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PERSPECTIVE

Statutory originalism has firmly arrived

By Steven B. Katz

The U.S. Supreme Court has made two important arbitration rulings this month, handing down a split decision in terms of arbitration politics: one win for proponents of arbitration, one win for opponents. I don't see these decisions as "split" in any meaningful sense. They speak with one voice to announce a clear shift in the way the high court is going to interpret federal law in the future: "Statutory originalism" has firmly arrived.

The first of these decisions was the first ever opinion from the newest justice, Brett Kavanaugh. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 2019 DJDAR 147 (Jan. 8, 2019), he wrote for a unanimous court that when the parties to an arbitration agreement delegate "gateway" arbitrability questions to an arbitrator, the courts must send the dispute to arbitration, even if it is indisputably not arbitratrable. Although the court squarely held in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), that parties may delegate "gateway" arbitrability questions to an arbitrator, so long as there is "clear and unmistakable" evidence of the delegation, some circuits held a district court need not do so if compelling arbitration would be "wholly groundless" because the underlying dispute was clearly inarbitrable. Justice Kavanaugh rejected the idea that a "wholly groundless" exception could be read into the Federal Arbitration Act. First, as always, because "courts must enforce arbitration contracts according to their terms." Second, because "[w]e must interpret the Act as written." Third, "the Act contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text."

This reasoning seems to be unremarkable and airtight — except that there is a clear textual tether for a "wholly groundless" exception: Section 10 of the FAA "provides for backend judicial review of an arbitrator's decision if an arbitrator has 'exceeded' his or her 'powers.'" Deciding a clearly inarbitrable dispute is the epitome of an arbitrator exceeding his or her powers. So why doesn't Section 10 permit courts to avoid the fruitless act of compelling arbitration of a gateway issue that can only be decided one way? Because, Justice Kavanaugh wrote, "Congress has designed the Act in a specific way, and it is not our proper rule to redesign the statute."

The second decision was authored by Justice Neil Gorsuch, also writing for a unanimous court. *New Prime, Inc. v. Olveira*, 2019 DJDAR 397 (Jan. 15, 2019), held that the FAA does not cover certain transportation workers — whether the worker is an employee, an independent contractor, or something else.

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The FAA generally favors arbitration of disputes and provides that arbitration agreements should be enforced. Section 2 of the FAA broadly extends the generous enforcement of arbitration agreements to any "contract evidencing a transaction involving commerce." But there are exceptions. Section 1 exempts "contracts of employment of seamen, railroad workers, or any class of workers engaged in foreign or interstate commerce." In order to keep Section 1 from completely erasing Section 2, the Supreme Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that "any class of workers engaged in foreign or interstate commerce" refers to "transportation workers" — in other words, those "actually engaged in the movement of goods in interstate commerce."

In *New Prime*, the Supreme Court turned to the meaning of "contracts of employment." The plaintiff, an interstate truck driver, was arguably an independent contractor, not an employee. However, the court interpreted "contracts of employment" according to its meaning when the FAA was enacted in 1925 and found that "employment" at that time was synonymous with "work" rather than a true employer-employee relationship as we understand it today.

Thus, the court held, even if the plaintiff was an independent contractor, his contract fell within the Section 1 exemption, and *New Prime* could not compel him to arbitrate his wage and hour class action.

Before *New Prime*, most courts looked at the FAA's Section 1 language through 21st century eyes: A "contract of employment" meant a contract that created an employer-employee relationship. If a transportation worker was truly an independent contractor, the contract could not be one "of employment." If he or she was truly an "employee," then it was. But the Supreme Court held that "contract of employment" must be interpreted instead through "1920s eyes." The court's analysis was largely devoted to examining, in detail, what the word "employment" meant when the FAA was enacted in 1925, and it concluded that the meaning of "employment" was "broader than may be often found in dictionaries today." In 1925, "employ" "usually meant nothing more than an agreement to perform work."

Justice Gorsuch defended this style of interpretation by writing, "it's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.' ... After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands."

This is "statutory originalism" — the idea that statutes must be interpreted (1) strictly according to their words (textualism), and (2) in light of the common meaning of those words that existed at the time they were enacted (originalism). "Statutory originalism" is to be contrasted with an interpretive style that strives to divine the underlying purposes of a statute and reinterpret old words, if necessary, to remain faithful to that purpose — what Justice Oliver Wendell Holmes Jr. meant when he said, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."

New Prime's wholesale adoption of "statutory originalism" as an interpretive rule opens up new opportunities for employers to challenge extensions of employment laws into areas unanticipated when the laws were enacted. The Fair Labor Standards Act — enacted only a decade after the FAA — is an especially fertile ground for such opportunities. Hotly litigated questions over the extension of FAA coverage to student interns and trainees — certainly not considered "employees" in the 1930s — could be resolved in favor of employers by a statutorily originalist Supreme Court. Another area where "statutory originalism" might be relevant would be the recent expansion of "sex" in Title VII (enacted in 1964) to encompass sexual orientation and gender identity.

In the Supreme Court's newest arbitration decisions we are seeing the full flower of "statutory originalism." Both opinions were issued on behalf of a unanimous court. Justice Ruth Bader Ginsburg's brief concurrence in *New Prime* departed from the majority opinion only to note that Congress could "design legislation to govern changing times and circumstances" if it chose to do so — hardly a rejection of "statutory originalism." As Justice Elena Kagan observed during her confirmation hearing: "[W]e are all orginalists."

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