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The FAA Exclusionary Clause: Are We Headed for a Broader Interpretation of Interstate Commerce?

*Miller v. Public Storage Management, Inc.*¹

I. INTRODUCTION

The Federal Arbitration Act (“FAA”) encompasses a vast spectrum of arbitration controversies. The FAA provides that “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable.”² The preceding section of the Act, however, 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.”³ In their efforts to maintain a balance between these competing interests, many courts have attempted to assemble a consistent definition of the term “commerce” throughout the act for the purpose of defining who is exempt and who is not exempt.⁴ This balance has not always been easily met, however, and such efforts have led to intense debates concerning the very meaning of the FAA.

II. FACTS AND HOLDING

Janice Sue Miller (“Miller”) worked as a property manager for Public Storage Management, Inc. (“Public Storage”).⁵ At a performance review conducted in August 1993,⁶ Public Storage presented Miller with an employment contract containing an arbitration clause providing that any dispute arising over employment termination would be resolved by binding arbitration.⁷ The agreement stipulated that any and all disputes concerning termination due to physical disabilities or medical conditions would be resolved by means of arbitration.⁸ The agreement also provided

1. 121 F.3d 215 (5th Cir. 1997).

2. 9 U.S.C. § 2 (1996).

3. 9 U.S.C. § 1 (1996). Section one has been deemed by many courts as the “exclusionary clause” or “excepting clause.” See *United Electrical Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221, 223 (4th Cir 1954).

4. *United Electrical Workers of America* is one case that has sought such a balance. *Id.*

5. *Miller*, 121 F.3d at 215.

6. The facts of *Miller* do not indicate whether these performance reviews were regular or merely done capriciously.

7. *Id.* at 216.

8. *Id.* at 216 n.1.

that only the arbitrator, not a judge or jury, would decide the dispute.⁹ Miller initialed each page of the document and signed the agreement.¹⁰

Nearly two years later, in February 1995, Miller injured her arm at work and eventually took a medical leave of absence.¹¹ After eight months of leave, she was still unable to return to work and was subsequently fired.¹²

Miller filed a charge of disability discrimination with the Equal Employment Opportunity Commission.¹³ She subsequently received a Notice of Right to sue.¹⁴ She brought suit against Public Storage, citing both violations of the Americans with Disabilities Act ("ADA")¹⁵ and retaliation under the Texas Labor Code.¹⁶

Public Storage successfully moved to dismiss Miller's suit and compel arbitration.¹⁷ The United States District Court for the Northern District of Texas held that under the Federal Arbitration Act,¹⁸ the arbitration agreement in her employment contract was valid and enforceable.¹⁹ The district court, noting the broad scope of the exclusionary clause in section 1 of the FAA, ruled that Miller's employment contract easily fell within its auspices.²⁰

Miller appealed to the United States Court of Appeals for the Fifth Circuit,²¹ basing her appeal upon three substantial claims.²² She claimed that the legislative history of the ADA indicates that Congress did not intend for arbitration clauses to prevent individuals from bringing suit for alleged ADA violations.²³ Miller also contended that the circumstances under which she signed the contract constituted unconscionability and fraud.²⁴

Most importantly, Miller asserted that the FAA's scope did not cover her employment contract with Public Storage.²⁵ Since the FAA excludes from its reach the employment contracts of seamen, railroad employees, and any other class of workers engaged in interstate commerce,²⁶ Miller asserted that employment contracts for workers *generally engaged in interstate commerce* should also be excluded from the FAA's intended scope.²⁷ Claiming that her employment as a property manager was well within the scope of interstate commerce, she argued that the FAA did not

9. *Id.*

10. *Id.* at 216-17.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. 42 U.S.C. §§ 12101-12213 (1990).

16. TEX. LAB. CODE ANN. §§ 451.001-.003.

17. *Miller*, 121 F.3d at 217.

18. 9 U.S.C. §§ 1-2 (1996).

19. *Miller*, 121 F.3d at 217.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 218.

24. *Id.* at 218. At trial and in her appellate argument, Miller claimed she was given insufficient time to read the contract. The court, however, gives little deference to this issue. *Id.* at 217-18.

