"Workers’ Contracts" Under The United States Arbitration Act: An Essay in Historical Clarification

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The United States Arbitration Act exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The prevailing judicial view holds the provision to exempt only transportation workers. Professor Finkin argues that this view proceeds from a total want of appreciation for the circumstances surrounding the exemption’s submission and passage. He argues that once the historical context is understood, the Act should be given its plain meaning—as an exemption of all contracts of employment over which Congress has interstate commerce power.

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The decision of the United States Supreme Court in Gilmer v. Interstate/Johnson Lane Corp.1 has stimulated a burst of interest in unilaterally promulgated employer arbitration systems that might largely supplant judicial fora for labor protective law.2 These efforts have rested upon the confident assumption that the United States Arbitration Act3 (U.S.A.A.) would apply to most individual employment contracts. This

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issue, however, was expressly reserved by the *Gilmer* Court (over the dissent of Justices Stevens and Marshall) and remains as yet without a definitive resolution. Why such an important issue should remain unresolved with respect to a statute now seventy years old is a bit mysterious.

The U.S.A.A. renders enforceable in federal court a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce" providing for the arbitration of controversies "arising out of such contract or transaction." The Act defines "maritime transaction" and "commerce" rather broadly, but adds the following exemption — 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.

This exemption has long vexed the courts and commentators: Does it exempt all contracts of employment over which Congress had interstate commerce jurisdiction? Or is the statute limited to interstate transportation workers? Alternatively, does the exemption cover something entirely different from individual employment contracts, such as collective bargaining agreements or agreements to arbitrate future contractual terms? The reach of the exemption is best understood in historical context; but until now that context has been at once ignored and misrepresented. What follows is a clarification of the U.S.A.A.'s historical context.

I
THE HISTORY OF THE EXEMPTION

The American Bar Association's Committee on Commerce, Trade and Commercial Law, acting upon an ABA resolution of 1920, drafted a proposed federal arbitration act in 1921. The proposal, which had the strong support of Secretary of Commerce Herbert Hoover, was part of a package of three measures, including a uniform state law and an international treaty, designed to foster commercial arbitration:

In the opinion of your committee, the adoption of the international treaty, the federal statute and the uniform state statute will put the United States in the forefront in this procedural reform. It will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts. In pressing forward this improvement in the law, the Association will align itself with the best economic and

4. *Id.* at § 2.
5. *Id.* at § 1.
commercial thought of the country and will do much to overcome the criti-
cism of the law's delays.\footnote{Id. at 295. The history of the Act, the ABA's work on it, and its fate at the hands of the United States Supreme Court is deftly limned by Ian R. Macneil in his book \textit{American Arbitration Law} (1992).}

The final version of the ABA's proposed bill was introduced in the United States Senate and House in late December, 1922.\footnote{H.R. 13522, 67th Cong., 4th Sess. (1922).} The ABA's proposal quickly drew the attention of Andrew Furuseth, President of the International Seamen's Union (ISU). It is not surprising that it should have done so. Furuseth was a noted figure in American labor history as the long-time leader of the ISU and in the American Federation of Labor (AFL) until the mid-1930s.\footnote{See generally \textit{Hyman Weintraub, Andrew Furuseth: Emancipator of the Seamen} (1959).} He was legislative representative for the AFL from 1894 to 1901 and a close ally of Samuel Gompers. His labor injunction bill, introduced by Senator Shipstead in 1922, stimulated an alternative draft that became the Norris-LaGuardia Act of 1926 against, it might be added, Furuseth's bitter opposition.\footnote{Id. at 187-90; \textit{Irving Bernstein, The Lean Years: A History of the American Worker 1920-1933}, 400-03 (1960).} He spearheaded the Seamen's Union's active legislative agenda,\footnote{In addition to \textit{Weintraub, supra note 9, a chronology of Furuseth's legislative activities is set out in \textit{A Symposium on Andrew Furuseth 28-44} (1948) [hereinafter Symposium].} As legislative agent for the AFL, Furuseth fought, unsuccessfully, to have seamen exempted from the Erdman Act, apparently to the chagrin of the railway brotherhoods. \textit{Phlip Taft, The A.F. of L. in the Time of Gompers} 292 (1957).} the greatest achievement of which was the LaFollette Seamen's Act of 1915, but which also included a number of other measures including the Jones Act of 1920. In sum, Furuseth was a well-known and respected figure in Congress, having appeared before its committees and having actively lobbied it for more than two decades. In addition, he was vigilant for any measure that might adversely affect workers' rights—especially the rights of seamen.\footnote{Id. at 84: To use the necessities of men as in H.R. 13522, whether such necessities be individual or arising out of family relations, is especially reprehensible because it makes need, hunger and want, the basis of contracts which the American sovereign may legally be able to make, and which a misused equity power will enforce but which is an abdication of such sovereignty for the purpose of obtaining bread for self or family...}

Furuseth prepared an analysis of the proposed Arbitration Act and presented it to the Annual Convention of the Seamen's Union on January 13, 1923, under the heading "Compulsory Labor."\footnote{Id. at 203-05.} The Convention agreed to oppose the law in two resolutions. One dwelt upon the "compulsion" inherent in the Act.\footnote{Id. at 84: To use the necessities of men as in H.R. 13522, whether such necessities be individual or arising out of family relations, is especially reprehensible because it makes need, hunger and want, the basis of contracts which the American sovereign may legally be able to make, and which a misused equity power will enforce but which is an abdication of such sovereignty for the purpose of obtaining bread for self or family...} The other expressly adopted the detailed analysis Furuseth submitted. He also sought and secured the AFL's opposition to the bill.
The subcommittee of the Senate Judiciary Committee held hearings on the bill on January 31, 1923. Furuseth did not testify, but the ABA representative, W.H.H. Piatt, adverted to Furuseth’s objection, of which the members of the subcommittee may have already been aware:

Senator Sterling. Has your attention been called to the letter I received from a constituent of mine, Mr. C.O. Bailey, a lawyer at Sioux Falls?

