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## Diminution Doctrine: Arbitration's First Amendment Problem

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## INTRODUCTION

When Congress passed the Federal Arbitration Act (“FAA”),<sup>1</sup> it aimed to end an era of judicial enmity with arbitration.<sup>2</sup> The FAA put arbitration agreements “upon the same footing as other contracts,”<sup>3</sup> ushering in a new era of privatized adjudication. After centuries of invalidation by default,<sup>4</sup> this seemingly faster, cheaper alternative to litigation became widely available. And despite early resistance, the judiciary would ultimately come to embrace, prefer even, the FAA’s “national policy favoring arbitration.”<sup>5</sup>

Arbitration is ubiquitous these days. Scarcely confined to contracts between comparably sophisticated commercial actors, arbitration clauses can be found in everything from cell phone contracts<sup>6</sup> to employment applications.<sup>7</sup> Increasing public concern with “forced arbitration”<sup>8</sup> notwithstanding, the U.S. Supreme Court continues to accommodate the FAA’s ever-expanding scope.<sup>9</sup> Once-stalwart

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<sup>1</sup> Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2013)), <http://www.legisworks.org/congress/68/publaw-401.pdf>.

<sup>2</sup> See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987); see also Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 210 (2012).

<sup>3</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>4</sup> See *McMahon*, 482 U.S. at 22-26.

<sup>5</sup> *Keating*, 465 U.S. at 10.

<sup>6</sup> See, e.g., VERIZON WIRELESS, CUSTOMER AGREEMENT, <http://www.verizonwireless.com/b2c/support/customer-agreement> (showing an example of this in a section entitled “How Do I Resolve Disputes with Verizon Wireless?”). See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding arbitration clause and class action waiver in mobile service provider contract).

<sup>7</sup> See, e.g., NATIONAL ARBITRATION AND MEDIATION, SAMPLE DISPUTE RESOLUTION CONTRACT PROVISION (EMPLOYMENT), <http://www.namadr.com/wp-content/uploads/2016/07/ContractProvisions-Employment.pdf>. See generally *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (upholding an arbitration clause in a retail worker’s employment application).

<sup>8</sup> See, e.g., Christine Hines & Jim Lardner, *Leaving Consumers High and Dry*, U.S. NEWS & WORLD REP. (Apr. 21, 2015), <http://www.usnews.com/opinion/economic-intelligence/2015/04/21/cfpb-data-shows-forced-arbitration-leaves-consumers-high-and-dry> (discussing a Consumer Financial Protection Bureau study proving the systematic unfairness of arbitration provisions); Martin S. Kardon, *The Injustice of Forced Arbitration at Nursing Homes*, LAW360 (Sept. 4, 2015), <http://www.law360.com/articles/699082/the-injustice-of-forced-arbitration-at-nursing-homes>; Andrew Strickler, *ABA Opposes Forced Arbitration of Sex Harassment Claims*, LAW360 (Aug. 7, 2018), <https://www.law360.com/commercialcontracts/articles/1070507/aba-opposes-forced-arbitration-of-sex-harassment-claims>.

<sup>9</sup> Most recently, in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the Supreme Court doubled down on its holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333

defenses against federal encroachment are no match for its “liberal federal policy favoring arbitration agreements.”<sup>10</sup> The FAA has transcended its remedial roots — transforming arbitration agreements into “super contracts”<sup>11</sup> replete with special rules favoring the enforcement of the formerly unenforceable.<sup>12</sup>

But what can be said of the broader public interest in the judicial process? As legal scholars mourn the FAA’s crushing blow to federalism,<sup>13</sup> few have stopped to consider its First Amendment implications. If the right “to petition the Government for a redress of grievances”<sup>14</sup> guarantees a certain degree of judicial functionality, the Court’s arbitration doctrine must ensure at least that level of protection.

Diminution doctrine provides an objective framework for such an assessment. By measuring FAA enforcement against three public interests protected by the right to petition — court access, precedential currency, and judicial review — diminution doctrine brings into focus constitutional encroachments that contract-based critiques of mandatory arbitration often overlook. This Essay argues that the Court’s arbitration doctrine has so deeply eroded these interests that the FAA in its current form cannot withstand First Amendment scrutiny.<sup>15</sup>

This Essay has four parts. Part I considers whether the right to petition encompasses access to judicial relief. Part II gives an overview of the FAA and the doctrine responsible for its contemporary boundlessness. Part III presents diminution doctrine by examining the

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(2011), finding that *Concepcion*’s invalidation of a California law barring class action waivers prevented parties from agreeing to have their arbitration agreement governed by that law.