25. *Id.* at 217.

26. 9 U.S.C. §1 (1996).

27. *Miller*, 121 F.3d at 217.

apply to her employment contract.²⁸ Therefore, she should not have been forced to arbitrate her claim.²⁹

The Fifth Circuit rejected all of Miller's arguments.³⁰ They reaffirmed the decision of the district court,³¹ explaining that the explicit language of the ADA advocated the use of arbitration,³² and that fraud in the inducement did not apply to the making of the arbitration agreement.³³ Finally, the court held that when an employee agrees to arbitrate disputes with an employer, the language in section 1 of the FAA precluding arbitration for employees involved in interstate commerce should only be applicable to employees actually engaged in the movement of goods in interstate commerce.³⁴ Therefore, since Miller was not specifically engaged in the movement of goods in interstate commerce, the Federal Arbitration Act should apply,³⁵ and Miller must submit to arbitration.³⁶

III. LEGAL HISTORY

A. The Federal Arbitration Act's Exclusionary Clause read narrowly

Senior Judge Peck commented in *Bacashihua v. U.S. Postal Service*³⁷ that "[t]he proper interpretation of the exclusionary provision in 9 U.S.C. section 1 has been subject to much debate."³⁸ He further noted that one particular area of dispute involves whether the language "workers engaged in interstate commerce" requires the workers to be personally engaged in such interstate commerce.³⁹

A significant number of federal courts have read the statute as requiring the worker in question to be directly involved in interstate commerce, for example, employed in the transportation industries, in order for the exclusionary provision to take effect.⁴⁰ The seminal case on this issue is a 1953 Third Circuit decision, *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437*.⁴¹ In *Tenney*, the plaintiff brought suit for damages for breach of contract.⁴² The contract contained an arbitration clause, and defendants moved for a stay of suit

28. *Id.*

29. *Id.*

30. *Id.* at 219.

31. *Id.*

32. *Id.* at 217.

33. *Id.* at 218. The court specifically stated that fraud in the inducement relates to formation of the contract as a whole and not merely to the making of the arbitration agreement. Therefore, fraud in the inducement is a moot issue. *Id.*

34. *Id.* at 217.

35. *Id.*

36. *Id.* at 219. The Fifth Circuit affirmed the holding of the district court.

37. 859 F.2d 402 (6th Cir. 1988).

38. *Id.* at 404.

39. *Id.*

40. See also *Pietro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150*, 351 F.2d 576 (7th Cir. 1965); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984).

41. 207 F.2d 450 (3rd Cir. 1953).

42. *Id.* at 451.

pending arbitration.⁴³ Although both parties conceded that plaintiff's employees were engaged in the manufacture of goods for interstate commerce,⁴⁴ the court interpreted the statutory language as exempting from the statute "only those other classes of workers who are likewise engaged directly in the movement of interstate or foreign commerce."⁴⁵

In *Tenney*, the Third Circuit grappled with determining the meaning the 1925 Congress desired to attach to the phrase "workers engaged in foreign or interstate commerce."⁴⁶ The issue arose eighteen years later in *Dickstein v. duPont*⁴⁷ and *Erving v. Virginia Squires Basketball Club*.⁴⁸ *Dickstein*, a First Circuit decision, again involved an action for a breach of contract based on an agreement which contained an arbitration clause.⁴⁹ In construing whether a financial "registered representative" is involved in interstate commerce for purposes of the FAA, the court emphatically dismissed the plaintiff's claim, holding that the employee must be involved in, or closely related to, the actual movement of goods in interstate commerce.⁵⁰ *Erving*, a Second Circuit breach of contract case concerning basketball great Julius Erving,⁵¹ cited *Dickstein* with approval, explaining that due to the strong national interest favoring arbitration, there is no reason to give an expansive interpretation to the exclusionary language of section 1 of the FAA.⁵²

In 1984, the Seventh Circuit narrowed the definition of "workers engaged in interstate commerce."⁵³ *Miller Brewing Company v. Brewery Workers Local Union No. 9, AFL-CIO* involved a plaintiff wishing to set aside an arbitrator's award to the union.⁵⁴ The *Miller* court ultimately found that a multi-employer collective bargaining agreement with Milwaukee brewery workers did not exclude the issue from arbitration, as 9 U.S.C. § 1 had been held to be limited to workers employed in the transportation industries.⁵⁵

Two relatively recent decisions have affirmed the narrow construction of the section 1 exclusionary provision. In a Fifth Circuit case, *Rojas v. TK*

43. *Id.*

44. *Id.*

45. *Id.* at 452.

