



---

2019

## The Supreme Court's Landmark Decision in *New Prime Inc. v. Oliveira*: A Panoptic View of America's Civil Justice System and Arbitration

Imre S. Szalai

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj-online>

---

### Recommended Citation

Imre S. Szalai, *The Supreme Court's Landmark Decision in New Prime Inc. v. Oliveira: A Panoptic View of America's Civil Justice System and Arbitration*, 68 Emory L. J. Online 1059 (2019).

Available at: <https://scholarlycommons.law.emory.edu/elj-online/8>

This Essay is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal Online by an authorized administrator of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

# THE SUPREME COURT'S LANDMARK DECISION IN *NEW PRIME INC. V. OLIVEIRA*: A PANOPTIC VIEW OF AMERICA'S CIVIL JUSTICE SYSTEM AND ARBITRATION

*Imre S. Szalai*<sup>\*</sup>

## INTRODUCTION

Earlier this year, the U.S. Supreme Court issued a historic, unanimous decision in the case of *New Prime Inc. v. Oliveira*.<sup>1</sup> This case, on its surface, involves the trucking industry and a focused issue of arbitration law. However, on a deeper level, the *New Prime* decision raises fundamental questions about America's civil justice system and how our society should resolve disputes. This Essay situates the *New Prime* decision using three different viewpoints: the past, present, and future. Through the lens of *New Prime*, one can see the overall, sweeping trajectory and potential future role of arbitration within America's civil justice system.

Viewed from the perspective of the past, and as explained in section II.A of this Essay, the *New Prime* decision stands apart as representing the first decision in several decades where the Supreme Court has ruled in favor of workers and rejected an expansive interpretation of the Federal Arbitration Act (FAA),<sup>2</sup> a statute which plays a central role in our civil justice system. This sparse statute, enacted in 1925 for limited purposes, regulates and facilitates the resolution of disputes through arbitration.<sup>3</sup> However, since the 1980s, the Supreme Court has in effect rewritten and expanded the FAA, transforming America's civil justice system in the process.<sup>4</sup> Compared to the last several decades of Supreme Court

---

<sup>\*</sup> Judge John D. Wessel Distinguished Professor of Social Justice, Loyola University New Orleans College of Law; Yale University, B.A.; Columbia University, J.D. The Author served as an amicus curiae in the *New Prime* case before the Supreme Court. The Author would like to thank the following people for their feedback and assistance in reviewing this Essay: Rebecca Alvarez, Ajeet S. Badesha, Michael K. Blackwell, Alexandra E. Celio, Tristan A. Chandra, Kendall E. Clark, Dalita M. Collins, Caleb N. Dorrance, Avery P. Dubois, Justin J. Fitch, Lindsey R. Freihoff, Jeffrey C. Gasser, Jelvec L. Gozly, Derek M. Graves, Elizabeth C. Griffin, Christopher L. Kerrigan, Maeghen E. Kling, Claire T. Lansden, Ayisha I. Lawrence, Chasity M. Matthews, Monica Mendoza, Obinna Moneme, Angel J. Salome, Laura T. Sanchez Fowler, Alberto E. Silva, Paul J. Smith, Matthew J. Succi, Vladimir D. Thomas, Warner B. Thompson, Constance E. Tullier, Bianca L. Velez, Trevor S. Wieprecht, and Trey M. Williams. Any errors remain the Author's own.

<sup>1</sup> 139 S. Ct. 532 (2019).

<sup>2</sup> 9 U.S.C. §§ 1–16 (2012).

<sup>3</sup> See generally *id.*

<sup>4</sup> Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 204–07 (2017) (describing the Supreme Court's transformation of the FAA).

cases involving the FAA, the *New Prime* decision represents a new, more literal, restrained interpretation of this critical statute.<sup>5</sup>

As further explored in section II.B, one can also understand the *New Prime* decision in the context of the current sociopolitical environment in which it was issued. In the wake of the #MeToo movement, a public backlash has developed against the widespread use of forced arbitration in America, with bipartisan support for legislative reforms as well as some private initiatives to cut back on the use of arbitration.<sup>6</sup> Further, the contentious confirmation hearings of Justice Brett Kavanaugh and President Donald J. Trump's attacks on the judiciary have raised questions about partisanship and the independence of the judiciary.<sup>7</sup> The unanimous *New Prime* decision and its curtailment of arbitration arguably reflect the particular environment in which it was issued.<sup>8</sup>

Looking ahead to the future, and as explained in section II.C of this Essay, the *New Prime* case can solve some problems involving the FAA and raise several others. First, *New Prime* suggests a new approach courts may use to fine-tune the existing legal framework of the FAA. There are conflicting decisions involving multiple different aspects of arbitration law<sup>9</sup>—and fixing arbitration law is a pressing need in light of the hundreds of millions of arbitration clauses that have proliferated in American society.<sup>10</sup> The Court's analysis in *New Prime* suggests a new judicial approach that can be used to fix the legal framework for arbitration.<sup>11</sup> Second, this final section about the future discusses how *New Prime* raises larger questions about the scope of the FAA and which workers are exempt from its coverage, and workers in the gig economy, such as Uber and Lyft drivers, could be impacted and no longer forced to arbitrate.<sup>12</sup> Third, this Essay concludes by examining fundamental questions raised by *New Prime*, like what the future role of arbitration in America's civil justice system should be,

---

<sup>5</sup> See *infra* Section II.A.

<sup>6</sup> See, e.g., Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); Kerri Anne Renzulli, *Workers at Google, Facebook, eBay and Airbnb Can Now Sue over Sexual Harassment—Here's What that Means for Employees*, CNBC (Nov. 19, 2018, 12:32 PM), <https://www.cnbc.com/2018/11/19/google-facebook-airbnb-employees-can-now-sue-over-sexual-harassment.html>.

<sup>7</sup> Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>; Laurence H. Tribe, *Opinion, All the Ways a Justice Kavanaugh Would Have to Recuse Himself*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/opinion/justice-kavanaugh-recuse-himself.html>.

<sup>8</sup> See *infra* Section II.B.

<sup>9</sup> See *infra* Section II.C.1.

<sup>10</sup> See generally Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

<sup>11</sup> See *infra* Section II.C.1.

<sup>12</sup> See *infra* Section II.C.2.

whether Congress should curb the use of arbitration, access to justice, and federalism.<sup>13</sup>

The Supreme Court's *New Prime* decision is a major milestone, and as explored below, it unveils a panoptic, sweeping view of the past, present, and future role of arbitration in America's civil justice system.

## I. THE SUPREME COURT'S HOLDING IN *NEW PRIME*

Before discussing deeper implications of *New Prime*, this Part provides some background regarding the case and the Supreme Court's holding. The *New Prime* case involves the trucking industry, which is critical to the economy and the entire retail industry in America.<sup>14</sup> Unfortunately, abusive, predatory practices involving dangerous conditions and crushing debt have been well-documented in this industry, and truckers have been described as "modern-day indentured servants."<sup>15</sup>

Mr. Dominic Oliveira, the plaintiff in the underlying lawsuit, is a truck driver who hauled freight for New Prime, Inc., an interstate trucking company.<sup>16</sup> Mr. Oliveira first worked for New Prime as an "apprentice" and completed 10,000 miles of driving while being paid nothing.<sup>17</sup> Next, he worked for New Prime as a "driver trainee" for the next 30,000 miles of driving, while being paid less than minimum wage.<sup>18</sup> Then, when Mr. Oliveira finally became a regular driver for New Prime, he leased a truck from a company closely related to New Prime.<sup>19</sup> He also was required to buy insurance, fuel, locks, and other equipment from New Prime's store, and New Prime made regular deductions from his paycheck for the lease payments and purchases.<sup>20</sup> Due to these deductions, Mr. Oliveira's paycheck was negative on several occasions.<sup>21</sup>

---

<sup>13</sup> See *infra* Section II.C.3.