<sup>10</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>11</sup> Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 532-33 (2014); see also Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 581 (2007).

<sup>12</sup> See Frankel, *supra* note 11, at 554-87 (explaining three areas in which arbitration doctrine has departed from ordinary contract law doctrines: term ambiguity, waiver, and third party obligations).

<sup>13</sup> See generally Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326 (2007) (advocating greater deference to state regulation of arbitration); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129 (2004) (arguing state courts should interpret the FAA narrowly to correct the statute’s blow to federalism).

<sup>14</sup> U.S. CONST. amend. I.

<sup>15</sup> See *infra* Part III.

extent to which the FAA has undermined the Petition Clause's guarantee of judicial access. Part IV responds to potential detractors.

### I. FINDING THE COURTHOUSE IN THE RIGHT TO PETITION

Diminution doctrine first requires a well-established judicial function within the right to petition. The First Amendment provides that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”<sup>16</sup> This word choice is critical. Preventing Congress from “abridging” this right — as opposed to merely “respecting” or outright “prohibiting” it — denotes a quantitative character<sup>17</sup> that the Framers ostensibly thought unique to the rights following the Establishment and Free Exercise Clauses. Though research yields scant purposive insight, one First Amendment scholar attributes this word choice to “that Madisonian idea that equated *abridging* with government attempts to ‘cut short’ the many messages of ‘We the People.’ Half-truths, condensed government records, redacted judicial documents, abridged literary works, and word-sanitized TV programming are antithetical to a vibrant First Amendment.”<sup>18</sup> It is with such “government-ordered brevity”<sup>19</sup> — here, as clandestine, expedited private adjudication — that diminution doctrine ultimately takes issue.

#### A. *The Functional First Amendment*

To grasp the importance of this point, one must appreciate the First Amendment's functional framework. Invoking a Kantian sense of justice, Justice Brandeis once described the First Amendment as facilitating governance in which “deliberative forces . . . prevail over the arbitrary.”<sup>20</sup> Beyond the dignitary quality of the First Amendment for which he is so often credited,<sup>21</sup> this more intentional description

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<sup>16</sup> U.S. CONST. amend. I; *see also* *Lance v. Dennis*, 546 U.S. 459, 461 (2006) (stating Petition Clause in the same manner); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (same).

<sup>17</sup> *See Abridge*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“To reduce or diminish <abridge one's civil liberties>”); *Abridge*, MERRIAM-WEBSTER DICTIONARY ONLINE (“to diminish or reduce in scope”), <https://www.merriam-webster.com/dictionary/abridge>.

<sup>18</sup> Ronald K. L. Collins, *The Speech & Press Clauses of the First Amendment*, 29 DEL. LAW. 8, 11 (2011), <http://www.klgates.com/files/Publication/8e0b64aa-8acd-445c-bbc5-11d928f6f740/Presentation/PublicationAttachment/88f4b0c7-f196-4f13-8cdf-18d4a7e4034d/DELAWinter2012-low%5B1%5D.pdf> (underlining added).

<sup>19</sup> *Id.*

<sup>20</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>21</sup> *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J.,

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speaks of a First Amendment by which transparency, careful reflection, and accountability are endemic to our governmental structure.

This command is most readily understood in the context of the Establishment and Free Exercise Clauses. By prohibiting the government from mandating respect for religion as well as from preventing its free exercise, these clauses work to eliminate one of the most invidious forms of arbitrary governance. The religion clauses serve a self-governmental function by “protect[ing] the interior spaces of the mind, where an idea develops.”<sup>22</sup> But that is only the beginning. Beyond serving as an incubator for democratic participation, the religion clauses (and those that follow) promote a deliberative character of governance that ensures much more. A personal-institutional symbiosis is equally present and imperative — a portrayal of people as government, not merely participating in it.

Deliberative governance reaches beyond a set of governmental prohibitions. Of course, the Constitution is “a charter of negative rather than positive liberties.”<sup>23</sup> As Judge Posner explains, “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”<sup>24</sup> Yet still, this is too simplistic a characterization, particularly as it relates to those liberties housed in the First Amendment.