46. *Id.*

47. 443 F.2d 783 (1st Cir. 1971).

48. 468 F.2d 1064 (2d Cir. 1972).

49. *Dickstein*, 443 F.2d at 784-85. As a condition precedent to employment with duPont, *Dickstein* was required to submit an "Application for Approval of Employment" to the New York Stock Exchange. This application stated in part that all controversies arising out of employment or termination thereof would be settled by arbitration. The plaintiff *Dickstein* questioned the applicability of the FAA to his situation and the enforceability of the arbitration clause itself. *Id.* This issue also arose in *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 306 (6th Cir. 1991) and in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

50. *Dickstein*, F.2d. at 785.

51. *Erving*, 468 F.2d at 1066. The court, in view of the publicity surrounding "Dr. J," admitted to not being surprised at the amount of "perhaps pardonable exaggeration and bombast" in the claims of both parties. The court noted that Erving's counsel repeated, "ad nauseam," that the sum of \$500,000 was inadequate compensation for Julius Erving. *Id.* at 1066-67.

52. *Id.* at 1069.

53. *Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO*, 739 F.2d 1159, 1162 (7th Cir. 1984).

54. *Id.* at 1161.

55. *Id.* at 1162.

Communications, Inc.,⁵⁶ the court found that a radio disk jockey was not involved in interstate commerce for purposes of the FAA;⁵⁷ in *Asplundh Tree Expert Co. v. Bates*,⁵⁸ the Sixth Circuit found that an employment agreement between a consultant and his corporate employer was not employment vis-a-vis foreign or interstate commerce.⁵⁹ *Asplundh* noted that every circuit court that has addressed the question of the exclusionary clause since *Tenney* has advocated narrow construction; only one circuit has ruled differently.⁶⁰ *Asplundh* cites to *DiCrisci v. Lyndon Guaranty Bank*,⁶¹ a New York District Court case which provides rationalization of a narrow constructional approach. The reference to seamen and railroad employees suggests that Congress intended to refer to workers engaged in interstate commerce in the same manner as those aforementioned employees.⁶²

B. The Federal Arbitration Act's Exclusionary Clause read broadly

Despite *Asplundh's* assertion that the majority of appellate jurisdictions advocate narrow construction of the interstate commerce clause in section 1 of the FAA,⁶³ a few courts and justices, including several justices on the United States Supreme Court, have advocated a broad interpretation. In a 1954 case, *United Electrical Radio & Machine Workers of America v. Miller Metal Products, Inc.*,⁶⁴ the Fourth Circuit unequivocally rejected the *Tenney* court's reasoning and stated that the statute should be construed as applying to employees engaged in the production of goods for interstate commerce as well as employees engaged in the transportation of goods in interstate commerce.⁶⁵ Consequently, an action for breach of a no-strike clause in a collective bargaining agreement was excluded from arbitration.⁶⁶

In *Willis v. Dean Witter Reynolds, Inc.*,⁶⁷ the plaintiff, a former securities employee, wished to bring a sexual harassment suit against her former employer and forego arbitration.⁶⁸ Although the court held that discrimination claims were subject to the arbitration clause in the Securities Registration Form which plaintiff had executed,⁶⁹ a mention of section 1 of the FAA was made in dicta.⁷⁰ The court emphasized that because of Congress' determination in Title VII that any employer with fifteen or more employees necessarily implicates interstate commerce, such employment contracts would be included within the "contracts of employment"

56. 87 F.3d 745 (5th Cir. 1996).

