Georgia Law Review

Volume 56 | Issue 1 Article 6

12-2021

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Cover Page Footnote

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THE GIG ECONOMY'S SHORT REACH: AN ANALYSIS OF THE SCOPE OF THE FEDERAL ARBITRATION ACT'S "TRANSPORTATION WORKER" EXEMPTION

Emina Sadic Herzberger[*]

The Federal Arbitration Act (FAA) governs arbitration agreements in the United States. Section 1 of the FAA provides an exemption from arbitration for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In a 2001 decision, Circuit City Stores, Inc. v. Adams*, the U.S. Supreme Court held that the residual phrase "any other class of workers engaged in foreign or interstate commerce" includes transportation workers. But, such language is ambiguous, and the Supreme Court did not expound upon what it means to be a transportation worker or to be engaged in interstate commerce for purposes of the exemption.*

Since the FAA's enactment in 1925, modes of employment have evolved drastically and now include the recent platform- or mobile-based gig economy—one subsect of which includes delivery drivers working for companies like Amazon Flex, Grubhub, Lyft, and Uber. Mandatory arbitration agreements in their employment contracts compel these drivers to arbitrate, rather than litigate, disputes against these companies.

A circuit split has emerged regarding whether modern gig economy drivers fall within the "transportation worker" exemption, with courts divided primarily on whether these drivers are "engaged in interstate commerce." Without a blueprint to follow, lower courts have created their own tests and applied their own standards to these drivers, leading to inconsistent results. Some courts have held that the driver does

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not need to cross state lines to be exempt from arbitration; instead, these courts look to the companies that these drivers work for to determine if the company is engaged in interstate commerce. If so, they find that the company's workers are engaged in interstate commerce. Other courts emphasize that the driver must be a member of a "class of workers" that is engaged in interstate commerce, thereby requiring the driver to actually cross state lines to obtain the exemption. This circuit split highlights the difficulty of applying a near century-old statute to a modern worker context.

This Note argues that, in the absence of a Supreme Court ruling or congressional amendment on the matter, lower courts should not exempt gig economy delivery drivers from arbitrating employment disputes against their platform companies because the drivers are not transportation workers engaged in interstate commerce.

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I. INTRODUCTION

The gig economy is a lucrative industry in the United States: in 2017, approximately 57 million people—or a third of the entire workforce—engaged in some form of gig work.[1] By 2021, estimates project that the gig economy will contribute over $1 trillion to the U.S. economy.[2] Referred to by various names, including the "sharing" or "1099 economy,"[3] the gig economy often involves "economic transactions that are facilitated by online platforms that match customers with providers."[4] The transportation services sector represents one major component of the gig economy that employs this online platform system.[5] Within the transportation services sector, last-mile delivery drivers form one subsect of gig economy workers.[6] These drivers transport people and deliver goods

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[1] TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy; *see also* Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 52 (2017) ("The Gig Economy emerged in a perfect storm of several interrelated developments. Advances in digital technologies, the widespread availability of handheld devices, and ever-increasing high-speed connectivity have combined with the realities presented by several cycles of economic downturn, shifts in lifestyle, and generational preferences.").

[2] Srikanth Karra, *The Gig or Permanent Worker: Who Will Dominate the Post-Pandemic Workforce?*, FORBES (May 13, 2021, 7:00 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/05/13/the-gig-or-permanent-worker-who-will-dominate-the-post-pandemic-workforce.

[3] *See* Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 L. & CONTEMP. PROBS. 107, 107 (2018) ("[B]usinesses such as Uber, Airbnb, Lyft, TaskRabbit, Rover, and DogVacay represent a new sector and way of providing goods and services. This group of firms has variously been referred to as the sharing economy, gig economy, platform economy, 1099 economy, and peer-to-peer economy.").

[4] Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 205 n.1.

[5] Josue Aparicio, *The Arbitration Hack: The Push to Expand the FAA's Exemption to Modern-Day Transportation Workers in the Gig Economy*, 54 U.S.F. L. REV. 397, 397 n.2 (2020); *see also* Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443, 454 (2018) ("The advent of pocket-sized computers with GPS, wireless Internet access, and the ability to run complex algorithms connecting individual users to one another has enabled a new breed of companies that serve as intermediaries between their users, offering 'platforms' or 'virtual marketplaces' that connect those in need of specific services with those offering them.").

[6] *See* Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13–14 (1st Cir. 2020) (identifying Amazon "last-mile" delivery drivers as those who "sign up for delivery shifts and then use their own methods of transportation . . . to deliver products ordered through Amazon within

or prepared restaurant meals to customers' homes or offices.[7] While some platform companies offer only one type of service, generally either some form of ride-sharing or food delivery, other companies are expanding their range of services, meaning drivers can participate in transporting both goods and people through the same platform.[8]

Regardless of the platform, there are benefits of working as a gig economy delivery driver, including a flexible self-created work schedule,[9] the opportunity to gain supplemental or part-time income,[10] and the ability to work seamlessly for multiple platforms simultaneously.[11]

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a specified timeframe and in compliance with other Amazon service standards"); *In re* Grice, 974 F.3d 950, 954 (9th Cir. 2020) (explaining how the Uber App "connects riders needing transportation with local drivers available to drive them to their destinations for a fare").

[7] *See* Aparicio, *supra* note 5, at 397 (explaining that that the gig economy "relies upon independent contractors to offer goods and services, including transportation services," through ride-sharing platforms like Uber and Lyft, meal delivery platforms like Grubhub, grocery delivery platforms like Instacart, and some platforms that provide "delivery of virtually everything under the sun" like Amazon Flex).

[8] *See, e.g.*, *Frequently Asked Questions About Amazon Flex*, AMAZON FLEX, https://flex.amazon.com/faq (last visited Sept. 11, 2021) (indicating that Amazon's Amazon Flex drivers deliver packages, groceries, household items, and store orders directly to customers); *Uber's Technology Offerings,* UBER, https://www.uber.com/us/en/about/uber-offerings/ (last visited Sept. 30, 2021) (indicating that Uber drivers can participate in ride-sharing and food delivery); Nitasha Tiku, *Desperate Workers Rush to Delivery App Jobs to Find Low Pay and Punishing Rules*, WASH. POST (May 23, 2020), https://www.washingtonpost.com/technology/2020/05/23/gig-work-instacart-shipt-amazon-flex-doordash (noting Uber's reallocation of 40% of its drivers in the United States and Canada to its Uber Eats food delivery service early in the COVID-19 pandemic). Rather than working in multiple roles for one company, some people work for multiple companies. *See* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 938 (9th Cir. 2020) (Bress, J., dissenting) ("[D]elivery workers often work for multiple services, even at the same time (think of drivers with both Uber and Lyft stickers on their windshields). An AmFlex worker who also works for Doordash and is doing the same basic work for both companies would thus be subject to arbitration based on which company's 'hat' he is wearing.").

[9] Charles Towers-Clark*, The Uberization of Work: Pros and Cons of the Gig Economy*, FORBES (July 8, 2019, 6:09 AM), https://www.forbes.com/sites/charlestowersclark/2019/07/08/the-uberization-of-work-pros-and-cons-of-the-gig-economy ("Working on your own terms, with your own hours and earning your own wage has been a dream since the inception of the office and 'office hours.'").

[10] *See Let's Drive*, AMAZON FLEX, https://flex.amazon.com/lets-drive (last visited Sept. 11, 2020) (advertising general pay rates of $18–$25 per hour).

[11] *See* Memorandum from the Benenson Strategy Group on Findings from Survey of Likely 2020 Voters and App-Based Drivers to Interested Parties 3 (Aug. 25, 2020) (stating that 66% of Uber drivers surveyed drive for multiple app-based companies besides Uber, including

To become a driver for one of these platform-based companies, applicants must accept the terms of use that create a contractual relationship between the company and the driver.[12] An agreement to arbitrate a dispute, which precludes a driver from bringing a collective or representative action against the company,[13] is common in these contracts.[14] Despite this requirement to arbitrate disputes, there has been an uptick in suits brought by drivers against their respective platform employers for employment contract violations.[15] Litigation brought against these companies conflicts with a recent trend in the United States to view arbitration, including employment arbitration, favorably.[16] In bringing these suits, drivers argue that they are exempt from arbitration based on a carveout in the Federal Arbitration Act (FAA).[17] Section 1 of the FAA exempts certain classes of workers from mandatory arbitration, including "workers engaged in foreign

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"Lyft, DoorDash, GrubHub, Instacart, or Amazon Flex"); Faiz Siddiqui, *Where Have All the Uber Drivers Gone?*, WASH. POST (May 7, 2021, 8:00 AM), https://www.washingtonpost.com/technology/2021/05/07/uber-lyft-drivers (reporting that as demand for rideshare services decreased during the COVID-19 pandemic, many rideshare drivers "turned to food delivery through Uber, DoorDash or other apps as demand exploded for delivery of meals and household items").

[12] *See* Aparicio*, supra* note 5, at 399 ("Contracts that impose mandatory arbitration are commonplace in the gig economy.").

[13] *See* 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 2.1.2 (1995) ("Arbitration is the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them." (quoting Bel Pre Med. Ctr., Inc. v. Frederick Contractors, Inc., 320 A.2d 558, 563 (Md. Ct. Spec. App. 1974))).

[14] *See* Garden*, supra* note 4, at 213 (demonstrating that gig economy employment agreements generally contain arbitration clauses). Drivers may not even be aware that they have entered such an agreement. *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 4 (2015) ("Because these arbitration clauses are usually buried in a sea of boilerplate, many people who are subject to them do not realize that they exist or understand their impact.").

[15] *See infra* Part III; Aparicio, *supra* note 5, at 398 (highlighting that the emergence of the gig economy "has sparked . . . litigation as gig economy workers bring wage and hour claims" against companies); *see also* Capriole v. Uber Techs., Inc., 7 F.4th 854, 858 (9th Cir. 2021) ("Disputes are inevitable given the differences between employees and independent contractors, and many gig-economy workers have unsurprisingly attempted to legally challenge their current classification.").

[16] *See infra* Section II.A.