<sup>14</sup> Rachel Premack, *There's a Critical Shortage of Truck Drivers in the US, and It's Causing Everything from Delayed Amazon Orders to More Expensive Groceries*, BUS. INSIDER (May 17, 2018, 3:52 PM), <https://www.businessinsider.com/truck-driver-shortage-slowing-amazon-orders-increasing-retail-prices-2018-5>.

<sup>15</sup> Brett Murphy, *Rigged*, USA TODAY (June 16, 2017), <https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/>.

<sup>16</sup> *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 9–10 (1st Cir. 2017).

<sup>17</sup> *Id.*

<sup>18</sup> *Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125, 128 (D. Mass. 2015).

<sup>19</sup> *Id.* at 128, 129.

<sup>20</sup> *Id.* at 129.

<sup>21</sup> *Id.*

Mr. Oliveira eventually filed a class action in federal court against New Prime for failure to pay minimum wage under state and federal law, breach of contract, and violations of other laws.<sup>22</sup> In response to this lawsuit, New Prime asked the court to force Mr. Oliveira into private, individual arbitration, which would have ended his class action in court.<sup>23</sup> Like tens of millions of other workers in the United States,<sup>24</sup> Mr. Oliveira was purportedly bound by an arbitration clause in his contract with New Prime.<sup>25</sup> However, the federal district court,<sup>26</sup> the First Circuit,<sup>27</sup> and ultimately, the Supreme Court decided not to enforce the arbitration clause under federal law.<sup>28</sup>

Turning to the applicable legal standards, the FAA generally declares that arbitration agreements are fully binding.<sup>29</sup> Through different mechanisms—like summary hearings, orders to compel arbitration, and judicial confirmation of arbitrators’ awards—the FAA helps facilitate the resolution of disputes through arbitration.<sup>30</sup> At first glance, it seems that the FAA requires enforcement of Mr. Oliveira’s arbitration agreement. However, the FAA contains an important limitation involving specifically identified workers.

The first section of the FAA, which contains some key definitions and limitations, states that nothing in the statute “shall apply to contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce*”<sup>31</sup>—the so-called transportation worker exemption. In 2001, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court construed this exemption narrowly to refer to contracts of employment of transportation workers, not all employment contracts.<sup>32</sup> As a result, the FAA

---

<sup>22</sup> *New Prime*, 857 F.3d at 11.

<sup>23</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019); *New Prime*, 141 F. Supp. 3d at 128–29 (containing text of arbitration agreement).

<sup>24</sup> ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 4–5 (2017), <http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>; IMRE S. SZALAI, THE EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA’S TOP 100 COMPANIES 2 (2017), <http://employeeerightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf>.

<sup>25</sup> *New Prime*, 141 F. Supp. 3d at 128–29.

<sup>26</sup> *See generally id.* at 125.

<sup>27</sup> *See generally New Prime*, 857 F.3d at 7.

<sup>28</sup> *See generally New Prime*, 139 S. Ct. at 532.

<sup>29</sup> 9 U.S.C. § 2 (2012).

<sup>30</sup> *Id.* § 4 (providing for an order compelling arbitration and the possibility of a focused jury trial on the making of an arbitration agreement); *id.* § 6 (providing that FAA applications generally “shall be made and heard in the manner provided by law for the making and hearing of motions”); *id.* § 9 (confirmation of arbitral awards).

<sup>31</sup> *Id.* § 1 (emphasis added).

<sup>32</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

generally covers all workers, but “transportation workers” are carved out and exempt from the FAA’s arbitration requirement.<sup>33</sup>

In the wake of *Circuit City*, a circuit split developed regarding the meaning of the phrase “contracts of employment” in the FAA’s transportation worker exemption.<sup>34</sup> Does this phrase “contracts of employment” refer exclusively to the employer–employee relationship, as opposed to contracts involving independent contractors? Or does the phrase “contracts of employment” refer more broadly to all types of transportation workers, including employees and independent contractors? Several district courts had held that the exemption applied to transportation workers who were employees, but not independent contractors.<sup>35</sup> In contrast, the First Circuit in its *New Prime* decision reached the opposite result and held that the exemption broadly covered all transportation workers, both employees and independent contractors.<sup>36</sup>

A related split developed concerning whether the transportation worker exemption is applied by a court or arbitrator. The Ninth Circuit held that only a court could determine whether the transportation worker exemption applied, and the First Circuit in *New Prime* adopted the same holding.<sup>37</sup> However, the Eighth Circuit took the opposite view and held that parties could delegate to the arbitrator whether the transportation worker exemption applied.<sup>38</sup>

In January 2019, the Supreme Court resolved these conflicts involving the transportation worker exemption and issued its 8–0 unanimous decision in *New Prime*, written by Justice Gorsuch.<sup>39</sup> Regarding the “who decides” question—whether a court or arbitrator would construe the transportation worker exemption—the Supreme Court held that courts should decide whether the exemption applied.<sup>40</sup> The Court reasoned that because not all contracts are covered by the FAA, a court’s power to compel arbitration pursuant to the FAA is limited.<sup>41</sup> Section 1 of the FAA helps define the scope of the entire FAA and exempts from the FAA’s coverage contracts of employment of transportation

---

<sup>33</sup> *Id.*

<sup>34</sup> *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 17–18, 22 (1st Cir. 2017) (collecting, and ultimately rejecting, several court decisions finding that independent-contractor agreements are not contracts of employment for purposes of the transportation worker exemption).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 22.

<sup>37</sup> *Id.* at 15; *In re Van Dusen*, 654 F.3d 838, 844–45 (9th Cir. 2011).

<sup>38</sup> *Green v. SuperShuttle, Int’l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

<sup>39</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537, 543–44 (2019). Justice Kavanaugh, who had just joined the Court, did not participate. *Id.* at 532, 544.

<sup>40</sup> *Id.* at 537.

<sup>41</sup> *Id.* at 537–38.

workers.<sup>42</sup> The Supreme Court reasoned that before a court could invoke the power of the FAA to send a dispute to an arbitrator, a court must first assess whether the FAA applies to the particular contract.<sup>43</sup> As a result, courts must decide the antecedent question of whether the transportation worker exemption applies to a particular contract.<sup>44</sup>

In reaching its decision regarding independent contractors, the *New Prime* Court relied on a canon of statutory construction providing that terms should be construed today as having the same meaning when Congress first enacted the statute.<sup>45</sup> Based on its examination of historical documents using the phrase “contract of employment”—like old dictionaries, cases, and statutes from the late 1800s and early 1900s—the Court concluded that this phrase in the transportation worker exemption was not limited to the employer–employee relationship and instead included the concept of an independent contractor.<sup>46</sup> Additionally, the Court emphasized that the FAA’s text refers to contracts of employment of “workers,” not the more limited term “employees.”<sup>47</sup> The Court thought that Congress in 1925 used the particular, more expansive term “workers” in the FAA “in a broad sense to capture any contract for the performance of *work* by *workers*,” including independent contractors.<sup>48</sup> Because the FAA’s transportation worker exemption applied broadly to all transportation workers, regardless of their status as independent contractors or employees, the Supreme Court ultimately held there was no authority under the FAA to compel arbitration of Mr. Oliveira’s claims.<sup>49</sup> The FAA was simply inapplicable to Mr. Oliveira’s contract as a transportation worker.<sup>50</sup>

---

<sup>42</sup> *Id.* at 537.

<sup>43</sup> *Id.* at 538.

<sup>44</sup> *Id.* at 537.

<sup>45</sup> *Id.* at 539.

<sup>46</sup> *Id.* at 539–44.

<sup>47</sup> *Id.* at 541.