57. *Id.* at 747.

58. 71 F.3d 592 (6th Cir. 1995).

59. *Id.* at 601.

60. *Id.* at 599. The one circuit that has ruled differently is the Fourth Circuit in *United Electrical Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954). *Id.* at 601. See discussion *infra* notes 63-66.

61. *DiCrisci v. Lyndon Guaranty Bank*, 807 F. Supp. 947 (W.D.N.Y. 1992).

62. *DiCrisci*, 807 F. Supp. at 953.

63. *Asplundh*, 71 F.3d at 599.

64. 215 F.2d 221 (4th Cir. 1954).

65. *Id.* at 224.

66. *Id.* at 221.

67. 948 F.2d 305 (6th Cir. 1991).

68. *Id.* at 306.

69. *Id.* at 312.

70. *Id.* at 311-12.

stipulation in section 1 of the FAA.⁷¹ Therefore, such employment contracts would be excluded from the FAA.⁷² The court added that it could see no reason why individual employment contracts involving employees within interstate commerce should be handled differently.⁷³

A landmark case on this issue, and a case that indicates some of the propensities of United States Supreme Court Justices, is *Gilmer v. Interstate/Johnson Lane Corp.*⁷⁴ Petitioner Gilmer was required by the respondent, his employer, to register as a securities representative with the New York Stock Exchange.⁷⁵ The registration application included a stipulation that Gilmer would be required to arbitrate any controversy arising from a termination of employment.⁷⁶ When Gilmer was terminated at age 62, he brought suit in New York District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act.⁷⁷ Respondent's motion to compel arbitration was denied by the district court; however, the court of appeals reversed.⁷⁸

Although the Supreme Court ultimately compelled arbitration,⁷⁹ the court's majority opinion never addressed the extent of Gilmer's association with interstate commerce.⁸⁰ Despite the fact that several amici briefs argued that section 1 of the FAA should exclude all "contracts of employment," the majority asserted that since Gilmer had failed to raise the issue in the courts below and had not presented the issue in the petition of certiorari, they need not address the issue.⁸¹

Justice Stevens, joined by Justice Marshall,⁸² dissented, primarily advocating that arbitration clauses contained in employment agreements should be exempt from FAA coverage.⁸³ Stevens believed the court should have addressed so crucial an issue *sua sponte*, as many amici had briefed and raised the issue.⁸⁴ In support of his viewpoint, Stevens cited Senate Judiciary Subcommittee hearings concerning the bill. He quoted the chairman of the drafting committee, who "assured the Senators that the bill 'is not intended [to] be an act referring to labor disputes, at all.'"⁸⁵ Stevens also cited Senator Walsh, another member of the subcommittee, who expressed his concern that "a great many of these contracts that are entered into are really not [voluntary] things at all."⁸⁶ As a result, Stevens explained that the exclusion in section 1 of the FAA should be interpreted to cover any agreements by

71. *Id.* at 311.

72. *Id.*

73. *Willis*, 948 F.2d at 312.

74. 500 U.S. 20 (1991).

75. *Id.* at 20.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Gilmer*, 500 U.S. at 35.

80. *Id.* at 25 n.2.

81. *Id.*

82. *Id.* at 36.

83. *Id.*

84. *Id.* at 36-38.

85. *Id.* at 39. These Judiciary Subcommittee hearings were held in or around 1923. *Id.*

86. *Id.*

the employer to arbitrate disputes with the employer arising out of such a relationship, especially when such agreements are conditions of employment.⁸⁷

It is apparent that at least one Supreme Court Justice has strong feelings about the construction of the exclusionary provision. This is pertinent, because technically, the Supreme Court has not yet ruled on this issue.⁸⁸ Presently, there are internal inconsistencies among the circuits as well. The Third Circuit, forum of the *Tenney* decision, has also found that the FAA by its own terms, does not apply to employment contracts.⁸⁹ Puzzlingly, this broad reading was handed down by the same circuit that had stated the exclusionary clause should apply only to workers directly engaged in the movement of “interstate or foreign commerce or work so closely related therein as to be in practical effect a part of it.”⁹⁰