[17] *See infra* Part III.

or interstate commerce,"[18] which the U.S. Supreme Court has ambiguously classified as "transportation workers."[19]

Without guidance from either the statutory language or Supreme Court jurisprudence, it is unclear which workers are "transportation workers" for purposes of the Section 1 exemption.[20] The influx of these suits forces lower courts to determine whether gig economy drivers are transportation workers under Section 1 of the FAA; if so, Section 1 would exempt them from mandatory arbitration.[21] A recent circuit split involving a range of gig-based companies and their drivers considers whether gig economy drivers are transportation workers "engaged in foreign or interstate commerce," thereby exempting these drivers from having to arbitrate their claims.[22] Recent cases illustrate that courts diverge widely in their treatment of gig economy drivers based on a variety of Section 1 interpretations.[23] The Supreme Court has declined to rule on this issue,[24] which will invariably result in lower courts furthering the patchwork of interpretations.

This Note argues that a narrow interpretation of the Section 1 exemption is the appropriate reading, under which gig economy delivery drivers are not entitled to the arbitration exemption. Part II examines the contours of the FAA, Section 1, and the recent extension of Section 1 to employment disputes within the scope of Supreme Court caselaw. Part III surveys the current circuit split and the varied approaches taken by three circuit courts of appeals. Part IV then illustrates why the Section 1 exemption should not extend to gig economy delivery drivers and offers a defense of arbitration in employment dispute contexts.

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[18] 9 U.S.C. § 1.

[19] *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (holding that transportation workers are exempt from Section 1 of the FAA).

[20] *See infra* Part III.

[21] *See infra* Part III.

[22] 9 U.S.C. § 1; *see infra* Part III.

[23] *See* Aparicio, *supra* note 5, at 401 (stating that because the Supreme Court has never defined who a transportation worker is, nor has it provided a framework to help resolve the question, state and federal courts have been inconsistent and often implement "flawed legal frameworks").

[24] Amazon.com, Inc. v. Rittmann, 141 S. Ct. 1374 (2021) (denying Amazon.com, Inc.'s petition for writ of certiorari).

II. BACKGROUND: THE FEDERAL ARBITRATION ACT

Alternative dispute resolution (ADR) mechanisms, including arbitration, mediation, and negotiation, operate as a substitute for litigation by offering an efficient and effective means to resolve disputes between parties.[25] Arbitration exists as one ADR mechanism and is defined as follows:

> [A]rbitration is an adjudicatory method of private, third-party dispute resolution. It is an alternative to adjudication in the courts, on the one hand, and to self-help, negotiated settlements, and mediation on the other. It depends upon and can be controlled in large measure by agreement between the parties. Arbitration is currently facilitated by strong legislative policies favoring enforcement of the agreement and finality of the award. It is, in short, a favorite of the law at a time when interest in alternative dispute resolution is high.[26]

Arbitration contains three basic elements: (1) parties' agreement to arbitrate a dispute; (2) parties' selection of a dispute resolution method with the intent to reduce time and cost in rendering a fair decision by a neutral third party; and (3) an award or decision that is final.[27] The FAA governs the majority of consensual arbitral agreements in the United States.[28] The FAA applies broadly to written contracts involving an agreement to settle disputes by arbitration:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to

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[25] *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 5, 15–24 (1992) (detailing ADR mechanisms that are "generally vastly more efficient and effective than are State dispute resolution processes").

[26] MACNEIL ET AL., *supra* note 13, § 2.1.3.

[27] *Id.* § 2.1.1.

[28] *Id.* § 1.1.1.

> arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[29]

While Section 2 illustrates the FAA's broad reach, Section 1 serves to limit its scope by providing an exemption to certain classes of workers.[30] Section 1 states that "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*."[31] Commentators and courts agree that Section 1 is ambiguous, particularly because the statutory language does not articulate which workers fall under the umbrella of "any other class of workers engaged in foreign or interstate commerce,"[32] nor is it clear whether the exemption extends to employment contract disputes.[33] As gig economy drivers push to litigate, rather than arbitrate, claims against platform companies, questions arise regarding whether these drivers are exempt under the Section 1 carveout as a class of workers engaged in interstate commerce and whether the "engaged in" interstate commerce language requires such a class to cross state lines.[34]

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[29] 9 U.S.C. § 2.

[30] *Id.* § 1.

[31] *Id.* (emphasis added).

[32] *Id.*

[33] *See* MACNEIL ET AL., *supra* note 13, § 11.2.3 ("The exclusionary language is imprecise; the legislative history has been described as 'vague and inconclusive.'" (quoting Signal-Stat Corp. v. Loc. 475, UEW, 235 F.2d 298, 302 (2d Cir. 1956), *overruled by* Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Loc. 812, 242 F.3d 52 (2001))*; see also* Jay E. Grenig, *Evolution of the Role of Alternative Dispute Resolution in Resolving Employment Disputes*, 71 DISP. RESOL. J. 99, 109–10 (2016) (highlighting that "[t]he scope of the Section 1 exemption has been the subject of considerable debate since its enactment," particularly regarding the question of whether it extends to labor disputes).

[34] *See infra* Part III.

A. HISTORY OF THE FAA

As a dispute resolution mechanism, arbitration has historically been viewed favorably in commercial settings.[35] In the nineteenth and early twentieth centuries, New York served as the United States' center of arbitration, where legislative support for the practice led to the creation of a prominent state arbitration statute and a Court of Arbitration.[36] Statutory and common law from this period demonstrate favorable views toward arbitration in the United States,[37] but existing laws were flawed because they lacked mechanisms to enforce arbitration agreements.[38] Charles L. Bernheimer, an arbitration scholar, and Julius Henry Cohen, general counsel of the Chamber of Commerce of the State of New York, spearheaded a reform movement to modernize arbitration in New York as "part of a broader package of legal simplification and responsiveness to commercial needs in general and avoidance of litigation in particular."[39]

The 1920 New York Act followed, which provided that a "written contract to settle a controversy thereafter arising was valid, enforceable, and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract."[40] The New York

[35] *See* MACNEIL, *supra* note 25, at 15–24 (detailing premodern arbitration law in the United States); MACNEIL ET AL., *supra* note 13, § 4.3.1 (discussing arbitration practice and law before 1800 in the United States, specifically its use in community dispute settlement in Connecticut in the seventeenth century and its expansion into the commercial world of New York).

[36] *See* MACNEIL, *supra* note 25, at 25–26 (detailing "New York's history of institutional and legal reinforcement of arbitration" through the creation of various arbitral courts and its history as an arbitration hub for financial and trade associations).

[37] *See id.* at 19 (detailing how the common law and Illinois Statute of 1873 demonstrate positive notions toward arbitration in the United States).

[38] *See id.* at 20 ("[A]n [arbitration] agreement did not bar a party from breaching it and bringing a judicial action or suit on the cause giving rise to the dispute. The court would not stay such an action or suit pending arbitration.").

[39] *Id.* at 28–29; *see also* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1134 (2019) (describing Cohen and Bernheimer as the FAA's "lead proponents" who argued arbitration would "make the disposition of business in the commercial world less expensive, faster, and more just" (internal quotation marks omitted) (quoting Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 302 (2015))).

[40] MACNEIL, *supra* note 25, at 35; *see also* MACNEIL ET AL., *supra* note 13, § 8.1 (detailing how the New York act's success prompted reformers to push for a federal act).

arbitration law was limited to commercial arbitration decisions.[41] In the wake of the New York arbitration law and heightened enthusiasm towards commercial arbitration, Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts."[42] The fourteen original sections of the statute, taken together,[43] codified three issues that arbitration aims to solve: (1) the long delay usually found in legal proceedings due to congested court calendars and preliminary motions and appeals that draw out consideration of a case's merits; (2) litigation expense; and (3) litigation's failure to reach a just decision in business dealings.[44] In the decades that followed, the U.S. Supreme Court helped the reformers achieve their goal of promoting the efficacy of arbitration through the FAA.[45] In a handful of cases, the Court solidified its pro-arbitration stance and indicated its support for the prevailing view of the FAA as "a substantive statute regulating all *inter*state commercial disputes."[46]

B. EXTENSION TO EMPLOYMENT DISPUTES

More recently, the pro-arbitration developments of the twentieth century continued to shape the American arbitration system as courts extended the FAA's application beyond its original

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[41] *See* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 494 (1995) (stating that prior to the enactment of the New York arbitration law, the New York Bar Association lobbied to establish "statutory backing of commercial arbitration decisions").

[42] 1 MARTIN DOMKE, GABRIEL WILNER & LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 7:5 (2021).

[43] *See* MACNEIL ET AL., *supra* note 13, § 9.3 (emphasizing that the FAA "is unitary, not a series of independent fragments . . . 'each section of an act is to be construed with every other section and all sections are to be considered parts of a connected whole, and harmonized, if possible, so as to give effect to the intention of the lawmakers'" (quoting Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184, 185 (D. Del. 1930))).

[44] *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926) (describing the ends that arbitration is meant to achieve).

[45] *See* Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 27–39 (2016) (describing how the Supreme Court's decisions over the past century encouraged the use of arbitration).

[46] MACNEIL ET AL., *supra* note 13, §14.1 n.1.

commercial dispute roots to employment agreements.[47] Although one could argue that "the purpose of the FAA was to provide for the enforceability in federal courts of arbitration agreements between merchants,"[48] the U.S. Supreme Court definitively extended the FAA to employment disputes despite initial judicial hostility toward expanding the FAA's reach beyond the commercial context.[49]

The non-arbitrability doctrine initially checked arbitration arising from employment disputes based on statutory claims.[50] The non-arbitrability doctrine dictates "that some matters so pervasively involve 'public' rights and concerns, or interests of third parties, that agreements to resolve such disputes by 'private' arbitration should not be given effect."[51] The Supreme Court's 1953 decision in *Wilko v. Swan* exemplified this application of the non-arbitrability doctrine when the Court invalidated the use of arbitration to resolve federal statutory claims.[52] This trend continued through the 1960s, when the Court applied the non-

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[47] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *see also* MACNEIL, *supra* note 25, at 138–47 (explaining how two late twentieth-century cases, *Prima Paint* and *Southland*, expanded the Court's pro-arbitration stance). Employment dispute arbitration is arbitration between employers and individual employees, as opposed to labor arbitration, which arises from union-employer agreements. *See* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 OHIO ST. J. ON DISP. RESOL. 1, 2–3 (2017) (discussing differences between labor and employment arbitration). This Note focuses on employment arbitration, rather than labor arbitration.

[48] Margaret L. Moses, *Arbitration of Worker Contracts:* New Prime*'s Proper Statutory Interpretation of the 1925 Federal Arbitration Act*, 21 CARDOZO J. CONFLICT RESOL. 415, 422 (2020).