<sup>48</sup> *Id.* (emphasis in original).

<sup>49</sup> *Id.* at 544.

<sup>50</sup> *Id.* Justice Ginsburg, who joined the Court’s decision, issued a short concurring opinion. *Id.* at 544 (Ginsburg, J., concurring). She observed that as a general rule, a word in a statute should take on the meaning of the word at the time of the statute’s enactment, and it was therefore appropriate to examine materials from the time period surrounding the FAA’s enactment. *Id.* However, she cautioned that Congress may sometimes design a statute to “govern changing times and circumstances.” *Id.* (recognizing antitrust laws, RICO, and the Securities Exchange Act as examples of statutes that should be interpreted as having a “dynamic,” “changing content”).

## II. THE *NEW PRIME* DECISION, SITUATED IN THE CONTEXT OF THE PAST, PRESENT, AND FUTURE

### A. New Prime Viewed Through the Lens of the Past

Looking back to the origins of the FAA, one can see how the Supreme Court has radically transformed the FAA over the decades. As has been extensively documented, Congress originally intended the statute to have a limited scope.<sup>51</sup> Prior to the 1920s, pre-dispute agreements to arbitrate were generally not enforceable, and the FAA was designed to reverse the previous judicial hostility against the enforcement of arbitration agreements.<sup>52</sup> The FAA's original goal was to place arbitration agreements on the "same footing" as other contracts so that arbitration agreements became enforceable like any other term of a contract.<sup>53</sup> Also, the statute was originally designed to cover arbitration of contractual claims between parties engaged in interstate shipments crossing state lines,<sup>54</sup> and the FAA, as a procedural rule, would only govern in federal court proceedings.<sup>55</sup> Furthermore, the statute was intended to govern the enforceability of negotiated, voluntary arbitration agreements, not take-it-or-leave-it agreements,<sup>56</sup> and the drafters of the FAA added a special exception to clarify that no workers, in any field, would be covered by the statute.<sup>57</sup> For the first few decades of its existence, the FAA was generally interpreted and applied as intended.<sup>58</sup>

---

<sup>51</sup> Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 117–22 (2016); Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 56 (2014). See generally IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013).

<sup>52</sup> IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 19–20 (1992) (observing that although pre-FAA laws were supportive of arbitration, there was a "relative lack of enforceability of such agreements before an award was made").

<sup>53</sup> H.R. REP. NO. 68-96, at 1 (1924) (explaining that the FAA's purpose is to place arbitration agreements "upon the same footing as other contracts").

<sup>54</sup> 9 U.S.C. § 2 (2012) (limiting coverage of the FAA to agreements "to settle by arbitration a controversy thereafter arising out of such contract"); *Bills 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 on with Foreign Nations: Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) (FAA designed for disputes such as one arising from an interstate shipment of a carload of potatoes between a seller in Wyoming and a dealer in New Jersey).

<sup>55</sup> See generally MACNEIL, *supra* note 52.

<sup>56</sup> *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and 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: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9–10 (1923).

<sup>57</sup> See generally SZALAI, *OUTSOURCING JUSTICE*, *supra* note 51.

<sup>58</sup> Compare, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (statutory claims not arbitrable), with *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989) (statutory claims are arbitrable);

But this modest scope and purpose did not last. The Supreme Court has changed the FAA on several different levels, such as by expanding its scope and applicability; developing special pro-arbitration tests and presumptions; and imbuing the statute with special preemptive powers. For example, as to its scope and applicability, the Supreme Court since the 1980s has grossly and erroneously expanded the statute so that it controls in both federal and state court;<sup>59</sup> provides for the enforceability of take-it-or-leave-it, adhesionary agreements to arbitrate;<sup>60</sup> and generally covers all types of statutory claims<sup>61</sup> and employment disputes.<sup>62</sup> Instead of placing arbitration agreements on equal footing with other contracts—the original intent behind the FAA<sup>63</sup>—arbitration agreements now have a demigod status with special protections and presumptions developed by the Court inapplicable to other contracts.<sup>64</sup> The Supreme Court has found in the FAA a strong federal policy favoring arbitration,<sup>65</sup> but this policy is manufactured by the Court and not found anywhere in the text or history of the FAA.<sup>66</sup> Moreover, the FAA now has a super-preemptive status, overriding state laws of general applicability that are perceived as having a “disproportionate impact” on arbitration.<sup>67</sup> At this current stage of its development, the FAA has been held to displace state tribunals specially designed to have exclusive jurisdiction to hear claims based on state law.<sup>68</sup> Over the decades, the Supreme Court has held that the FAA overrides numerous state laws,<sup>69</sup> and recently, even an agreement between parties as interpreted under state contract law by a state court.<sup>70</sup> The application of the

---

*also compare, e.g.,* *Wilson & Co. v. Fremont Cake & Meal Co.*, 43 N.W.2d 657, 664–65 (Neb. 1950) (FAA does not control in state court proceedings), *with* *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA governs in state court proceedings).

<sup>59</sup> *Southland*, 465 U.S. at 16.

<sup>60</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 n.5 (2011).

<sup>61</sup> *Rodriguez de Quijas*, 490 U.S. at 483.

<sup>62</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

<sup>63</sup> *See supra* note 53 and accompanying text.

<sup>64</sup> *Concepcion*, 563 U.S. at 352 (setting forth a broad preemption test under the FAA, which overrides any state law that undermines arbitration).

<sup>65</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding that the FAA embodies a “liberal federal policy favoring arbitration agreements”).

<sup>66</sup> The FAA’s text simply declares that arbitration agreements are binding, 9 U.S.C. § 2 (2012), and the text does not require any doubts be resolved in favor of arbitration. *But see Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25 (holding that, in light of the purported federal policy in favor of arbitration, doubts in interpreting the scope of an arbitration clause must be resolved in favor of arbitration).

<sup>67</sup> *Concepcion*, 563 U.S. at 342.

<sup>68</sup> *Preston v. Ferrer*, 552 U.S. 346, 352–53, 359 (2008) (relying on national policy favoring arbitration and overriding exclusive jurisdiction of state administrative agency).

<sup>69</sup> *See, e.g., Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>70</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015).

FAA to state courts raises serious federalism concerns and should be unconstitutional.<sup>71</sup>

As another example of a pro-arbitration doctrine, the Court held that an employee seeking to avoid arbitration must first lodge a legal attack against a mini-arbitration agreement within a larger arbitration agreement, and pursuant to this mini-agreement, the employee purportedly agreed to arbitrate whether the parties agreed to arbitrate.<sup>72</sup> Most people are probably unaware of arbitration clauses or do not understand their significance; thus, assessing whether an employee agreed to arbitrate whether they agreed to arbitration sounds comical. Because of this case, courts have lost a degree of supervision or monitoring over the fairness of arbitration clauses before sending a dispute to arbitration, and some courts are in effect merely rubber-stamping arbitration agreements.<sup>73</sup>

Examining the transition of the FAA from its humble, limited beginnings during the 1920s to today, one sees that today's FAA has become an all-encompassing, all-powerful, overriding statute. One can summarize the last few decades of the Supreme Court's FAA decisions with a simple mantra: Thou Shalt Arbitrate! However, the pro-arbitration results from these Supreme Court cases sometimes require the acceptance of fictional doctrines;<sup>74</sup> a willingness to turn a blind eye to the text, history, and policy of the statute;<sup>75</sup> and ignoring constitutional violations.<sup>76</sup>

Given the troubled history of the Supreme Court's judicial expansion of the modern FAA—a development which has been so extreme that it would be almost comedic if not for its impact on justice and virtually every area of American law—the oral argument in *New Prime* was remarkable. During oral argument, the Justices seemed more skeptical and critical of the employer's arguments, and not as much of the worker's arguments.<sup>77</sup> The questions of Justice Gorsuch and Chief Justice Roberts appeared to favor the worker's view,<sup>78</sup> and normally, with their conservative and pro-business tendencies, one would expect that they would be inclined to favor the employer in this case. With

---

<sup>71</sup> See MACNEIL, *supra* note 52.