IV. INSTANT DECISION

In *Miller v. Public Storage Management*, the court framed the issue in terms of whether the exclusionary provision should broadly apply to all employment contracts or narrowly apply to those employment contracts of workers directly engaged in the transportation of interstate commerce.⁹¹ The Fifth Circuit unequivocally utilized a narrow interpretation of the interstate commerce clause in section 1 of the FAA⁹² and upheld the district court’s ruling that the case should be submitted to arbitration.⁹³

This outcome was consistent with the leading Fifth Circuit case on the construction of the exclusionary clause, *Rojas v. TK Communications*.⁹⁴ The *Miller* court relied solely upon and reaffirmed the *Rojas* test, which had quoted *Asplundh Tree Expert Co. v. Bates*, stating that the exclusionary clause of the FAA applies only to employees “actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.”⁹⁵ The court concluded that “under *Rojas*, *Miller* is bound by the arbitration clause in her employment contract.”⁹⁶

In addressing the appellant’s argument, the court was compelled to address the applicability of *Lincoln Mills v. Textile Workers Union*,⁹⁷ and promptly dismissed its

87. *Id.* at 40.

88. *Id.* at 25 n.2. The Supreme Court did not address the scope of the section one inclusion in *Gilmer*. *Id.*

89. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1119, 1119-20 (3rd Cir. 1993). The case, in differentiating between contracts of employment and pension plan agreements, states that “[appellees] correctly note that the FAA by its own terms does not apply to employment contracts.” *Id.* However, this issue is not central to the holding and would probably be construed as dicta.

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

91. *Miller*, 121 F.3d at 217.

92. *Id.* at 218.

93. *Id.* at 219.

94. *Rojas v. TK Communications*, 87 F.3d 745, 748 (5th Cir. 1996).

95. *Miller*, 121 F.3d at 217.

96. *Id.* at 218.

97. 230 F.2d 81 (5th Cir. 1956).

relevance to the issue at hand.⁹⁸ In *Lincoln Mills*, the Fifth Circuit held a collective bargaining agreement was a contract of employment within the meaning of the FAA exclusionary clause and therefore was excluded from the FAA's application.⁹⁹ The court distinguished *Lincoln Mills* from the present case, emphasizing that *Lincoln Mills* raised concerns about the collective bargaining agreements between labor unions and large corporations.¹⁰⁰ Since Miller's contract was merely an agreement between an employer and an employee, *Lincoln Mills* was inapplicable and *Rojas* was applied.¹⁰¹

The court emphasized that Congress had failed to broaden the FAA section 1 exclusionary provision through statutory language.¹⁰² Since there had been no congressional modifications of the FAA, *Miller* explained that the courts should not undertake to expand the reach of the statute and that any broader interpretation of that clause would underscore its significance.¹⁰³

The *Miller* court does not address the often conflicting viewpoints in other circuits. With the exception of mentioning *Asplundh* in a string citation,¹⁰⁴ the court fails to discuss the *modi operandi* of any other circuits, including the conflicting viewpoints of the Fourth Circuit¹⁰⁵ and Justice Stevens' dissent in *Gilmer*.¹⁰⁶ Although there is no internal conflict within the Fifth Circuit concerning the exclusionary clause of the FAA, there are still conflicting interpretations existing among the other various circuits.

V. COMMENT

The majority rule concerning the exclusionary clause of the FAA is obvious. Each circuit court which has addressed the scope of the exclusionary clause, with the exception of the Fourth Circuit, has held that it should be interpreted in a narrow fashion.¹⁰⁷ *Miller* adheres to this viewpoint as well.¹⁰⁸

Although there exists a well-defined majority rule, this majority rule is not entirely immune from criticism. The issue has yet to be considered by the United States Supreme Court,¹⁰⁹ and at least one Justice has very forceful opinions contrary

98. *Miller*, 121 F.3d at 218.

99. *Lincoln Mills*, 230 F.2d at 86.

100. *Miller*, 121 F.3d at 218.