Mr. Piatt. No, sir; but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen—

Senator Sterling. Mr. Furuseth?

Mr. Piatt. Yes; some such name as that. He has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, “but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.” It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.15

Secretary Hoover also wrote in support of the bill and proposed a similar exemption.16

Furuseth’s objection and the legislative response adopted by the Senate Judiciary Committee were subsequently noted in the ABA Committee’s Report for 1923:

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

but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce. Various suggestions were made by the Committee on the Judiciary, and to meet these suggestions, but without changing the substantial form of the bill, it was amended. . . .

16. Id. at 14; see infra text accompanying note 58.
Senator Sterling and Congressman Mills both promise hearty cooperation in pressing the bill to passage in the next Congress.\textsuperscript{17}

The 1924 Convention of the Seamen’s Union called attention to Furuseth’s “splendid analysis” of the bill the year before and called for continued cooperation with the AFL in opposing any measure that would have the lamented evils.\textsuperscript{18} In the event, the 1924 exemption was satisfactory to both the ISU and the AFL (as the latter reported in the Proceedings of its Annual Convention of 1925\textsuperscript{19}) and it became law.

The foregoing is on the well-thumbed record and recited in the literature. What remains unexamined is why Furuseth (and the unions acting at his urging) opposed the proposed law as one providing for “compulsory labor.” The ABA’s representative gave the tersest account to the Senate subcommittee, and the ABA Committee supplied an equally terse, if somewhat different, account later in its annual report. By contrast, Furuseth’s published analysis of the arbitration bill was expressly endorsed by the ISU and was the public basis for his (and the union’s) opposition. That analysis is appended in full at the close of this essay. It is necessary, however, first to put his objections into context; indeed, the lack of context may have contributed over the years to the neglect of Furuseth’s precise objections.

Under a statutory scheme enacted in 1790,\textsuperscript{20} consistent with maritime practice in Europe as well as in the new republic, every master of a ship bound for a foreign port was required to “make an agreement, in writing or in print, with every seaman or mariner on board such ship or vessel” in a statutorily specified form, and addressing statutorily required subject matter. These agreements had to be dated and signed by the seaman and master, the latter before the seaman signed. The statutory scheme provided judicial enforcement of these “shipping articles,” and penalties for violations of the Act (e.g., for shipping without agreement, for failure to post a copy of the agreement on the ship, etc.).\textsuperscript{21} In other words, at the time the U.S.A.A. was being considered, seamen were the only employees required by federal law to have individually executed employment contracts.

Consequently, the ease with which an arbitration provision could be applied to seamen—simply by inserting a boilerplate arbitration clause into a printed form shipping article—was noted in Furuseth’s analysis and stressed in his presentation of it to the ISU Convention:

\begin{itemize}
  \item \textsuperscript{17} 46 A.B.A. Rep. 287 (1923).
  \item \textsuperscript{18} 27 Proc. Ann. Convention Int’l Seamen’s Union Am. 100 (1924).
  \item \textsuperscript{19} 45 Proc. Ann. Convention Am. Fed’n Lab. 52 (1925) (under the heading “Commercial Arbitration”).
  \item \textsuperscript{20} Act of July 20, 1790, Ch. 29, 1 Stat. 131 (government and regulation of seamen in the merchant’s service).
\end{itemize}
PRESIDENT FURUSETH: The Chair wants to especially call your attention to this matter with reference to the seamen. You are more likely to understand and get a full meaning of that than the rest of it.

You know that there is not a set of articles signed that has not in it some kind of rider, as I call it, something about this, that, or the other thing. I collected them together as near as I could and put them into the proceedings at the Philadelphia Convention and referred to them again at other Conventions. Now some of those riders are not prohibited plainly by law. There is nothing in the law that deals with it, but it goes to the very root of things all the same and the men are signing those riders right and left. I cannot pick up a set of articles anywhere but there is some such rider on it. And then there is usually at the end of the article, or somewhere in the article, a provision that any dispute arising shall be referred to the shipping commissioner and settled by him.22

Furuseth’s analysis then dwelt upon several evils of including an arbitration provision in the form contract. Notably, he feared that arbitrators would order employees to work pursuant to the terms of the contract, i.e. to order specific performance of the contract, whence the term of “compulsory labor.” This was a deep and abiding concern of Furuseth’s, abetted by the United States Supreme Court’s decision in Robertson v. Baldwin,23 which had allowed sailors who jumped ship to be detained and forcibly returned to work. That evil was eradicated by the Seamen’s Act of 1915. It gave seamen the right to half their wages at every port of call, the right to leave the ship if payment were not made, and provided for forfeiture of wages instead of forcible return in case of desertion. Furuseth feared that physical coercion would return by arbitral order:

The seaman having made the contract to serve must serve. The railroad man having entered into a contract to serve with an arbitration clause inserted must continue to serve; because such contract becomes through this law, if enacted, “Valid, enforceable, irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.”24

Were that the sole objection, it might be possible to limit the exemption to seamen alone, joined, perhaps, by the adverted to railroad men. However, Furuseth’s objection ran much deeper, to the general substitution of arbitrators for the courts in the vindication of individual employee rights, both contractual and statutory. Furuseth held the ideal of an impartial judiciary as almost an article of faith, possibly derived from the judicial view of seamen as “wards of the admiralty” entitled to solicitude. Under his personal direction, the ISU had used litigation extensively as a means of vindicating seamen’s rights, especially under the Seamen’s Act. His draft of the anti-injunction bill did not limit judges, who were viewed by others in or-