The Bill of Rights is not a mandate for governmental dormancy in these sensitive areas. Instead, it calls for proactive governance that protects these liberties from encroachment.<sup>25</sup> What good is a First

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dissenting) (“The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”); see also BURT NEUBORNE, MADISON’S MUSIC: ON READING THE FIRST AMENDMENT 8-9 (2015) (“Justice Brandeis . . . tells us that the real purpose of the First Amendment is to enhance human dignity by protecting individual self-expression and autonomous choice.”).

<sup>22</sup> NEUBORNE, *supra* note 21.

<sup>23</sup> Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

<sup>24</sup> *Id.*

<sup>25</sup> This function is perhaps most visible in the Supreme Court’s Fourteenth Amendment jurisprudence. In *City of Boerne v. Flores*, for example, the Court enshrined Congress’s remedial powers under Section 5 of the Fourteenth Amendment as inherent in the “positive grant of legislative power” effected by the amendment. See 521 U.S. 507, 517-18 (1997).

Amendment that fails to mandate access adequate to ensure the rights it enshrines? The First Amendment's functional character underscores qualities of deliberative governance that the Supreme Court, as "ultimate expositor of the constitutional text,"<sup>26</sup> must protect.

### B. *The First Amendment Right to Judicial Redress*

The Petition Clause is tragically forgettable. Frequently overshadowed by the Speech Clause and easily swallowed up as the foreseeable effect of the Assembly Clause, its independent significance is not so readily detected. Even so, the Supreme Court has broken sufficient ground to know the Petition Clause's judicial quality. Professor Resnik explains: "The choice of the word 'government' (instead of the term 'legislature'), coupled with the history of legislative responses to public and private parties' petitions, supports reading the Clause to reference access to courts."<sup>27</sup> This was not always so.

For nearly two centuries, courts construed the Petition Clause quite narrowly.<sup>28</sup> Only in the 1960s did the notion of court access as a First Amendment right begin to seep into the Supreme Court's First Amendment jurisprudence. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>29</sup> the Court narrowed the scope of the Sherman Act to avoid a potential collision with the Petition Clause by holding that governmental lobbying efforts fell outside the Act's prohibitions.<sup>30</sup> Four years later, in *United Mine Workers of America v. Pennington*,<sup>31</sup> the Court doubled down on *Noerr*, finding such lobbying efforts beyond the Act's reach "regardless of intent or purpose."<sup>32</sup>

The *Noerr-Pennington* doctrine, as it came to be known, would eventually form the foundation for the Petition Clause's judicial

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<sup>26</sup> *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

<sup>27</sup> Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2822-23 (2015) (footnotes omitted).

<sup>28</sup> See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 *OHIO ST. L.J.* 557, 562-580 (1999) (outlining the trajectory of the right to court access prior to becoming rooted in First Amendment jurisprudence).

<sup>29</sup> 365 U.S. 127 (1961).

<sup>30</sup> See *id.* at 137-38 ("[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

<sup>31</sup> 381 U.S. 657 (1965).

<sup>32</sup> *Id.* at 670.

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function. In *California Motor Transport v. Trucking Unlimited*,<sup>33</sup> the Court took the next logical step. Citing *Noerr*'s cautious approach in "imput[ing] to Congress an intent to invade [the right to petition]," Justice Douglas explained:

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.<sup>34</sup>

Though this view would lay dormant for another decade, the Court allayed any lingering doubt in *Bill Johnson's Restaurants v. NLRB*.<sup>35</sup> There an employer appealed a National Labor Relations Board ("NLRB") order prohibiting the employer from filing a retaliatory lawsuit against picketing employees. Observing the order's "weighty countervailing considerations,"<sup>36</sup> the Court credited *Trucking Unlimited* in finding that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."<sup>37</sup> The Court ultimately held that the NLRB had the power to enjoin a demonstrably "baseless lawsuit" used to thwart the National Labor Relations Act — but only after affirming the fundamentality of access to courts under the Petition Clause.<sup>38</sup> Nevertheless, this sham litigation exception left a standard-shaped hole.

The Court filled that void when it decided *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*<sup>39</sup> There the Court held that a lawsuit could not be barred as a sham suit "unless the litigation is objectively baseless."<sup>40</sup> Excluding subjective intent altogether, the Court clarified that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent."<sup>41</sup> It continued that "[o]nly if challenged litigation is objectively meritless may a court

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<sup>33</sup> 404 U.S. 508 (1972).