[49] *See* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 476–77 (noting that "old judicial hostility persisted" until 1967 when the Court began shifting its stance on arbitration and expanding the FAA's scope to include employment disputes arising under federal statutory law).

[50] *See* Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1192 (2008) ("[T]hrough the 1960s, the non-arbitrability doctrine prevented arbitrators from resolving issues of federal statutory law.").

[51] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 6.01, at 1029 (3d ed. 2021).

[52] *See* Wilko v. Swan, 346 U.S. 427, 435 (1953) ("When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions."), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

arbitrability doctrine to render claims under newly enacted federal employment discrimination laws non-arbitrable.[53]

Through a series of cases over several decades, the U.S. Supreme Court broadened the FAA's application beyond solely commercial disputes, thus removing the non-arbitrability doctrine from federal statutory claims.[54] Beginning in 1974 with *Scherk v. Alberto-Culver Co.*,[55] followed by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[56] in 1985, the Court expanded the FAA's reach from purely commercial contexts to federal antitrust and securities laws in international contexts.[57] Affirming its earlier decision in *Scherk*,[58] in which the Court ruled that international disputes involving securities law claims can be subject to arbitration,[59] the *Mitsubishi* Court reasoned that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[60] The Court's willingness to expand its pro-arbitration policy beyond international contexts to the domestic sphere came in 1987 with

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[53] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.").

[54] *See* MACNEIL, *supra* note 25, at 57 ("[T]he immense progress of labor arbitration during and after the New Deal years undoubtedly played a significant role in the success of the movement to reform commercial arbitration."); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .").

[55] 417 U.S. 506 (1974).

[56] 473 U.S. 614 (1985).

[57] *See, e.g.*, R. James Filiault, Comment, *Enforcing Mandatory Arbitration Clauses in Employment Contracts: A Common Sense Approach to the Federal Arbitration Act's Section 1 Exclusion,* 36 SANTA CLARA L. REV. 559, 562–70 (1996) (providing an overview of relevant Supreme Court caselaw).

[58] *See Mitsubishi*, 473 U.S. at 631 ("*Scherk* establish[ed] a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution.").

[59] *See id.* at 621 ("[I]n [*Scherk*] this Court ordered arbitration, pursuant to a provision embodied in an international agreement, of a claim arising under the Securities Exchange Act of 1934 . . . .").

[60] *Id.* at 626–27.

Shearson/American Express, Inc. v. McMahon.[61] There, the Court found that, "[a]lthough the holding in [*Scherk*] was limited to international agreements, the competence of arbitral tribunals to resolve [securities] claims is the same in both [domestic and international] settings."[62]

In 1991, the Court formally extended the FAA to employment disputes in a landmark case, *Gilmer v. Interstate/Johnson Lane Corp*.[63] There, the Court found that the Age Discrimination in Employment Act (ADEA) did not preclude arbitration as a valid dispute resolution mechanism.[64] Shutting down criticism that arbitration is not an appropriate mechanism for employment disputes, the Court reasoned that the "[m]ere inequality in bargaining power [between employers and employees] . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[65] Relying on its precedent in *Mitsubishi,* the *Gilmer* Court found that, even in relationships where there may be unequal bargaining power between the parties, an arbitration agreement was enforceable because "the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'"[66] The Court established that arbitration agreements in employment contexts can be upheld unless the arbitration agreement resulted from a "sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any

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[61] 482 U.S. 220 (1987).

[62] *Id.* at 232. The Court reasoned that "the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time." *Id.* at 233. The Court officially overruled *Wilko* in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), finding that "*Wilko* was incorrectly decided," especially in light of the steady erosion of judicial hostility towards arbitration. *Id.* at 480, 484.

[63] 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.").

[64] *Id.* at 29 ("Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA.").

[65] *Id*. at 33.

[66] *Id.* (quoting 9 U.S.C. § 2).

contract.'"[67] As such, *Gilmer* formally opened the door for the FAA to reach employment disputes.[68]

C. PIVOTAL CASES: *CIRCUIT CITY* AND *NEW PRIME*

Since *Gilmer*, the U.S. Supreme Court has decided two employment contract dispute cases involving the scope of the Section 1 exemption.[69] First, in its 2001 *Circuit City Stores, Inc. v. Adams* decision, the Court limited the Section 1 exemption to transportation workers' employment agreements specifically, rather than to all employment agreements.[70] In that case, a Circuit City employee filed an employment discrimination suit against the company under California's Fair Employment and Housing Act in contravention of his employment agreement's requirement to arbitrate all disputes.[71] In the decision below, the Ninth Circuit ruled that all employment contracts were excluded from the FAA, creating a circuit split that prompted the U.S. Supreme Court to grant certiorari to resolve the issue of the exemption's applicability in employment contracts.[72] In line with decades' worth of pro-arbitration decisions,[73] the Court held that "Section 1 exempts from the FAA only contracts of employment of transportation workers."[74] To reach this ruling, the Court applied a narrow interpretative

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[67] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

[68] *See* William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 615 (2006) ("[T]he Supreme Court gave the signal in its landmark *Gilmer v. Interstate/Johnson Lane Corp.* decision that it was federal labor policy to promote arbitration of statutory issues and that arbitration could provide an adequate substitute for litigation." (footnote omitted)).

[69] Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001); New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

[70] *Cir. City*, 532 U.S. at 109 ("We now decide that the better interpretation is to construe the statute . . . to confine the exemption to transportation workers.").

[71] *Id.* at 109–10.

[72] *Id.* at 109 ("All but one of the Courts of Appeals which have addressed the issue interpret this provision as exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA's coverage.").

[73] *Id.* at 123 (stating that "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law").

[74] *Id.* at 119.

framework to Section 1 that examined the plain meaning of the statutory text, the statute's structure, and the statute's purpose.[75]

The Court employed a textual reading of Section 1 to reach its conclusion.[76] In analyzing the Section 1 phrase "engaged in commerce," the Court determined that Congress intended for this language to have a "limited reach" by comparing Section 1 to Section 2, which uses the broader phrase "involving commerce."[77] The Court found that the "plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.'"[78] The "engaged in commerce" language, the Court reasoned, denotes "persons or activities within the flow of interstate commerce,"[79] whereas "affecting commerce," like "involving commerce," signals Congress's intent to fully exercise its commerce power.[80] Because Congress applies "different modifiers to the word 'commerce' in the design and enactment of its statutes,"[81] the deliberate use of "engaged in" indicates a narrow interpretation not "subject to variable interpretations depending upon the date of adoption."[82] The Court expressly disregarded the argument that the phrase "engaged in commerce" should be read in a different manner—namely, one that would emphasize the fact that "'engaged in commerce' was not a term of art indicating a limited assertion of congressional jurisdiction" at the time of the FAA's enactment.[83] The Court stated that this alternative reading would result in "[a] variable standard for interpreting common, jurisdictional phrases [that] would contradict [the Court's] earlier cases and bring instability to statutory interpretation."[84]

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[75] *Id.* at 118 ("The plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.' . . . We must, of course, construe the 'engaged in commerce' language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose.").

[76] *See* Claire Kennedy-Wilkins, Note, *Playing Ostrich with the FAA's History: The Scope of Mandatory Arbitration of Employment Contracts*, 54 HASTINGS L.J. 1593, 1594 (2003) ("[T]he Court in *Circuit City* based its decision on a textual analysis of Section 1 . . . .").

[77] *Cir. City*, 532 U.S. at 115.

[78] *Id.* at 118.

[79] *Id.* (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974)).

[80] *Id.* at 115.

[81] *Id.*

[82] *Id.* at 117.

[83] *Id.* at 116.

[84] *Id.* at 117.

The Court also applied the maxim *ejusdem generis*—a "statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words'"—to the Section 1 phrase "any other class of workers engaged in . . . commerce."[85] This construction suggests that the phrase is residual because it follows an explicit reference to "seamen" and "railroad employees"; therefore, "any other class of workers" should be "controlled and defined by reference to the enumerated categories of workers which are recited just before it."[86] The Court acknowledged that canons of construction can generally be countered, but "[t]he application of the rule ejusdem generis in this case, however, is in full accord with other sound considerations bearing upon the proper interpretation" of Section 1.[87]

Finally, the Court examined the purpose of the FAA to emphasize the need for a narrow reading of Section 1.[88] In asserting that "engaged in commerce" has a limited reach, the Court reasoned that this language must be construed "with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose."[89] The Court reiterated that the FAA "seeks broadly to overcome judicial hostility to arbitration."[90] Thus, the statute counsels in favor of a reading that upholds such purpose.[91] The Court promulgated a narrow interpretation of the Section 1 exemption, "making the FAA a vehicle for the enforcement of most employment arbitration agreements."[92] The Court explicitly minimized the influence that historical arguments and legislative history have on its interpretation of Section 1, particularly because

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[85] *Id.* at 114–15 (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)).

[86] *Id.*

[87] *Id.* at 115.

[88] *Id.* at 118.

[89] *Id.*

[90] *Id.* (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995)).

[91] *See id.* at 118–19 (explaining that the Court lacked any basis to go beyond the text to interpret the statute broadly).

[92] Dennis R. Nolan, *Employment Arbitration After* Circuit City, 41 BRANDEIS L.J. 853, 853 (2003).

the sparse legislative record on the exemption does not provide information on the provision's meaning.[93]

Eighteen years after *Circuit City*, the Court again examined the scope of Section 1 in *New Prime Inc. v. Oliveira*.[94] There, the Court determined that the term "contracts of employment" under Section 1 extended not only to formal employees, but also to independent contractors.[95] The case involved an interstate trucking company that classified a long-haul driver as an independent contractor rather than an employee, raising the question of whether the arbitration clause in his employment agreement was valid in light of this classification.[96]

The Court applied a textual analysis to determine the scope of the phrase "contract of employment."[97] First, the Court reasoned that it is a fundamental statutory construction canon to interpret words in a statute by their ordinary meaning at the time enacted by Congress.[98] Turning to what "contract of employment" meant at the time of the FAA's enaction in 1925, the Court examined legal and popular dictionaries to determine that "employment" had a broad definition, serving as a synonym for "work."[99] The Court also determined that early twentieth-century Supreme Court caselaw used the phrase "contract of employment" for independent contractor agreements.[100] The Court then examined the use of the term "workers" in Section 1 and concluded that Congress

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[93] *See Cir. City,* 532 U.S. at 119 ("While the historical arguments respecting Congress' understanding of its power in 1925 are not insubstantial, this fact alone does not give us basis to adopt . . . an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used.").