<sup>72</sup> *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

<sup>73</sup> Szalai, *More than Class Action Killers*, *supra* note 51, at 33–34.

<sup>74</sup> *Jackson*, 561 U.S. at 70–71 (fictionally treating an arbitration clause as separable from the rest of the contract).

<sup>75</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 133–40 (2001) (Souter, J., dissenting); *Southland Corp. v. Keating*, 465 U.S. 1, 21–36 (1984) (O'Connor, J., dissenting).

<sup>76</sup> See MACNEIL, *supra* note 52.

<sup>77</sup> See generally Transcript of Oral Argument at 8–10, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (No. 17-340).

<sup>78</sup> See, e.g., *id.*

Justice Kavanaugh not having been confirmed yet, and considering the past trajectory of expansive, twisted FAA interpretations, original expectations may have forecasted a 4–4 split vote along conservative and liberal lines prior to oral argument. However, immediately after oral argument, some commentators asked if this could be the first time in decades the Court would rule in favor of workers by rejecting an expansive interpretation of the FAA.<sup>79</sup>

Despite these cautiously optimistic expectations, the Court’s decision in *New Prime* was jaw-dropping. The Supreme Court’s decades-long, steady, pro-arbitration march finally hit a roadblock—the text of the FAA. Not only was the ultimate result in *New Prime* blindsiding compared to the Court’s prior FAA decisions, but the Supreme Court’s method of interpreting the FAA in *New Prime* was jarring as well. In a nutshell, the approach used in *New Prime* is more textual and more comprehensive. A review of Justice Gorsuch’s FAA decisions when he was a judge on the U.S. Court of Appeals for the Tenth Circuit, showed a similarly “piercingly textual” approach.<sup>80</sup> At the time, some predicted that his nomination to the Court could potentially bring about a shift in the FAA’s interpretation,<sup>81</sup> and that shift occurred in *New Prime*. Justice Gorsuch’s textual interpretation of the FAA when he was sitting on the Tenth Circuit foreshadowed the approach he used in *New Prime*.<sup>82</sup>

The Court examined the FAA more comprehensively than in the past by looking at how its various sections fit together—it distanced itself from its past approach, which sometimes examined parts of the statute in isolation or in a piecemeal fashion in order to implement the Court’s pro-arbitration policy.<sup>83</sup> While prior Supreme Court decisions ignored key language in the FAA,<sup>84</sup> the Court in *New Prime* tried to take into account all relevant language. For example, the Court highlighted the word “nothing” in Section 1 of the FAA to stress that

---

<sup>79</sup> E.g., Imre Szalai, *A Shift in SCOTUS’s Interpretation of the FAA?*, OUTSOURCING JUST. (Oct. 6, 2018), <http://www.outsourcingjustice.com/new-prime-oliveira-arbitration-case/>.

<sup>80</sup> Amanda Bronstad, *Neil Gorsuch ‘Piercingly Textual’ and Often Pro-Defense on Class Actions and Arbitration*, LAW.COM (Feb. 28, 2017, 03:15 PM), <https://www.law.com/sites/almstaff/2017/02/28/neil-gorsuch-piercingly-textual-and-often-pro-defense-on-class-actions-and-arbitration/>; Imre Szalai, *Supreme Court Nominee Gorsuch and Arbitration Law*, OUTSOURCING JUST. (Jan. 31, 2017), <http://www.outsourcingjustice.com/gorsuch-arbitration-law/> (describing Justice Gorsuch’s analysis of the FAA on the Tenth Circuit as piercingly textual).

<sup>81</sup> Szalai, *supra* note 80.

<sup>82</sup> See, e.g., *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977, 984 (10th Cir. 2014); *Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1201 (10th Cir. 2009). The Author discussed Justice Gorsuch’s textual approach in these Tenth Circuit cases when he was first nominated to the Supreme Court. Szalai, *supra* note 80.

<sup>83</sup> See *infra* note 98 and accompanying text.

<sup>84</sup> See *infra* note 98 and accompanying text.

“nothing” in the entire statute was intended to apply to transportation workers.<sup>85</sup> And the Court took a more comprehensive view of the statute by articulating that each section of the FAA should not be read in isolation, but as integrated parts of a unified statute. According to the Court, “Sections 1, 2, and 3 [and 4] are integral parts of a whole, [and Sections] 1 and 2 define the field in which Congress was legislating.”<sup>86</sup> To reach its conclusion, the Court construed different sections of the FAA as an integrated whole.

Furthermore, to help reinforce its interpretation of key language, the Court examined the broader history surrounding the enactment of the statute, such as the fact that Congress likely wanted the transportation worker exemption because “in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers.”<sup>87</sup> The Court also recognized it could not imbue “old statutory terms with new meanings.”<sup>88</sup> The Court cited dictionaries, cases, and statutes from the time period to carefully determine what Congress likely meant in 1925 when it adopted the words “contracts of employment” in the FAA.<sup>89</sup>

Throughout the opinion, the *New Prime* Court appeared to strive, in good faith, to ascertain the correct, original meaning of the statute at the time Congress enacted the FAA so that the Court would not overstep its boundaries and change what Congress had originally enacted.<sup>90</sup> In fact, the analysis in *New Prime* was so sharply textual and originalist, especially compared to prior FAA decisions, that Justice Ginsburg perhaps felt uncomfortable and compelled to write a separate concurring opinion, in which she emphasized that such a strong textualist approach may not always be appropriate.<sup>91</sup>

The approach used in *New Prime* for analyzing the FAA—which could be described as textualist, statutory originalist,<sup>92</sup> and more comprehensive—was striking compared to the Court’s prior FAA decisions. Over the years, the Supreme Court has issued several pro-arbitration FAA decisions, completely at odds with the policy, text, original meaning, and history of the statute.<sup>93</sup> For

---

<sup>85</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019).

<sup>86</sup> *Id.* at 538 (citation omitted).

<sup>87</sup> *Id.* at 537.

<sup>88</sup> *Id.* at 539.

<sup>89</sup> *Id.* at 539–40.

<sup>90</sup> *Id.* at 542–43.

<sup>91</sup> *Id.* at 544.

<sup>92</sup> Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 *TUL. L. REV.* 803, 812 (1994) (“[T]he fundamental objective of originalist statutory interpretation is to give effect to the wishes of the enacting legislature.”).

<sup>93</sup> *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Mitsubishi Motors Corp. v. Soler*

example, had *New Prime* been issued when Justice Scalia was still on the bench, the Court would have probably issued a 5–4 decision along the following lines:

We have described the FAA as embodying a strong federal policy in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). In light of this principle, the Court has already construed the Section 1 exemption narrowly. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). To avoid disrupting the expectations of contracting parties like the businesses that draft arbitration agreements (companies have rights too; see *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)), we must be consistent and construe the exemption narrowly here instead of adopting the broad, unsupported view advocated by the respondent.

Turning to the text of statute, which always should guide our analysis, the statute only exempts “contracts of employment,” and respondent has not demonstrated how this plain language concerning employment can be expanded beyond the employer–employee relationship. 9 U.S.C. § 1 (2012). Try as he may, respondent wishes us to rewrite the Section 1 exemption to explicitly mention “independent contractors,” which is nothing short of ludicrous. The FAA never uses the term “independent contractor,” and we cannot look at the scant legislative history in this case because the plain language of the statute is clear.

