

Oklahoma Law Review

Volume 57 | Number 1

1-1-2004

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Recommended Citation

Harry F. Tepker, *Reply to Judge Easterbrook: Regarding History as a Judicial Duty*, 57 OKLA. L. REV. 41 (2004),
<https://digitalcommons.law.ou.edu/olr/vol57/iss1/5>

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REGARDING HISTORY AS A JUDICIAL DUTY

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Judge Easterbrook's lecture, our replies, and the ongoing debate about methodology in legal interpretation are testaments to the fact that we all want to follow the advice of Mark Twain: "Always do right. This will gratify some people; and astonish the rest."¹ The problem, of course, is that agreement about what is right is elusive and even impossible when the meaning of a statute or a constitution is at issue.

Judge Easterbrook argues that a federal judge, unlike an administrative agency, is obliged to interpret a statute at a "low level of generality."² He adds that a statute is to be "taken as a code of things to *do* rather than a set of objectives to *achieve*."³ The judge disclaims the traditional emphasis on supposed "plain meanings" of text, but remains true to the spirit of textualism and its justifications. A confined role for an Article III judge leaves appropriate, flexible discretion in the hands of politically accountable administrative agencies. The methodological confinements serve democracy and political accountability, as well as the need for flexibility and change. A set of rules limits the dangers posed by the lifetime tenure enjoyed by the independent judiciary.

Lacking time or talent to address the broader jurisprudential case outlined skillfully by the judge, this paper is confined to a reply designed to pose a single question: Will avoidance of judicial scrutiny of a legislature's purpose in favor of the "low level of generality" actually limit the discretion of federal judges. I confess to skepticism.⁴

Judge Easterbrook's assessment of one case, *Circuit City Stores, Inc. v. Adams*,⁵ illustrates some of the problems. He offers a qualified praise for the

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1. Samuel Clemens ("Mark Twain"), To the Young People's Society, Greenpoint Presbyterian Church, Brooklyn, New York (Feb. 16, 1901), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 763 (Emily Morison Beck ed., 14th ed. 1968).

2. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 10 (2004).

3. *Id.*

4. I expressed similar skepticism about allegedly neutral and nonpolitical methods of statutory interpretation in recent labor and employment discrimination decisions of the U.S. Supreme Court. Harry F. Tepker, *Writing the Law of Work on Nero's Pillars: The 1998-99 Term of the U.S. Supreme Court*, 15 LAB. LAW. 181 (1999).

5. 532 U.S. 105 (2001).

majority's analysis: "What particularly impressed me . . . was the debate about the right level of generality."⁶

In *Circuit City*, the employer had insisted that all employees consent to arbitration of employment disputes as a condition of hiring.⁷ When the employee filed an employment discrimination action against petitioner under state law, the employer responded by suing in federal court to enjoin the state-court action and to compel arbitration pursuant to the Federal Arbitration Act (FAA).⁸ The district court ordered arbitration, and the employee appealed.⁹ The United States Court of Appeals for the Ninth Circuit reversed, holding that all employment contracts were beyond the FAA's reach.¹⁰

The opinion of the U.S. Supreme Court, written by Justice Kennedy, began by noting that the 1925 FAA sought to reverse the "hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice."¹¹ As written, 9 U.S.C. § 2 sought to enforce arbitration agreements "in any maritime transaction" or in any "contract evidencing a transaction involving commerce."¹² But 9 U.S.C. § 1, the "exemption provision," disclaimed coverage of employment contracts.¹³ Specifically, it provided that the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁴ In *Circuit City*, the Court embraced a broad interpretation of coverage and a narrow construction of the exclusion provision. It is a result that is difficult to square with Judge Easterbrook's recommendation that jurists focus on a low level of generality.

The majority rejected the employee's interpretation that "the word 'transaction' in § 2 extends only to commercial contracts," and that therefore

6. Easterbrook, *supra* note 1, at 16.

7. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999), *rev'd*, 532 U.S. 105 (2001).

8. *See id.*; 9 U.S.C. §§ 1-14 (2000).

9. *Circuit City*, 194 F.3d at 1071.

10. *Id.* at 1071-72.

11. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

12. 9 U.S.C. § 2 (2000). The FAA's coverage provision, 9 U.S.C. § 2, provides that:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

13. *Id.* § 1.