[94] 139 S. Ct. 532 (2019).

[95] *See id.* at 542–44 (reasoning that "[w]hen Congress enacted the [FAA] in 1925, the term 'contracts of employment' referred to agreements to perform work," and thus includes independent contractors within its scope).

[96] *Id.* at 536. The Court stated that both parties conceded that Mr. Oliveira qualified as a worker engaged in interstate commerce due to the nature of his trucking position. *Id.* at 539.

[97] *See id.* at 539–41 (analyzing the text of the statute itself because the statute did not provide the Court with any reason "to depart from the original meaning of the statute at hand").

[98] *Id.* at 539 (applying the "fundamental canon of statutory construction" that requires finding a text's original public meaning (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018))).

[99] *Id.* at 539–40.

[100] *Id.* at 540.

deliberately chose that broad term over "employees" or "servants" to indicate that the term "easily embraces independent contractors."[101]

The Court's decisions in *Circuit City* and *New Prime* resolved several important questions about certain aspects of the Section 1 exemption—namely, that transportation workers are those workers "engaged in interstate commerce"[102] and that the Section 1 exemption applies to independent contractors.[103] Although independent contractors are now exempt if they are engaged in interstate commerce, the Court did not determine who qualifies as a "transportation worker."[104] Additionally, neither case elaborated how closely related a worker's employment industry must be to a transportation sector or how closely related the employee's responsibilities must be to interstate commerce.[105] As a result, lower courts apply the exemption inconsistently in suits involving gig economy delivery drivers.[106]

III. CURRENT CIRCUIT SPLIT

Several circuit courts of appeals have considered whether employment contracts of certain delivery workers—those locally transporting goods, meals, and, in some cases, people—are exempt from arbitration under the FAA's Section 1 carveout for transportation workers.[107] These courts take one of two general approaches to determine whether the Section 1 exemption for transportation workers applies to gig economy drivers, with each

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[101] *Id.* at 541.

[102] *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) ("We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.").

[103] *See New Prime*, 139 S. Ct. at 543–44 (holding that independent contractor employment agreements fall within the Section 1 arbitration exception).

[104] *See* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After* Epic Systems*,* New Prime*, and* Lamps Plus, 56 AM. BUS. L.J. 815, 860 (2019) (noting that the Court failed to explain who a "transportation worker" is in its FAA decisions).

[105] *See* Aparicio, *supra* note 5, at 408 ("[T]he Supreme Court has yet to shed light on the classes of workers it considers to be 'transportation workers.'").

[106] *See id.* at 409 (stating that because the Supreme Court has never defined "transportation worker," lower courts have "come up with varying, inconsistent, and often times flawed legal frameworks" when applying this provision); *see, e.g.*, *id.* at 427–29 (providing examples of conflicting caselaw as applied to Amazon Flex drivers).

[107] *See infra* Sections III.A, III.B.

analysis turning on whether the workers must cross state lines to be "engaged in interstate commerce."[108] One approach employs a broad reading of the phrase that does not require these drivers to cross state lines to be deemed "engaged in" interstate commerce,[109] while a second approach promotes a narrow reading that denies delivery drivers the exemption because the drivers themselves do not cross state lines.[110]

A. BROAD APPROACH

In near-identical cases, the Courts of Appeals for the First Circuit in *Waithaka v. Amazon.com, Inc.*[111] and the Ninth Circuit in *Rittmann v. Amazon.com, Inc.*[112] found that the Section 1 arbitration exemption applies to gig economy drivers who transport goods or people intrastate.[113] Both courts interpreted the exemption broadly, concluding that drivers do not need to cross state lines because the nature of their employment is "so closely related" to

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[108] *Compare, e.g.*, Rittmann v. Amazon.com, Inc., 971 F.3d 904, 910 (9th Cir. 2020) ("The plain meaning of the relevant statutory text, case law interpreting the exemption's scope and application, and the construction of similar statutory language all support the conclusion that transportation workers need not cross state lines to be considered 'engaged in foreign or interstate commerce' pursuant to § 1."), *with* Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 801–02 (7th Cir. 2020) ("To determine whether a class of workers meets [the transportation worker] definition, we consider whether the interstate movement of goods is a central part of the class members' job description. . . . Then, if such a class exists, we ask in turn whether the plaintiff is a member of it.").

[109] *See infra* Section IV.A.

[110] *See infra* Section III.B.

[111] 966 F.3d 10 (1st Cir. 2020).

[112] 971 F.3d 904 (9th Cir. 2020).

[113] *See Waithaka*, 966 F.3d at 13 ("[W]e now hold that the exemption encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work."); *Rittmann*, 971 F.3d at 907 ("AmFlex delivery providers fall within the scope of the FAA's transportation worker exemption pursuant to § 1 because they deliver goods shipped from across the United States."). *But see* Capriole v. Uber Techs., Inc., 7 F.4th 854, 863 (9th Cir. 2021) ("We conclude that Uber drivers, as a nationwide 'class of workers,' are not 'engaged in foreign or interstate commerce' and are therefore not exempt from arbitration under the FAA." (quoting 9 U.S.C. § 1)). In *Capriole*, *id.* at 864–65, the Ninth Circuit found "that Uber's service is primarily local and intrastate in nature," so interstate movement is not a central part of Uber drivers' occupation.

interstate transportation as to practically be in it.[114] These courts turned to Supreme Court precedent interpreting the exemption's scope and application, the plain meaning of the statutory text, contemporaneous caselaw and statutes, and the specific factual contexts of the businesses involved to support the conclusion that drivers do not need to cross state lines to be considered engaged in interstate commerce under Section 1.[115]

1. Contemporaneous Caselaw and Statutes. The First Circuit acknowledged *Circuit City*'s narrow statutory interpretive approach in its *Waithaka* decision but found that *New Prime* "supplemented the interpretive guidance of *Circuit City* by instructing that we must interpret the Section 1 exemption according to the 'fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time'" of enactment.[116] According to the First Circuit, this canon requires interpreting contemporaneous statutes, which suggested that the phrase "engaged in" does not require drivers to cross state lines to be "engaged in commerce."[117]

To that end, the court in *Waithaka* stated that the *Circuit City* Court relied on the interpretation of the phrase "engaged in commerce" in contemporaneously enacted statutes, including the 1914 Clayton Act, because a comparative analysis of the language would aid the court in assessing "the meaning of the words in the exemption when written."[118] The court used this mechanism as an invitation to compare the "engaged in" language of the FAA to that of the Federal Employers' Liability Act (FELA), which states that

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[114] *Rittmann*, 971 F.3d at 911 (quoting Palcko v. Airborne Express, Inc., 372 F.3d 588, 593 (3d Cir. 2004)).

[115] *See Waithaka*, 966 F.3d at 13, 22 (examining the "text and purpose of the statute and the relevant precedent" and determining that "[t]he nature of the business for which a class of workers perform their activities must inform th[e] assessment" of whether a class is engaged in interstate commerce); *Rittmann*, 971 F.3d at 909–15 (interpreting the phrase "engaged in interstate or foreign commerce" by turning to *Circuit City*'s precedent, parsing the ordinary meaning of the term "commerce," and assessing the use of the phrase "engaged in commerce" in contemporaneous statutes).

[116] *Waithaka*, 966 F.3d at 17 (alterations in original) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)).

[117] *Id.* at 18–22.

[118] *Id.* at 18–19 (citing Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 117–19 (2001)). The Clayton Act defines "commerce" as "trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation . . . ." 15 U.S.C. § 12.

"[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."[119] The court also found that cases interpreting the scope of the FELA's "engaged in commerce" language support a parallel application to the FAA because "these cases show that workers moving goods or people destined for, or coming from, other states—even if the workers were responsible only for an intrastate leg of that interstate journey—were understood to be 'engaged in interstate commerce' in 1925."[120] The Ninth Circuit in *Rittmann* also turned to cases decided around the time of the FAA's enactment to discount the argument that a transportation worker must cross state lines to be exempt from Section 1 because those cases did not interpret the phrase as requiring workers to cross state lines for the exemption to apply.[121]

2. Textual Reading. The *Waithaka* court's textual reading of Section 1's residual clause focuses on the "nature of the business for which a class of workers perform their activities" to determine whether a class of workers is engaged in interstate commerce.[122] The court stated that the drivers "carry out the objectives of a business, which may or may not involve the movement of 'persons or activities within the flow of interstate commerce,'—the crucial concept reflected in the FELA precedents."[123] The court asserted that considering the nature of the business is consistent with the *ejusdem generis* canon invoked in *Circuit City* because the enumerated groups of "seamen" and "railroad employees" in Section 1 are "defined by the nature of the business for which they work, demonstrat[ing] that the activities of a company are relevant in determining the applicability of the FAA exemption to other classes of workers."[124]

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[119] *Id.* at 19 (alteration in original) (quoting 45 U.S.C. § 51).

[120] *Id.* at 22.

[121] *See* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 912 (9th Cir. 2020) ("[C]ourts interpreting FELA have held that workers were employed in interstate commerce even when they did not cross state lines.").

[122] *Waithaka*, 966 F.3d at 22–23.

[123] *Id.* (citations omitted) (quoting *Cir. City*, 532 U.S. at 118).

[124] *Id.* at 23; s*ee also Rittmann*, 971 F.3d at 918 ("Amazon's business includes not just the selling of goods, but also the delivery of those goods, typically undertaken by those businesses we have considered to be engaged in foreign and interstate commerce . . . .").

The Ninth Circuit echoed this approach in *Rittmann*, highlighting the importance of considering the nature of the employee's business.[125] The majority in *Rittmann* found that Amazon Flex delivery drivers are a class of workers engaged in interstate commerce because "the Amazon packages they carry are goods that remain in the stream of interstate commerce until they are delivered."[126] The Ninth Circuit examined a 1909 definition of "engaged" and a 1910 definition of "commerce" and found that the combined terms "can reasonably be read to include workers employed to transport goods that are shipped across state lines."[127] The court read this combined definition broadly to mean that it applies equally to one worker delivering goods that originated out-of-state and to another delivering goods that originated in-state.[128]

Finally, both courts dismissed the weight of the FAA's pro-arbitration purpose, finding that its "pro-arbitration purpose cannot override the original meaning of the statute's text"[129] and that "[n]othing in *Circuit City* requires that we rely on the pro-arbitration purpose reflected in § 2 to even *further* limit the already narrow definition of the phrase 'engaged in commerce.'"[130]

B. NARROW APPROACH

In *Wallace v. GrubHub Holdings, Inc.*,[131] the Seventh Circuit instituted a narrow approach that denies extending the Section 1 exemption to intrastate delivery drivers, finding that this group

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[125] *Rittmann,* 971 F.3d at 917.

