. Virginia Squires*, 349 F. Supp. at 719. Implicitly, the contemporaneous *Legg, Mason & Co. v. Mackall & Coe, Inc.*, fits with the 1970s revival of this view of Section 1, although *Legg, Mason* did not focus on the employment contract exception. 351 F. Supp. 1367, 1371 (D.D.C. 1972) (enforcing arbitration provisions in stockbrokers' job contracts).

74. *Dickstein* was written by Judge Frank Coffin while *Erving* was written by Judge Harold Medina, a strong advocate for arbitration. See, e.g., *Robert Lawrence Co.*, 271 F.2d at 406 (Medina, J.) ("One of the dark chapters in legal history concerns [insufficient judicial solicitude for] the validity, interpretation and enforceability of arbitration agreements").

75. See *American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 470-73 (11th Cir. 1987); *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 404-05 (6th Cir. 1988). Mercifully, neither of these courts have attempted to resurrect the "worker-management" distinction invoked by *Signal-Stat* (e.g., finding letter carriers but not inspectors within the exception) although

workers is engaged in interstate commerce, it is postal workers."⁷⁶ Another noted that postal employees "are responsible for dozens, if not hundreds, of items of mail moving in 'interstate commerce' on a daily basis. Indeed, without them, 'interstate commerce,' as we know it today, would scarcely be possible."⁷⁷

Notwithstanding the neither "snow, nor rain, nor heat nor gloom of night" rhetoric⁷⁸ of the postal services cases, their results suggest a substantial infirmity in the *Tenney* line of cases (explored at greater length in Part III, *infra*) and perhaps an inconsistent broadening of the restriction of the exclusion. The postal service cases quickly concluded that postal workers are more like sailors and railroad workers than they are like stockbrokers, basketball players, woodworkers, assemblers, and other manufacturers.⁷⁹ To my mind, this categorization is not so obvious. More likely, postal workers lie between the previously classified groups.

At one end of the spectrum are sailors or airline pilots. Ships on navigable waterways and commercial airliners are virtually always in the course of transporting matter between states or countries. Not only is the aggregate work performed by these groups important to interstate commerce but the bulk of sailors and airline workers are in fact involved in interstate commerce. Railroad workers are closer in on the spectrum. Many of them work only at a switchyard within a given state.⁸⁰ Although they are links in a chain of transportation commerce, railroad workers are essentially local employees. The same can be said of a local letter carrier in Lincoln, Nebraska, although other postal workers constantly move mail across state lines. Unlike the sailor, pilot, or railroad worker, the letter carrier's link to interstate commerce is more attenuated. Virtually every item loaded by the stevedore sails to another jurisdiction, but much of the letter carrier's work is purely local or intrastate and can hardly be said to have entered

it is not clear from the job titles of the litigants whether either of these cases presented an opportunity to apply this analysis.

76. *Bacashihua*, 859 F.2d at 405.

77. *American Postal Workers Union*, 823 F.2d at 473. In another Section 1 case, the district court sensibly held that the use of repair personnel to service industrial equipment did not make the sale of the equipment a "contract of employment" under Section 1. See *Great Nekoosa*, 657 F. Supp. 1253, 1256.

78. The full quotation reads: "not snow, nor rain, nor heat, nor gloom of night stays these couriers from the swift completion of their appointed rounds." In what many modern customers must view as supreme irony, it is found inscribed on the main post office in New York City. See *Sportique Fashions, Inc. v. Sullivan*, 597 F.2d 664, 665 (9th Cir. 1979). The quoted sentiment is first found in Herodotus (Book VIII) 98 (date uncertain). See *Pollard v. Cockrell*, 578 F.2d 1002, 1017 (5th Cir. 1978).

79. *Bacashihua*, 859 F.2d at 403-05; *American Postal Workers Union*, 823 F.2d at 473.

80. The same is of course true regarding airline ground crews. However, the airplane serviced by ground crews is far more certain to cross state lines than an individual train or postal truck. Consider, for example, commuter railroads surrounding Chicago, Boston, and New York. Many never leave their state of origin.

the stream of interstate commerce merely because the postal system as a whole is important to commerce.⁸¹

In any event, in the postal service cases, the courts have begun to leave the traditional transportation industry altogether. Perhaps they should go further. If the interstate nature of mail service as a whole places the letter carrier in Lincoln, Nebraska within the employment exception of Section 1, one might ask why the stockbroker trading shares by phone throughout the country, the maker of products shipped around the world, and Dr. J. (who during his illustrious career spent eight months each year dunking across the country) are not also covered by Section 1. They may not be transportation workers, but their role in interstate commerce seems at least as prominent as that of ship, rail or postal workers. Part III addresses whether prominent schools of statutory interpretation can support this arbitrary division of the employment exception.

B. Gilmer: Shifting from a Restrictive Commerce Test to a Restrictive Definition of Contract

Recently, in *Gilmer v. Interstate/Johnson Lane Corp.*,⁸² the Supreme Court broke its 65-year silence regarding the scope of the Section 1 employment exclusion. The Court granted certiorari in *Gilmer*⁸³ regarding whether an arbitration agreement contained in an employment contract may be enforced to remove from federal court an employee's claim pursuant to the Age Discrimination in Employment Act (ADEA).⁸⁴ The Fourth Circuit ruled that the arbitration clause was enforceable,⁸⁵ basing its decision solely on its conclusion that ADEA did not implicitly limit the reach of the Act.⁸⁶

81. In this sense, the wheat grown by the farmer in *Wickard v. Filburn*, 317 U.S. 111 (1942) (perhaps the height of expansive interpretation of the commerce clause, see STONE & SEIDMAN, *supra* note 8, at 176-77), can be seen as more interstate than much of the mail. Wheat prices are largely set by trading activity at a few exchanges (Chicago, Minneapolis, Kansas City) and wheat is quickly, constantly, and almost unavoidably commingled so that one is hard pressed to say that Farmer Jones's bushel grown in South Dakota did not go into the flour milled in Minnesota that went into the bread baked in Illinois. By contrast, one can be considerably more certain that the letter Farmer Jones, who lives in Huron, S.D., sent to his city slicker brother in Sioux Falls, S.D. never left the state.

82. 111 S. Ct. 1647.

83. 111 S. Ct. 41 (1990) (*cert. granted*).

84. *Id.*; 29 U.S.C. §§ 621-34 (1982 and Supp. 1986).

85. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 203 (4th Cir. 1990). Robert Gilmer, a long-time stock broker, was hired by Interstate/Johnson Lane as a manager of financial services. As a condition of his employment, he was required to register with the New York Stock Exchange (NYSE) as a securities representative. *Id.* at 196. The NYSE in turn required that he consent, through his written application, to arbitrate any controversy arising out of his employment. *Id.* The trial court, reversed by the Fourth Circuit, had agreed with Gilmer that ADEA implicitly exempted ADEA claims from the reach of the Arbitration Act. *Id.*

86. *Id.* at 199-201. The *Gilmer* panel's view conflicted with that of most courts considering the issue. See, e.g., *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1307 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 230 (3d Cir. 1989); *Utey v. Goldman Sachs &*

The Fourth Circuit did not address the issue of the applicability of the Section 1 exception. Neither did the Supreme Court's grant of certiorari, at least not expressly. However, several amici supporting *Gilmer* argued for the broader construction of Section 1 as advocated in this article and contended that the issue of the Act's applicability to employment contracts was implicitly within the scope of the certified question.⁸⁷ Counsel for Interstate/Johnson Lane moved to strike these portions of the amicus briefs, but the Court denied the motion.⁸⁸ Justice O'Connor was sufficiently intrigued by the argument for a Section 1 exception that she asked counsel about it during oral argument.⁸⁹ Subsequently, the court granted Interstate/Johnson Lane leave to file a supplementary brief on the issue.⁹⁰

My own hope was that the Court would remand the matter to the trial court for consideration of the employment contract exception issue as well as the issue of whether *Gilmer's* consent was sufficiently voluntary to make the arbitration agreement enforceable. Both matters are important⁹¹ and would benefit from the viewpoints of a variety of jurists. The issue of consent is particularly fact sensitive and logically requires district court examination and fact finding. Although the scope of Section 1's employment contract exception is almost a purely "legal" question, it would nonetheless benefit from some degree of "percolation" in lower courts prior to a Supreme Court pronouncement on the issue. During the pendency of a *Gilmer* remand, other courts could probably face and decide the Section 1 issue as well. When the issue returned to the Supreme Court, the Justices would have the benefit of the thoughts of other judges, a

Co., 883 F.2d 184, 187 (1st Cir. 1989); *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 105 (5th Cir. 1990).

Judge Widener's dissent in *Gilmer v. Interstate/Johnson Lane Corp.* agreed with these cases that the purpose of eradicating discrimination underlying ADEA would be unduly compromised if employers could enforce forum selection clauses to remove ADEA disputes from federal courts, which were perceived as more appropriate forums for discrimination claims. 895 F.2d at 203.

Although most courts addressing this issue have framed it as one of statutory conflict, it is in fact a part of the jurisprudence concerning whether antidiscrimination and civil rights claims should not be arbitrable as a matter of public policy. See Stempel, *supra* note 2, at 283-331. On this question, the Fourth Circuit and Supreme Court *Gilmer* opinions correctly decided that ADEA and general judicial solicitude for such claims should not preclude application of an on-point federal statute (the Act) requiring arbitration that remains consistent with social preferences. *Id.* at 327-31; see *infra* notes 193-206 and accompanying text (discussing dynamic statutory interpretation). However, both *Gilmer* majorities overlooked the very suspect "consent" or voluntariness of *Gilmer* in agreeing to arbitrate as a condition of obtaining his job, see Stempel, *supra* note 13, at 1395. The trial court and the Fourth Circuit both failed to address the potential applicability of the Section 1 employment contract exception, which was not argued by counsel.

87. See Cannon, *Are Arbitration Agreements Enforceable with Respect to Claims Under the Age Discrimination in Employment Act?*, 1990-91 Term, PREVIEW OF U.S. SUP. CT., CASES, FEB. 19 1991, at 188, 191 (noting that amicus briefs by AARP, the AFL-CIO, and the Lawyers' Committee for Civil Rights Under Law argued for application of Section 1 employment contract exception to *Gilmer*).

88. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 578 (1990).

89. See, *Arguments Before the Court: Employment Discrimination*, 59 U.S.L. Weekly 3525, 3525 (1991) (reporting questions by Justice O'Connor on this issue).

90. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 947 (1991).

91. Regarding the issue of consent see Stempel, *supra* note 13, at 1426-32.

particularly important consideration where, as with Section 1, the legal issue has not been subject to reflective judicial analysis during the past 40 years.⁹²

Unfortunately, the Court did not take the prudential path but instead decided a major segment of the Section 1 issue in a manner adverse to perhaps the most widely affected group of employees. In addition, the Court implicitly suggested it was hostile to consent-based defenses related to issues of adhesion or unconscionability.⁹³ In effect, employers and more powerful contracting parties won this issue with hardly a shot having been fired. Nonetheless, the indirect nature of the victory, in which the Court "skirted" both issues,⁹⁴ suggests that continued lower court reassessment and development of Section 1 doctrine is in order.

The bulk of the *Gilmer* opinion addresses the public policy/statutory interpretation issue of whether the Age Discrimination in Employment Act (ADEA) precludes operation of the Arbitration Act to require arbitration of an ADEA claim and concludes quite properly that it does not.⁹⁵ The Court also rejected plaintiff *Gilmer's* defenses based on contract doctrine, finding that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."⁹⁶ Although *Gilmer* was not a long opinion, the Court's treatment of the ADEA and contract formation issues was far deeper than its cursory semi-disposition of the Section 1 employment contract exception issue, which the Court relegated to a footnote. Said the Court, after quoting Section 1:

Several *amici curiae* in support of *Gilmer* argue that that section excludes from the coverage of the FAA [the Arbitration Act] *all* "contracts of employment." *Gilmer*, however, did not raise the issue in the courts below, it was not addressed there, and it was not among the

92. Readers who accept my criticisms of *Gilmer*, *Tenney* and *Signal-Stat* may argue that the scope of Section 1 has yet to receive wise and reflective judicial consideration.

93. See *Gilmer*, 111 S. Ct. at 1655-56.

94. See *Gilmer*, 111 S. Ct. at 1657 (Stevens, J., dissenting) (court in *Gilmer* "skirts the antecedent question of whether the coverage of the Act even extends to arbitration clauses contained in employment contracts").