Even if there was some ambiguity in the language justifying a quick peek at the legislative history (there is not), respondent has not brought anything to our attention from the FAA’s sparse legislative history demonstrating that Congress intended to cover independent contractors with the exemption. If Congress had so desired, it could have—and still can—explicitly exclude independent contractors from the scope of the FAA. Contrary to the dissent’s view, the Justices of this Court cannot invent new exceptions to the FAA, a venerable, almost 100-year-old statute.

Truth to tell, our prior cases involving statutory arbitrability, preemption, and severability all but resolve this case. We have already held that every type of claim is arbitrable. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). Nothing in the text, history, or purpose of the employment or wage statutes at issue in this case would prevent the respondent’s claims from being heard by an arbitrator. *Id.* Additionally, respondent’s fanciful interpretation, which is pure applesauce and has no basis in the text of the statute, would have a disproportionate impact on the enforcement of arbitration agreements and undermine the efficiency of arbitration. The FAA

would override such an interpretation. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Moreover, as demonstrated by the contract’s terms, respondent wished for an arbitrator to resolve all disputes regarding the arbitration clause, including whether he must arbitrate. We are not at liberty to adopt respondent’s interpretive jiggery-pokery and in effect rewrite his contract to cut back on an arbitrator’s powers.

Because arbitration is a matter of contract, and because respondent personally agreed to arbitrate arbitrability and did not challenge the delegation clause specifically, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010), all of respondent’s claims and arguments are subject to arbitration.

The Supreme Court could have easily manufactured the erroneous result above, following in what Justice O’Connor called an unconstitutional, deeply troubling, long tradition of “abandon[ing] all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”<sup>94</sup> *New Prime* is significant because the decision, with its strong textualist, statutory originalist, and more comprehensive approach to interpreting the FAA, represents a sharp break from prior FAA decisions.

The Court’s prior FAA decisions show that the Court relied on a purported policy in favor of arbitration to override or ignore the text of the FAA. *New Prime* is notable for emphasizing that policy goals, and the Supreme Court’s preference for arbitration in particular, should not drive the Court’s decisions. In response to a policy argument raised by *New Prime*, the Court explained:

But often and by design it is “hard-fought compromise[],” not cold logic, that supplies the solvent needed for a bill to survive the legislative process. If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to “tak[e] . . . account of” legislative compromises essential to a law’s passage and, in that way, thwart rather than honor “the effectuation of congressional intent.”<sup>95</sup>

The Court in *New Prime* recognized that statutory language, even though it may appear “bumpy” or not the result of “cold logic,” is often the result of legislative

---

<sup>94</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

<sup>95</sup> *New Prime*, 139 S. Ct. at 543 (citation omitted).

compromise.<sup>96</sup> As a result, courts should not ignore the text of a statute in the name of policy.<sup>97</sup>

But had the Court followed this approach in its prior FAA decisions, we would have a different-looking and more limited FAA today.<sup>98</sup> *New Prime* is notable not only for being the first case in decades where the Court rejects an expansive interpretation of the FAA, but also for suggesting a new, more restrained approach in interpreting the FAA that examines the entire statute and involves textualism and statutory originalism.

### B. *Understanding New Prime as a Product of Its Current Environment*

The *New Prime* decision can also be understood as reflecting current sociopolitical movements. For example, one can view this case through the broader lens of the #MeToo movement. Forced arbitration of employment disputes and statutory claims can help conceal wrongdoing in the workplace.<sup>99</sup> In the wake of #MeToo, there have been bipartisan calls to reform arbitration laws to exempt sexual harassment claims, and every attorney general in the United States asked Congress to end mandatory arbitration for such claims.<sup>100</sup> Bills, with bipartisan support, were introduced in Congress to limit the use of pre-dispute arbitration agreements.<sup>101</sup> Moreover, because of more public

---

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court misleadingly quotes Section 2 of the FAA by omitting a key limitation in the FAA concerning disputes “arising out of such contract,” thereby changing and expanding the coverage of the FAA to apply to disputes that do not arise out of a contract, such as tort disputes or statutory claims. 473 U.S. at 625. A policy goal of docket-clearing probably motivated the Court in *Mitsubishi* and similar cases to expand the FAA. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Blackmun, J., concurring in part and dissenting in part). However, if one follows the directive of the Court in *New Prime*, the Court should not use a desire to advance policy goals to “pave over” or rewrite the text of a statute. *New Prime*, 139 S. Ct. at 543. Similarly, in *Southland Corp v. Keating*, the Court relied on “a national policy favoring arbitration” to find that the FAA controlled in both state and federal courts. 465 U.S. 1, 10, 16 (1984). However, the *Southland* Court ignored the integrated, unitary nature of the FAA and the FAA’s clear references to federal courts. *Id.* at 22. *See also* 9 U.S.C. § 4 (2012) (party may petition “any United States district court” for an order compelling arbitration); *id.* §§ 7, 10.

<sup>99</sup> Widespread sexual harassment allegedly occurred at the nationwide chain of jewelry stores, Jared and Kay Jewelers, and one of the attorneys for the victims explained: “Most of them [the victim-employees] had no way of knowing that the others had similar disputes, because that was all kept confidential.” *See* Yuki Noguchi, *No Class Action: Supreme Court Weighs Whether Workers Must Face Arbitrations Alone*, NPR (Oct. 6, 2017, 4:22 AM), <https://www.npr.org/2017/10/06/555862822/no-class-action-supreme-court-weighs-whether-workers-must-face-arbitrations-alon>.

<sup>100</sup> Jacqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, HILL (Feb. 13, 2018 6:33 PM), <https://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual>.

<sup>101</sup> Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

awareness of arbitration and stronger calls for change, high-profile employers like Google and Uber engaged in efforts to curtail their use of arbitration agreements in the workplace.<sup>102</sup>

Our government's relationship with pre-dispute arbitration agreements, as expressed through law, has changed over time, from judicial hostility before the 1920s,<sup>103</sup> to a neutral acceptance during the 1920s with the enactment of the FAA,<sup>104</sup> to a broad embrace during the 1980s and following years through expansive, pro-arbitration interpretations of the FAA.<sup>105</sup> Perhaps the Court's infatuation with arbitration has hit its apogee and is beginning to stall—or swing in the other direction. The current climate may have caused the Justices to reconsider their expansive views of the FAA.

The confirmation hearings of Justice Brett Kavanaugh occurred right before the oral argument in *New Prime*, which took place during the first week of the Court's October 2018 Term.<sup>106</sup> The first phase of Kavanaugh's contentious confirmation hearings occurred earlier in September 2018, with a fifth day of unprecedented, explosive, dramatic, tearful, and angry testimony involving Kavanaugh and Dr. Christine Blasey Ford on September 27, 2018.<sup>107</sup> With the allegations that Kavanaugh had sexually assaulted Blasey Ford, issues regarding the #MeToo movement and related accountability became part of the intensity of these confirmation hearings.<sup>108</sup> Kavanaugh's partisan outbursts during the hearings were so strong that they prompted Professor Lawrence Tribe to author an op-ed explaining that Justice Kavanaugh may have to recuse himself in

---

<sup>102</sup> See, e.g., Marrian Zhou & Richard Nieva, *Google Will End Forced Arbitration for Employees*, CNET (Feb. 21, 2019, 4:45 PM), <https://www.cnet.com/news/google-will-reportedly-end-forced-arbitration-for-employees/>.

<sup>103</sup> See, e.g., *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007–08 (S.D.N.Y. 1915).

<sup>104</sup> 9 U.S.C. §§ 1–16 (2012). A House Report explained that the sole purpose of the FAA was to reverse the old judicial hostility against arbitration agreements and make such agreements enforceable, like any other contract: “Arbitration agreements are purely matters of contract, and the effect of [the FAA] is simply to make the contracting party live up to his agreement.” H.R. REP. NO. 68-96, at 1 (1924).