<sup>34</sup> *Id.* at 510.

<sup>35</sup> 461 U.S. 731 (1983).

<sup>36</sup> *Id.* at 741.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 741-47.

<sup>39</sup> 508 U.S. 49 (1993).

<sup>40</sup> *Id.* at 51.

<sup>41</sup> *Id.* at 57.



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examine the litigant's subjective motivation."<sup>42</sup> Just as importantly, the Court was careful not to confine this standard to antitrust matters, acknowledging that there might be "other contexts" in which courts must assess the propriety of enjoining this vital First Amendment activity.<sup>43</sup> Filing a lawsuit was no less-protected a vehicle for petitioning the government than protesting in the public square or lobbying Congress.

The Petition Clause's protection of court access is critical to the First Amendment's functional capacity. Of paramount concern in each case has been the use of a lawsuit to ask the government to do something. Still, there are other interests at play. Beyond the individual interest in resolving a particular dispute, litigation serves a broader public interest. As Justice Kennedy once explained, "The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign."<sup>44</sup> He continued:

Petitions to the courts and similar bodies can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for "the distinctive contribution of a minority group to the ideas and beliefs of our society." Individuals may also "engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.<sup>45</sup>

General access to courts thus plays a vital role in preserving the Petition Clause's virtue of deliberative governance. But for its ready availability, First Amendment and other constitutional rights are severely diminished. These interests are not unique to the individual litigants seeking relief. Whether a sophisticated constitutional inquiry or a simple question of statutory construction, when a court states

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<sup>42</sup> *Id.* at 60.

<sup>43</sup> *Id.* at 59.

<sup>44</sup> *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011) (holding municipality's allegedly retaliatory actions did not support liability under Petition Clause).

<sup>45</sup> *Id.* (citations omitted).

“what the law is,”<sup>46</sup> the effects are both acute and enduring. For example, a court’s interpretation of an employment statute in one case may urge employers throughout the affected sector to adjust their practices to avoid future liability.<sup>47</sup> The doctrine of *stare decisis* generally ensures subsequent litigation will be guided by that decision. Consistent with Justice Kennedy’s global view, precedential value regularly exceeds the impact of a single lawsuit.

The Petition Clause requires far more than government enforcement of a specific remedy for an individual petitioner. By prohibiting the right’s abridgement, it calls for a qualitative analysis of not only the ends one petition yields, but the means by which resolution is reached. In litigation, then, there are qualities that every adjudicatory body must possess to comply with the First Amendment’s demand for deliberative governance. The FAA lacks those qualities — at least as currently construed.

## II. THE FEDERAL ARBITRATION ACT

Passed in 1925, the FAA purported to place arbitration agreements on the same playing field as other contracts.<sup>48</sup> Simply put, if a party files a lawsuit subject to an arbitration agreement, the court must stay the action<sup>49</sup> and compel the parties to proceed before an arbitrator.<sup>50</sup> But the FAA is not so straightforward in its execution. The Supreme Court’s arbitration doctrine constitutes a marked departure from the FAA’s text and the historical setting in which it was passed.

### A. Historical Background

Congress passed the FAA to vanquish the “three evils” of delay, expense, and injustice.<sup>51</sup> It wanted to “reverse centuries of judicial

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<sup>46</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (finding this was “emphatically the province and duty of the judicial department”).

<sup>47</sup> See, e.g., Meridyth M. Andresen & Lenora B. Plimpton, *California High Court Rules that Contract Principles Govern Who Decides the Availability of Class Arbitration Under an Arbitration Agreement*, BRYAN CAVE (Aug. 2, 2016), <https://www.bryancave.com/en/thought-leadership/the-california-supreme-court-finds-that-the-arbitration.html> (advising employers on how to adjust their arbitration provisions on class action waivers in response to the California Supreme Court’s ruling in *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 510 (Cal. 2016)).

<sup>48</sup> 9 U.S.C. § 2 (2018).

<sup>49</sup> *Id.* § 3 (2018).

<sup>50</sup> *Id.* § 4 (2018).