95. See *Gilmer*, 111 S. Ct. at 1652-55; Stempel, *supra* note 2, at 327-31.

96. *Id.* at 1655. Statements like these lead me to conclude that *Gilmer's* case was not lawyered in an optimal manner. Instead of reaching for broad rules of prohibition, counsel for parties seeking to avoid arbitration agreements would obtain better support from contract-based defenses if they show that the particular litigant was forced to accept an unreasonably unfavorable contract term in order to earn a living, or was defrauded, or was forced to sign under duress, etc.

As a general proposition, the Court is correct. Simple incantations of unequal bargaining power should not invalidate contracts. However, where the contract concerns earning a livelihood and the instant facts suggest no consent or low quality consent, arbitration agreements may not apply because of factors like lack of knowledge, unfair dealing, adhesion, unconscionability, or defective agency. To invalidate such "lifeline" contracts for work, food, clothing, shelter, or medical care, the individual employee should not bear a heavy burden in order to prevail on one of these affirmative defenses. See generally Stempel, *supra* note 13, at 1438-42.

questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U.S.C. §§ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. See, e.g., *Dickstein v. duPont*, 443 F.2d 783 (CA 1971); *Malison v. Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (W.D.N.C. 1987); *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367 (D.D.C. 1972); *Tonetti v. Shirley*, 219 Cal. Rptr. 616, 173 Cal. App. 3d 1144 (1985); see also *Stokes v. Merrill Lynch, Pierce, Fenner & Smith*, 523 F.2d 433, 436 (6th Cir. 1975). We implicitly assumed as much in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), where we held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his former employer, pursuant to an arbitration clause in his registration application. Unlike the dissent, see *post* at 1659-1660, we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae*.⁹⁷

I reproduce virtually the Court's entire discussion of the Section 1 issue both because it allows scrutiny and to assure readers that I have not mischaracterized the Court's "analysis." It is that bad.⁹⁸ In essence, the Court said: (a) the Section 1 issue was waived because not argued below, (b) but we are going to decide part of it anyway, (c) by making the amazingly broad pronouncement helpful to defendant and all brokerage houses that arbitration clauses required by a self-regulatory organization to which the defendant employer belongs are not within Section 1, (d) but nevertheless we refuse to render a complete examination

97. *Gilmer*, 111 S. Ct. at 1651-52 n.2 (emphasis and italics the Court's, as is the odd, unpunctuated citation form).

98. Some of the "cobbled together" feel of *Gilmer's* footnote 2 may have resulted from an "end of Term" rush to complete opinions. However, the *Gilmer* decision was announced on May 13, 1991, nearly six weeks before the end of the Term. My speculative theory is that the Court gave the Section 1 issue such rough hewn consideration because there was a clear majority on the merits of the judgment (7-2 in favor of the defendant brokerage house), the Section 1 issue was not going to be dispositive and was, at least partially, deferred rather than decided, and the Court felt pressure to devote its remaining six weeks to legal issues it deemed more complicated or important.

of Section 1 that might on closer analysis help Gilmer and other employees, (e) but many questions regarding the scope of Section 1 remain open, particularly when an arbitration clause is found in a bilateral employer-employee contract.

In deciding *Patterson v. McLean Credit Union*,⁹⁹ a thin majority of the Court found the plain language of 42 U.S.C. section 1981 (forbidding discrimination in the "making and enforcement of contracts") to limit the statute to only hiring decisions,¹⁰⁰ a firestorm of criticism ensued.¹⁰¹ Congress overwhelmingly passed legislation to change that crabbed and tortured "plain language" construction as well as to overrule other Court decisions narrowly construing civil rights laws.¹⁰² Although President Bush vetoed the bill (and barely warded off an override by Congress), the Justice Department has consistently stated that it disagreed with the Court's narrow interpretation of *Patterson* and that the Bush administration would support a civil rights bill that overruled only *Patterson*.¹⁰³

The purported "plain language" rationale of *Gilmer* is cut from the same cloth as *Patterson* and deserves equivalent condemnation. The Court confused strict interpretation (not extending language beyond the reach of words generally accepted by those who speak the language) and literal interpretation (using a precise dictionary-like application of language even where it produces absurd results or results different from common connotative understandings of the term). *Gilmer* is literalist rather than plain or strict in its construction of language. Although plaintiff Gilmer's stock exchange application may not have been the contract of employment between Gilmer and his employer, it was clearly a related document essential to the formation of the employment relationship.¹⁰⁴ Interstate/Johnson Lane would not have hired Gilmer had he not completed the application (including signature of the arbitration clause) and been approved by the Exchange. Even with a strict view of language, most people would view the application as one of the contract documents of Gilmer's employment.

In addition, of course, the Court's invocation of "plain language" despite the absurdity of result provides a neat way for the *Gilmer* majority to avoid

99. 491 U.S. 164 (1989).

100. *Id.* at 178-82.

101. See, e.g., *A Civil Rights Symposium Honoring Judge John Minor Wisdom*, 64 TUL. L. REV. 1351 (1990) (several articles highly critical of *Patterson* reasoning and approach); Committees on Civil Rights, Federal Legislation, and Sex and the Law, Association of the Bar of the City of New York, *The Civil Rights Act of 1990*, 45 RECORD 430, 430-35 (1990) (criticizing *Patterson* and other Supreme Court decisions restricting scope of federal legislation, endorsing proposed legislation to overrule court decisions).

102. See Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 618 (1991); Stempel, *The Rehnquist Court, Inertial Burdens, Civil Rights, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 645-55 (1991) (both discussing congressional reaction to *Patterson* and other Court decisions adopting narrow interpretation of civil rights laws).

103. See Stempel, *supra* note 102, at 652.

104. See *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting) ("Gilmer was, however, required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE)").

considering the other factors thought to be integral to intelligent statutory interpretation: legislative history; specific legislative intent; overall legislative purpose; evolutionary influences on law and society; the distribution of power within the political system; and (in close cases) the "better" rule. As discussed below, these factors powerfully support a broader interpretation of the Section 1 exclusion. Justices Stevens and Marshall came to that same conclusion because they permitted themselves to review this evidence,¹⁰⁵ an opportunity the majority denied itself.

Furthermore, the Court's crabbed reading of the term "contract of employment" creates a functional asymmetry in arbitration law that the Court itself touches upon but fails to grasp. As footnote 2 observes, there is no written arbitration clause between Gilmer and his employer.¹⁰⁶ Yet, when Gilmer sues, his employer is permitted to force Gilmer into the arbitration forum on the basis of Gilmer's signature to an arbitration agreement that, in the eyes of the Court, he made with someone else.¹⁰⁷ In other words, Interstate/Johnson Lane gets to enforce the arbitration clause of a contract it did not sign but Gilmer is not permitted to invoke a statutory exclusion based on that same contract.

Although this result may seem reasonable to those steeped in Canon law or the common law of the 18th Century, it seems grossly unfair by modern standards. At a minimum, it is a clear victory for formalism over functionalism and equity. Further reflection raises the issue of whether the Court's reasoning passes even formalist scrutiny. To enforce an arbitration clause against Gilmer without an arbitration agreement with Gilmer, Interstate must be a third-party beneficiary of Gilmer's application to become a registered representative.¹⁰⁸ Unfortunately, the Court's backhanded way of deciding this issue under the rubric of "plain language" prevented full (or even fragmented) development of an evidentiary record on these matters.

The issue of third-party beneficiary status is by no means open-and-shut. "The performance of a contract usually benefits persons other than the parties who made it, but they cannot ordinarily enforce it."¹⁰⁹ However, courts have recognized a "wide variety of situations" in which persons not a party to a contract

105. See *id.* at 1659-60.

106. *Id.* at 1651-52.

107. *Id.*

108. One might also wonder whether Gilmer's application even qualifies as a contract. Of course, most courts hold it does, but the application is hardly the sort of bargain envisioned when one thinks of a true contract. Rather, the application is something akin to a ticket purchased by Gilmer or a receipt given when he pays a toll to ride on the expressway. Just as the back of the ticket or receipt may contain exculpatory language, the exchange application contained a standardized arbitration clause that probably received only perfunctory reading from Gilmer. If this sort of "contract" is enforceable against Gilmer in disputes arising out of his employment why is it not also considered to be a "contract of employment?" The Court has no answer other than its strained mantra of "plain language." See generally Stempel, *supra* note 13, at 1438-42 (discussing conditions for enforcing adhesion terms and whether items like tickets qualify as contracts).

109. E. FARNSWORTH, *CONTRACTS* §10.1, at 710 (1982) (citation omitted).

have been allowed to enforce the contract.¹¹⁰ The modern test adopted in the Restatement (Second) of Contracts looks to whether the non-signer seeking to enforce a contract was an intended beneficiary and whether performance of the contract would satisfy an obligation to the non-signer or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."¹¹¹ Although brokerage houses can probably make this showing in cases like *Gilmer*, the fact remains that the Court leaped to its conclusions without requiring a showing of entitlement to enforce the "non-employment contract arbitration clause" against *Gilmer* and other plaintiffs.

Interstate and other firms undoubtedly derive some benefit from having the Exchange screen those applying for broker positions. Since employment disputes are usually directed at the employer rather than a self-regulatory organization like a stock exchange, there was probably an intent that the member firm have the benefit of the arbitration promise. However, the Exchange as its own entity would presumably want to screen applicants (e.g., to ease pressure for further government regulation and to preserve confidence in the Exchange) and would for its own reasons desire arbitration clauses (e.g., to keep disputes out of the newspapers). This may, in the context of all the facts, suggest a limit to Interstate's rights to enforce arbitration clauses entered into with others.

If Interstate is to obtain the fruits of such asymmetric application of contract and statutory law, it should at least shoulder the burden of persuading the Court that it is a true third party beneficiary entitled to enforce *Gilmer's* arbitration agreement with the exchange, even though *Gilmer* lies outside Section 1. Of course, if Interstate is truly an intended beneficiary of *Gilmer's* contract with the stock exchange, how can the arbitration agreement not come within Section 1? Merely asking the question leads one to adopt the view of the *Gilmer* dissent.

In addition, the Court in footnote 2 takes maximum license with the cases it cites for support. All of them: *Dickstein v. duPont*, *Malison v. Prudential-Bache*,¹¹² *Legg, Mason & Co. v. Mackall & Coe*¹¹³ and *Stokes v. Merrill Lynch*¹¹⁴ fail to support the *Gilmer* construction and result. *Dickstein* and *Legg, Mason* give their primary focus to the issue of whether the employee plaintiffs in question were sufficiently "engaged in interstate commerce" to benefit from the employment exception.¹¹⁵ *Dickstein* and *Legg, Mason* did not directly adopt the narrow definition of contract used by the *Gilmer* Court.¹¹⁶ To the contrary, *Dickstein* found that a broker's application to the NYSE was "an integral and mutually binding part" of the employment relation with a brokerage house.¹¹⁷

110. *Id.*

111. *Id.* § 10.3, at 717 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981)).

112. 654 F. Supp. 101, 104 (W.D.N.C. 1987).

113. 351 F. Supp. 1367 (D.D.C. 1972).

114. 523 F.2d 433, 436 (6th Cir. 1975).

115. See *Dickstein*, 443 F.2d at 785-88; *Legg, Mason*, 351 F. Supp. at 1369-71.

116. *Dickstein*, 443 F.2d at 785-88; *Legg, Mason*, 351 F. Supp. at 1369-71.

117. See *Dickstein*, 443 F.2d at 786.

Legg, Mason, read fairly, makes a similar implication.¹¹⁸ *Stokes* addressed only the pre-emptive force of the Act and did not mention Section 1.¹¹⁹ *Malison* and *Tonetti*, can be read as supplementing their narrow construction of the commerce prong of Section 1 with a narrow construction of the contract within the employment prong only through a vast interpretative leap.

The Court's invocation of its own precedent, *Perry v. Thomas*, is similarly unconvincing. According to the *Gilmer* Court, *Perry* assumed that applications for stock exchange approval to work for a member house are not contracts of employment.¹²⁰ Perhaps. It is more likely, however, that the *Perry v. Thomas* Court simply overlooked the issue of Section 1 since it was not raised in that case. In similar fashion, the *Gilmer* Court would probably have overlooked the Section 1 issue (as did the Eastern District of North Carolina and the Fourth Circuit) had it not been raised by amici curiae. To convert oversight into tacit approval hardly strengthens the Court's position.