<sup>105</sup> See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>106</sup> See generally Transcript of Oral Argument, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (No. 17-340).

<sup>107</sup> Richard Wolf, ‘*Calculated Political Hit*’: *Brett Kavanaugh Says Accusations Rooted in Anger over Trump*, USA TODAY, <https://www.usatoday.com/story/news/politics/2018/09/27/brett-kavanaugh-testifies-after-christine-fords-assault-allegations/1442762002/> (last updated Sept. 27, 2018, 7:29 PM).

<sup>108</sup> Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. TIMES (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html>.

several cases because of the “blatant partisanship and personal animosity” he displayed during the hearings.<sup>109</sup> Against the backdrop of the contentious Kavanaugh hearings—just a few days before the opening of the Court’s new Term—perhaps the Justices felt a need to avoid accusations of partisanship in their decisions. The Court’s prior FAA decisions, such as *Southland Corp. v. Keating* and *Circuit City*, can certainly be criticized as illegitimate, unconstitutional rulings that rewrite the statute enacted by Congress. And they can be attacked as the result of the Justices’ partisan views—and indeed, partisanship may never completely disappear from judicial decision-making. But, as recognized by some Court-watchers, the contentious confirmation hearings of Justice Kavanaugh may have caused Chief Justice Roberts and others to shift some of their views more towards the center and issue more moderate, restrained decisions, at least in the near future, to protect the legitimacy of the Court.<sup>110</sup>

The *New Prime* decision was also issued in the midst of a polarized society and the unorthodox, controversial presidency of Donald Trump, who has leveled attacks against the judiciary. After the oral argument but before the Court issued its decision in *New Prime*, Chief Justice Roberts issued a public rebuke of the President’s attacks that the judiciary was filled with “Obama judges,” “Clinton judges,” and “Bush judges.”<sup>111</sup> Given the attacks of Trump and in the wake of the confirmation hearings of Justice Kavanaugh, the Justices may have been more sensitive to allegations about partisanship and the lack of independence of the judiciary when they were considering and deliberating the *New Prime* case. Perhaps wanting to avoid a split along partisan lines, the Justices may have tried harder in *New Prime*, as compared to prior FAA cases, to construe and apply the FAA as originally written by Congress. One can easily criticize the last several decades of FAA decisions as involving partisan rulings,<sup>112</sup> but such a critique cannot stand against the *New Prime* decision.

---

<sup>109</sup> Tribe, *supra* note 7.

<sup>110</sup> See, e.g., Lawrence Baum & Neal Devins, *The Hidden Silver Lining if Kavanaugh Is Confirmed*, WASH. POST (Oct. 5, 2018), [https://www.washingtonpost.com/opinions/the-hidden-silver-lining-if-kavanaugh-is-confirmed/2018/10/05/fc2d7fb6-c8ce-11e8-b2b5-79270f9cce17\\_story.html](https://www.washingtonpost.com/opinions/the-hidden-silver-lining-if-kavanaugh-is-confirmed/2018/10/05/fc2d7fb6-c8ce-11e8-b2b5-79270f9cce17_story.html).

<sup>111</sup> Robert Barnes, *Rebuking Trump’s Criticism of ‘Obama Judge,’ Chief Justice Roberts Defends Judiciary as ‘Independent’*, WASH. POST (Nov. 21, 2018), [https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09\\_story.html](https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html).

<sup>112</sup> See generally, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (5–3 opinion); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (5–4 opinion); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (5–3 opinion).

### C. *New Prime and Looking Ahead to the Future*

Looking ahead to the future, *New Prime* can help solve some problems involving the FAA, as well as raise fundamental questions about America's justice system. First, *New Prime* suggests a new approach courts may use to fine-tune the existing legal framework of the FAA. Second, this final section about the future discusses how *New Prime* raises larger questions about which workers are exempt from the coverage of the FAA, and several types of workers in the gig economy could be impacted. Third, this Essay concludes by examining fundamental questions raised by *New Prime*, like what the future role of arbitration in America's civil justice system should be, whether Congress should curb the use of arbitration, access to justice, and federalism.

#### 1. *Using New Prime to Fine-Tune the FAA's Legal Framework*

The FAA is now nearly 100 years old, and it is badly in need of reform. Because the statute is relatively short and was originally designed for a much more limited scope of arbitration than seen today, lower courts have issued conflicting decisions when interpreting the FAA. This confusion in arbitration law is disappointing, because a policy objective of this area of law should be the efficient resolution of disputes. However, the FAA cannot properly operate as a statute that smoothly facilitates arbitration if there is continued litigation and conflicting decisions over the FAA's meaning or standards. The *New Prime* decision suggests a new approach courts could use when resolving these conflicting decisions and fine-tuning arbitration law.

As explained above, the Court in *New Prime* adopted a literalist, originalist, and more comprehensive approach when interpreting the FAA.<sup>113</sup> Looking forward, courts can use this approach to address ongoing controversies in arbitration law. To help illustrate this approach, this section addresses some examples of confusion in arbitration law in light of *New Prime*.

One area of confusion involves pre-hearing discovery. Section 7 of the FAA provides arbitrators with subpoena power over third parties, and courts can hold such persons in contempt if they refuse to honor the arbitrator's subpoenas.<sup>114</sup> However, there is confusion regarding the subpoena power. Some courts, like the Third Circuit, construe the subpoena power narrowly to only cover testimony from third parties at the live merits hearings before an arbitration panel.<sup>115</sup> Other

---

<sup>113</sup> See *supra* notes 80–93 and accompanying text.

<sup>114</sup> 9 U.S.C. § 7 (2012).

<sup>115</sup> *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004). This particular opinion

courts, like the Eighth Circuit, construe the subpoena power expansively to cover not only testimony from third parties at the arbitral hearings but also pre-hearing discovery from third parties.<sup>116</sup>

The approach adopted in *New Prime* suggests how courts should resolve this split involving subpoena power. Under a textualist, statutory originalist approach, the Third Circuit's narrow, more limited view of the subpoena power is correct. Broad pre-hearing discovery did not really exist when the FAA was enacted in 1925; this kind of discovery was one of the landmark changes arising from the adoption of the Federal Rules of Civil Procedure in 1938.<sup>117</sup> Further, the FAA's text provides that the arbitrators "may summon in writing any person to attend *before them*,"<sup>118</sup> and physical presence before the arbitrators likely describes attendance at the hearings, where the arbitrators would be present. Therefore, under an originalist approach to statutory interpretation, courts should construe Section 7 of the FAA as limited to subpoenas for providing testimony at the hearings, not pre-hearing discovery. In fact, then-Judge Alito, who wrote the Third Circuit opinion adopting the narrow view, criticized the Eighth Circuit's expansive view of Section 7. Alito pointed out that the Eighth Circuit was improperly using its own policy preferences to override the clear text of the statute,<sup>119</sup> a concern addressed in *New Prime*.<sup>120</sup>

Courts are also split as to the meaning of the term "arbitration," which is not defined anywhere in the FAA. Some courts view arbitration under the FAA as requiring a binding process,<sup>121</sup> while other courts are willing to classify nonbinding procedures as arbitration under the FAA.<sup>122</sup> The approach used by the Court in *New Prime* also suggests a solution for this conflict. *New Prime* suggests that the different provisions of the FAA should be construed as a unitary, comprehensive whole.<sup>123</sup> Under this approach, the FAA carefully

---

was authored by then-Judge Samuel Alito. *Id.* at 404.

<sup>116</sup> *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870–71 (8th Cir. 2000).

<sup>117</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998) ("Prior to [the adoption of] the Federal Rules of Civil Procedure [in 1938], discovery in civil cases in federal court was severely limited. The Federal Rules discovery provisions dramatically increased the potential for discovery.").