14. *Id.*

“an employment contract is not a ‘contract evidencing a transaction involving interstate commerce’ at all.”¹⁵ In the majority’s analysis, the § 1 exemption is confined to transportation workers — and is basically irrelevant to an employment dispute between employer and employee outside the maritime and transportation sectors,¹⁶ but the coverage provision, § 2, compels judicial enforcement of arbitration agreements “in any . . . contract evidencing a transaction involving commerce,”¹⁷ which covers all employment contracts substantially affecting commerce.¹⁸

One of the interpretive problems posed by *Circuit City* is how to handle historical context. In essence, the employee wanted some interpretive consistency. If the Court was going to ignore history and pretend that the word “commerce” was used in the coverage provision in its post-1937 sense (despite the fact that the law was written in 1925), then the same ought to have been done with interpretation of the exemption provision. In this way, the Court would “do” what Congress seemed to want courts to “do”: encourage and enforce commercial arbitration, but not employment dispute arbitration.¹⁹ The coverage provision in the 1925 law was written when constitutional doctrine did not permit a broad federal regulation of employment relationships. As is well known, this modern regulation of employment did not emerge until well after the constitutional crisis of 1937 and did not extend fully to antidiscrimination problems until after the civil rights struggles of the 1960s.²⁰ Again, the majority held the § 1 exemption interpretation need not and should not be guided by the fact that, when Congress adopted the FAA, the phrase “engaged in commerce” came close to expressing the outer limits of its Commerce Clause power as then understood.²¹ The majority characterized the argument as an invitation about what Congress would have thought if blessed with the power of prophecy, rather than as a more straightforward attempt to interpret what Congress was doing at the time it passed the law.²² In short, the majority all but ignored the significance of

15. *Circuit City*, 532 U.S. at 113, 119.

16. *Id.* at 119.

17. 9 U.S.C. § 2.

18. See *Circuit City*, 532 U.S. at 119.

19. “Congress did not need to worry especially about the FAA’s effect on legislation that did not exist and was not contemplated. As to workers uncovered by any specific legislation, Congress could write on a clean slate, and what it wrote was a general exclusion for employment contracts within Congress’s power to regulate. The Court has understood this point before . . .” *Id.* at 140 (Souter, J., dissenting).

20. *Circuit City Stores*, 532 U.S. at 1161; *id.* at 1319 (Souter, J., dissenting).

21. See *id.* at 118.

22. *Id.* at 119 (“While it is of course possible to speculate that Congress might have chosen a different jurisdictional formulation had it known that the Court would soon embrace a less

historical context. But is this studied ignorance a genuine intention to the specifics of the legislation? Is it truly a focus on what Congress said it wanted the judges to do?

An answer to assessing the real allure of this victory for the employer may be found later in Justice Kennedy's opinion, when the majority relied quite openly and candidly on the FAA's purpose of overcoming judicial hostility to arbitration. This purpose, as the Court saw it, "further compel[s] that the § 1 exclusion provision be afforded a narrow construction."²³ Having found the statute's purpose, the justices declined to assess other elements of historical context, because "the legislative record on the § 1 exemption is quite sparse."²⁴ Finally, the majority spoke of justifications and benefits of its ruling in terms that a "textualist" committed to enforcing a "code" of "what to do" ought to reject as out-of-bounds:

[F]or parties to employment contracts. . . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, . . . and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and "breeding litigation from a statute that seeks to avoid it."²⁵

restrictive reading of the Commerce Clause, the text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts.").

23. *Id.* at 118.

24. *Id.* at 119.

25. *Id.* at 122-23.

Though there is little doubt that the practical and economic consequences of its decision are as the Court describes them, the reasoning does not seem so very different than the discretionary, policy-laden analysis that Judge Easterbrook would confine to politically accountable institutions. The justices are skeptical of litigation, its costs and inefficiencies, and so are moved to an interpretation that preempts the choices of the states, when there seems little doubt as a matter of legal history that Congress could not have imagined any such outcome. In dissent, Justice Stevens quite persuasively sees the *Circuit City* decision as one of several that have “pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.”²⁶

It is difficult to see *Circuit City* as a disinterested, neutral search for specific rules about what to do, as opposed to a preference for alternative dispute resolution systems. Justice Stevens summarizes the reasons for skepticism well:

It is not necessarily wrong for the Court to put its own imprint on a statute. But when its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority. As the history of the legislation indicates, the potential disparity in bargaining power between individual employees and large employers was the source of organized labor’s opposition to the Act, which it feared would require courts to enforce unfair employment contracts. That same concern . . . underlay Congress’ exemption of contracts of employment from mandatory arbitration. When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.²⁷

26. *Id.* at 131-32 (Stevens, J., dissenting).

27. *Id.* at 132-33 (Stevens, J., dissenting).