23. 165 U.S. 275 (1897).
organized labor as biased or hostile, by denying them the power to issue labor injunctions (as did Norris-LaGuardia); instead, it redefined “property” in such a way that judges, faithful to the task, would limit themselves. At a time when some federal judges were publicly reviled for anti-labor injunctions, Furuseth never openly criticized them. He saw judges as public officers, charged with doing justice. He saw arbitrators here as creatures of contracts unilaterally dictated by employers, charged with enforcing the rights of property:

It is, of course, presumed that the arbitrator will do justice, but he must primarily see that the contract is carried out, whether it has reference to the labor of procuring, making, transporting or delivering commodities, or the labor of repairing, building, or erecting any structure, or in the work performed to those ends by individual workmen or mechanics. The contract being property, the arbitrator must see, that such property is protected. Where he can use any judgment he will be expected, and he will feel, that it is his particular duty to protect the existing status. Where the question is one of the condition of the laborers or mechanics, his very humanity will induce him to err, if at all, on the side of the employer, because half a loaf is better than no bread . . .

In addition, Furuseth feared that such arbitration provisions would reach the labor protective laws the seamen had fought to secure: the “seaman’s right to wages [by contract and under the Seamen’s Act], to food [under maritime law], to damages under the Jones Act, together with his present right to quit work in harbor becomes void. With the seamen the machinery is there” — that is, by inserting a boilerplate arbitration clause into the seamen’s form contracts would—to eviscerate these protections by eliminating the role of the courts in enforcing them. But, such machinery could readily be used by any employer, simply by insistence upon the exe-

25. As Irving Bernstein explained:
[Senator] Shipstead had little interest in the bill that bore his name. He introduced it as a favor to its author, his friend Andrew Furuseth, president of the International Seamen’s Union. That grizzled, self-educated, and obstinate sailor had devoted a quarter century to delving into the history of chancery. He had concluded that the equity courts issued injunctions on a strained definition of property. If intangible property rights were excluded by definition, Furuseth argued, there could be no labor-injunction problem. This idea had been advanced originally by Thomas S. Spelling, a writer on equity, and had been picked up early in the century by Gompers and Furuseth. It had found its way into the stillborn Pearre anti-injunction bill of 1908 and lay behind the ill-fated concept of the Clayton Act that labor is not a commodity. In the twenties Furnseth, whose mind changed slowly if at all, persuaded Shipstead to make another try.

Bernstein, supra note 10, at 395. As Furuseth’s biographer further observed, Furuseth did not agree with those who attacked the courts for usurping power, for he felt that the courts had correctly interpreted the Sherman Antitrust Act. The attack should be made on Congress, which had the power to limit the equity power of the courts to jurisdiction over property, but not over labor.

Weintraub, supra note 9, at 186.

26. Silas B. Axtell, Introductory Article, in Symposium, supra note 11, at 7, 12. See also Weintraub, supra note 9, at 97.

ution of a short form to that effect, as employers in the coal, hosiery, street railway and shoe industries had insisted upon the signing of “yellow dog” forms at the time.  

Consequently, Furuseth’s concern was not parochial in that regard, even though seamen were virtually unique in the extent to which they enjoyed both contractual and statutory protections. As the above shows, Furuseth argued to the application of the proposed law—and so of the evils he perceived—to workers other than seamen or the transportation trades: to workers in building construction and repair, to workers engaged in the procuring and making of commodities as well as in the delivering and transporting of them. Again,

So much for the seamen. (Was it the Protective and Indemnity Insurance lawyers that drew this bill?) Hardly. There were others. The bill applies to all workers in interstate and foreign commerce and to others, that are not necessarily workers — to shippers and travelers.

And, in referring to the imbalance in power that would drive workers to accede to such boilerplate arbitration provisions:

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

Consequently, when the 1924 ISU Annual Convention again endorsed Furuseth’s analysis, it resolved again to continue its cooperation with the AFL “in preventing the enactment of any measure designed to fasten any species of compulsory arbitration upon any group of workers in America.”

II

THE INTERPRETIVE Muddle

By its plain meaning, the Act would seem to exempt employment contracts of any worker over whom Congress has interstate commerce jurisdiction. Yet the interpretation of the exemption by the courts and commentators remains a muddle because the interpreters, lacking an appre-

28. Bernstein, supra note 10, at 149. See id. at 131 (under the authority of Hitchman Coal & Coke v. Mitchell, 245 U.S. 229 (1917), the courts sustained the “notorious Red Jacket yellow dog”—a form that provided that, “I am not now a member of the United Mine Workers . . . and I enter this employment with the understanding that the policy of the company is to operate a nonunion mine . . . and would not give me employment under any other conditions.”). The Arbitration Act did not require a complete written contract; it required only a “written provision” providing for arbitration in an interstate “transaction.” Accordingly, a form arbitration provision in an otherwise oral at-will hiring would come under the Act if the employment were in interstate commerce and not otherwise exempted.


30. Id. at 203-04 (emphasis added).

ciation of the historical context, have felt free to provide ahistorical (and in some cases anachronistic) "explanations" in support of their conclusions. Note, for example, the Fourth Circuit's reasoning:

It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union [sic]; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute. The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisions. No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by the collective bargaining agreements.32

The court actually did get a bit of it right, if inadvertently. Furuseth believed that arbitration provisions agreed to by weak labor organizations might be held to bind the individual member because the individual employment contract incorporated the terms of the collective bargaining agreement. (See Furuseth's analysis appended at the close).33 But the entire thrust of his critique was based on the individual contract, not the collective agreement, and so the court's conclusion could not have been more wrong.34

The prevailing view is that the exemption does reach the individual employment contract, but only those of seamen, railroad and other workers engaged in like work, i.e. the physical movement of goods in interstate commerce.35 That distinction found its fullest development in the Third


33. It should be noted that in 1921 the ship owners refused to renew their agreement with the ISU or to enter into any further collective bargaining with it, and the union's membership fell from 115,000 in 1920 to 50,000 in 1921. Bargaining did not resume until a strike on the Atlantic Seaboard in 1934. See Short History of the International Seamen's Union, in Symposium, supra note 11, at 30, 32.