<sup>118</sup> 9 U.S.C. § 7 (emphasis added).

<sup>119</sup> *Hay Grp., Inc.*, 360 F.3d at 406, 410.

<sup>120</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019).

<sup>121</sup> *Dluhos v. Strasberg*, 321 F.3d 365, 372–73 (3d Cir. 2003) (rejecting application of the FAA to a nonbinding dispute resolution process because the FAA "applies only to binding proceedings likely to realistically settle the dispute").

<sup>122</sup> *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998) (holding that the FAA covers nonbinding procedures).

<sup>123</sup> *See supra* notes 84–86 and accompanying text.

regulates all aspects of arbitration proceedings, including the beginning,<sup>124</sup> middle,<sup>125</sup> and end of a proceeding;<sup>126</sup> the FAA envisions a process that will result in a final award that can be confirmed and entered as a court judgment.<sup>127</sup> This comprehensive framework, which is consistent with the comprehensive interpretive approach adopted in *New Prime*, suggests that the FAA was designed to cover binding procedures that could result in an award that would be entered as a final court judgment.<sup>128</sup>

There are many other conflicting judicial decisions involving the FAA.<sup>129</sup> Looking ahead to the future, courts may resolve these conflicting decisions by using the textualist, originalist, and comprehensive approach from *New Prime*.<sup>130</sup>

## 2. Whom Does the FAA Cover?

*New Prime* clarifies that for purposes of the transportation worker exemption in the FAA, whether the worker is an employee or independent contractor is irrelevant.<sup>131</sup> But *New Prime* leaves unanswered deeper questions about who counts as a transportation worker. Some courts have required that a worker literally cross state lines to trigger the exemption.<sup>132</sup> Other courts have rejected this requirement, and have suggested that local postal workers and managers of

---

<sup>124</sup> 9 U.S.C. §§ 3, 4 (2012).

<sup>125</sup> *Id.* § 7.

<sup>126</sup> *Id.* §§ 9, 10.

<sup>127</sup> *Id.* § 9.

<sup>128</sup> *Dluhos v. Strasberg*, 321 F.3d 365, 371–73 (3d Cir. 2003) (holding that the FAA applies to proceedings that result in a final, binding resolution of a dispute).

<sup>129</sup> *See, e.g.*, *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 355–56 (5th Cir. 2009) (recognizing the uncertainty and confusion involving the manifest disregard standard for vacatur of arbitral awards); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) (“The absence of a consensus on the meaning of ‘evident partiality’ [for vacatur] is evidenced by the approaches adopted by the different circuits.”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1051–52 (4th Cir. 1985) (noting conflicting views about the availability of preliminary injunctive relief from a court in aid of arbitration).

<sup>130</sup> Although the Court in *New Prime* adopted a textualist approach and appeared to reject policy-driven arguments in connection with the FAA, a purported policy of promoting efficiency seems to have driven a majority of the Justices in the Court’s most recent decision in *Lamps Plus, Inc. v. Varela*. No. 17-988, 2019 WL 1780275 (U.S. Apr. 24, 2019). The Court in *Lamps Plus* held that an ambiguous arbitration agreement cannot provide the required contractual basis for compelling class arbitration. *Id.* at \*9. In reaching its holding, the majority relied on a policy-driven argument that class arbitration would sacrifice the efficiency and speed of bilateral arbitration. *Id.* at \*7–8. The Author suspects that the majority’s opinion in *Lamps Plus* is probably not really about the FAA or arbitration at all, and instead, is more about the majority’s dislike for class procedures. Perhaps the Supreme Court will use a more textualist approach when interpreting the FAA in future cases, as long as class proceedings are not involved, and lower courts may also use *New Prime*’s textualist approach when interpreting the FAA.

<sup>131</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 544 (2019).

<sup>132</sup> *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015) (holding that local delivery drivers do not qualify for the transportation worker exemption).

interstate truckers may be covered.<sup>133</sup> For example, in *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, the Eleventh Circuit reasoned that postal workers are covered by the exemption: “[I]f any workers are ‘actually engaged in interstate commerce,’ the instant postal workers are. They are responsible for dozens, if not hundreds, of items of mail moving in ‘interstate commerce’ on a daily basis. Indeed, without them, ‘interstate commerce,’ as we know it today, would scarcely be possible.”<sup>134</sup>

Similarly, the Sixth Circuit found that this exemption covered a distributor at a local mail center who apparently did not cross state lines.<sup>135</sup> Although some postal workers would likely cross state lines when driving a truck carrying mail from one state to another—like Mr. Oliveira, an interstate trucker hauling freight—some courts have held that local postal workers involved in the process are also covered by the exemption.<sup>136</sup> With today’s e-commerce economy, if anyone is involved in the interstate transport of goods, wouldn’t drivers, warehouse workers, and perhaps other employees at Amazon qualify? Amazon is one of the largest companies in the world, with a massive, comprehensive logistics network facilitating deliveries all around the country and world.<sup>137</sup> Massive, vertically integrated, corporate behemoths like Amazon may take on certain features of the traditional transportation industry and arguably may qualify for the transportation worker exemption.<sup>138</sup> As Professors Richard Bales and Lise Gelernter have pointed out, there is uncertainty whether Uber and Lyft drivers in today’s gig economy would qualify for the transportation worker exemption, and the Supreme Court may ultimately have to engage in sharper line drawing and revisit its holding in *Circuit City*,<sup>139</sup> which judicially created the transportation worker exemption.<sup>140</sup>

---

<sup>133</sup> See, e.g., *Zamora v. Swift Transp. Corp.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at \*7–8 (W.D. Tex. June 3, 2008) (holding that supervisory manager for interstate trucking company qualifies for the transportation worker exemption).

<sup>134</sup> 823 F.2d 466, 473 (11th Cir. 1987).

<sup>135</sup> *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988).

<sup>136</sup> *Id.*; *Am. Postal Workers Union*, 823 F.2d at 473.

<sup>137</sup> Eytan Buchman, *The Rise of Amazon Logistics*, TRANSP. TOPICS (Aug. 20, 2018, 6:00 AM), <https://www.tnews.com/articles/rise-amazon-logistics>. See generally *Amazon*, AMAZON, <https://logistics.amazon.com/> (last visited Apr. 19, 2019);

<sup>138</sup> See *Rittmann v. Amazon.com, Inc.*, No. C16-1554-JCC, 2019 WL 1777725, at \*7 (W.D. Wash. Apr. 23, 2019) (Amazon delivery drivers qualify for the FAA’s transportation worker exemption under the rationale of *New Prime*).

<sup>139</sup> Rick Bales, “*New Prime*” and the Gig Economy, U. MO. SCH. L.: ARB. INFO, <http://law.missouri.edu/arbitrationinfo/new-prime-gig-economy/> (last visited Apr. 19, 2019); see also Lise Gelernter, U. MO. SCH. L.: ARB. INFO, “*New Prime*” and the Viability of State Arbitration Acts, <http://law.missouri.edu/arbitrationinfo/new-prime-viability-state-arbitration-acts/> (last visited Apr. 19, 2019).

<sup>140</sup> *Circuit City* was wrongly decided, and the drafters understood the FAA would not apply to any

### 3. *New Prime Raises Fundamental Questions About the Future Role of Arbitration in America's Civil Justice System*

Looking forward, the *New Prime* decision raises a technical, focused question about the future role of state law in regulating arbitration agreements involving transportation workers. This narrow question, in turn, then raises a more fundamental, broader question about the continued expansive use of arbitration in America's civil justice system. In *New Prime*, the Court held that the FAA does not cover transportation workers, whether the worker is an independent contractor or an employee.<sup>141</sup> It is clear that arbitration agreements involving transportation workers cannot be enforced *pursuant to the FAA*. However, this holding raises a technical, narrow question: can such arbitration agreements involving transportation workers be enforced under state laws, perhaps state arbitration laws or state contract laws? The Third Circuit, more than a decade before *New Prime*, held that such agreements can be.<sup>142</sup> But *New Prime* suggests this approach may be flawed.