[126] *Id.* at 915. The court distinguished Amazon Flex delivery drivers from food delivery services based on the fact that "local food delivery drivers are not 'engaged in the interstate transport of goods' because the prepared meals from local restaurants are not a type of good that are 'indisputably part of the stream of commerce.'" *Id.* at 916 (quoting Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1153 (N.D. Cal. 2015)). The court emphasized that Amazon's products "do not 'come to rest'" when they reach a warehouse; therefore, the interstate transaction does not end at the warehouse. *Id.* Rather, products arriving at a warehouse are still in the interstate process, which concludes when a last-mile driver delivers them to a customer's intended destination. *Id.*

[127] *Id.* at 910.

[128] *See id.* ("The ordinary meaning of those words does not suggest that a worker employed to deliver goods that originate out-of-state to an in-state destination is not 'engaged in commerce' any less than a worker tasked with delivering goods between states.").

[129] *Waithaka*, 966 F.3d at 24.

[130] *Rittmann*, 971 F.3d at 914.

[131] 970 F.3d 798 (7th Cir. 2020).

does not qualify as a class of transportation workers engaged in interstate commerce.[132] Under this line of reasoning, the operative unit of the residual phrase is "class of workers," rendering whether the individual worker actually engaged in interstate commerce irrelevant.[133] Rather, it is relevant "*whether the class of workers to which the complaining worker belonged* engaged in interstate commerce."[134] Under this approach, a class of workers is exempt from arbitration when it is "actually engaged in the movement of goods in interstate commerce,"[135] or stated differently, when a class of workers is "connected not simply to the goods, but to the act of moving those goods across state or national borders."[136]

The Seventh Circuit's statutory interpretation began by examining the text, which suggests that "the first thing we see in the text of the residual category is that the operative unit is a 'class of workers.'"[137] This reading indicates that a transportation workers' class member qualifies for the Section 1 exemption when her class engages in interstate commerce.[138] To determine what it means for a class of workers to be engaged in interstate commerce, the Seventh Circuit relied on *Circuit City*'s narrow reading of the "engaged in" language used in Section 1 rather than the "involving commerce" language used in Section 2.[139]

Courts employ a two-part test to determine if a class meets the "engaged in interstate commerce" requirement.[140] First, the court considers "whether the interstate movement of goods is a central part of the class members' job description," which becomes the

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[132] *See id.* at 803 ("To show that they fall within this exception, the plaintiffs had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong.").

[133] *Id.* at 802–03.

[134] *Id.* at 800 (quoting Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988)).

[135] *Id.* at 801 (quoting Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 956 (7th Cir. 2012)).

[136] *Id.* at 802.

[137] *Id.* at 800.

[138] *Id.*

[139] *Id.* at 800–01.

[140] *See id.* at 801–02 (explaining that circuit courts of appeals first consider whether the relevant job description puts a class of workers within the group of "transportation workers" sufficiently engaged in interstate commerce then turn to whether the plaintiff is a part of that class).

central question in the analysis.[141] If a court finds that the interstate movement of goods is a central part of the class's job description, then the question becomes whether the individual worker belongs to that class.[142] Using this framework, the *Wallace* court determined that drivers for Grubhub, a mobile food-ordering platform, are not exempt from arbitration because it is not enough that the drivers are connected only to the goods; rather, the drivers must be connected to cross-border movement of those goods to qualify for the interstate commerce exemption.[143]

The governing framework provided by *Circuit City* serves as the basis for this line of reasoning, which focuses on whether a worker is a member of a class of workers that is actively engaged in the "movement of goods across interstate lines."[144] This narrow approach requires that the employee herself be "engaged *in the channels of* foreign or interstate commerce,"[145] making the "transportation worker" category "analogous to that of seamen and railroad employees, whose occupations are centered on the transport of goods in interstate or foreign commerce."[146] This framework is also significant from a policy perspective because applying the broad apporach over *Circuit City*'s narrow approach would exempt a wide range of workers "whose occupations have nothing to do with interstate transport" from the FAA.[147]

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[141] *Id.* at 801. The *Wallace* court noted caselaw that concluded that an interstate trucker is plainly a transportation worker, while someone who occasionally delivers furniture to out-of-state customers is not a transportation worker. *Id.* at 801–02 (first citing New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019); and then citing Hill v. Rent-A-Center, 398 F.3d 1286, 1289–90 (11th Cir. 2005)).

[142] *Id.* at 802. The court acknowledged that this distinction is straightforward in some cases, as in *New Prime*, but it can also be difficult, as in *Waithaka*. *Id.*

[143] *Id.*

[144] *Id.* at 801–02.

[145] *Id.* at 802 (quoting McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998)).

[146] *Id.*; s*ee also* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 921 (9th Cir. 2020) (Bress, J., dissenting) (stating that despite the difficulty in applying "somewhat opaque, century-old statutory language to a technology-based convenience of modern life . . . for a delivery worker to be 'engaged in' interstate commerce under the FAA, he must belong to a 'class of workers' that crosses state lines in the course of making deliveries").

[147] *See Wallace,* 970 F.3d at 802 (noting that the alternative interpretation could result in "dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy," for example, being exempt from the FAA despite lacking any closer connection to interstate commerce).

IV. ANALYSIS: GIG ECONOMY DELIVERY DRIVERS SHOULD NOT RECEIVE THE SECTION 1 ARBITRATION EXEMPTION

The current circuit split highlights the difficulty in applying an ambiguous provision of a century-old statute to the "technology-based convenience of modern life."[148] Resolving this split requires a universal determination of whether gig economy drivers are transportation workers exempt under Section 1 of the FAA. This Part proposes that gig economy delivery drivers should not be classified as transportation workers for purposes of the Section 1 arbitration exemption for legal and practical reasons.

A. LEGAL ANALYSIS

Because gig economy delivery drivers are not "seamen" or "railroad employees," they must fall within the embrace of "any other class of workers engaged in foreign or interstate commerce" to qualify for the arbitration exemption.[149] A narrow statutory reading of the Section 1 exemption, as dictated by *Circuit City*, proposes that gig economy drivers operating in a wholly intrastate context should not be exempt from arbitration because they do not fall within the scope of the residual phrase "class of workers engaged in foreign or interstate commerce."[150]

Although *Circuit City* did not define "transportation worker,"[151] its narrow interpretation of Section 1 indicates that the casual nature of gig work does not constitute a class of workers in transportation. Under the appropriate narrow reading of Section 1, a transportation worker must be connected to the act of moving goods across state or national borders, rather than only tangentially linked to a good that has traveled in interstate commerce or only working for a company affiliated with interstate commerce.[152] This

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[148] *Rittmann*, 971 F.3d at 921 (Bress, J., dissenting).

[149] 9 U.S.C. § 1.

[150] *Id.*; *see Wallace*, 970 F.3d at 800 ("What does it mean for a class of workers to be 'engaged in interstate commerce'? The Supreme Court's decision in *Circuit City* goes a long way toward providing an answer.").

[151] Aparicio, *supra* note 5, at 408.

[152] *See Wallace*, 970 F.3d at 802 ("Whether easy or hard, though, the inquiry is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines."); *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting) ("As a matter of common parlance,

Section proposes that such a reading is supported by a plain reading of the statutory language, the statutory structure, and the purpose of the FAA.

1. Misapplication of Contemporaneous Statutes. The *Waithaka* court relied on *New Prime* to reason that it "must interpret the Section 1 exemption according to the 'fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'"[153] Using contemporaneous statutes as a blueprint for statutory interpretation, the court considered the scope of "engaged in" interstate commerce within the meaning of the 1908 FELA.[154] The First Circuit in *Waithaka* referred to Supreme Court cases involving the FELA in which the Court found that workers "engaged in interstate commerce" included both "those who transported goods or passengers that were moving interstate" and "those who were not involved in transport themselves but were in positions 'so closely related' to interstate transportation 'as to be practically a part of it.'"[155] The *Waithaka* court stated that "by looking to these FELA precedents to understand the original meaning of the phrase in 1925, [it was] not engaging in a method of interpretation that Circuit City forbids"[156] and thus did not stray from relevant FAA precedent.

The *Waithaka* court's interpretation of the *Circuit City* and *New Prime* framework is unconvincing, though, because neither case mandated the use of contemporaneous statutes to determine the ordinary meaning of Section 1 at the time Congress enacted the FAA.[157] The First Circuit correctly stated that "engaged in

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and remembering *Circuit City*'s guidance on the narrowness of 'engaged in,' a 'class' of delivery workers would more commonly 'engage in' (*i.e.*, be employed in) 'interstate commerce' by transporting goods across state lines.").

[153] Waithaka v. Amazon.com, Inc., 966 F.3d 10, 17 (1st Cir. 2020) (alterations in original) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)).

[154] *See id.* at 18–22 (examining "the interpretation of similar phrases in statutes contemporaneous to the FAA" to discern the proper meaning of "engaged in commerce").

[155] *Id.* at 20 (first citing Phila. & Reading Ry. Co. v. Hancock, 253 U.S. 284, 285–86 (1920); and then citing Shanks v. Del., Lackawanna, & W.R.R. Co., 239 U.S. 556, 558–59 (1916)).

[156] *Id.* at 21.