34. Alas, the leading treatise on point shares this erroneous conclusion based solely on the record of the hearings of January 31, 1923. See Ian R. Macneil et al., Federal Arbitration Law § 11.22 (1994).

35. The Sixth Circuit, in dictum, stated that the exemption applied more broadly to all workers engaged in interstate commerce, Gatiff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944), a statement which it later reiterated. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311 (6th Cir. 1991). It has now repudiated that position to opt for the narrower reading. Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600-01 (6th Cir. 1995). Cases supporting the narrower reading include: Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, n.3 at 53 (7th Cir. 1995); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971); Tenney Eng’g, Inc. v. United Elec., Radio & Mach. Workers, Local 437, 207 F.2d 450, 452-53 (3d Cir. 1953) (en banc); Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952, 957-58 (D. Md. 1994); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1240-42 (D.N.J. 1994). However, in dictum the Crawford Circuit
Circuit's frequently cited decision in *Tenney Engineering v. United Electrical Workers*. Judge Maris briefly reviewed only the ABA Committee's Report and then concluded:

It thus appears that the draftsmen of the Act were presented with the problem of exempting seamen's contracts. Seamen constitute a class of workers as to whom Congress had long provided machinery for arbitration. In exempting them the draftsmen excluded also railroad employees, another class of workers as to whom special procedure for the adjustment of disputes had previously been provided. Both these classes of workers were engaged directly in interstate or foreign commerce. To these the draftsmen of the Act added "any other class of workers engaged in foreign or interstate commerce." We think that the intent of the latter language was, under the rule of ejusdem generis, to include only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

The first footnote adverted to the availability of arbitration by shipping commissioners; the second referred to arbitration for railroad workers under the Transportation Act of 1920 and the later Railway Labor Act of 1926.

In essence, the court reasoned backward and so got it wrong. If Congress excluded seamen, railroad, and like transportation workers—but only seamen, railroad and like transportation workers—it must have done so for a reason; and because the former two categories had federally legislated arbitration available, then, the court reasoned, Congress must have excluded them—and so they alone—because there was no need to make arbitration enforceable for them.

On its own terms, this explanation would not have been applicable to the other transportation workers, the interstate busmen and truckers "rounded out" by the court's account. The interstate transportation of goods and passengers by motor carrier was not an insignificant part of interstate commerce; and the visibility of these enterprises politically was heightened by the legal contest over their regulatory status at the time. In

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*seemed to suggest that all employment contracts were exempted. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1120 (3d Cir. 1993). See also* *Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 120-23 (N.D. Miss. 1995).*

36. 207 F.2d 450 (3d Cir. 1953).
37. *id.* at 452-53.
39. *Transportation Act of 1920, Ch. 91, § 301, 41 Stat. 469 (1920) (repealed 1926).*
40. *See John J. George, Motor Carrier Regulation in the United States 215 (1929)*, reporting that in 1926, 25,000 trucks and over 3,000 buses engaged in interstate motor commerce.
41. *Id. See also* *Buck v. Kuykendall, 267 U.S. 307 (1925).*
sum, the exemption of these workers could not be justified by the availability of any alternative arbitration system.

More important, there is no hint historically that Congress took note of these arbitration systems at the time; but Furuseth did. In presenting the matter to the union, Furuseth mentioned that existing law made arbitration by shipping commissioners available; indeed, he noted that such a rider had become "rather usual" in the seamen's articles, and went on to observe that arbitration in foreign ports was provided for before the United States consuls. There was nothing to be done about the consuls, but of the shipping commissioners Furuseth had this to say:

Now the consuls find this thing in the articles, the average ship commissioner finds it in the articles and they without any hesitation say, "Well, you signed this kind of a thing and you stay by it," and you have no remedy in the case of consul because you have no court to go to. In the case of shipping commissioners you have a remedy if you have the necessary money to get a lawyer and take it to the court, but if this bill is passed and this system adopted you could not get to the court at all. You will go nowhere except to the shipping commissioner and in the foreign countries to the consul. And that is all there is to it. You cannot get anywhere because the road is blocked by legislation.43

Like the Fourth Circuit in Miller Metal Prods., the Third Circuit in Tenney Engineering got it wrong. Furuseth's fear was not for the maintenance of existing arbitration machinery, but that the courts, in which he had such faith and which he thought available even after a decision by a shipping commissioner, would be supplanted for the vindication of workers' rights. This was made plain at the outset of his published analysis:

Let a clause to arbitrate be placed in any contract, and any dispute about the meaning and enforcement of the contract must be referred to arbitration, and the Court with all the Saxon rules of procedure and constitutional guarantees [sic] ceases to operate.46

42. At the time the Arbitration Act was being considered, Furuseth engaged in extensive correspondence with Albert Thomas, Director of the International Labor Office in Geneva, concerning a draft international code for seamen. The exchange was occasionally vituperative; and some of it was reprinted in the Congressional Record at the behest of Senator Jones. In a letter of December 26, 1924, Furuseth discussed the role of the consuls as arbitrators of seamen's rights in the context of the proposed code:

The public officials dealing with the seamen would, of course, be the consuls, and my experience with nearly all of them either through my own personal contact or the contact of my ship-mates, has been such that we seamen nearly always expect the consul to use his power to sustain the master. And after all, that is reasonable because he is there to look after trade and commerce mainly and because he is usually saturated with the ideas that a seaman is lying in order to be permitted to leave his vessel.