101. *Id.* The court distinguished the cases by explaining that the holding in *Lincoln Mills* that the FAA does not authorize arbitration in disputes arising under collective bargaining agreements does not conflict with the *Rojas* holding that workers not directly involved in the transport of goods in interstate commerce are subject to the requirements of the FAA. *Id.*

102. *Id.* at 217.

103. *Id.*

104. *Id.*

105. See *United Electrical, Radio & Machine Workers*, 215 F.2d 224.

106. *Gilmer*, 500 U.S. at 36.

107. See *Asplundh Tree Expert Co.*, 71 F.3d at 599.

108. *Miller*, 121 F.3d at 217. A broad interpretation of the exclusionary clause would undermine its significance. *Id.*

109. The court refused to address the issue in *Gilmer*. In particular, the court stated that since *Gilmer* did not raise the issue in the courts below and since it was not among the questions presented in the petition for certiorari, they would disregard the issue. *Gilmer*, 500 U.S. at 25.

to the majority rule.¹¹⁰ Thus, if the Supreme Court were to grant certiorari to consider the extent of the exclusionary rule, at the very least, a lively argument would be generated.

The legislative history surrounding the passage of the FAA was the topic of specific discussion by Stevens in his *Gilmer* dissent.¹¹¹ As previously mentioned, the chairman of the ABA committee responsible for drafting the FAA, assured the Senate Judiciary Subcommittee that the bill “is not intended [to] be an act referring to labor disputes, at all.”¹¹² The chairman unequivocally noted that the purpose of the act is to give merchants the right or privilege of sitting down and agreeing with each other as to what their damages are.¹¹³ Senator Walsh, expressed his concerns that

[t]he trouble about the matter is that a great many of these contracts are really not voluntary at all. Take an insurance policy; there is a blank in it. The agent has no power at all to decide it . . . it is the same with a good many contracts of employment. A man says, “These are our terms. All right, take it or leave it.” Well, there is nothing for the man to do except sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.¹¹⁴

Such comments suggest, in and of themselves, that the framers and constructors of the FAA did not mean for the act to apply to ordinary employment contracts.

Not only is the legislative history dissonant with the majority viewpoint, but the Senator’s comments acknowledge the modern dilemma of contract negotiations between understandably naïve employees and sophisticated employers. Two primary reasons exist for lack of employee bargaining power. First, a great number of employees, in exchange for receiving treasured work and employment opportunities, sign “form” contracts which are not challenged for fear of abdicating their job opportunities. Prospective employees are faced with the choice of either signing the contracts containing such clauses or refusing to sign them and finding other employment.¹¹⁵ If they attempt to argue over a seemingly meaningless arbitration clause, the employer may simply eliminate that employee from the running.¹¹⁶ Such a lack of bargaining power is all too likely in today’s saturated workforce. A second reason these arbitration clauses should be viewed as suspect is their omnipresence

110. *Id.* at 36. (Stevens, dissenting).

111. *Id.* at 36-38.

112. *Gilmer*, 500 U.S. at 39 (citing Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923)).

113. *Id.*

114. *Id.*

115. See Anthony J. Jacob, *Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena*, 30 J. MARSHALL L. REV. 1099, 1118 (1997), (citing Wade Lambert, *Legal Beat, Employee Pacts to Arbitrate Sought by Firms*, WALL ST. J., Oct 22, 1992 at B1).

116. Recall Senator Walsh’s comments in discussing the FAA: “These are our terms. All right, take it or leave it.” *Gilmer*, 500 U.S. at 39.

within boilerplate contractual language. This language is often difficult for a layperson to understand and can lead to claims of unconscionability.¹¹⁷

For these dual reasons, Congress should not perpetuate the unequal distribution of power by authorizing near-total compliance with these often biased arbitration clauses. Granted, the FAA establishes a federal policy favoring arbitration;¹¹⁸ however, such a policy should not come at the expense of relatively powerless employees.