Further, *Perry v. Thomas* is not a solid jurisprudential rock on which to build the Court's church of restrictive application of Section 1. *Perry* has a hurried quality about it similar to *Gilmer* (*Perry* was decided in mid-June 1987 near the end of that Term) and commits a major analytic flaw by suggesting that state law should govern construction of arbitration agreements.¹²¹ Reflection on that issue should suggest to the Court that interpretation of contracts subject to the Federal Arbitration Act be accomplished pursuant to federal common law.¹²² In addition, the author of *Perry* is Justice Marshall, who joined Justice Stevens' dissent in *Gilmer*. Apparently, Justice Marshall did not believe he "implicitly assumed" the narrow construction of Section 1 "contracts of employment" held by the *Gilmer* majority when he wrote *Perry v. Thomas*.

In practical effect, *Gilmer* renders half a decision on the Section 1 question. By far the largest category of reported individual employee arbitration disputes involve workers for registered brokerage houses belonging to the New York Stock Exchange or other exchanges that insist workers sign an arbitration clause as a condition of working in the business. Unless reconsidered or altered through legislation, the bulk of workers who should enjoy the fruits of a more expansive reach of Section 1 are barred from this benefit. Nonetheless, as *Gilmer* acknowledges, other Section 1 issues await another day. In particular, *Gilmer* permits lower courts to apply Section 1 to direct employment contracts if they find the affected workers to be within the reach of the statutory provision.¹²³ Part III suggests that lower courts would act with greater fidelity to the Arbitration Act and general principles of statutory interpretation by adopting a broad view of Section 1.

118. See *Legg, Mason*, 351 F. Supp. at 1369-71.

119. See *Stokes*, 523 F.2d at 434-37.

120. See *Gilmer*, 111 S. Ct. at 1652 n.2.

121. *Perry*, 482 U.S. at 493 n.9.

122. I analyze *Perry* and make this argument in detail in Stempel, *supra* note 13, at 1452-55.

123. See *Gilmer*, 111 S. Ct. at 1651 n.2.

III. INTERPRETATION OF SECTION 1

A. *Approaches to Statutory Interpretation*

Although the groundrules of statutory interpretation are discussed as though they were drawn from a rulebook used by all judges, the legal profession (particularly the academy) diverges quite substantially regarding the most useful indicia of statutory meaning. The following approaches to statutory interpretation have substantial support in legal literature and judicial opinion: textualism; intentionalism; purposivism; dynamism; and eclectic pragmatism. These schools of statutory thought differ in terms of their emphasis on particular factors or methods in resolving issues of statutory construction.

Textualism. Textualists regard the language of the statute as the primary datum for assessing meaning, with more strident textualists taking the view that consideration of any matter other than statutory text is illegitimate.¹²⁴ Less extreme textualists nonetheless place great emphasis on the language of the statute and argue for a "plain meaning" approach to construction; one that forbids consideration of other sources of meaning where the statute's text is deemed sufficiently clear.¹²⁵ However, the textual approach has substantial inherent limits for resolving many cases. Much statutory language admits of no plain meaning and requires resort to other data for interpretation.¹²⁶ Not surprisingly, some criticize textualism as occasionally leading only to result-oriented analysis since one person's ambiguity is another's plain meaning.¹²⁷

124. Professor Eskridge and others have noted that current textualist fashion differs from the traditional "plain meaning" rule in that new textualists are both quicker to find clear meaning and less willing to view non-textual interpretive aids as legitimate. See Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 645-55 (1990); Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 445, 453 (1988) ("[Justice] Scalia-led [textualist] attack upon the use of legislative history" differs from earlier concerns in vehemence, use of unsupported and incorrect factual assumptions, admitting of little or no role for bona fide indices of legislative intent extrinsic to text); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 285 (1990).

125. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("[w]here the language [of a statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); Eskridge, *Overruling Statutory Precedents*, *supra* note 50 at 1364; Note, *Intent, Clear Statements & the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 899 (1982).

126. See, e.g., *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J.) ("notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."); W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 590-95; S. FISH, *IS THERE A TEXT IN THIS CLASS?* 1-17 (1980) (finding words alone ambiguous and to depend on context, particularly shared views among readers, to give meaning); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 269-70 (1985); Wald, *supra* note 124, at 302 ("people frequently do not say precisely what they mean").

127. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting) (arguing that the venerable case of *Hans v. Louisiana*, 134 U.S. 1 (1890), misconstrued the meaning of the text of the eleventh amendment while purportedly taking a plain meaning approach; utilizing legislative history to support different textual reading of amendment); see Popkin, *The*

Intentionalism. A second major school of statutory construction seeks to ascertain the intended meaning of the provision held by the legislature that enacted the statute.¹²⁸ This typically involves looking at the text, legislative history of the statute, immediate and specific goal of the enacting body, and politico-legal climate at the time of the statute's passage.¹²⁹ Although the intentionalist view, like the textualist approach, purports to be one limiting judicial power, it differs from the textualist view in that it regularly resorts to extrinsic aids in construction and tends to focus on historical extrinsic material, all the while resisting attempts to "update" a statute.¹³⁰

Purposivism. Purposivism focuses not upon the immediate and narrow specific intent of the enacting legislature but upon the broader overall objectives of the law in question. One can make a strong case that purposivism is the most venerable and traditional of the interpretative approaches. It might well be summarized by the classic English cases that posit that courts locate the "mischief or defect" that prompted passage of the statute and discern the remedy for the mischief embodied in the law, thereafter giving the law "such construction as shall suppress the mischief, and advance the remedy [and] add force and life to the cure and remedy, according to the true intent of the makers of the Act."¹³¹

In the modern version of this venerable "suppress the mischief/advance the remedy" formula, courts take advantage of their institutional niche and decision-making advantages (e.g., depoliticalization, time for reflection, application of neutral and principled process) to effect the legislative will in a wise and fair manner consistent, insofar as possible, with legal and political consensus. In that sense, modern purposivism is closely associated with the legal process views of Professors Henry Hart and Albert Sacks.¹³² The Hart and Sacks view accepted a vision of positive law through legislative supremacy but posited an important

Collaborative Model of Statutory Interpretation, 61 S. CAL. L. REV. 541, 592 n.213 (1988) ("Literalism . . . is often a subterfuge for judicial activism" citing *Regan v. Wald*, 468 U.S. 222, 228-29 (1984) (Rehnquist, J.) as example); see also W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 594-95 (discussing "shifting fortunes of the plain meaning rule" and implying structural limits on its use and hegemony).

128. See, e.g., *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23-25 (1976); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989); A. SUTHERLAND, *STATUTORY CONSTRUCTION* (1985). Although the influential Sutherland treatise has been described as one that avoids "grand, foundationalist theories of statutory interpretation, Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 n.7 (1990), the underlying goal of the Sutherland approach was to implement legislative intent and it can be broadly characterized as intentionalist in thrust. See *id.* at 325 n.11; Sunstein, *Statutory Interpretation in the Regulatory State*, 103 HARV. L. REV. 405, 428-32 (1990).

129. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 87-102 (1975); A. SUTHERLAND, *supra* note 128, § 45.05, at 20-21; Eskridge & Frickey, *supra* note 128, at 325-26.

130. See, e.g., *Leo Sheep Co. v. United States*, 440 U.S. 668, 681-88 (1979) (court finds Congress did not intend to reserve any easement rights in western lands granted to Union Pacific railroad and makes reference to statutory purpose and American history to support construction, finding that legislative materials were inconclusive); see Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23-27 (1988).

131. *Heydon's Case*, 30 Co. 7a, 76 Eng. Rep. 637, 638 (Exchequer 1584).

132. See generally H. HART & A. SACKS, *supra* note 36.

role for courts based not only on the gaps, conflicts, and ambiguities attendant in a web of statutory law but also because of the perceived institutional competence of courts.¹³³ Although the Hart & Sacks view of the legislative process has been criticized,¹³⁴ purposivism continues to exert substantial influence.¹³⁵

Evolutionary Approaches. Adherents of evolutive or dynamic statutory interpretation¹³⁶ attempt to interpret a statute beginning with the meaning intended by the legislature that drafted it but allowing meaning to evolve according to experience with the statute, unforeseen issues, and intervening legal and political change. This approach allows for evolution in order to render a meaning as consistent as possible with text and original intent but also one that

133. See H. HART & A. SACKS, *supra* note 40, at 1190-1250; see also Eskridge & Frickey, *Legislative Scholarship & Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691-701 (1987); Weisberg, *The Calabrian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 216-17, 232-37 (1983).

134. See *infra* notes 155-63 and accompanying text (describing interest group analysis); W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 245-47 (Hart and Sacks assumed that the legislative process is a public-seeking one and that statutes will embody rational public policy).

135. See, e.g., Eskridge & Frickey, *supra* note 133, at 700-35; Sunstein, *supra* note 128, at 440-41 (employing notion of institutional competence to argue for more active judicial role in statutory construction and retreat from version of legislative supremacy paradigm that makes courts too much the agents of legislatures); see also Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-52 (1986) (suggesting current use of purposivism to maximize public interest interpretation of statutes insofar as permitted by separation of powers and legislative supremacy).

In addition, a "new" legal process has emerged that both attempts to refute and respond to the criticisms by refining the Hart & Sacks model. See, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1032-43 (1984) (contending Constitution does not establish interest group free-for-all for obtaining political or economic advantage through legislation); Farber & Frickey, *supra* note 124, at 461-69 (arguing that many laws cannot be simply explained as interest-group victories); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1173-74 (1986) [hereinafter Sunstein, *Private Preferences*] (suggesting that legislation can change attitudes and thus influence group and public thought as well as being product of group activity and public opinion); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) [hereinafter Sunstein, *Interest Groups*].

The new legal process adherents argue that lawmaking is as much the ongoing product of an interpretative community as it is isolated statutory enactments or administrative agency pronouncements. W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 333. In my view, both "old" Hart & Sacks style legal process and the "new" legal process techniques for discerning purpose are both part of purposivism as a school of statutory interpretation.

136. See, e.g., Eskridge, *Overruling Statutory Precedents*, *supra* note 50, at 1385; Eskridge, *Dynamic Interpretation*, *supra* note 50. Whether using the terms dynamic, evolutive, or another word, many have argued that judicial interpretation of law should keep pace with the times. See, e.g., Blatt, *The History of Statutory Interpretation: A Study in Form & Substance*, 6 CARDOZO L. REV. 799, 841-43 (1985); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 752-55 (1949). Much of this writing and judicial activity, however, focused on constitutional rather than statutory updating. See Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 167 (1958) (seeing two-thirds (60 out of 90) of overruling opinions as involving Constitution rather than statutes); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 492-93 (observing but criticizing trend).

will fit well with other statutes, current case law, and "public values."¹³⁷ One author describes his version of evolutive interpretation as a "nautical" approach in which courts set sail on a course mapped by the legislature but adjust the voyage in response to new information.¹³⁸

The evolutive approach is traditionally favored by those on the bench regarded as "liberals"¹³⁹ and is often attacked as "judicial activism" by those supporting the textualist or intentionalist view.¹⁴⁰ Nonetheless, it is a widely

137. See, e.g., G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-43 (1982); Eskridge, *Overruling Statutory Precedents*, *supra* note 50, at 1385; Eskridge, *Dynamic Interpretation*, *supra* note 50.

Calabresi and Eskridge differ in degree in that Calabresi advocates court authority to "overrule" statutes when their text or extrinsic matter squarely dictates a result at odds with current legal thinking. This is a candid but substantial change in the traditional role of courts, whose historical duty is to defer to the legislative will, even one of an ancient legislature, so long as the command is clear. Professor Eskridge stops short of this but urges a broad based judicial effort to render modern interpretations of statutes even where their text or legislative history come close to compelling a different result under the traditional legal process theory of legislative hegemony. See Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 360-62 (discussing Calabresi and Eskridge, finding both within school of dynamic interpretation).

Public values are fairly ascertainable, widely and firmly held societal beliefs (e.g., treat like cases alike, punishment should fit the crime, individual justice matters more than technical legality) which may legitimately influence statutory interpretation when more textual, commanding factors do not require a contrary result. Accord Sunstein, *supra* note 128, at 460-62; see Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1010-17 (1988).