<sup>51</sup> Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 103 (2006).

hostility to arbitration agreements by placing arbitration upon the same footing as other contracts.”<sup>52</sup> Though contemporarily justified on Commerce Clause grounds,<sup>53</sup> the legislative history actually suggests<sup>54</sup> Congress passed the FAA pursuant to its Article I power “to constitute Tribunals inferior to the Supreme Court”<sup>55</sup> and Article III’s coterminous extension of “the Judicial Power” to “such inferior Courts as the Congress may from time to time ordain and establish.”<sup>56</sup> Congressional motives aside, the FAA had two goals: (1) to end the longstanding doctrine against “ouster” and (2) to level the playing field between arbitration agreements and other contracts.

### 1. Ending Ouster

Before the FAA, arbitration agreements were almost impossible to enforce in federal courts.<sup>57</sup> The Supreme Court had held that “agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”<sup>58</sup> Ouster doctrine was nothing new: “The long period of hostility by the English courts toward arbitration shaped American law, leading U.S. courts to also hold that arbitration agreements were not to be enforceable and that they could be revoked by either party until an arbitration actually began.”<sup>59</sup> Such hostility was apparently attributable to the idea that “arbitrations, if unsupervised by the courts, are undesirable, and that legislation was

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<sup>52</sup> Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225-26 (1987) (quotation marks, citations, and modifications omitted).

<sup>53</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (finding that Congress passed the FAA pursuant to its Article I power to regulate interstate commerce and admiralty).

<sup>54</sup> See *Moses*, *supra* note 51, at 108-09 (citing *Arbitration of Interstate Commercial Disputes*: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 16 (1924)).

<sup>55</sup> U.S. CONST., art. I, § 8.

<sup>56</sup> *Id.* art. III, § 1.

<sup>57</sup> See *Perlstadt*, *supra* note 2, at 210 (“Two rationales were invoked for this judicial refusal to enforce arbitration agreements. First, it was argued that private parties could not ‘oust’ courts of their jurisdiction to resolve disputes. Second, it was argued that arbitration was simply ineffective at administering justice.”) (citations omitted).

<sup>58</sup> *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

<sup>59</sup> HENRY S. KRAMER, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* § 1.02[4] (2015); accord *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-84 (2d Cir. 1942) (describing the “judicial hostility” of English courts to arbitration agreements).

needed to make possible such supervision.”<sup>60</sup> But even after legislation was passed, courts stayed apprehensive.

It took more than half a century for courts to resolve the arbitrability of covered disputes.<sup>61</sup> Early on, the Supreme Court carved out numerous exceptions, including shareholder suits under the Securities Act,<sup>62</sup> employee claims under the Fair Labor Standards Act,<sup>63</sup> and civil rights suits under Title VII of the Civil Rights Act of 1964<sup>64</sup> and 42 U.S.C. § 1983.<sup>65</sup> Though reasoning varied slightly among these statutes, the theme was the same: institutional competency. Each law, the Court reasoned, was specifically intended to provide a judicial forum given their important public law objectives.<sup>66</sup> But these final traces of ouster doctrine would not last.<sup>67</sup>

## 2. Contractualizing Arbitration

The Court regularly states that the thrust of the FAA was to enact a “national policy favoring arbitration” that “places arbitration agreements on equal footing with all other contracts.”<sup>68</sup> This notion of contractualizing arbitration is remarkable. Absurdity aside, the Court’s insistence that arbitration is simply “a matter of contract”<sup>69</sup> has successfully fashioned a seemingly benign veneer that, until only recently,<sup>70</sup> kept much of the public in the dark about arbitration’s ubiquity.

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<sup>60</sup> *Kulukundis*, 126 F.2d at 983.

<sup>61</sup> See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 451 (2011).

<sup>62</sup> See *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>63</sup> See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) (“While courts should defer to an arbitral decision where the employee’s claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.”).

<sup>64</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (“Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.”).

<sup>65</sup> See *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (“It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial.”).

<sup>66</sup> See, e.g., *Barrentine*, 450 U.S. at 743; *McDonald*, 466 U.S. at 292.

<sup>67</sup> See *infra* Part II.C.