45. Tenney Eng'g v. United Elec. Workers, 207 F.2d 450 (3d Cir. 1953).

And reiterated in his peroration:

Section 11 provides for review of his [the arbitrator's] action, his procedure and his award, if it should be leaning too much to the side of weakness [i.e. on behalf of the worker], it may be set aside by those who have the money to provide the cost of the process, together with the attorneys' fees. The bill seems to provide for all eventualities. It is evidently drawn with great care and by lawyers of great abilities; but its purpose is terrible. If it ever should (under the displeasure of God, visited upon the American people) become the law, it will destroy all that we cherish as American ideals. It uses the individual freedom and sovereignty of the American citizen to destroy all real human freedom in America.47

He restated this objection in a contemporaneous exchange with the Director of the International Labor Office (ILO) over the content of a proposed international code for seamen:

What you call a "party agreement" we seamen call "riders," and they are inserted in the articles of agreements for the purpose of nullifying the law or to tie the seaman up to something that the owner thinks is to his advantage. Among such riders are some to compel the seaman to consent that any disagreement between him and the master shall be arbitrated by those who conduct the shipping offices or consuls or commercial agents in lieu of taking the disputes before an admiralty court, where by custom and justice it belongs.48

The Tenney Court also offered a textual distinction: The Act includes all contracts "evidencing a transaction involving commerce" but excludes employment contract of workers "engaged in ... commerce."49 By its terms, the exclusion seems narrower than the coverage and, the court said, had Congress meant the two to be coextensive, it would have used the same words.50 The Sixth Circuit has recently adopted this view.51

Regarding the former clause, the United States Supreme Court has more recently interpreted the word "involving" to be as broad as the word

47. Id. at 205.
48. Letter from Andrew Furuseth, President of the ISU, to Albert Thomas, Director of the ILO (Feb. 28, 1924), reprinted in 65 CONG. REC. 7234 (1924) (emphasis added). Interestingly, Furuseth's letter would have crossed in the mail with Thomas's of the same date:

I entirely agree that it is desirable to prohibit clauses laying down, before disputes have actually occurred, that disputes are to be referred to an arbitrator. There is perhaps an omission in the Code in this respect. In most European countries, and in France in particular, such a clause is legally null and void; and for this reason it probably did not occur to the authors of the draft Code to prohibit it expressly. The Office therefore proposes to introduce the following clause in the draft Code after Article 14.

Prohibition of arbitration clause

"Any clause in the articles of agreement by which the parties agree not to accept the competence of the regular courts, or to submit to arbitration disputes relating to the application and termination of the agreement shall be null and void."

Letter from Albert Thomas to Andrew Furuseth (Feb. 28, 1924), reprinted in 28 PROC. ANN. CONVEN- TION INT'L SEAMEN'S UNION AM., supra note 42, at 133.
49. Tenney Eng'g, 207 F.2d at 454.
50. Id. at 453.
"affecting" commerce, i.e., as expressing the full reach of the Commerce power. Thus the argument is that employees referred to as "engaged" in commerce had a well developed meaning limited to those who either transported goods or were so closely connected to such transport so as to be practically part of it. Employees who "affected" commerce included not only transport workers "but also all workers involved in the manufacture or production of interstate goods." Consequently, the argument runs, when Congress chose to exempt only the former, it left the latter covered by the Act. It makes no difference, then, whether the distinction is between "involving" and "engaging" or "affecting" and "engaging." The idea is that the latter was, and was meant by Congress to be narrower than the former.

The difficulty is that the distinction has no support either in the law of the period or in the history of the Act. On the law, there is no doubt that by the 1940s the Supreme Court had expanded the Commerce power to reach a class of workers who "affected" commerce even though they were not engaged in it; but it is dubious, at the very least, that that distinction was well recognized in 1924. As Archibald Cox has pointed out:

At that time no one supposed that there was federal power to regulate employment relations in industries producing goods for commerce or industries affecting commerce, and the phrase "any other class of workers engaged in interstate or foreign commerce" might well have been consid-

53. Tenney Eng'g, 207 F.2d at 453.
55. The Tenney court relies entirely on cases from the 1940s to support the distinction. So, too, does the above Note, supra note 54. The only contemporary authority given by the Note for the narrower class is Shanks v. Delaware, Lackawanna & Western R.R. Co., 239 U.S. 556 (1916), decided under the Federal Employers' Liability Act of 1908, id. at 2177-78, but the Shanks Court made it quite clear that the Act spoke "of interstate commerce, not in a technical sense, but in a practical one." 239 U.S. at 558. See, e.g., Second Employers' Liability Cases, 223 U.S. 1, 48-49 (1911). Thus in Pedersen v. Delaware, Lackawanna & Western R.R. Co., 229 U.S. 146 (1913), upon which the Shanks Court relied, the question was whether an employee who was injured while repairing a bridge was "engaged" in interstate commerce at the time of his injury. The Court held that he was:

[I]ndependently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?

Id. at 151-52 (emphasis added). In addition, in the first Employers' Liability Cases, 207 U.S. 463 (1908), the Court used several examples of workers who could not be legislated for by Congress — the railroads' clerical staffs, for example — not because they were not "engaged" in railroading but because they were "wholly outside the power of Congress." Id. at 498 (emphasis added). In other words, it is far from clear that there was a well understood category of workers who "affected" commerce but were not "engaged" in it at the time.
On the ostensible choice Congress made by employing the narrower term for the exemption, the argument has to explain why the Congress chose to make such an anomalous distinction. This returns necessarily to the history of the exemption; but the textual argument avoids that history.