138. See Aleinikoff, *supra* note 130, at 57-61.

139. See R. POSNER, *supra* note 126, at 269 (liberals favor less fettered approach to statutory construction in order to accomplish perceived benefits where legislature has not legislated enough). It appears that Justice Brennan has used an evolutive approach in construing statutes. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 201-09 (1979) (reading Title VII, despite seeming literal language barring race-conscious affirmative action program, to permit such programs because of evolving views as to what means are necessary to redress race discrimination); *Smith v. Wade*, 461 U.S. 30, 50-55 (1983) (interpreting 42 U.S.C. § 1983 (1976 & Supp. V) to permit awards of punitive damages, in part because of legal and social evolution easing path to recovery of punitive damages as means of deterring and punishing legal wrongs).

140. Evolutive interpretation has been criticized as departing too greatly from the prevailing model of legal positivism and legislative supremacy. See, e.g., Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (use of extra-statutory information to refine statutory meaning inconsistent with democratic theory). Among jurists, Justice Hugo Black is thought the most illustrative proponent of this view. See, e.g., *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 258 (1970) (Black, J., dissenting) (judicial change in interpretation usurps Congress's legislative powers and violates article I of the Constitution); see also J. ELY, *DEMOCRACY AND DISTRUST* 4-8 (1980).

Justice Brennan, as perhaps the Court's most prominent "liberal" has been the focus of much criticism of alleged judicial activism, most of it focusing on constitutional decisions. He was author of *Boys Markets* and *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), both described by Professor Eskridge as evolutive opinions (although he finds *Monell* masquerading as an originalist opinion). See Eskridge, *Overruling Statutory Precedents*, *supra* note 50, at 1390-91, 1395-96.

accepted approach¹⁴¹ and is often used by judges described by themselves or others as moderate or conservative.¹⁴²

Eclectic Pragmatism. Eclectic pragmatism involves a court's use of any of the four previously discussed approaches (textualism, intentionalism, purposivism, dynamism) or some combination of them in order to reach what it regards as the correct interpretation in the case at hand. Use of "practical reasoning" in the writings of some scholars¹⁴³ essentially encompasses the approach I envision. By eclectic, I mean that the statutory interpreter willingly uses insights from the previously discussed schools, as may be apt in the individual case, to resolve a statutory question. By pragmatic, I mean that the interpreter is more concerned with sound and equitable case results than achieving a theoretical consistency or advancing a world view. The task of statutory interpretation is not to render elegant decisionmaking so much as it is to render acceptably wise and fair decision making consistent with the prevailing political construct. Thus, although legal theorists are hesitant to admit it, the judicial system is inherently pragmatic. Consequently, many of the better judges consistently use eclectic pragmatism to interpret statutes,¹⁴⁴ which accounts for a good deal of the perceived inconsistency in statutory construction.¹⁴⁵ Rhetorically, the textual, intentional, and purposive schools continue to hold sway,¹⁴⁶ although eclectic pragmatism may explain more actual case results.

141. See Zeppos, *supra* note 137, at 412 ("What Calabresi and Eskridge have shown is that in many cases, originalism never really served as the actual basis for deciding statutory cases. For years, judges have been profoundly nonoriginalist in deciding cases but have used originalism as a means for justifying their results").

142. See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111, 124-29 (1965) (Harlan, J.) (restricting use of three-judge district court where its use would be inconsistent with modern needs); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393-409 (1970) (Harlan, J.) (interpreting federal maritime law to provide cause of action for wrongful death, in part due to evolutionary pattern of state laws creating wrongful-death recovery barred at common law); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401-11 (1975) (Stuart, J.) (replacing old admiralty rule of even division of damages with modern proportional fault rules); see also Eskridge, *Overruling Statutory Precedents*, *supra* note 50, at 1389 n.147.

143. See Eskridge & Frickey, *supra* note 128, at 323.

144. See *id.* at 321-22 ("Judges' approaches to statutory interpretation are generally eclectic, not inspired by grand theory, and this is a good methodology . . . [W]e find an underlying coherence in the Supreme Court's practices of statutory interpretation."); Posner, *Legislation and its Interpretation: A Primer*, 68 NEB. L. REV. 431, 450 (1989) (pragmatic approach "taken by the best judges, and it is thus an attainable ideal").

145. See Eskridge & Frickey, *supra* note 128, at 345-50, 364-78 (finding aspects of practical reasoning model in several recent United States Supreme Court cases but incorrectly applied or hindered by Court's reluctance to discuss with candor practical reasoning factors, especially evolutive aspects).

146. See *id.* at 324-25 (labeling these theories "foundationalist" in that "each seeks an objective ground ('foundation') that will reliably guide the interpretation of statutes in all situations."). Although less rigidly replicable and less concerned with the limits of judicial power, the evolutive or interest group approaches could also be characterized as foundationalist in that each also suggests that its result be employed, or at least consulted, in every case, even where statutory text or legislative intent and purpose is clear.

Related to the presence of eclectic idea borrowing is the considerable degree of overlap among the various schools, in particular the presence of two or more statutory schools seemingly competing for the hearts and minds of individual scholars or judges. The interpretative views of judges can change over time.¹⁴⁷ Similarly, the emphasis of scholars can shift.¹⁴⁸ Prominent judicial proponents of particular statutory schools can frequently be found employing other schools of analysis. For example, Justices Kennedy and O'Connor as well as Chief Justice Rehnquist are often seen as textualist¹⁴⁹ but also invoke legislative background materials to bolster an originalist and or purposivist¹⁵⁰ approach to decisions. Justice Brennan's opinions often marshalled almost every major school to support his disposition of the matter.¹⁵¹

A postscript. In addition, there exist less mainstream approaches to statutory construction that urge a less restrained approach by the judiciary. Scholars have identified a separate school of "free inquiry" statutory interpretation used in continental Europe,¹⁵² but few in the United States argue for completely

147. See Posner, *supra* note 126, at 434.

Legislation scholarship has become cacophonous. I admit to having contributed to the noise. In a series of articles written mainly in the 1970s I pushed the economic interest-group line hard . . . More recently I proposed renewed reliance on the method of imaginative reconstruction; more recently still, I suggested a command theory of interpretation; still more recently . . . a pragmatic approach. (emphasis in original).

Id.

148. Compare Eskridge, *Dynamic Statutory Interpretation*, *supra* note 50 (emphasizing dynamic approach) with Eskridge & Frickey, *supra* note 128 (emphasizing eclectic pragmatism).

149. See Eskridge, *supra* note 124, at 657-66.

150. See, e.g., *Gomez v. United States*, 490 U.S. 858, 863-76 (1989) (Justice Kennedy joins unanimous Court in finding U.S. Magistrate presiding over jury selection improper because not intended by Congress without consent of the parties); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring in judgment that sexual stereotyping may make out Title VII claim, relying on legislative history, with intentionalist orientation); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 443 (1989) (per Rehnquist, C.J., legislative history suggests Congress did not intend jurisdiction in instant case under Foreign Sovereign Immunities Act); see also W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 350 n.115 ("Chief Justice Rehnquist will sometimes disregard text or legislative history (but not both) to reach results supported by current policy or fairness") (citing cases).

151. See, e.g., *Smith v. Wade*, 461 U.S. 30, 54 (1983) (employing both originalist and evolutive approaches to find punitive damages recoverable under § 1983); see also W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 350 n.114 ("Justice Brennan has sometimes even adopted a textualist perspective—*contra Weber*—in cases where a clear text supports a result at odds with contextual evidence and policy considerations.") (emphasis in original) (citing cases). Compare *National Labor Relations Bd. v. Catholic Bishop*, 440 U.S. 490, 508-18 (1979) (Justice Brennan takes strong textualist and originalist approaches) with *United Steelworkers v. Weber*, 443 U.S. at 195 (Justice Brennan relies heavily on evolutive and purposive approaches).

152. See, e.g., W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 329-30; Zweigert & Kötz, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 706 (1970).

unrestrained judicial choice in assigning meaning to statutory terms.¹⁵³ The approach closest to free inquiry is found where commentators argue for reading statutes to emphasize fairness, equality, aid to the disempowered, or aid to the politically favored.¹⁵⁴ No one theory or school of thought consistently dominates judicial application of statutes but the basic methodologies employed by courts seem well-established if not always well-defined.

Interest Group Analysis. A rich body of literature has emerged discussing the impact of interest group activity on lawmaking.¹⁵⁵ A good deal of this writing is written from the "public choice" perspective, in which the author applies economic concepts such as individual utility maximization and presumed rationality to predict that political actors, particularly legislators, will vote (or avoid voting) in a manner designed to increase their job security, wealth, or personal power and prestige rather than to reflect a particular ideology or policy assessment.¹⁵⁶ Public choice theory largely proceeds by applying to legislative behavior an economic model of rational behavior. The fulcrum of public choice theory is the notion that interest groups compete for monopoly "rents" established by the legislature¹⁵⁷ through lobbying, promising support, marshalling opposition

153. *But see* Sunstein, *supra* note 128, at 438-39 ("courts should be authorized to depart from the ordinary or original meaning [of a statute] and to press ambiguous words in particular directions if the context suggests this would lead to superior outcomes") (footnote omitted). Professor Sunstein found some support for this view in the writings of Alexander Hamilton. *Id.* at 440 n.123 (quoting THE FEDERALIST NO. 78 (A. Hamilton)).

The free inquiry or "anti-doctrinal" approach has greater favor in Europe. *See* W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 329-30 (citing F. GENY, *METHOD D'INTERPRETATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1899)). Although Professor Sunstein sees courts as having greater latitude in this regard than traditionally assumed, a direct comparison between European and American courts is perhaps inapt because of the substantial distinction between European legislatures, which are marked by greater ideological orientation, partisanship, party discipline, and fluid mobility than their U.S. counterparts.

154. This perspective is perhaps most often reflected in writings of Critical Legal Studies (CLS) authors. *See, e.g.,* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985); Singer, *The Player & the Cards: Nihilism & Legal Theory*, 94 YALE L.J. 1 (1984). For criticisms of the CLS perspective, *see* Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221 (1990).

155. *See, e.g.,* J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962); R. DAHL, *DILEMMAS OF A PLURALIST DEMOCRACY* (1986); M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL MARKETS* (1981); J. KINGDON, *AGENDA, ALTERNATIVES, AND PUBLIC POLICIES* (1984); T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); R. RIPLEY, *CONGRESS: PROCESS AND POLICY* (1977); K. SCHLOZMAN & J. TIERNAY, *ORGANIZED INTEREST AND AMERICAN DEMOCRACY* (1986).

156. *See, e.g.,* J. BUCHANAN & G. TULLOCK, *supra* note 155; M. FIORINA, *supra* note 155; M. HAYES, *supra* note 155; T. LOWI, *supra* note 155; D. MAYHEW, *supra* note 155; M. OLSON, *supra* note 155; R. RIPLEY, *supra* note 155.

157. Monopoly rents are enhanced earnings reaped by those who have managed to suppress competition. Ricardian rents are enhanced earnings resulting from superior talent, such as the higher appearance fees enjoyed by Frank Sinatra as compared to an ordinary singer. *See* A. ALCHIAN AND W. ALLEN, *EXCHANGE AND PRODUCTION* 189 (3d ed. 1983); *see also* J. GWARTNEY & R. WAGNER,

or corrupting legislators and that legislators respond to powerful interest groups in order to stay in power.¹⁵⁸

Public choice and other writers focused on interest groups tend not only to exhibit a wide range of views about what happens in the political process but also diverge even more widely as to normative prescriptions. Some writers find the market-based political arena acceptable while others decry it and seek structural reform to mute the power of interest groups. Correspondingly, these scholars take different views of the implications of interest group theory for statutory construction. Although it does not inevitably support a particular interpretative approach, interest group analysis can be used to illuminate the particular statute in question so that the reviewing court can determine whether the provision is a publicly purposed enactment, as assumed by Professors Hart & Sacks, or a private-regarding deal, which should receive more narrow construction to prevent interest groups from obtaining more from courts than they could from the legislature.¹⁵⁹

One might easily envision a continuum of both scholarly views and, more important, specific statutes. Some laws, such as the 1964 Civil Rights Act,¹⁶⁰

PUBLIC CHOICE & CONSTITUTIONAL ECONOMICS 22 (1988) ("Rent-seeking is a term used by economists to describe actions taken by individuals and groups to alter public policy in order to gain personal advantage at the expense of others").