One view, expressed by the Third Circuit in *Palcko v. Airborne Express, Inc.*, is that the transportation worker exemption does not preempt state arbitration laws.<sup>143</sup> In other words, if the FAA's transportation worker exemption is triggered, an arbitration agreement may still be fully enforceable under state arbitration laws or state contract laws. According to the court, if an agreement falls within the scope of the Section 1 exemption, then, for that agreement, it is "as if the FAA had never been enacted."<sup>144</sup> As a result, state law can then fill the gap, and states are free to choose whether to enforce such an agreement. Under this view, transportation workers must now consult state laws to determine whether their arbitration agreements are enforceable.

However, the *New Prime* Court suggests a different framework that would preempt any state law purporting to enforce a transportation worker's arbitration agreement. According to the *New Prime* Court, "Sections 1, 2, and 3 [and 4] are integral parts of a whole, [and Sections] 1 and 2 define the field in which Congress was legislating."<sup>145</sup> One must construe the statute as an integrated, interwoven whole, so that the principles of Sections 1 and 2 of the FAA should be construed together. Under this reading, the exclusion regarding transportation

---

employment disputes. See generally SZALAI, *OUTSOURCING JUSTICE*, *supra* note 51.

<sup>141</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543–44 (2019).

<sup>142</sup> *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *New Prime*, 139 S. Ct. at 538; see *supra* notes 84–86 and accompanying text.

workers is part and parcel of Section 2's directive to enforce arbitration agreements, and the concepts embodied in Section 1 are interwoven and inseparable from the concepts in Section 2. Thus, in passing the FAA, Congress declared a principle that all arbitration agreements, except for those involving transportation workers, are fully binding. Courts must enforce all arbitration agreements, but not those involving transportation workers.

In its sweeping *Southland* decision in 1984, a deeply flawed decision but nevertheless governing law, the Supreme Court held that Section 2's directive applies in state court and overrides conflicting state laws.<sup>146</sup> Because Section 2's principles are inextricably interwoven with those of Section 1 according to *New Prime*,<sup>147</sup> it appears that state courts must enforce all arbitration agreements except those of transportation workers, contrary to the earlier view of the Third Circuit. The combined punch of Sections 1 and 2, which are interwoven sections that cannot be read separately, overrides conflicting state laws. Under this interpretation of the FAA, and accepting the flawed *Southland* decision as governing law, as we must, one could argue that as a matter of federal, preemptive law, states must generally enforce arbitration agreements, but arbitration agreements involving transportation workers are unenforceable. As a result—and contrary to the view of the Third Circuit in the older *Palcko* case<sup>148</sup>—the FAA would preempt any state laws declaring enforceable arbitration agreements of transportation workers. Lower courts, and eventually perhaps the Supreme Court, will have to sort out these issues and whether the Third Circuit's *Palcko* decision is good law in light of *New Prime*.<sup>149</sup>

At a deeper, more fundamental level, the *New Prime* Court's conceptualization of the FAA as involving an integrated statute raises the question of the continued validity or constitutionality of the Court's infamous *Southland* decision.<sup>150</sup> If we take the *New Prime* majority at its word, and if Sections 1, 2, 3, and 4 are integral parts of a whole and must be read together, this view casts serious doubts on the continued validity of *Southland*. Sections 3 and 4 refer to federal courts and the Federal Rules of Civil Procedure,<sup>151</sup> which suggests that Sections 1 and 2 are also designed solely for federal courts. Indeed, the evidence and arguments are overwhelming that Congress intended the FAA

---

<sup>146</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>147</sup> *New Prime*, 139 S. Ct. at 538.

<sup>148</sup> *Palcko*, 372 F.3d at 596.

<sup>149</sup> *Id.*

<sup>150</sup> *Southland*, 465 U.S. 1.

<sup>151</sup> 9 U.S.C. § 3 (2012) (“courts of the United States”); *id.* § 4 (“any United States district court” and the “Federal Rules of Civil Procedure”).

to apply solely in federal court.<sup>152</sup> *Southland* and its progeny, like the *Preston* case and its displacement of a state agency's authority over issues of state law,<sup>153</sup> represent unconstitutional deprivations of state power. The *New Prime* Court has set up a potential showdown for deciding the continued validity of *Southland*. Currently, arbitration agreements are enforceable everywhere in America and for virtually every type of claim, in both state and federal courts, pursuant to the Court's broad interpretations of the FAA.<sup>154</sup> However, if *Southland* is overruled and the FAA becomes applicable solely in federal court, states would be free to enforce or not enforce arbitration agreements. The FAA's role would then shrink and only cover the arbitration of disputes that trigger the limited subject matter jurisdiction of the federal courts, and increased opportunities for state regulation of arbitration would occur. Increased state regulation of arbitration could in turn enhance the values of federalism and allow for more experimentation with arbitration.<sup>155</sup> Thus, at a deeper level, *New Prime* raises questions about the future role and regulation of arbitration in America's entire civil justice system, both federal and state.

The broader policy issues raised by *New Prime* involve an ongoing, larger arbitration debate in America: are there certain disputes that we deem to be inappropriate for arbitration? The pendulum has shifted to broad, sweeping acceptance of arbitration so that virtually every matter can be arbitrated. But it seems like American society, both through private initiatives and proposals in Congress,<sup>156</sup> is at a crossroads, looking forward to possible future paths, where we can fine-tune the legal framework for arbitration to perhaps limit its uses. Limiting arbitration does not necessarily mean a return to an old distrust of arbitrators or arbitration in general. Arbitrators strive as much as any judge to do what is right and fair under the law, and arbitration enables parties to realize certain values, such as efficiency, speed, finality, and expertise in dispute resolution. Instead of framing this larger debate in terms of hostility towards arbitration, the debate over the scope of the FAA is best framed by asking whether there are other values society wishes to emphasize for particular claims, by ensuring the judiciary's ability to adjudicate them. For example, a society may decide that the values of finality, speed, and efficiency are appropriate for most disputes, but not as pressing for others. Perhaps we as a society want victims of certain wrongdoing—like sexual or racial harassment or

---

<sup>152</sup> MACNEIL, *supra* note 52.

<sup>153</sup> *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

<sup>154</sup> *Southland*, 465 U.S. at 16.

<sup>155</sup> PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 121 (2013).

<sup>156</sup> *See supra* Section II.B.

discrimination—to feel respected and heard in a public forum by a jury of peers and a government representative serving as a judge. Such a system, although arguably more cumbersome, provides extra procedural protections such as broad discovery and broad appellate rights to ensure that a correct, fair judgment has been issued.

### CONCLUSION

Compared to the last several decades of Supreme Court decisions involving the FAA, *New Prime, Inc. v. Oliveira* is a landmark case for rejecting an expansive interpretation of the statute and ruling in favor of workers. Using *New Prime* as a lens into the past, present, and future, one can see a panoptic view of the development of arbitration law and the role of arbitration within our broader legal system. The expansive growth of the legal framework for arbitration, a growth resulting mainly from the policy driven, flawed holdings of prior Supreme Court cases, represents one of the most far-reaching and transformative legal developments in American history because of the potential impact of arbitration on virtually every area of law. Moving forward, it is my hope that the Supreme Court will follow the more restrained interpretative approach it used in *New Prime* and not apply its own policy choices in the larger debate about arbitration. Instead, the Supreme Court should apply the limited statute Congress originally adopted in 1925 and let the American people debate and decide the appropriate role of arbitration in our broader legal system.