The history of the exemption will be returned to shortly, but before doing so yet another distinction has been conjectured that ought be addressed—that, “The section 1 exclusion was inserted into the statute apparently in response to objections from organized labor that the FAA might be construed to displace collective bargaining in favor of compulsory interest arbitration.” The only arguable foundation that could be offered for this supposition is Mr. Piatt’s mention to the Senate subcommittee of what he took Furuseth’s objection to be, that the bill would compel “arbitration of the matters of agreement between the stevedores and their employees.” We cannot know what, if anything, Furuseth communicated to Mr. Piatt in conversation or in writing, and it is conceivable that this consideration

57. As the Amicus Curiae Brief of the AFL-CIO in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), pointed out:
[I]nterpreting “engaged in commerce” to be narrower than “involving commerce” would create the following paradoxical result: those employment contracts most involving interstate commerce, and most certainly within the Commerce Clause jurisprudence of the day (i.e. contracts in the transportation field), would fall outside the Act’s coverage; those with less direct connection to interstate commerce—viz., those as to which the constitutional authority of the day indicated that federal regulation was suspect—would fall within the Act’s affirmative coverage and would not be exempt.

Id. at 14 (emphasis in original). I am indebted to Marsha Berzon, Esq., principal author of the brief, for bringing this brief to my attention.
58. Cf. Allied-Bruce Terminex Cos. v. Dobson, 115 S. Ct. 834, 840 (1994) (“[N]othing suggests that the drafters of the FAA looked to these cases [distinguishing “involving” from “affecting”] as a source.”).
59. Samuel Estreicher, Arbitration of Employment Disputes Without Unions, 66 Chi.-Kent L. Rev. 753, 761 (1990) (emphasis added). The main source cited is Herbert Burstein, The United States Arbitration Act—A Reevaluation, 3 Vill. L. Rev. 125, 130 (1958), who mentions the ISU’s and AFL’s actions but does not discuss their substance, and the later proceedings on the bill. Upon this—and this alone—conjecture becomes fact:
Since there was very little arbitration of “rights” disputes under collective bargaining agreements at the time—something organized labor, in any event, generally favored—labor’s opposition was aimed at what it feared might be government-imposed arbitration of “interests” disputes in derogation of its right to strike. This was consistent with the AFL’s general opposition during this period to “compulsory arbitration, compulsory investigation of industrial disputes, industrial courts, and similar devices which involve limitations upon the right to strike and regulation of relations between employers and employees by law.”

Estreicher, id. at 761 n.25 (citation omitted) (emphasis added).
61. No “paper trail” has been left of the history of the exemption. A search of the files of the Commerce Department, the Senate Judiciary Committee, then Secretary Hoover, Senator Walsh (who left a voluminous archive), the legislative files of the AF of L, and Victor Olander (for the files of the ISU) yielded a scanty record bearing upon the Act and no record whatsoever concerning the exemption. The author would like to thank the following archivists for their generous help, even if their searches
was mentioned, despite Furuseth’s healthy dislike for longshoremen and their union.62 However, “interest arbitration” was not made compulsory by the Bill, it was never part of Furuseth’s public objections, and the ABA Committee’s Report for 1923 made no mention of it.

In fact, the ABA Committee never really engaged with Furuseth’s public concerns or, from what is hinted at in Mr. Piatt’s offhanded treatment, with Furuseth at all. The elemental reason is that they had drafted and were pressing a commercial arbitration law. This law concerned disputes between growers, packing houses, and shippers,63 but was unconcerned with employment contracts. The unions’ objection to including individual employment contracts was an unanticipated and unnecessary obstacle to achieving their objective.

Moreover, the adhesive feature of the Act in which a one-sided agreement to arbitrate future disputes could be commanded as a condition of contract by the stronger party was a significant source of potential criticism, as it had been in the common law hostility toward executory arbitration agreements.64 However, this feature only surfaced in passing during consideration of the ABA draft. Senator Walsh ruminated briefly on the seeming unfairness of the bill as it applied to employment contracts.65 From what appears, the issue was obviated in employment by adding the exemption.


62. WEINTRAUB, supra note 9, at 78-84.
63. By a circular letter dated October 15, 1921, James B. Stafford, Secretary Hoover’s assistant, called for a conference on the subject for November 15, 1921, to be addressed by the Secretary. The idea was recommended by the California Fruit Growers Association and the National League of Commission Merchants. Those attending were to be executives of the different trade organizations in the marketing of farm, fruit, vegetables and dairy products, to consider and define recommendations to be submitted to the Department of Commerce, showing whereby it can assist in making the system of arbitration in trade disputes, more universal, effective, efficient, expeditious and economical.

Letter from James B. Stafford, Assistant to Secretary Hoover, to trade executives (Oct. 15, 1921) (on file with author).

A list of 28 commercial organizations was entered upon the record of the hearing before the Senate subcommittee in support of the law, 13 of which were fruit, vegetable or poultry packers, shippers or commercial agents. Hearings, supra note 15, at 3.

64. MACNEIL, supra note 7, at 60-61, 68.
65. In the Hearings, supra note 15, Senator Walsh ruminated in response to Mr. Piatt's testimony:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily things at all. Take an insurance policy: there is blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; 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.

Id. at 9.
Consider, then, the circumstances surrounding the exemption's submission. The ABA's proposed commercial arbitration law was introduced on December 22, 1922. Three weeks later, Andrew Furuseth secured the opposition of the ISU (and later the AFL) to the inclusion in it of "any group of workers in America." In the hearings on the measure two weeks later, the ABA proposed in response the exclusion of "seamen or any class of workers in interstate and foreign commerce." Secretary Hoover wrote to the Senate subcommittee on the same date that:

The clogging of our courts is such that the delays amount to a virtual denial of justice. I append an excerpt of the American Bar Association report which would seem to support that statement. I believe the emergency exists for prompt action and I sincerely hope that this Congress may be able to relieve the serious situation. If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."66

Hoover's role should not be ignored. He had been an active supporter of the bill:67 he listed it in his Annual Report for 1925 as one of his Department's achievements,68 he pressed it before the public as an important commercial measure,69 and he stressed the Arbitration Act (and the cause of commercial arbitration) in his memoirs.70 It was his language, not that proposed by the ABA, that the subcommittee accepted. Unlike the ABA, which proposed to exclude workers "in" interstate commerce, Hoover's exemption added railway workers and the word "engaged" in interstate commerce. Yet no one at the time saw any difference in the two formulations. Hoover explained that his proposal was designed to take "workers' contracts" out of the law's scheme altogether, and it satisfied the unions who had sought that very end.