Most reference in legal literature to "rents" has focused on monopoly rents, which are generally condemned as resulting from market imperfections, often obtained by less than praiseworthy means. By contrast, Ricardian rents are generally not subject to criticism, no matter how much one agrees with the Doonesbury perspective on Sinatra or questions the taste of the consuming public (e.g., Guns 'N Roses, New Kids on the Block). See, e.g., Macey, *supra* note 135, at 224 ("Rent-seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price through government intervention in the market.")).

158. See J. BUCHANAN & G. TULLOCK, *supra* note 155, at 283-96; J. GWARTNEY & R. WAGNER, *supra* note 155, at 7-24; W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 323-26; Eskridge, *supra* note 48, at 278-85; Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883-90 (1987); Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126-28 (1989); Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 945-48 (1990).

159. See, e.g., Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court & the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

If statutes generally are designed to overcome 'failures' in markets and to replace the calamities produced by unguided private conduct with the ordered rationality of the public sector, then it makes sense to use the remedial [broad, liberal construction] approach to the construction of statutes—or at least most of them. If, on the other hand, statutes often are designed to replace the outcomes of private transactions with monopolistic ones, to transfer the profits ("rents") of productive activity to a privileged few, then judges should take the beady-eyed contractual [narrow, strict construction] approach.

Id.

This approach can be seen as inconsistent with the more textually driven literal approach to interpretation seemingly urged by Judge Easterbrook in his article, *Statutes' Domains*. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); see W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 612-13.

160. 42 U.S.C. §§ 1971, 1975(a)-(d).

are at the public interest end of the continuum¹⁶¹ while others, such as the Smoot-Hawley Tariff,¹⁶² are at the private deal end of the spectrum.¹⁶³ Depending upon where a reviewing court consciously or subconsciously places a law under review, the court may apply a differing approach according to the degree to which it wishes to expansively interpret or buttress a "good" law or limit the damage of a "bad" law.

B. Applying Statutory Interpretation Theory to the Employment Contract Exception

Reviewing the employment exception of Section 1 of the Arbitration Act according to the different interpretative constructs suggests that limiting the exception to workers engaged in interstate transit lacks substantial support under any major interpretative school. Several schools strongly contradict these judicial interpretations.

Textualism. The textualist view provides perhaps the best support for a narrow view of the types of workers entitled to the employment exception to arbitrability but is insufficiently persuasive, especially when other factors are considered. Section 1 speaks of "any other class of workers engaged in interstate commerce."¹⁶⁴ As some courts rendering the narrow interpretation have suggested, the term "engaged in commerce" differs from "affecting commerce", the broader language used by Congress when it legislates at the height of its powers under the Commerce Clause. Although there is obviously a semantic distinction between the words and a possibly different connotation, this seems a thin sliver of evidence on which to base a statutory construction that potentially affects millions of workers.

To some extent, this shortcoming is inherent in virtually any exclusively textualist statutory construction in that it presumes that Congress (indeed, different Congresses) carefully and exactly choose precise words intended to differentiate statutes passed decades apart! Thus, the textualist giving narrow scope to the employment exception presumes that the 1925 Congress enacting the Arbitration Act consciously wrote "engaged in commerce" with the goal of differentiating the Act from previous statutes using "affecting commerce" and that post-1925

161. Although various groups were, of course, organized and supporting the 1964 Act, the law provided a diffuse benefit across society rather than a concentrated benefit to a few. In addition, the forces supporting the Act were not relatively discreet interests with much to gain from the law. See W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 1-28.

162. Ch. 497, 46 Stat. 590 (1930).

163. Smoot-Hawley is private-regarding because its passage resulted from the directed activities of a relatively small group (American manufacturers facing foreign competition) who stood to gain much from passage of the higher tariff while the diffuse public stood to lose only a small amount as individual consumers but a large amount as a society. See W. ESKRIDGE & P. FRICKEY, *supra* note 35, at 40-46.

164. 9 U.S.C. § 1.

Congresses used the term "affecting commerce" to provide broader coverage than that given workers by the Section 1 employment exception.

This view assumes an unrealistic degree of drafting precision, awareness of the terminology of other statutes, and efforts to provide continuity between legislatures.¹⁶⁵ Unfortunately, the current Supreme Court's fascination with "plain meaning" and willingness to find it in even relatively open-ended text can be read as supporting the semantic distinction between "affecting commerce" and "engaged in commerce." Recall that in *Gilmer v. Interstate/Johnson Lane Co.*,¹⁶⁶ the Supreme Court found plain meaning in the term "contract of employment" and implicitly differentiated these from a "contract affecting employment," thus replicating the suspect approach to Section 1 seen in the *Tenney* case.¹⁶⁷

The narrow construction of the employment exception and its thin textualist support also lacks persuasiveness because the relatively small number of cases construing it have yielded results exposing the unhelpfulness of the distinction. For example, the cases involving postal workers have quickly concluded that these workers as a class are engaged in commerce¹⁶⁸ notwithstanding that many of them never leave the confines of their own localities; to call letter delivery "commerce" invokes a proper but broad notion of the word.

Conversely, the cases involving stockbrokers have been equally quick to conclude that these workers,¹⁶⁹ although they clearly affect interstate commerce, as a class are not engaged in interstate commerce. In other words, the broker who uses a long distance phone and the mail to consummate the sale of \$100,000 of federally regulated securities from a California buyer to a New York seller is not engaged in interstate commerce because she does not engage in physical movement of items across state lines. However, the letter carrier who lives in Lincoln, Nebraska, picks up mail at the central post office there, and then delivers it in a residential area of Lincoln is a worker engaged in interstate commerce. When word fixation renders results that contradict common sense, this should signal courts that the textual approach is either inapt, has been applied in too crabbed a manner, or both.¹⁷⁰ The incoherence of the "engaged in com-

165. See *supra* notes 102-08, 139-44 and accompanying text, (discussing shortcomings of model that assumes well-informed, rational, public-spirited legislative behavior at all times); see also J. BARRY, *THE AMBITION AND THE POWER* (1988) (author-observer at elbow of former House Speaker Jim Wright continually notes harried atmosphere in which legislation is enacted, precluding time for careful drafting and choice of precise words intended to differentiate statutes); Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 658-68 (1988) (noting lack of coordinated policy choice or statutory integration between successive legislatures).

166. 111 S. Ct. at 1651-52 n.2; see *supra* notes 85-122 and accompanying text.

167. See *Tenney*, 207 F.2d 450; *supra* notes 28-51 and accompanying text.

168. See *supra* notes 75-77 and accompanying text (discussing *American Postal Workers and Bacashihua*).

169. See *supra* notes 68-73 and accompanying text (discussing these cases, including *Dickstein*).

170. See *Rector of Holy Trinity Church v. United States*, 12 S. Ct. 511, 516 (1892) (statutory language should not be applied literally where this yields absurd results or results inconsistent with congressional purpose); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940).

merce/affecting commerce" semantic distinction as applied suggests that courts must look beyond textualism to reach apt construction of Section 1.

Intentionalism. A number of the cases giving only a narrow scope to the phrase "workers engaged in commerce" have purported to support the narrow construction by reference to the legislative history of the Arbitration Act.¹⁷¹ In particular, these courts note that the employment exception was included in the bill at the behest of the Sailors Union, which feared its members would lose some of the protections available to them under federal statutory law if disputes were arbitrated rather than litigated.¹⁷²

The American Bar Association committee drafting the bill responded by specifically exempting sailors, railroad workers (who enjoyed similar special federal statutory protections)¹⁷³ and the now problematic "any other class of workers engaged in commerce" language.¹⁷⁴ From this slender piece of legislative history, the majority of courts have concluded Congress intended the employment exception to apply only to workers similar to sailors and railroad workers, *i.e.*, those who physically move things across state lines and enjoy federal statutory favor, adopting a narrow view of similarity.

Prior to the ABA's change in the language to the proposed bill that ultimately became the Act, there had been discussion of the issue in Congress on the predecessor bill to the Act. Although the 67th Congress did not pass the Act, it held hearings on arbitration legislation virtually identical to the legislation that was enacted during the 68th Congress. Although this dialogue is perhaps not part of the core legislative history of the Act, it is instructive, certainly more probative than the vague speculations of the *Tenney* and *Signal-Stat* courts and the textual rigidity of the *Gilmer* Court. Kansas City attorney W.H.H. Piatt, testifying on behalf of the ABA, had the following exchange with Senator Sterling, who had authored the legislation.

Mr. PIATT. [T]here is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official

171. See *supra* notes 29-40 and accompanying text (discussing narrow construction in cases such as *Tenney*).

172. According to H.R. Rep. No. 96, 68th Cong., 1st Sess. (1923), the Arbitration Act was essentially drafted by the American Bar Association Committee on Commerce, Trade and Commercial Law. That report states:

Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: '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.'

H.R. REP. NO. 96, 68th Cong., 1st Sess., 48 A.B.A. Rep. 287 (1923).

173. See Federal Employers Liability Act (FELA), 46 U.S.C. § 951 (1988).

174. See 9 U.S.C. § 1 (1982).

head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen—

Senator STERLING. Mr. [Andrew] Furuseth?

Mr. PIATT. Yes, some such name as that. He has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' It is not intended that this shall be an act referring to labor disputes at all. It is 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 in this.¹⁷⁵

Despite attorney Piatt's thinly veiled dislike for organized labor and the almost offhand nature of his suggested redrafting of the bill, his opinion appears to represent the consensus of the Act's promoters, affected interest groups, and Congress in general: the Act was to abrogate the common law rule against specific performance of arbitration agreements so that merchants could enforce arbitration agreements; the Act was not to apply to *any* employment contracts. The most logical inference is that Piatt (and the ABA Committee of Commerce, Trade, and Commercial Law which Piatt chaired and which submitted the bill that became the Act during the ensuing Congress) spoke only of workers "engaged in commerce" out of a belief that the Act, which was based upon congressional power to legislate pursuant to the Commerce Clause, would automatically have no impact on workers who were not engaged in interstate commerce.

Discussion of legislator views of Section 1 is necessarily speculative because of the virtual dearth of comment on the provision. Consequently, reviewing courts should approach any intentionalist view of Section 1 with caution. Despite this, courts such as *Tenney* and *Signal-Stat*, which adopted a narrow construction, have spoken as though some sort of clear legislative intent supported their reliance on the canon of statutory construction *ejusdem generis*, which has been invoked to conclude that the catchall provision of the employment exception must apply only

175. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 & S. 4214 Before the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1922) [hereinafter *Senate Judiciary Hearings*] (Testimony of W.H.H. Piatt).

to workers who belong to a group that actively performs interstate movement of products.¹⁷⁶

Another weak argument supporting the narrow construction of the exception's catchall provision is the special status of sailors and railroad workers. Some courts have tended to focus on the dispute resolution mechanisms already governing labor-management relations¹⁷⁷ and to construe Section 1 as applying only to workers already covered by a statutory arbitration scheme. A variant of this view argues that the Section 1 exception applies only to "privileged" workers¹⁷⁸ and thus should be so restricted via the *ejusdem generis* mode of construction in which only workers for which there is some demonstrated federal favoritism may avail themselves of the Section 1 employment exception. In view of the limited data in the legislative record, neither view merits intentionalist support. As a dissenting judge in a key narrow construction case observed, "[t]he legislative history [of Section 1] is of a kind that possesses little weight and should not be considered."¹⁷⁹

As a matter of logic and publicly interested statutory construction, this interest group compass for divining legislative intent has even less to recommend it. In effect, a court taking this view advocates a statutory interpretation which heightens interest group gains by denying the benefits of the employment contract

176. See, e.g., *Tenney*, 207 F.2d at 452.

[U]nder the rule of *ejusdem generis* [the catchall language in the Section 1 exception was intended] to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of 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.

Id.

177. See, e.g., *id.* at 452-53 ("[t]he draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers"). Unfortunately, *Tenney* and other courts giving narrow construction to the employment exception fail to mention any other statutes establishing arbitration regimes. Unless courts like *Tenney* viewed Congress as anticipating more laws like the Railway Labor Act, 45 U.S.C. §§ 151-57 (1988), which establishes a labor arbitration scheme, they were rendering the catchall a nullity and violating the canon of construction that requires courts to give effect to all statutory language, a canon of at least arguable importance equivalent to the *ejusdem generis* canon. Perhaps more important, the *Tenney* court's notion of what the Act's supporters "had in mind" is belied by what little evidence of legislative intent exists.