[157] *See* Hamrick v. Partsfleet, LLC, 1 F.4th 1337, 1348 (11th Cir. 2021) ("Specifically, in *Circuit City*, the Supreme Court rejected the employee's argument that 'engaged in commerce' should be interpreted the same way as other federal statutes that used the same phrase.").

commerce" is a phrase that has not been interpreted "as expansively" as Section 2's "involving commerce," but it incorrectly indicated that *Circuit City* examined other statutory contexts to reach this conclusion.[158] To reach its holding, the Court in *Circuit City* only relied on its interpretation of these phrases in *Allied-Bruce*.[159] The use of the other cases cited by the *Waithaka* court is dicta and is therefore not binding.[160] Moreover, a comparison of the FAA to any other contemporaneous statute requires that the statute share the FAA's statutory context and purpose.[161] The First Circuit and Ninth Circuit's reliance on the FELA, the Clayton Act, and the Robinson-Patman Act is misplaced because these Acts do not share the FAA's context, text, or purpose.[162]

The FELA, in particular, focuses on the "common carrier," while "the FAA's specific structure and phrasing," including the references to "seamen" and "railroad employees," "give the [Section]

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[158] *Waithaka*, 966 F.3d at 16–17, 21 (finding that the Court used several cases to come to this narrow reading of "engaged in"). The *Circuit City* Court only reflected on its past cases involving similar statutory language to prove that it "has declined in past cases to afford significance, in construing the meaning of the statutory jurisdictional provisions 'in commerce' and 'engaged in commerce,' to the circumstance that the statute predated shifts in the Court's Commerce Clause cases." Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 117 (2001).

[159] *Cir. City*, 532 U.S. at 115–16 ("In *Allied-Bruce* itself the Court said the words 'in commerce' are 'often-found words of art' that we have not read as expressing congressional intent to regulate to the outer limits of authority under the Commerce Clause." (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995))).

[160] *See* WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 189 (2016) ("If an appellate court authoritatively construes a statute, the court's holding is binding on future courts. In contrast to dicta, the holding is the specific application of statutory text to particular facts, together with the legal reasoning deemed necessary to support that application."). The *Circuit City* Court, 532 U.S. at 119, held that "Section 1 exempts from the FAA only contracts of employment of transportation workers," and its discussion of prior caselaw was not a part of that holding; therefore, the case discussion should not be an authoritative source for lower courts.

[161] *See* ESKRIDGE, *supra* note 160, at 121 (stating that the use of other statutes to deduct meaning in a different statute is "especially persuasive when the same term, phrase, or provision is found in statutes that are very similar in object, purpose, and subject matter to the one being interpreted"); *see also* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 931 (9th Cir. 2020) (Bress, J., dissenting) (finding that the "FELA and the Clayton and Robinson-Patman Acts do not share the FAA's text, 'context,' or 'purpose'").

[162] *See Rittmann*, 971 F.3d at 931–32 (Bress, J., dissenting) (countering the *Waithaka* court and the *Rittmann* majority opinion's reasoning by arguing that the FELA, the Clayton Act, and the Robinson-Patman Act cannot "overcome the more natural import of the FAA's text, structure, and purpose").

1 residual clause some of its meaning."[163] Additionally, these contemporaneous statutes do not share the FAA's purpose,[164] nor did the Supreme Court ever instruct for the FAA to be interpreted in light of the FELA.[165] The argument in support of using the FELA as a blueprint for interpreting the FAA requires a broad leap from precedent because *Circuit City* never mandated this as a test; rather, its reference to the Clayton Act serves only as an example.[166] Therefore, depending too heavily on the language of other statutes may not be indicative of the drafters' intent behind the FAA, nor is it determinative of the statutory language.

2. Statutory Language and Structure. A textual, ordinary meaning analysis[167] of Section 1's residual phrase "any other class of workers engaged in foreign or interstate commerce"[168] at the time of the FAA's enactment supports the proposition that a class of workers must cross state lines to be engaged in interstate commerce.[169] Dictionaries from the time of the FAA's enactment and the use of the "engaged in" language in contemporaneous caselaw support this proposition.[170] Specifically, dictionaries from the time of enactment demonstrate that the terms "engaged" and "interstate commerce" were afforded a meaning that required crossing state

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[163] *Id.* at 931.

[164] *See id.* at 931–32 ("The identified purposes of these other statutes are also not comparable to the FAA's recognized objectives.").

[165] *Cf. id.* at 933 (indicating that neither the majority in *Rittmann* nor the First Circuit in *Waithaka* identified FELA cases from the first quarter of the twentieth century that involved "last leg" delivery drivers like Amazon Flex drivers).

[166] *See* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 118–19 (2001) (stating that, while it looked to the prior interpretation of the language in the Clayton Act for help in interpreting the FAA, the Court did "not mean to suggest that statutory jurisdictional formulations 'necessarily have a uniform meaning whenever used by Congress'" (quoting United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 277 (1975))).

[167] *See* ESKRIDGE, *supra* note 160, at 33–43 (explaining that "apply[ing] the meaning that a reasonable reader would derive from the text of the law" is a prime directive in statutory interpretation and that "[t]he ordinary meaning rule requires that the judge provide a fair reading of statutory language, as it would be understood by the audience for the statute").

[168] 9 U.S.C. § 1.

[169] *See* Kennedy-Wilkins, *supra* note 76, at 1601 (arguing that the *Employers' Liability Cases*, which required interpretation of the FELA, indicate that "at the time of the FAA's enactment, Congress's power to regulate the terms and conditions of employment was thought to be limited to circumstances where employees were actually engaged in acts of commerce").

[170] *See, e.g.*, Rittmann v. Amazon.com, Inc., 971 F.3d 904, 925–26 (Bress, J., dissenting) (surveying dictionaries from the early twentieth century).

lines.[171] Dictionaries from the early 1900s defined "engaged" as "occupied" or "employed."[172] "Interstate commerce," on the other hand, was defined as "the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state."[173]

The prior-construction canon also supports the idea that courts often consider the contemporaneous understandings of statutory terms in pre-enactment decisions when undertaking a plain meaning analysis of those terms.[174] Despite the First Circuit's argument that interpretations of FELA-related caselaw decided around the time of the FAA's enactment support the broad approach,[175] there are two cases that indicate otherwise. *The Employers' Liability Cases* of 1908[176] and 1912[177] demonstrate that, around the time of the FAA's enactment, an employee could not be engaged in interstate commerce without crossing state lines.[178]

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[171] *See id.* at 926 (Bress, J., dissenting) (finding dictionaries from the early twentieth century support the contention that, at the time Congress enacted the FAA, the terms "engaged" and "interstate commerce" could be understood to mean "a person who is 'engaged in … interstate commerce' is one who is employed to do the thing that is the subject of the engagement, here 'foreign or interstate commerce'"). Dictionaries are an increasingly popular source of support in statutory interpretation. *See* ESKRIDGE, *supra* note 160, at 44 ("Increasingly, judges are turning to dictionaries as external evidence of what words might mean."). *But see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS app. A at 415–16 (2012) (cautioning against the use of non-legal dictionaries to determine statutory meaning).

[172] *Engaged*, WEBSTER'S COLLEGIATE DICTIONARY (3d ed. 1919).

[173] Rittmann v. Amazon.com, Inc., 971 F.3d 904, 926 (9th Cir. 2020) (Bress, J., dissenting) (quoting *Interstate Commerce*, BLACK'S LAW DICTIONARY (2d ed. 1910)).

[174] *See* SCALIA & GARNER, *supra* note 171, at 322–23 (defining the prior construction canon and explaining that "when a statute uses the very same terminology as an earlier statute . . . it is reasonable to believe that the terminology bears a consistent meaning").

[175] *See* Waithaka v. Amazon.com, Inc., 966 F.3d 10, 19–20 (1st Cir. 2020) (analyzing FELA cases then settling on a broad definition of "engaged in commerce" derived from Supreme Court precedent).

[176] Howard v. Ill. Cent. R.R. Co., 207 U.S. 463 (1908).

[177] Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1 (1912).

[178] *Howard*, 207 U.S. at 499 (invalidating a statute that attempted to regulate employer-worker relationships because it "includes many subjects wholly beyond the power [of Congress] to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution"). The *Howard* Court found that including wholly intrastate workers, who may work for a company that engages in interstate commerce, would nonetheless "extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which . . . [are]

These cases involved the FELA, which covered "all common carriers engaged in interstate commerce" and imposed liability on such carriers "without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury."[179] The *First Employers' Liability Case* found that, at the time, the FELA exceeded the scope of Congress's commerce power "because the law included employees who may not have been actually engaged in commerce when they were injured."[180] The *Second Employers' Liability Case* further clarified that to be engaged in interstate commerce required movement across state lines, declaring the following proposition as "so firmly settled as no longer to be open to dispute":[181]

> Among the instruments and agents to which the [commerce] power extends are the railroads over which *transportation from one state to another is conducted*, the engines and cars by which such transportation is effected, and *all who are in any wise engaged in such transportation*, whether as common carriers or as their employees.[182]

This reading comports with the Supreme Court's narrow view of the phrase "engaged in commerce" in *Circuit City*, where it was

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under their control so long as the Constitution endures." *Id.* at 502–03; *see also Mondou*, 207 U.S. at 48–49 ("[I]n the exertion of its power over interstate commerce, [Congress] may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."); Kennedy-Wilkins, *supra* note 76, at 1601 (concluding that "employment activities the Court considered within the realm of interstate commerce and those they considered outside of that realm is [sic] consistent with a broad reading of the language that was used in the Section 1 exemption").

[179] *Howard*, 207 U.S. at 498.

[180] Kennedy-Wilkins, *supra* note 76, at 1601; *see Howard*, 207 U.S. at 499 (**"**As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.").

[181] *Mondou*, 223 U.S. at 46.

[182] *Id.* at 47 (emphasis added).

"understood to have a more limited reach."[183] Even following *New Prime*'s instruction that words should have their ordinary meaning at the time of a statute's enactment, the phrase "engaged in interstate commerce" would still require a transportation worker to move across state lines.[184]

Circuit City provides the correct structural framework to follow, and it supports the interpretation of the Section 1 exemption as requiring transportation workers to cross state lines.[185] The Court in *Circuit City* indicated that the phrase "any other class of workers" requires applying the maxim *ejusdem generis*, which groups "transportation worker" with "seamen" and "railroad employees."[186] This reading requires "transportation worker" to be "controlled and defined by reference to the enumerated categories of workers which are recited just before it."[187] Two rationales exist for applying this canon: First, "[w]hen the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage. . . . And second, when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous."[188] In the case of the FAA, if Congress intended "to extend section 1's residual clause to

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[183] Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001); *see also* Hamrick v. Partsfleet, LLC, 1 F.4th 1337, 1347 (11th Cir. 2021) ("The *Circuit City* Court did not hold, because the issue was not before it, that the transportation worker exemption applied to a class of workers that made intrastate deliveries of goods that had traveled in interstate commerce, even if the class itself did not actually engage in interstate commerce.").