<sup>68</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

<sup>69</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

<sup>70</sup> See, e.g., Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration->

This rhetorical prophylaxis extends beyond the general public. By acknowledging Congress's hope of placing arbitration agreements "upon the same footing as other contracts, where [they] belong,"<sup>71</sup> the Court has ensured that legislative fixes fall flat. During each term over the past decade, Representative Henry Johnson, Jr., and former Senator Al Franken introduced versions of the Arbitration Fairness Act ("AFA").<sup>72</sup> The AFA would void arbitration clauses that affect employment, consumer, civil rights, and antitrust matters.<sup>73</sup> Yet it has no chance of passing.<sup>74</sup> While congressional gridlock and partisanship are surely to blame at least in part, the Court's repeated insistence that it treats arbitration agreements like all other contracts sends a powerful signal to lawmakers that the AFA is a solution in search of a problem. Simply put, the FAA is fine as is. Resisting enforcement, then, is easily dismissed as mere buyer's remorse.

### B. Statutory Structure

The FAA's text is similarly disarming. Section 2, dubbed "the primary substantive provision of the Act,"<sup>75</sup> 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

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scripture-is-the-rule-of-law.html; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>71</sup> H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924).

<sup>72</sup> See Ashlee Kieler, *Arbitration Fairness Act Would Reinstate Consumers' Right to Sue in Court*, CONSUMERIST (Apr. 30, 2015), <https://consumerist.com/2015/04/30/arbitration-fairness-act-would-reinstate-consumers-right-to-sue-in-court/>.

<sup>73</sup> *Id.*

<sup>74</sup> H.R. 2087: Arbitration Fairness Act of 2015, GOVTRACK.US (last visited Aug. 5, 2018), <https://www.govtrack.us/congress/bills/114/hr2087>.

<sup>75</sup> *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

upon such grounds as exist at law or in equity for the revocation of any contract.<sup>76</sup>

A party need only “petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.”<sup>77</sup> In other words, the FAA “does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed *in the manner provided for in the parties’ agreement.*”<sup>78</sup>

Enforcement of arbitration agreements seems rather intuitive. The court first resolves “the question of arbitrability”<sup>79</sup> — namely, whether the dispute at issue must be arbitrated. And it only orders arbitration if it is certain that “the making of the agreement for arbitration or the failure to comply therewith is not in issue.”<sup>80</sup> Otherwise, the FAA requires, upon demand of the opposing party, that a trial be held regarding the existence of an agreement to arbitrate.<sup>81</sup> Such trials are rare.<sup>82</sup>

The FAA’s judicial review provisions deviate considerably from ordinary review of non-judicial awards. Section 9 holds that courts “must” enter judgment affirming an arbitration award “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11.”<sup>83</sup> Under section 10, a court should vacate:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

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<sup>76</sup> 9 U.S.C. § 2 (2018).

<sup>77</sup> *Id.* § 4 (2018).

<sup>78</sup> *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989) (quotation marks and alternations omitted).

<sup>79</sup> *AT&T Tech., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).

<sup>80</sup> 9 U.S.C. § 4 (2018).

<sup>81</sup> *See id.*

<sup>82</sup> *See, e.g.,* *Burgoon v. Narconon of N. Cal.*, 125 F. Supp. 3d 974, 983 (N.D. Cal. 2015); *Hutton & Hutton Law Firm, LLC v. Girardi & Keese*, 96 F. Supp. 3d 1208, 1230-31 (D. Kan. 2015); *Williams v. General Elec.*, 13 F. Supp. 3d 1176, 1188 (E.D. Ala. 2014).

<sup>83</sup> 9 U.S.C. § 9 (2018).

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controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>84</sup>

And per section 11, courts should modify or correct an award:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.<sup>85</sup>

Such deference to private tribunals is rare. Indeed, agency and magistrate decisions are rigorously scrutinized by comparison.<sup>86</sup> These provisions pose the greatest threat to the Petition Clause's functional framework.<sup>87</sup>

### C. Doctrinal Expansion

While much has been written about the Court's arbitration doctrine, two facets are particularly relevant here. First, despite the law's reference to state contract law, the Court has methodically replaced state laws deemed hostile to arbitration with a new federal common law of contract.<sup>88</sup> Second, the Court has been careful to maintain the

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<sup>84</sup> *Id.* § 10 (2018).

<sup>85</sup> *Id.* § 11 (2018).

<sup>86</sup> *See, e.g.,* *Peretz v. United States*, 501 U.S. 923, 936-39 (1991) (permitting a defendant in a felony trial to waive the right to jury selection supervised by an Article III judge where adequate protections remain); *CFTC v. Schor*, 478 U.S. 833, 857 (1986) ("We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.").