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67. The ABA draft was circulated to Secretary Hoover, at his insistence, prior to its final approval by the ABA Committee. On January 21, 1922, A.J. Wolfe, the Department's Chief of the Division of Commercial Laws, wrote to commend the bill as advancing "the cause of commercial arbitration." Letter from A.J. Wolfe, Chief, Division of Commercial Laws, Department of Commerce, to James B. Stafford, Assistant to Secretary Hoover (Jan. 21, 1922) (on file with author).
69. On December 28, 1925, shortly before the United States Arbitration Act took effect, Secretary Hoover issued a lengthy press release describing the law as an "Important Step Toward Elimination of Business Waste":

The information collected by the Department of Commerce over the past several years" he [Hoover] said "clearly showed that the substantial element of the American business public is overwhelmingly in favor of arbitration in the settlement of commercial disputes in both domestic and foreign trade.

Press release from the Department of Commerce, Secretary Hoover Favors Arbitration (Dec. 28, 1925) (on file with author).
III

CONCLUSION

It should now be clear that the necessary assumption of the "involved in" versus "engaged in" dichotomy—that Congress intended some but not other workers to be covered by the Act—is wrong. The U.S.A.A. exempts contracts of employment, all contracts of employment, over which Congress had constitutional authority. The scope of the commerce power when the U.S.A.A. was enacted was quite narrow; in the employment setting, it was limited largely to transportation workers. Thus in 1925, the U.S.A.A. could not have applied to an arbitration provision in the employment contract of a neo-natal physician, a manufacturing manager, or a secretary in a law firm because these employees would not have been considered as being in interstate commerce. As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it, leaving the status of these employees' contracts in practical effect just as they were when the Act was passed.

The contrary (though currently prevailing) view produces an anomaly: that a boilerplate arbitration clause in an interstate trucker's employment form or application could not be covered by the U.S.A.A., but the same provision in the same form used for the employment of the trucking company's secretary would be. This result could be defended only if there were any assurance that that is what Congress intended. However, we are not told that Congress intended any such result; only that the judicial policy toward arbitration has rendered the courts amenable to giving the Act a more sweeping application. The heightened judicial emphasis upon the policy of the Act ignores the policy of the exemption.

It would do well here to recall Furuseth's fundamental objections: a boilerplate arbitration provision could be demanded as a condition of employment to which employees would have no alternative but to accede; these provisions would sweep in labor protective laws; and the courts would

74. See, e.g., Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 599 (6th Cir. 1995), citing Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972). Of this larger development, Macneil opines:

One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple. That is, the Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system. If this means overriding the consent principle of the USAA, sobeit [sic]; if it means abdication of judicial responsibility for enforcing regulatory legislation, sobeit [sic]; if it means converting a statute from one governing procedure in federal courts to a substantive regulatory one overriding state law, sobeit [sic]. Yet nowhere does the Court admit to such a policy.

MACNEIL, supra note 7, at 172 (references omitted).
be precluded from performing the public function of protecting labor—that employees would be relegated to a forum not of their own choosing and which might be biased against them. These are weighty objections; indeed, they have been mustered afresh in response to *Gilmer*. This is not to judge their merit, but Congress did not consider them. Instead, it avoided them by exempting "workers' contracts" from the Act.

Whether or not individual employment disputes should be swept into unilaterally promulgated arbitration plans, whether these arbitration systems should include not only federal labor protective laws but also claims deriving from state statutes and common law, and just what the federal interest is in the latter instance, are large questions of public policy. Congress chose at the time to avoid dealing with them by exempting employment. Fidelity to the text of the Act and its history should counsel an equal judicial solicitude for that choice.
APPENDIX:

ANALYSIS OF H.R. 13522 SUBMITTED BY PRESIDENT ANDREW FURUSETH TO THE CONVENTION, WHICH WAS ADOPTED

H.R. 13522

A BILL

to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations. Introduced in the House by Mr. Mills of New York.

Section 17 enacts that this Act may be referred to as “The United States Arbitration Act.” Thus the Act is given its proper name—The Arbitration Act—The name is proper because it will put the arbiter in place of the Court. It will take away from all citizens, except those who have the knowledge and the money to hire the best of lawyers and who can afford to wait, the present right to a day in Court.

Let a clause to arbitrate be placed in any contract, and any dispute about the meaning and enforcement of the contract must be referred to arbitration, and the Court with all the Saxon rules of procedure and constitutional guaranties ceases to operate. The clause to arbitrate may be added to any contract after it is entered into either before or after a disagreement has arisen. When so inserted it is controlling, and the Court’s duty is not to hear and determine, but to order arbitration to proceed and to enforce the award. For this purpose all the powers of the Court—legal and equitable—must be used.

There can be but little doubt about the power of the Court. The Court’s power will rest upon the fact that a freeman—one of the American Sovereigns—has granted this right to the other party and being a grant from the Sovereign, it becomes a vested right. As between individuals there does not seem to be any question about the constitutionality; but if there be, then the obiter dicta by the majority of the Supreme Court in the case of Robertson vs. Baldwin would seem to cover the case pretty well. In substance, the Court, in construing the 13th Amendment, fastened itself upon the word “IN VOLUNTARY.” Could service ever become involuntary if it was voluntarily entered into, and then it held that the seamen having voluntarily entered into the service, he was not in involuntary servitude. The seaman having made the contract to serve must serve. The railroad man having entered into a contract to serve with an arbitration clause inserted must continue to serve; because such contract becomes through this law, if enacted, “Valid, enforcible, irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (Section 2.) Any “existing controversy arising out of such contract, transaction, or refusal” (Section 2)
goes to the arbitrator for decision and to the Court for enforcement. Thus it seems certain that this bill provides for reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in “Interstate and Foreign Commerce.”