[184] *See* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 925–26 (9th Cir. 2020) (Bress, J., dissenting) (relying on *New Prime*'s ordinary meaning analysis to find that "dictionary definitions from the relevant time" aid in discerning the ordinary meaning of the phrase "engaged in interstate commerce," which would require crossing state lines).

[185] *See Cir. City*, 532 U.S. at 115–16 (recalling that the phrase "involving commerce" in Section 2 is meant to have a broad reading to signal Congress's intent to exercise its commerce power to the fullest extent, while Section 1's "engaged in language" is "understood to have a more limited reach").

[186] *Id.* at 114–15; *see also Rittmann*, 971 F.3d at 927 (Bress, J., dissenting) ("Neither of these classes of workers is defined with reference to the provenance of the goods (or people) they transport. Instead, the FAA casts them at a high level of generality, referring to the broad type of work they perform.").

[187] *Cir. City*, 532 U.S. at 115; s*ee also Rittmann*, 971 F.3d at 928 (Bress, J., dissenting) ("The statutory text in the FAA supports this approach because it refers to workers by their '*class*,' reflecting the same paradigmatic approach as *ejusdem generis* itself. In this case, if the statute excluded 'seamen, railroad employees, and local delivery persons,' it seems clear that one is quite a bit less like the others.").

[188] SCALIA & GARNER, *supra* note 171, at 199–200.

classes of workers who transport both goods and passengers from anywhere to anywhere, it would have presumably indicated this intention by eliminating the enumerated categories preceding it, or by using broader language than 'engaged in . . . interstate commerce.'"[189]

3. Legislative History and Context. Although the Court in *Circuit City* did not resort to legislative history,[190] congressional hearings on the FAA also support the assertion that the drafters intended the residual clause to require crossing state lines.[191] At the Senate hearing introducing the FAA in 1923, Charles Bernheimer, the former chairman of the Arbitration Committee for the New York Chamber of Commerce, presented the bill as one that aimed "to eliminate friction, delay, and waste, and . . . to establish and maintain business amity and to reduce the price of commodities to the consumer."[192] In the same hearing, Francis B. James, the former chairman of both the Committee on Commercial Law and the Committee on Commerce and Trade Law of the American Bar Association, indicated that interstate transportation occurs when "goods are shipped from one point in a State to another point in the same State, passing through another State."[193] At the time of the FAA's enactment, "the transportation of goods sold or contracted to be sold as described in the first section of the bill [was] interstate or foreign commerce," determined by "whether the goods are to be transported to or through another State."[194]

One year later, the scope of interstate commerce was again discussed at the Joint Hearings before the Subcommittees of the Committees on the Judiciary.[195] When asked by the Chairman

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[189] Tamar Meshel, *If Apps Be the Food of the Future, Arbitrate On!: Mobile-Based Ride-Sharing, Transportation Workers, and Interstate Commerce*, 15 VA. L. & BUS. REV. 1, 43 (2020) (alteration in original).

[190] *Cir. City,* 532 U.S. at 119 ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.").

[191] *See, e.g.*, *infra* note 195 and accompanying text.

[192] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. 3 (1923) (statement of Charles Bernheimer, Former Chairman, Arbitration Committee, New York Chamber of Commerce).

[193] *Id.* at 12.

[194] *Id.* at 17 (Brief in Support of S. 4213).

[195] *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary,* 68th Cong. 7 (1924).

whether the proposed FAA bill related to "contracts arising in interstate commerce," Charles Bernheimer indicated that the bill related to interstate commerce entirely, even offering an example of a "farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey."[196] These exchanges reveal that at the time of its enactment, the FAA was intended to reach only workers employed in the physical traffic of commerce. Consequently, the legislative history, although sparse, does indicate that crossing state lines must be involved to constitute interstate commerce.

B. PRACTICAL ANALYSIS

A narrow approach resolves the current inconsistency that lower courts have created by generating their own tests and cherry-picking the types of gig economy drivers to be exempt under Section 1. To illustrate this inconsistency, consider the Ninth Circuit's decision in *Rittmann*.[197] That court applied the exemption to Amazon last-mile drivers,[198] but the Northern District of California in *Capriole v. Uber Technologies, Inc.* later refused to extend the arbitration exemption to Uber rideshare drivers, finding that "Uber drivers, as a class, 'are not engaged in interstate commerce' because their work 'predominantly entails intrastate trips.'"[199] The *Capriole* court stated that the exemption did not apply because "Uber's service is primarily local and intrastate in nature,"[200] despite the argument that the nature of rideshare drivers' work is nearly identical to that of workers who transport goods.[201] Likewise, the

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[196] *Id.* (statement of Charles Bernheimer, Former Chairman, Arbitration Committee, New York Chamber of Commerce).

[197] Rittmann v. Amazon.com, Inc., 971 F.3d 904 (9th Cir. 2020).

[198] *See id.* at 921 ("We hold that the AmFlex delivery providers in this case are transportation workers engaged in interstate commerce and are thus exempt from the FAA's enforcement provisions pursuant to § 1.").

[199] 7 F.4th 854, 858 (9th Cir. 2021) (quoting *In re* Grice, 974 F.3d 950, 956 (9th Cir. 2020)).

[200] *Id.* at 864; *see also* Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020) (determining that Lyft "is in the general business of giving people rides, not the particular business of offering interstate transportation to passengers").

[201] *See* Rick Bales, *"*New Prime*" and the Gig Economy*, ARB. INFO., https://law.missouri.edu/arbitrationinfo/new-prime-gig-economy/ (last visited Sept. 12, 2021) ("[L]ower courts should coalesce around an understanding that transporting people across

Ninth Circuit in *Rittmann* further distinguished platform-based food delivery drivers because those drivers "are not 'engaged in the interstate transport of goods' because the prepared meals from local restaurants are not a type of good that are 'indisputably part of the stream of commerce.'"[202] Meanwhile, the *Capriole* court's approach contradicts *Rittman* and requires rideshare drivers to cross state lines to be considered engaged in interstate commerce, mirroring the narrow approach that the Seventh Circuit employed in *Wallace*.[203]

Further, the courts in *Waithaka* and *Rittmann* both concluded that Amazon Flex drivers are exempt from arbitration under Section 1 because these drivers "haul *goods* on the final legs of interstate journeys."[204] These courts, however, do not account for the other aspects of the Amazon Flex program—such as delivering groceries and household items, picking up orders from local stores to deliver them directly to customers, and delivering packages from Amazon delivery stations.[205] These services are identical to those offered by food delivery services, like Grubhub in *Wallace*, that hire local delivery drivers via a smart phone application to transport meals from restaurants to customers' homes, schools, or offices.[206]

Finally, the narrow approach promotes judicial uniformity and foreseeability in arbitrating employment suits involving gig

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state lines for profit is indistinguishable, for purposes of the Section 1 exclusion, from transporting goods.").

[202] *Rittmann*, 971 F.3d at 916 (quoting Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1153 (N.D. Cal. 2015)).

[203] *Capriole*, 7 F.4th at 865 (reasoning that because Uber is not in "the particular business of offering interstate transportation to passengers" . . . interstate movement cannot be said to be a 'central part of the class members' job description.'" (first quoting *Rogers*, 452 F. Supp. 3d at 916; and then quoting Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 801 (7th Cir. 2020))).

[204] Waithaka v. Amazon.com, Inc., 966 F.3d 10, 26 (1st Cir. 2020) (emphasis added); *see also Rittmann*, 971 F.3d at 907 ("In the AmFlex program, Amazon contracts with individuals to make 'last mile' deliveries of products from Amazon warehouses to the products' destinations using the AmFlex smart phone application.").

[205] *Frequently Asked Questions About Amazon Flex*, AMAZON FLEX, https://flex.amazon.com/faq (last visited Sept. 30, 2021).

[206] *See Wallace*, 970 F.3d at 799 ("[Grubhub] provides a platform for diners to order takeout from local restaurants, either online or via its mobile app. When a diner places an order through Grubhub's app, Grubhub transmits the order to the restaurant, which then prepares the diner's meal. Once the food is ready, the diner can either pick it up herself or request that Grubhub dispatch a driver to deliver it to her.").

economy drivers. The broad approach does not consider that, by the very nature of gig work, delivery drivers often drive for multiple companies that provide different types of services.[207] Applying the broad approach would suggest that an individual driving for Amazon Flex during a morning shift and Grubhub in the evening would find herself in two wildly opposite arbitration dilemmas for substantially the same work.[208] The broad approach also does not consider the implications that this rule will have on delivery drivers for other businesses, like furniture stores or florists, whose goods may originate out-of-state.[209] The narrow approach, on the other hand, applies evenly to various gig economy drivers, including both those who deliver goods and food and those who transport people, because it requires any gig economy driver to cross state lines.[210] By requiring drivers to cross state lines to be deemed exempt from arbitration, courts applying the narrow approach would minimize the current inconsistencies resulting from conflicting applications of the Section 1 exemption to gig drivers.

C. A DEFENSE OF ARBITRATION

Courts finding that gig economy delivery drivers are exempt from arbitration as transportation workers "engaged in . . . interstate

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[207] *See supra* Part I; *see also, e.g.*, Lizette Chapman, *Lyft Tells Drivers to Work for Amazon After Ridership Plummets*, BLOOMBERG QUINT (Mar. 30, 2020, 8:45 P.M.), https://www.bloombergquint.com/technology/amazon-teams-up-with-lyft-to-recruit-drivers-for-deliveries (documenting that in light of the COVID-19 pandemic, which has affected the need for certain services like ridesharing and food delivery services, "Amazon.com Inc. [has teamed] up with Lyft Inc. on recruiting the ride-hailing company's drivers to deliver packages).

[208] *See Rittmann*, 971 F.3d at 938 (Bress, J., dissenting) ("Under the majority opinion, therefore, the same person performing the same type of work at the same time through the same means is required to arbitrate against some employers but not others.").

[209] *Id.* at 936; s*ee also Wallace*, 970 F.3d at 802 ("By erasing [the requirement to cross state lines] from the statute, the plaintiffs' interpretation would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport—for example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy.").