A semantic quagmire that accompanies a narrow reading of the exclusionary clause involves its compatibility with section 2 of the FAA. Section 2 of the FAA reads, in part, “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable.” This FAA section has been traditionally construed as broadly as Congress’ power to regulate under the commerce clause.¹¹⁹ Many courts have had no problem construing section two’s “commerce” as being overly broad, yet have expressed disdain at broadening the exclusionary clause’s definition of “interstate commerce.”¹²⁰ Mired by this inconsistency, other courts have simply applied the broad view of interstate commerce to both sections.¹²¹ The Fourth Circuit invoked uniformity, claiming “[t]here is no reason to think that it was not intended that the exception incorporated in the statute should not reach also to the full extent of its powers.”¹²²

Academics also have promoted logical uniformity within the confines of the FAA. Professor Cox of Harvard Law School has stated that “[o]ne should not rely on one policy in interpreting the phrases relating to commerce and an opposite conception in reading ‘contract of employment’.”¹²³ Cox relies upon Congressional intent in establishing a uniform definition, stating that “[t]oday Congress probably uses these phrases as words of art, but it is hard to believe that they were so understood in 1924 [as possessing different meanings], long before such precise distinctions were introduced by the Court.”¹²⁴ He concludes that the two phrases should be made coextensive if the interpretation of the statute is to be guided by a policy distrustful of judicial intervention.¹²⁵

117. Unconscionability is defined by the U.C.C. as “whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.” U.C.C. 2-302, Comment 1, cited in FARNSWORTH, CONTRACTS § 4.28 (2nd edition, 1990).

118. *Moses H. Cone v. Mercury*, 460 U.S. 1, 24 (1983).

119. *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986), (stating that concerning the FAA, “the requirement that the underlying transaction involve commerce is to be broadly construed as to be coextensive with congressional power to regulate under the Commerce Clause.) See also *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986) (mentioning in part that commerce under the FAA includes all contracts “relating to interstate commerce”)

120. The *Miller* court follows such a precedent. *Miller*, 121 F.3d at 217.

121. *United Electrical, Radio & Machine Workers of America*, 215 F.2d at 224.

122. *Id.*

123. Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 599 (1954).

124. *Id.* at 598.

125. *Id.*

VI. CONCLUSION

The topic presented here is pertinent not only because of the arbitration issues it raises, but also because of the recent overhauling of the Commerce Clause since *United States v. Lopez*.¹²⁶ Interstate commerce is hardly a stagnant issue, it is constantly being refined and redefined, and its definition is often controversial.

The majority rule of narrow construction of the FAA exclusionary provision is clearly demarcated by the federal appellate courts. However, this analysis has fallen upon sharp criticism by scholars, academics, and even members of the United States Supreme Court. Uniformity of definition seems to be the major concern of the academics; interpretation of the legal history seems to be the major concern of the legal practitioners and judges. For now, the narrowly conceived definition is firmly rooted in the majority of federal courts.

Notwithstanding *Lopez*, the FAA needs some internal consistency concerning its application of interstate commerce. Although *Lopez* has narrowed the definition of interstate commerce, this limitation has hardly reached the rigid proportions given to the FAA exclusionary clause by nearly all the Appellate Circuits.¹²⁷ The majority of the courts' definition of employees in interstate commerce in the exclusionary clause as "those employees directly engaged in interstate commerce," such as seamen and railroad employees, leads to ancillary problems. What if an employee works as a bus driver for a company that normally offers interstate transportation, but he or she does not actually drive for those trips? What about a railroad employee who loads new automobiles onto trains, half of which remain in the state and half of which are transported over state lines? Must expensive and irrelevant discovery be done to determine whether the employee is involved in interstate commerce? Professor Cox has provided an easier and workable alternative; the two phrases should be made coextensive if the interpretation of the statute ought to be guided by a policy distrustful of judicial intervention.¹²⁸

MATTHEW POTTER

126. 514 U.S. 549 (1995). In *Lopez*, the Supreme Court abandoned the traditional broad definition of commerce and adopted a more narrow one that focused upon economic activity that substantially affects interstate commerce.

127. The one exception is the Fourth Circuit. See note 107 and the accompanying text.

128. See note 123 and accompanying text.