178. For example, the FELA provides injured workers with a claim for relief that may be brought in either state or federal court without removal from state court (total forum choice by plaintiff) as well as a rule of pure comparative negligence in which an injured worker can recover some compensation for injuries even where the worker's negligence greatly exceeds that of the employer. See 45 U.S.C. §§ 51-60 (1988). Sailors have similarly broad remedial rights, both procedural and substantive, that exceed those of conventional tort law in most states. See 46 U.S.C. § 688 (1988). In the early Twentieth Century these laws were considered fair or necessary to offset historical dangers and mistreatment befalling these workers. Criticism of both acts has increased, however. Recently, the Federal Courts Study Committee recommended repeal of both statutes since they single out particular types of workers for benefits not shared by the workforce at large. See FEDERAL COURTS STUDY COMMITTEE, FINAL REPORT 62-64 (1990).

179. *Tenney*, 207 F.2d at 454, 455 (Biggs, C.J., dissenting).

exception to all other workers simply because they were not on the scene when Sailors Union President Furuseth complained and ABA committee chair Piatt thought of the first set of words that came to mind when adapting the Act to the concerns of the Sailors Union. Although the legislative background shows sailors effectively and easily lobbying for the exemption and railway workers quickly added, this hardly compels the conclusion that only sailors were to reap its benefits.¹⁸⁰

Although one can draw analogies between seamen and other workers, these analogies lack the persuasiveness of a specific statutory text or a clear congressional pronouncement in the legislative history. Furthermore, the analogy supporting narrow construction is vulnerable to attack. One could as easily argue that the ABA committee and Congress, in so rapidly adopting the provision urged by the sailors, were sensitive to the vulnerable position of employees and desired to protect them from losing any legal rights through sharp contracting practices that employers might use. Taking this view, the existence of the catchall makes more sense.

Another concern about the narrow interpretation that was never addressed by the courts adopting it: if one assumes that Congress only wished the employment exception to apply to privileged workers or to workers with arbitration schemes already established by statute, the listing of seamen and railroad workers effectively exhausted the universe. The catchall, if it is to have meaning, either was inserted to respond to future labor law, to protect workers subject to contract pressures by employers, or both.

In addition, the case law of the employment exception undercuts the intentionalist rationale of the narrow view. Postal workers, although subject to labor laws regulating collective bargaining by public employees, also enjoy civil service protection and generally better wages and job security than many workers. Although they are unlikely to be oppressed by individual contracts of employment with arbitration clauses, they are seen as within the narrow scope of Section 1 while other workers who are more likely to be subject to arbitration clauses of questionable consent are not protected by Section 1. In addition, vast numbers of postal workers are not directly engaged in the movement of goods across state lines, a factor thought important by courts applying the narrow view of the employment exception.¹⁸¹ Further, the narrow reading of the employment exception may make it superfluous. If the most common thread among workers entitled to the exception is not their employment activity but rather the presence

180. Although it has been deemed legitimate to examine the contribution of non-official sources to statutes, even those taking a broad view of permissible considerations agree that non-legislative material should be accorded less weight in discerning congressional intent. *See, e.g., Kosak v. United States*, 465 U.S. 848, 857 n. 13 (1984) (Court employs memorandum by nonmember of Congress regarding unsuccessful predecessor to Federal Tort Claims Act to interpret FTCA exception but acknowledging that "ideas expressed [by nonlegislators] should not be given great weight in determining the intent of the legislature").

181. *See, e.g., Tenney*, 207 F.2d at 452; *see supra* notes 49-59 and accompanying text.

of a federally established labor arbitration scheme, that scheme would logically pre-empt any arbitration clauses in individual employment contracts.¹⁸²

An additional factor to consider is the state of the common law of arbitration at the time of the Act's passage. As previously noted,¹⁸³ courts prior to 1925 usually failed to give specific performance to predispute arbitration agreements. By definition, courts generally did not enforce arbitration agreements contained in employment contracts.¹⁸⁴ In attempting to divine legislative intent, a court could rationally conclude that Congress did not intend to change any of the common law of arbitration except where this was clear from the face of the statute or the legislative materials. Under these circumstances, where Congress wrote into the Act an employment contract exception that is at least ambiguous, courts should be hesitant to conclude that the catchall provision of the employment contract exclusion was intended to abrogate the common law prerogatives of contractual employees.

Proponents and opponents of narrow construction can debate these points endlessly. However, it is beyond debate that the legislative background of Section 1 simply does not speak with sufficient clarity to make an intentionalist position the last word on the issue. For supporters of the narrow interpretation, intentionalism presents a weak case at best. However, one can take this same legislative history, perhaps with an "imaginative reconstruction" of intentionalism, and present a strong case for a broad view of Section 1. Under this method a court should, upon finding that the enacting Congress did not give specific consideration to the application of the statute to the instant case, imaginatively reconstruct what it believes Congress would have done had it knowingly faced the question.¹⁸⁵

Without doubt, Congress did not when passing Section 1 stop to consider whether stockbrokers, assembly line workers, salespersons, or professional athletes were within the employment exception. The evidence suggests, however, that the 1925 Congress would have considered all workers subject to the commerce power as within the employment exception. The legislative history of the Act focuses on commercial dealings and the perceived problem of courts failing to enforce arbitration provisions in commercial contracts.¹⁸⁶ The Act was clearly the pet project of the nation's business community, which focused on arbitration between

182. See *STONE & SEIDMAN*, *supra* note 8, at 313-21 (discussing federal statutory pre-emption). The usual rule of statutory construction posits that a specific law (*i.e.*, the Railway Labor Act provisions on arbitration) takes precedence over a general law (*i.e.*, the Arbitration Act's command that courts enforce private arbitration agreements). See, *e.g.*, *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. 557, 563 (1987) (Railroad Workers FELA claim not required to be arbitrated under RLA).

183. See *supra* notes 1-5 and accompanying text.

184. See *Robert Lawrence Co.*, 271 F.2d at 406-07.

185. See *R. POSNER*, *supra* note 126, at 286-87.

186. See generally *Joint Hearings on S. 1005 and H.R. 646 Before the House and Senate Judiciary Comms.*, 68th Congs., 1st Sess. (1924) [hereinafter *Joint Hearings*] (discussion focuses exclusively on both the problem of inadequate judicial enforcement of arbitration agreements between commercial traders and notes emerging popularity of commercial arbitration and commercial arbitration organizations).

commercial firms, not between employer and employee.¹⁸⁷ This suggests that the 1925 Congress, if put the question directly, would have preferred that the text of its Section 1 employment exception to be interpreted broadly. Many members of Congress must have viewed the Act as directed exclusively toward intra-merchant contracts. Others undoubtedly would have appreciated the weak bargaining power of employees asked to sign a contract containing an arbitration provision.¹⁸⁸ Still others saw the Act as a means of thinning court dockets.¹⁸⁹ Because employment-related litigation comprised only a fraction of cases during the 1920s, legislators viewing the Act as a form of docket relief would have been unlikely to argue against a broad construction of the employment exception.

Purposivism. The purposivist approach argues for a broad construction of the types of workers exempted from the Act. The purpose of the Act was to foster enforcement of arbitration agreements so that commercial entities could reap perceived benefits of expert decisionmakers, lowered disputing costs, and increased

187. See, e.g., *id.* at 21-24 (listing 67 business organizations supporting proposed Act, including letters of endorsements from various groups).

188. One must not make too much of this, however. In 1925, employees had far fewer statutory rights and wrongful discharge doctrine was virtually nonexistent. But see *Senate Judiciary Hearings*, *supra* note 175, at 9-10 (Questions of Sen. Walsh during testimony of W. H. H. Piatt, representing the ABA). Their exchange, albeit brief, suggests not only a consensus that the employment contract exception was intended to protect workers in general because of their minimal bargaining power with employers but also a generalized agreement that arbitration agreements should only be enforced if sufficiently voluntary.

Senator WALSH of Montana. The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily things as all. Take an insurance policy; there is a blank in it. You can take that or you can leave it . . .

Mr. PIATT. [I]t is not the intention of this bill to cover insurance cases . . . Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit the forcing a man to sign that kind of contract [of adhesion in a bill of lading where refusal to sign imperils goods]. I can see where that could be, right now.

Senator WALSH of Montana. You can see where they are not really voluntary contracts, in a strict sense.

Mr. PIATT. I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants with one with another, buying and selling goods. The shipper is nearly always under a necessity.

Senator WALSH of Montana. Yes.

Mr. PIATT. It is like we go and buy a railroad ticket. We transport our own baggage. We do not have anything to say about it.

Senator WALSH of Montana. Of course it is well established that the railroad company can not insist upon these restrictions and conditions that they put in their contract . . .

Mr. JAMES. There is nothing that I can add to anything you have said. The subject has been fully covered.

Id.

Concern about adequate consent to an arbitration clause suggests a broader interpretation of the Section 1 exception in light of the typically involuntary employee assent to contract provisions. See Stempel, *supra* note 13, at 1395.

189. *Accord Senate Judiciary Hearings*, *supra* note 175, at 3-4 (Statement of Charles L. Bernheimer); see *Joint Hearings*, *supra* note 186, at 16-18 (statement of Julius Henry Cohen) (nation in midst of litigation backlog making private dispute resolution desirable to lessen court congestion).

certainty and acceptability of outcomes.¹⁹⁰ The "mischief" was judicial jealousy of jurisdiction, which resulted in giving arbitration clauses less favorable treatment than ordinary contracts.¹⁹¹ The "remedy" for the mischief was a statutory directive that arbitration contracts be given treatment equal to that accorded to other types of contracts.¹⁹²

Accepting this as the thrust of the Act, one need not a great deal of imagination to realize that the purpose of the Act was to clear up a perceived problem involving commercial arbitration. Consequently, courts interpreting the Act should broadly construe both the Act's coverage and power regarding commercial arbitration but read the Act more narrowly when it is applied to noncommercial situations. Since Congress in fact added the Section 1 text exempting employment contract arbitration clauses, one would expect a true purposivist to read the employment exception broadly, or at least to refrain from narrow construction absent a clear congressional directive.

Dynamism. The evolutionary approach to statutory construction demonstrably favors a broader view of employment contracts falling within the Section 1 exception. Since 1925, legislatures, courts, and the public have all become substantially more solicitous of employee rights. Various labor¹⁹³ and antidiscrimination¹⁹⁴ laws have been enacted and enforced by the courts, which have increasingly been receptive to common law wrongful discharge actions.¹⁹⁵ In addition, the legal community since 1925 has shown a far more sensitive appreciation of the problems attending contracts between parties of vastly unequal bargaining power where contract terms are essentially dictated by the party with more leverage.¹⁹⁶ Modern courts have shown greater willingness to police such

190. See *Joint Hearings*, *supra* note 186, at 35.

191. See Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 *UNIV. CHI. L. REV.* 445, 452 (1958); Wolaver, *supra* note 2, at 138-44.

192. See *Southland Corp.*, 465 U.S. at 6.

193. See, e.g., Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 102-219 (1988).

194. See, e.g., Equal Pay Act, 29 U.S.C. § 206 (1988); Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1988); 42 U.S.C. § 2000e(k) (important amendments to bar pregnancy discrimination); The Age Discrimination in Employment Act (ADEA), 42 U.S.C. §§ 6101-07 (1988).

195. See Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 *GA. L. REV.* 323, 377 (1986).

196. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 464, 276 N.E.2d 144, 148 (1971) (refusing to enforce limitation of remedies clause in gasoline dealer's franchise agreement); E. FARNSWORTH, *CONTRACTS* §§ 4.26-.28 (1982) (discussing contracts of adhesion and unconscionable contracts, citing increasing number of cases since 1925 that have employed these concepts to aid disadvantaged party); Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 *AKRON L. REV.* 1, 30 (1972); Kessler, *Contracts of Adhesion — Some Thoughts of Freedom of Contracts*, 43 *COLUM. L. REV.* 629, 633 (1943); Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 *U. PA. L. REV.* 485, 504 (1967).

agreements for substantive fairness.¹⁹⁷ In short, the legal world—both judicial and legislative—is today more hesitant to mandate enforcement of adhesive bargains between unequals unless the terms are basically fair, yield economically efficient results, and do not run afoul of other legal goals.¹⁹⁸ Recently, Congress voted to expand and fortify antidiscrimination protections for individual workers but the legislation was successfully vetoed by President Bush.¹⁹⁹

In this environment, it is unlikely that Congress, if asked to interpret Section 1 or to write it from scratch would take the narrow view of "workers engaged in commerce" that has dominated since the 1950s. Rather, today's legislators would most likely exempt all workers from the Arbitration Act because of the inherently disempowered position of the individual employee, who can easily be led to sign a contract providing not only for arbitration, but also for arbitration stacked in favor of the employer. In addition, many members of Congress would probably agree with the courts, which have usually found arbitration forums too inhospitable to federal antidiscrimination laws (although the Supreme Court has not).²⁰⁰ The Supreme Court has read Congress, through passage of Title VII, to have implicitly put race and gender employment discrimination claims outside the reach of

197. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965); *Henningson v. Bloomfield Motors Inc.*, 32 N.J. 358, 403, 161 A.2d 69, 95 (1960) (refusing to give effect to provisions characterized as unconscionable contained in contract of adhesion); see also sources cited *supra* note 196.