With reference to the seaman it will be an easy matter. Place in the contract to labor—the shipping articles—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commissioner (under existing statutes this includes consuls), and the seaman’s right to wages, to food, to damages under the Jones Act, together with his present right to quit work in harbor, becomes void. With the seaman the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make. So much for the seamen. (Was it the Protective and Indemnity Insurance lawyers that drew this bill?) Hardly. There were others. The bill applies to all workers in interstate and foreign commerce and to others, that are not necessarily workers—to shippers and travelers. The traveler and shipper too may become victims, they too may unwittingly or by necessity, sign the agreement to arbitrate and thus lose the right to the protection of the Courts with the machinery, which the Saxon civilization has built up around the perhaps otherwise weak and defenseless. Miscalled equity has taken much of American freedom, now comes a law to complete the job.

So far we have dealt with the individual. What about those, who shall seek to protect themselves through mutual aid? Some organizations are very strong in their cohesiveness. Cannot those organizations save not only the individuals but themselves?

The Supreme Court has decided that voluntary organizations may be sued. If they shall enter into an agreement containing an arbitration clause, there can be little doubt that the organization will be bound. But would such action bind the members? The hatters case and the Coronado case seem to answer this question; but, aside from these cases, does not the principle of the corporation law (excluding limitation of liability) apply? Would it not be held that the members are the stockholders, the convention the meeting of the stockholders, and that the Executive Board is the Board of Directors? And if such should be the decision of the Court (and we have seen something more remarkable than this would be), then organization would be an added danger.
Of course, specially capable lawyers might find a way out, but we are to remember, first, that especially capable lawyers are too expensive to be hired by the poor who might and would suffer; second, that those who have the means to hire such lawyers are not liable to sign such agreements, unless it be to enforce the consequences upon others.

Section 3 relegates the settlement of all disputes to the arbitrator and imposes upon the Court the duty to see that the arbitration is proceeded with.

Section 4 designates the Courts to which the aggrieved party may appeal to have the arbitration proceed and determines the procedure.

Section 5 provides that if there be no agreement for selection of the arbitrator, or if none is agreed upon, then the Court shall select one.

Section 7 authorizes the arbitrator or arbitrators to send for persons and papers and to compel the attendance of witnesses and places the Court with all its power behind the arbitrator or arbitrators.

Section 8 provides for jurisdiction where there is difference of the citizenship, either with reference to States or Foreign Country.

Section 9 provides that if the question at issue is justifiable in admiralty—"then, notwithstanding anything herein to the contrary"—"the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

It is, of course, presumed that the arbitrator will do justice, but he must primarily see that the contract is carried out, whether it has reference to the labor of procuring, making, transporting or delivering commodities, or the labor of repairing, building, or erecting any structure, or in the work performed to those ends by individual workmen or mechanics. The contract being property, the arbitrator must see, that such property is protected. Where he can use any judgment he will be expected, and he will feel, that it is his particular duty to protect the existing status. Where the question is one of the condition of the laborers or mechanics, his very humanity will induce him to err, if at all, on the side of the employer, because half a loaf is better than no bread, and

Section 11 provides for review of his action, his procedure and his award, if it should be leaning too much to the side of weakness, it may be set aside by those who have the money to provide the cost of the process, together with the attorneys’ fees. The bill seems to provide for all eventualities. It is evidently drawn with great care and by lawyers of great abilities; but its purpose is terrible. If it ever should (under the displeasure of God, visited upon the American people) become the law, it will destroy all that we cherish as American ideals. It uses the individual freedom and sovereignty of the American citizen to destroy all real human freedom in America.
Hostile Work Environment Harassment

In November, 1995, the Boalt Hall Federalist Society and the Berkeley Journal of Employment and Labor Law co-sponsored a debate on hostile work environment harassment and the First Amendment between Professor Eugene Volokh and Professor David B. Oppenheimer. Following the debate, BJELL invited Professors Volokh and Oppenheimer to submit for publication brief, informal articles explaining their respective positions on the issue. The two articles that follow are the result.

Professor Volokh, Acting Professor at University of California, Los Angeles Law School, in an article entitled “Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment,” argues against broad prohibitions of harassing speech in the workplace. Professor Volokh expresses his concern about the implications for free speech generally of allowing harassing speech in the workplace to be banned, and his fears of creating a slippery slope where banned speech in the workplace creates precedent to ban other types of speech. While recognizing the constitutionality of some limits on harassing speech, such as restrictions on things said one-to-one, Professor Volokh argues that other forms of workplace speech are constitutionally protected from government restriction.

In “Workplace Harassment and the First Amendment: A Reply To Professor Volokh,” Professor Oppenheimer, Associate Professor of Law at Golden Gate University, takes the position that banning harassing speech in the workplace is appropriate under Title VII, and legal under the First Amendment. For Professor Oppenheimer, the protections offered by Title VII caselaw are more than sufficient to protect employers from frivolous or meritless suits. By analogizing to obscenity, fighting words, and captive speech doctrine, Professor Oppenheimer argues that not all speech is entitled to First Amendment protection. Further, Professor Oppenheimer points out that the First Amendment is not the only Constitutional provision at issue when we deal with government regulation of the workplace—the Thirteenth Amendment also establishes a right for employees to be free of harassment. Finally, Professor Oppenheimer explains that the government has the right to regulate tortious conduct in the workplace, and that the regulation of hostile speech in the workplace should not be seen as breaking new ground.

The Berkeley Journal of Employment and Labor Law would like to thank Professors Volokh and Oppenheimer for their participation in the debate and for their willingness to publish the following articles on short notice. BJELL would also like to thank the Federalist Society for their efforts in originating a dialogue on this issue.