[210] *Cf.* O'Shea v. Maplebear Inc., 508 F. Supp. 3d 279, 287 (N.D. Ill. 2020) ("[D]rivers [for Instacart, a grocery delivery platform company] who deliver food purchased over the internet from a grocery store differ in no material way from drivers who pick up food purchased over the web from a restaurant.").

commerce"[211] undermine the purpose of arbitration as an efficient and effective means of dispute resolution.[212] The Section 1 transportation worker carveout should not be interpreted to exempt delivery drivers because a long line of Supreme Court precedent establishes that arbitration is an appropriate mechanism for employment agreement dispute resolution.[213] Further, there is evidence that, compared to litigation, arbitration is a more viable dispute resolution option for employees because it offers them a forum to settle a dispute,[214] and it is more cost-effective for involved parties.[215]

There is strong opposition to imposing arbitration agreements in employment contracts.[216] This opposition, however, is unwarranted.

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[211] 9 U.S.C. § 1.

[212] *See Rittmann*, 971 F.3d at 937 (Bress, J., dissenting) ("Undertaking such confounding inquiries in the context of the FAA is particularly undesirable when the result will inevitably mean more complex civil litigation over the availability of a private dispute resolution mechanism that is supposed to itself reduce costs.").

[213] *See, e.g.*, Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.").

[214] *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790–91 (2008) (stating that because litigation involves high costs that bar low-income employees from litigating disputes and plaintiffs' attorneys are often unwilling to take certain cases, arbitration gives plaintiffs an accessible forum); *id.* at 794 ("Since employers win the vast majority of summary judgments in federal court employment cases, and since employers naturally try to buy out the stronger employee cases during preliminary proceedings in litigation, decent arguments can be made either way about whether trial results exaggerate or depress employee win rates, at least in federal court."); *see also* Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. & PUB. POL'Y 549, 560–62 (2008) (highlighting various studies that indicate that there is a perception among parties that arbitration leads to satisfactory results for claimants).

[215] *See Cir. City*, 532 U.S. at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."); *see also* Rutledge, *supra* note 214, at 568–69 (providing examples of how arbitration can be cost-effective).

[216] *See, e.g.*, Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 102 (2010) ("[C]oncerns have been expressed about the fairness of requiring employees to rely on arbitrators to enforce their statutory rights."); *see also* Imre S. Szalai, *The Supreme Court's Landmark Decision in* New Prime Inc. v. Oliveira*: A Panoptic View of America's Civil Justice System and Arbitration*, 68 EMORY L.J. ONLINE 1059, 1060 (2019) ("In the wake of the #MeToo movement, a public backlash has developed against the widespread use of forced arbitration in America, with bipartisan support for legislative reforms as well as some private initiatives to cut back on the use of arbitration."). *But see* Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the*

The critique of employment arbitration generally focuses on two considerations: whether workers knowingly agree or understand that they are agreeing to arbitrate disputes when they sign agreements with such clauses and whether the arbitral process will be unfair for employees.[217]

As to the first critique, some argue that many arbitration agreements in employment contracts can be easily overlooked because "they are printed in small type," are buried in lengthy contracts, or are hidden "behind a link that the signer is unlikely to" read.[218] The second critique suggests that arbitration is inherently unfair towards employees because it may not be easily accessible for them or because it is biased in favor of employers.[219] In addition to the lack of conclusive data to support these critiques,[220] both raw and comparative win rate data indicate that employee-claimants are as likely as or more likely than employer-defendants to succeed in arbitration.[221] Moreover, in response to the argument that arbitration may be unfair towards low-wage earners

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Arbitration Fairness Act, 9 CARDOZO J. CONFLICT RESOL. 267, 267 (2008) ("Abolishing the system of enforceable pre-dispute agreements, as proponents of the Arbitration Fairness Act urge, would hardly improve the lot of the average individual.").

[217] *See* Garden, *supra* note 4, at 206–07 (highlighting that the lack of consent and the lack of public scrutiny are two problems associated with individual arbitration in her discussion of arbitration and gig economy workers); *see also* Hickox, *supra* note 216, at 126 ("There have been two main reasons to challenge the fairness of the arbitration program: the fairness of the process itself; and the alleged bias of the arbitrators. Issues of fairness have not been addressed by recent Supreme Court decisions upholding employees' obligations to arbitrate employment disputes." (footnote omitted)).

[218] Garden, *supra* note 4, at 207.

[219] *See id.* (suggesting that criticism against arbitration includes "the possibility that the arbitral forum will be more expensive to access or farther away from the plaintiff 's home or work than a judicial forum, that discovery will be limited or unavailable, and the chance that the 'repeat player' phenomenon will erode workers' or consumers' recoveries").

[220] *See id.* at 208 ("Unfortunately, empirical evidence about how workers fare in arbitration is inconclusive.").

[221] *See* Rutledge, *supra* note 214, at 556–58 (demonstrating that studies indicate that employees fair favorably in arbitration). *But see* STONE & COLVIN, *supra* note 14, at 19 (indicating that "the employee win rate in arbitration is 35.7 percent lower than the employee win rate in federal court" but because most cases settle before going to trial, "it is possible that settlement patterns could explain part of the difference between trial and arbitration outcomes").

who cannot afford proper arbitral representation,[222] data suggests that lower-compensated workers do not have a better chance at litigation because adequate attorneys turn down the vast majority of employees seeking representation.[223]

While arbitration is proven to be an effective and viable option for employment disputes, arbitration is not the best option for every employer-worker relationship.[224] In light of the large number of suits brought by delivery drivers and the issues related to arbitrating these disputes,[225] arbitration might not be an appropriate solution. But it is not because these drivers are exempt under Section 1. Rather, it is because the factors for choosing arbitration do not make sense in these cases. In deciding whether to choose arbitration as the dispute resolution mechanism for disputes involving gig economy drivers, platform companies should consider various factors, including the following:

(1) The quality of the assent process.
(2) The probability that arbitration will be concluded faster and with less cost than litigation.
(3) The importance of informality in the process.
(4) The importance of privacy.

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[222] *See* Garden, *supra* note 4, at 211 ("Even where companies commit to picking up arbitral forum costs . . . workers are still unlikely to arbitrate their low-dollar claims for a list of reasons, including difficulty retaining counsel.").

[223] *See* Rutledge, *supra* note 214, at 559 (noting that one study found claimants' attorneys refused to take on 95% of cases presented to them); *see also id.* at 570 (arguing that "[c]ivil litigation presents significant access to justice barriers for claimants" and that most cases are settled or dismissed before the chance to go before a jury); Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849, 851 (2017) (contending that "[a]rbitration, unlike mediation and negotiation, offers considerable promise to minority disputants facing a well-heeled opponent in a dispute"); St. Antoine, *supra* note 214, at 796 ("For most lower-paid workers, [arbitration] may in fact be their only feasible option.").

[224] *See* MACNEIL ET AL., *supra* note 13, § 7.3.2 ("Arbitration is not for everyone or every dispute.").

[225] *See* Michael Hiltzik, *Column: DoorDash Thought It Was Smart to Force Workers to Arbitrate but Now Faces Millions in Fees,* L.A. TIMES (Feb. 11, 2020, 2:48 PM), https://www.latimes.com/business/story/2020-02-11/doordash-arbitration-blunder (illustrating an example involving DoorDash, a meal delivery platform, that faced arbitration filing fees of $12 to $20 million when 5,800 arbitration claims were filed by drivers against the company, which prompted the company to insist on going to court instead of arbitrating these disputes).

> (5) The likelihood that the arbitrators will render expert justice responsive to party needs.
> (6) The nature and complexity of the issues to be decided.
> (7) The attitude of the parties to arbitration and the nature of the relationship between or among them.
> (8) The importance of award finality as opposed to judicial review.[226]

Going forward, it may be necessary for platform-based companies that rely on gig workers to assess whether including arbitration clauses in employment or independent contract agreements makes sense, especially in cases where arbitration costs exceed potential litigation costs.[227] As it currently stands, however, parties have validly entered into these arbitration agreements,[228] and they should be subject to arbitration when a dispute arises unless and until Congress amends the FAA[229] or the U.S. Supreme Court rules on the scope of the Section 1 exemption.

V. CONCLUSION

While the ambiguous language of the Section 1 arbitration exemption affords multiple interpretations of the extent to which a transportation worker must be engaged in interstate commerce to

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[226] MACNEIL ET AL., *supra* note 13, § 7.3.2.

[227] *See* Kevin R. Vozzo, *Ninth Circuit Allows Arbitrator to Rule on Postmates' Challenge to Mass Arbitration Tactics*, EPSTEIN BECKER GREEN: WAGE & HOUR DEF. BLOG (Oct. 5, 2020), https://www.wagehourblog.com/2020/10/articles/california-wage-hour-law/ninth-circuit-allows-arbitrator-to-rule-on-postmates-challenge-to-mass-arbitration-tactics/#page=1 (recounting a case from the Ninth Circuit in which plaintiffs' attorneys commenced mass arbitrations by filing more than 5,000 individual arbitration demands simultaneously to force Postmates, a food and grocery delivery platform company, to pay arbitration filing fees, which can amount to tens of millions of dollars).

[228] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.").

[229] *See* Garden, *supra* note 4, at 225 ("[B]ecause the US Supreme Court has interpreted a federal statute, the Federal Arbitration Act, to preempt states from adjudicating or legislating limits on arbitration, the fix would have to be accomplished by Congress." (quoting MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 224 (2013))).

be exempt from arbitrating an employment dispute, a narrow statutory reading is proper under the framework established by U.S. Supreme Court precedent and the favorable view of arbitration as a dispute resolution mechanism in the United States. To remain consistent with *Circuit City* and *New Prime* and to avoid practical application problems associated with differentiating between gig economy delivery drivers by the platform(s) for which they drive, lower courts should interpret the Section 1 exemption for workers engaged in interstate commerce to require that workers themselves actually cross state lines. This narrow interpretation of the statutory text stays true to the meaning of the phrase "engaged in interstate commerce" at the time of the FAA's enactment in 1925, by which courts should abide unless and until Congress[230] or the U.S. Supreme Court rules otherwise.[231]

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[230] *See* Meshel, *supra* note 189, at 43 ("Should Congress now view the activities of [mobile-based transportation network companies like Uber and Lyft] and their drivers as properly falling outside of the purview of the FAA, Congress may amend the Act.").

[231] *See* Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 171, at xxi ("The court's job is to carry out the legislative project, not to change it in conformity with the judge's view of sound policy.").