198. See E. FARNSWORTH, *supra* note 196; Linzer, *Uncontracts*, 1988 ANN. SURV. AM. L. 137, 166-81. Furthermore, considerable flux and uncertainty has attended the legal characterization of exactly who is a "seaman," a Section 1 term viewed as key by *Tenney*, *Signal-Stat* and other courts applying a narrow construction of the employment contract exception. See *McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. 807, 811 (1991). *Wilander* clarified the issue by stating that one need not be actively engaged in activities in aid of the navigation of a vessel to be a seaman. Rather, the unanimous *Wilander* Court defined "seaman" (and consequently the term "master or member of a crew" under the Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-50 (1988)) "solely in terms of the employee's connection to a vessel in navigation, [finding that the] key to seaman status is employment-related connection to a vessel in navigation" rather than actual navigation activity by the employee. 111 S. Ct. at 817.

Wilander thus adopted a pragmatic and functional approach to the issue of seaman status, suggesting that the modern judicial view should apply a similar approach to the Section 1 exception. Confining the employment contract exception solely to workers engaged in physical movement of goods across state lines is decidedly formal (it attaches too much importance to the words "engaged in" and the *eiusdem generis* canon) and dysfunctional. The function of Section 1 was to prevent oppression of individual employees. A broad construction of Section 1 vindicates that function while a narrow construction thwarts it.

199. See Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 653 (1991).

200. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974) (holding that arbitration clause in collective bargaining agreement does not encompass Title VII disputes as arbitration forum would give insufficient support to statute's goals); *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (finding union's arbitration clause not to encompass individual employee's constitutional claims under 42 U.S.C. § 1983); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 227 (3d Cir. 1989) (finding individual employee's ADEA claims not subject to arbitration clause in his employment contract), *overruled by Gilmer*, 111 S. Ct. at 1655-57.

predispute arbitration agreements.²⁰¹ Regardless of whether these interpretations are correct,²⁰² they indicate a legal, political²⁰³ and social environment that harbors some significant misgivings about vigorously enforcing arbitration clauses against individual workers. This context supports a broader interpretation of the employment exception of Section 1.

One could argue that the increasing favor shown arbitration by the courts during the 1970s and 1980s represents an evolutionary trend so favorable to arbitration that a narrow construction of the employment exception is necessary to remain consistent with that evolution. I disagree. As noted above, the Court has declined to permit arbitrability in a number of cases in which employees were thought to be disadvantaged by arbitration and perhaps had not really consented to arbitrate. Despite its endorsement of arbitration and removal of public policy exceptions for securities, antitrust, ERISA and ADEA claims, the Supreme Court has consistently stated that arbitration is an obligation created by contract and that a party can be required to arbitrate only if it has made a sufficiently clear agreement to arbitrate²⁰⁴ and has required that courts make this determination.²⁰⁵ The generalized increase in court regard for arbitration is not inconsistent with and does not overcome the trend toward concern over employee rights and limited choice in contracting. In addition, the demise of the "indirect/direct" distinction in constitutional Commerce Clause jurisprudence suggests that the "engaged in commerce/affecting commerce" distinction, giving some textualist support to a narrow reading of Section 1, has even less persuasive power than it once did.²⁰⁶

201. See *Alexander*, 415 U.S. at 48. However, the Court recently claimed that *Alexander* was premised more on grounds of preclusion and the potential conflict of interest between union members and the union. See *Gilmer*, 111 S. Ct. at 1656-57. Although *Alexander* can be explained as a collective bargaining exception to arbitrability based on what I call a "defective agency" defense (see Stempel, *supra* note 13, at 587), most observers have interpreted *Alexander* as based on public policy concerns or a purported statutory conflict between Title VII and the Act. See, e.g., Stempel, *supra* note 2, at 585; Sterk, *supra* note 9, at 507.

202. In *Pitfalls of Public Policy: The Public Policy Exception to Arbitrability*, I argue that cases such as *Alexander v. Gardner-Denver* and *McDonald v. City of West Branch* (allowing 42 U.S.C. § 1983 litigation of disputed facts previously decided in labor arbitration) misinterpreted the statutes in question. Stempel, *supra* note 2, at 585.

203. Cases such as *Alexander*, *McDonald*, and *Nicholson*, creating a civil rights exception to arbitrability and another case creating an individual employee's exception to arbitrability of Fair Labor Standards Act claims, *Barrentine v. Arkansas-Best Motor Freight Sys.*, 450 U.S. 728 (1981), have not been subject to any serious legislative effort to change their results. Although lack of congressional response may result from a variety of factors, absence of even attempted change in the law, especially when organized commercial and union actors would presumably prefer the arbitral forum, suggests to me that the results of the cases exempting many employee claims from arbitration comport with current views. See generally Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 89 (1988).

204. See, e.g., *Neil*, 918 F.2d at 37.

205. See, e.g., *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 650 (1986).

206. See *STONE & SEIDMAN*, *supra* note 8, at 115-210 (discussing Supreme Court's ultimate rejection of test of congressional regulatory authority under the Commerce Clause based on whether activity regulated had "direct" affect on interstate commerce).

Eclectic Pragmatism. Regarding the employment exception, the eclectic pragmatist would probably minimize the influence of the textualist and intentionalist schools since both are ambiguous regarding what Section 1 meant by "workers engaged in commerce."²⁰⁷ However, making use of other methods with potential value, eclectic pragmatism would most likely favor a broader reading of the exception. The 1925 Congress was concerned with enforcing agreements among business firms, not encouraging employers to establish an arbitration system for private employment disputes.²⁰⁸ The legislative purpose of the Act similarly would not support a narrow reading, because lack of enforcement of employment arbitration clauses was not the perceived mischief toward which the Act was directed.²⁰⁹

Other Considerations If employing a free inquiry approach and left only to find the "best" view of Section 1, a court would presumably elect a broad construction of the employment exception. This approach furthers the goal of the Act in ensuring that arbitration agreements be placed on equal footing with other contracts and permitting parties to consensually move disputes, principally commercial disputes, from the courts to arbitrators. The broader reading of the employment exception prevents the Act from making arbitration contracts more equal than others and also protects a relatively weak party, the individual employee, from being bound by clauses in contracts whose consensual nature is highly suspect. Free inquiry should not lead to statutory construction that results in the enforcement of contracts whose consensual underpinnings are suspect.²¹⁰

This broader reading would tend to give individual workers the protections enjoyed by union members, who are often subject to arbitration of their work disputes. Although the union member is bound by such arbitration clauses, she is bound not because she was coerced but because an arbitration agreement was included in the collective bargaining agreement resulting from the negotiations of her powerful agent (the union). In the event of dispute with the employer, she is represented by the union against the employer. Although there exists considerable potential for conflict of interest, the unionized worker at least has some backing in attempting to negotiate contract terms with the more powerful party. Individual employees, unless possessed with attributes in high demand (*e.g.*, movie actors, former presidents, both), lack this negotiating leverage.

Under the current regime, as acknowledged in the Supreme Court's recent *Gilmer* opinion, union members are treated much more favorably under the Arbitration Act.²¹¹ When unionized workers arbitrate pursuant to a collective bargaining agreement and suffer an adverse result, they may nonetheless obtain

207. 9 U.S.C. § 1. However, the intentionalist perspective is less ambiguous and tends to support the broader construction exempting all employment contracts from the Act. See *supra* notes 128-30 and accompanying text.

208. See *supra* notes 186-89 and accompanying text.

209. See *id.*

210. See Stempel, *supra* note 13, at 587.

211. See *Gilmer*, 111 S. Ct. at 1656-57.

trial de novo on claims brought pursuant to Title VII,²¹² the Fair Labor Standards Act,²¹³ and the Civil Rights Acts.²¹⁴ By contrast, the individual worker, whose consent to arbitration is more suspect, has no ability to relitigate adverse arbitration results touching on discrimination claims.²¹⁵ This suggests an interest group perspective in favor of the broader construction of Section 1. A broader version of the employment contract exception would tend to place relatively weak unorganized workers on the same footing as unionized workers, who through their unions have more political clout.

By contrast, the narrow view of the employment exception is better only if one uncritically accepts the view that arbitration provides superior resolution of employment related claims. To date, there is no evidence of such superiority. Certainly, the Supreme Court has found to the contrary,²¹⁶ and employees involved in disputes with their employers seem, if the reported cases are even roughly indicative, to prefer the judicial forum. Because the consent of the average employee to arbitration is highly suspect,²¹⁷ a court advocating narrow construction to further overall policies of contract enforcement and free choice is unlikely to be persuasive.

An interest group/public choice analysis of the Arbitration Act suggests that it falls somewhere between the public interest end of the continuum (e.g., the 1964 Civil Rights Act) and its rent-seeking opposite (e.g., the Smoot-Hawley Tariff). To be sure, the Act was passed as the result of group activity to help the active group. However, the interest group involved (the merchant community) was rather large. In classic rent-seeking legislation, the victorious interest group is small and receives a tangible wealth transfer because of the legislation. Although American merchants were undoubtedly happy to see the Act passed, one is hard pressed to see how the wealth of others in society was in any way transferred to merchants merely because merchants could now more easily obtain judicial enforcement of intra-merchant arbitration agreements. At best, there was a very attenuated gain in that merchants had statutory authorization for assistance from the judiciary that

212. See *Alexander*, 415 U.S. at 59-60.

213. See *Barrentine*, 450 U.S. at 745.

214. See *McDonald*, 466 U.S. at 292. *McDonald* involved a case brought under 42 U.S.C. § 1983 but its reasoning is applicable to any claims brought pursuant to 42 U.S.C. §§ 1981-88.

215. *Gilmer*, 111 S. Ct. at 1556-58.

216. See, e.g., *Alexander*, 415 U.S. at 53-54; *Barrentine*, 450 U.S. at 743-45; *McDonald*, 466 U.S. at 290-91. But see *Gilmer*, 111 S. Ct. at 1654 ("generalized attacks on arbitration [based] 'on suspicion of arbitration . . . are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989))).

217. Nonlawyer employees will generally appreciate neither the types of job disputes that may arise nor the differences between arbitration and litigation. When they do, they will often undervalue the risk of a dispute arising during their job tenure. Accord, Tversky & Kahneman, *Rational Choice and the Framing of Decisions* in *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* 67 (R. Hogarth and M. Reder eds. 1987); see Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (suggesting that people are often "myopic" and undervalue short-term risks and benefits).

others might have wished for their own personal legal problems. Similarly, although the Act's authorization of injunctive relief may require other litigants to wait until completion of emergency arbitration-related motions, there is no significant loss to other litigants.²¹⁸

Overall, the Act provides limited gains to a reasonably diffuse group (merchants) with no costs or insignificant costs to a more diffuse group (non-merchants). In addition, the Act is vested with at least some public regarding aspects in that it presumably relieves overall court congestion to the benefit of the litigating (but not arbitrating) public. To the extent that arbitration results are more expert or tailored to commercial custom, this should foster greater commercial harmony and economic efficiency, providing a diffuse benefit to consumers.

During the subsequent 65 years, as the Act has been employed to enforce boilerplate arbitration clauses in securities customer agreements, employment agreements, and perhaps some merchant-consumer sales, one can argue that the Act has conveyed a concentrated benefit (e.g., brokers can minimize or avoid legal liability by directing disputes to an anti-employee or anti-customer forum)²¹⁹ and imposed costs on consumers, who will either have less vindication of legal claims or be discouraged from bringing claims at all. The issue of whether some arbitral forums are kangaroo courts is both complex and beyond the scope of this article. I suggest only that the Act as passed was not rent-seeking legislation and avoids being a rent-seeking law so long as its application is confined to those situations specifically envisioned by the 1925 Congress that passed the Act: organized firms, particularly manufacturers, wholesalers and retailers.

When the Act is applied to others such as individual workers or securities customers, the Act may well be transformed to a vehicle conveying wealth to some by taking it from others. To the extent that courts resist this, they give the Act a more public regarding construction. However, so long as a court operates within the prevailing model of legislative supremacy and reasonable fidelity to text, a court may need to apply the Act in situations that give it a rent-seeking character. Securities customer accounts may be an example in that Section 2 of the Act makes it applicable to "any contract" and neither Section 1 nor any other part of the Act provides an exception for securities investors. However, the Act does contain an exception for employees.

If interpretation of the scope of the exception is not mandated by text or clear legislative background material, interest group/public choice theory suggests that courts give the employment contract exception a broad reading. Interest group analysis "liberals" would urge this to prevent the Act from becoming less public

218. Indeed, there may even be an overall gain to other litigants if disputes are removed from litigation, thinning court congestion and speeding resolution of court disputes.

219. See Glaberson, *When the Investor Has a Gripe*, N.Y. Times, Mar. 29, 1987, § 3, at 1, col. 2 (many customers, counsel representing claimants, and outside observers see securities industry arbitration as favoring brokerage houses more than would courts); Henriques, *When Naivete' Meets Wall Street*, N.Y. Times, Dec. 3, 1989, § 3, at 1, col. 2. But cf. Siconolfi, *Brokerage Firms Urged to Speed Arbitration Awards to Investors*, Wall St. J., July 26, 1990, at C1, col. 3.

regarding. Hard core public choice libertarians, even those advocating court enforcement of the legislative deal, should also opt for broad construction because a narrow construction of the exception gives employers a rent-seeking legislative victory that they did not truly win with the 1925 Congress.²²⁰ The original congressional "deal" or "contract" was with merchants for merchants in their dealings with each other. Unless required by text or similarly compelling matter, courts should not sweeten the deal.

IV. THE ADVAANTAGES OF THE NEW CONSTRUCTION OF SECTION 1

The potential gains from a broader interpretation of the workers covered by the employment contract exclusion are significant. The parties affected by employment contract arbitration clauses exhibit polarized views. Employers like committing disputes with employees to arbitration. That is, of course, why employers, who have virtually absolute control of the contract terms, include arbitration provisions in some contracts.²²¹ When a dispute arises, the reported cases show employers seeking vigorous application of the arbitration agreement. By contrast, these same cases find that employees seek to avoid arbitration whenever possible through whatever argument is available.

Because of the inconsistent decisions surrounding the Act, employee efforts to avoid the perceived disadvantages of the arbitral forum (which lacks Article III judges, juries, evidence rules, broad discovery and appellate review) have run the gamut of possibilities, some successful and some not. As previously noted, attempting to invoke Section 1 to bring employment contract arbitration clauses within the Act has largely failed since the 1950's except for the specifically enumerated sailors and railroad workers as well as postal workers.²²² Arguments based on fraud, lack of consent, adhesive contract terms or unequal bargaining power have also largely failed.²²³ Surprisingly, the best success for employees seeking to avoid arbitration has come not through contract-based contentions but from public policy-based arguments, which have succeeded for employees making claims pursuant to Title VII,²²⁴ The Fair Labor Standards Act (FLSA),²²⁵ the

220. See Macey, *supra* note 135, at 239.

221. Or, as the *Gilmer* opinion suggests, employers may now leverage employees into arbitration agreements through surrogates and avoid Section 1 completely. See 111 S. Ct. at 1651-52 n.2 (New York Stock Exchange registration application, which requires consent to employment dispute arbitration in order to work as a registered representative for a member house, is not a "contract of employment" within the meaning of Section 1).

222. See *supra* notes 49-78 and accompanying text.

223. See, e.g., *Erving*, 468 F.2d at 1067; *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310 (7th Cir. 1981); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988); *Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561, 564 (S.D.N.Y. 1978).

224. See, e.g., *Alexander*, 415 U.S. at 56-58.

225. See, e.g., *Barrentine*, 450 U.S. at 737-38.

Civil Rights Acts,²²⁶ the Age Discrimination in Employment Act (ADEA) (until *Gilmer*),²²⁷ and occasionally the Employee Retirement Income Security Act (ERISA),²²⁸ although this last exception seems recently to have been implicitly rejected by the Supreme Court.²²⁹

Although many of these cases have couched their decisions in statutory construction terminology and argued that the statutes creating these claims countermand the Arbitration Act, closer analysis reveals courts have used a public policy exception in these cases which posits that arbitration does not do sufficient justice to certain individual rights claims.²³⁰ I have previously argued that these public policy arguments are invalid and that the statutory preemption claim is also unpersuasive. What has driven all of these arbitration exceptions is a judicial wariness of requiring arbitration where the forum appears to be disadvantageous to a party that had relatively weak bargaining power and can not be said to have meaningfully consented to the arbitration term. Although courts have ample power under Section 2 of the Act to fashion a doctrine invalidating arbitration agreements that lack sufficient consent,²³¹ they have largely failed to grasp this opportunity, seemingly preferring to use the public policy exception²³² or to force consumers and employees to arbitrate in situations where their "consent" to the arbitration agreement seems illusory.

A broader interpretation of the types of workers protected from coercive arbitration agreements through Section 1's employment contract exception provides

226. *McDonald*, 466 U.S. at 289-91 (holding claims arising under 42 U.S.C. § 1983 not subject to arbitration with reasoning applicable to all civil rights acts, 42 U.S.C. §§ 1981-85).

227. *See, e.g.*, *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306-07 (8th Cir. 1988); *Nicholson*, 877 F.2d at 227-28; *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543, 545-47 (D.N.J. 1987). *But see Gilmer v. Interstate Johnson Lane Corp.*, 895 F.2d at 198-201 (rejecting ADEA exception to arbitrability), *aff'd*, 111 S. Ct. 1647 (1991) (overruling ADEA exception cases).

228. *See, e.g.*, *Gavalik v. Continental Can Co.*, 812 F.2d 834, 849 (3d Cir. 1987); *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 293 (2d Cir. 1989), *vacated and remanded*, 110 S. Ct. 225 (1989), *on remand*, 926 F.2d 116 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2891 (1991); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 273 (E.D. Pa. 1977). *But see Sulit*, 847 F.2d at 477; *Fox*, 453 F. Supp. at 563 (rejecting ERISA exception to arbitrability).

229. *Bird*, 871 F.2d at 293, an opinion taking a forceful view in favor of an ERISA exception to arbitrability, was vacated and remanded by the Supreme Court, 110 S. Ct. 225, for reconsideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, which overruled the longstanding *Wilko v. Swan* exception to arbitration of claims arising under the Securities Act of 1933 and established a more stringent criteria for finding certain statutory claims exempt from arbitration. *Rodriguez de Quijas*, 490 U.S. at 483. Although the almost strident approach of *Bird* may have been what occasioned the remand, and although one can construct arguments for an ERISA exception more tailored to the language of *Rodriguez de Quijas*, I regard the Supreme Court's action as invalidating an ERISA exception to arbitrability. On remand, the Second Circuit took a similar view and mandated arbitration of ERISA claims. *See Bird*, 926 F.2d at 118, *cert. denied*, 111 S. Ct. 2891 (1991).

230. *See Stempel*, *supra* note 2, at 283-334; *Sterk*, *supra* note 9, at 538.

231. Section 2 of the Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Stempel*, *supra* note 13, at 1426.

232. *See Stempel*, *supra* note 2, at 283-334.

a more statutorily sound, less judicially activist means of satisfying the concerns that covertly gave rise to the public policy exceptions and continue to trouble critics of the Supreme Court's more recent "pro-arbitration" jurisprudence. By grasping Section 1's mantle, courts would protect disempowered employees not because the judiciary, acting *sua sponte*, saw it as the right thing to do, but because Congress has mandated it. The latter approach comports far better with prevailing legal thought than does the public policy approach. Similarly, recognition of the previously overlooked force of Section 1 provides a doctrinal tool by which courts unmoved by contracting abuses are forced to act in favor of employee rights.

To be sure, by giving Section 1 a broader interpretation, Courts are doing more than rendering an obvious and ministerial application of Section 1. However, as the preceding discussion regarding statutory interpretation suggests, such judicial helpfulness to the legislature is now widely regarded as legitimate by a diverse consensus of the profession. Certainly, the broad interpretation of Section 1 is much less unfriendly to the legislative process than use of a public policy exception. Although critics of the broad interpretation may argue that it is up to Congress to amend the Act, this view ignores the difficulties posed in getting access to the congressional agenda, especially when society's more powerful political interests are opposed to a textual broadening of Section 1. Besides, the bulk of statutory interpretation thought suggests that Congress already wrote a broad Section 1 nearly 65 years ago but that courts unwisely and unfairly constricted the reach of the employment contract exception.

Further, a broader interpretation of Section 1 protects all disempowered workers, not merely those fortunate enough to make a claim under the limited number of statutes given preferential treatment by the judiciary. At a time when the Court has shown increasing disfavor toward public policy exceptions,²³³ broader construction of Section 1 provides a more solid foundation for protecting the rights of persons likely to be subjected to somewhat coercive arbitration agreements.

V. CONCLUSION

One distinguished jurist, in a moment of hyperbole, stated that "one of the dark chapters in legal history concerns the validity, interpretation, and enforceability of arbitration agreements."²³⁴ Although I agree that many years of hostility toward arbitration were hardly a credit to the judiciary, the "dark chapter" rhetoric inappropriately elevates a century of poor arbitration doctrine to the status of some

233. See, e.g., *Mitsubishi*, 473 U.S. at 625 (rejecting antitrust exception to arbitrability); *McMahon*, 482 U.S. at 238 (rejecting 1934 Act securities exception); *Rodriguez de Quijas*, 490 U.S. at 483 (overruling 1933 Act securities law exception to arbitrability); *Bird*, 871 F.2d at 293, *vacated and remanded*, 110 S. Ct. 225 (1989), *on remand*, 926 F.2d 116 (1991) (compelling arbitration), *cert. denied*, 111 S. Ct. 2891 (1991).

234. *Robert Lawrence Co.*, 271 F.2d at 406 (Medina, J.).

of the truly dark chapters in law (aid to slavery,²³⁵ aid to segregation,²³⁶ assisting the rise of Nazism,²³⁷ insensitivity to women,²³⁸ internment of Japanese-Americans,²³⁹ resistance to major social reforms)²⁴⁰ and thereby risks trivializing these exceptionally dark moments. But although Section 1 doctrine does not embarrass the bench as do decisions such as *Dred Scott*²⁴¹ or *Plessy v. Ferguson*,²⁴² neither is the law of Section 1 a credit to the courts.

The courts' narrow construction of the "workers engaged in commerce" employment contract exception reveals a bench insufficiently able to grasp an opportunity to render better, modern, public-regarding statutory interpretation that would benefit potentially millions of workers in some small way. The bench has missed this opportunity because its vision was too myopically focused on a restricted and conventional statutory inquiry. With a wider, deeper, more comprehensive vision of statutory interpretation, the Arbitration Act, and the realities of modern employment, courts could substantially improve Arbitration Act jurisprudence, alchemizing the employment contract exception of Section 1 and this aspect of Arbitration Act jurisprudence from a gray chapter to one of law's brighter pages.

235. See generally R. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

236. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (tacitly overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954)).

237. See I. MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 14-17 (D. Schneider, trans. 1991) (sympathetic judges assisted the rise of Nazism in Germany by affording early Nazi criminal dissidents lenient treatment but rigidly enforcing laws against leftists when Hitler and his allies gained power); see also Posner, *Courting Evil*, *THE NEW REPUBLIC*, June 17, 1991, at 36 (reviewing Muller).

238. See U.S. CONST. amend. XIX (granting women right to vote in federal elections a mere 130 years after the founding of the nation).

239. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

240. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 268 (invalidating child labor law as unconstitutional) (overruled by *United States v. Darby*, 312 U.S. 100, 117 (1941)).

241. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 396 (1856) (holding former slave now claiming freedman status not to be citizen for purposes of federal diversity jurisdiction and that he remained a slave notwithstanding residence in area where slavery was illegal).

242. 163 U.S. 537, 552 (finding state-mandated separation of races on railroad passenger trains not to violate Equal Protection Clause).