<sup>87</sup> *See infra* Part III.

<sup>88</sup> This phenomenon undoubtedly raises significant *Erie* concerns, as numerous scholars, including this author, have acknowledged. *See* Matthew J. Stanford, *Odd Man Out: A Comparative Critique of the Federal Arbitration Act's Article III Shortcomings*, 105 CALIF. L. REV. 929, 943-51 (2017). This Essay is not concerned with the FAA's *Erie* implications.

FAA's deferential judicial review provisions, at times even narrowing them beyond their already limited text. These qualities form a unique impediment to the Petition Clause.

### 1. Preemption of State Contract Law

Arbitration agreements have attained "super contract" status over time,<sup>89</sup> exceeding the reach of any contractual counterpart. This departure is most easily detected in the interpretation of arbitration agreements. Competing contract interpretations are typically construed "against the party who supplies the words or from whom a writing otherwise proceeds."<sup>90</sup> Yet the Supreme Court has crafted a special rule under the FAA, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon such grounds as exist at law or in equity for the revocation of any contract."<sup>91</sup>

The Court anchors this presumption to the FAA's aim "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."<sup>92</sup> Despite an absence of preemptive text or legislative history,<sup>93</sup> the Court has interpreted the FAA to relieve states of their power to require a judicial forum for certain disputes.<sup>94</sup> This construction applies both to statutory exceptions requiring judicial forums<sup>95</sup> and to laws placing additional requirements on the enforceability of arbitration agreements.<sup>96</sup>

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<sup>89</sup> See Frankel, *supra* note 11, at 532-33.

<sup>90</sup> RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981). See David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 437-38 (2009) (explaining the rationales for this rule).

<sup>91</sup> *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (internal quotation marks omitted).

<sup>92</sup> See *id.* (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)).

<sup>93</sup> *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). See generally Claire Kennedy-Wilkins, *Playing Ostrich with the FAA's History: The Scope of Mandatory Arbitration of Employment Contracts*, 54 HASTINGS L.J. 1593 (2002) (explaining how Supreme Court jurisprudence is out of line with the clear legislative history of the FAA).

<sup>94</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>95</sup> See, e.g., *Perry*, 482 U.S. at 491 ("This clear federal policy places § 2 of [the FAA] in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way."); *Southland*, 465 U.S. at 10 ("The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the State statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the California Franchise Investment



Basically, any development in state contract law that threatens a disparate impact on arbitration agreements is invalid. This is so even if the defense is applicable to arbitral and non-arbitral agreements alike.<sup>97</sup> The result is the evisceration of ordinary contract defenses simply because they are too successful against the most common versions of arbitration agreements. The Court insists that only those defenses “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue”<sup>98</sup> are suspect. Its decisions belie these assurances.

Contracting around the FAA has proven similarly futile. Despite early signs of accommodation,<sup>99</sup> the Court ultimately dispensed with such flexibility. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>100</sup> the Court declared that in contracts containing an arbitration clause, choice-of-law provisions “encompass substantive principles that [state] courts would apply” but cannot incorporate any rules, including state rules, which threaten to limit arbitrator authority.<sup>101</sup>

Finally, the FAA’s special “rule of severability”<sup>102</sup> ensures that even contracts whose validity is in question “must go to the arbitrator.”<sup>103</sup> This is true even if state law prohibits severance from illegal or void contracts.<sup>104</sup> In sum, the FAA’s preemptive force has closed courthouse doors to litigants via the erasure of state contract law.

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Law directly conflicts with § 2 of the [FAA] and violates the Supremacy Clause”).

<sup>96</sup> See, e.g., *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (invalidating “special notice requirement” for arbitration agreements); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340-41 (2011) (invalidating class action waivers prohibition).

<sup>97</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (“Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability.”).

<sup>98</sup> *Id.* at 339.

<sup>99</sup> See *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (allowing parties’ inclusion of choice-of-law provision in contract containing arbitration clause to be interpreted as intent to apply state arbitration rules, because “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate”).

<sup>100</sup> 514 U.S. 52 (1995).

<sup>101</sup> *Id.* at 63-64.

<sup>102</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006).

<sup>103</sup> *Id.* at 449.

<sup>104</sup> See *id.* at 448-49.

## 2. Limited Judicial Review

The FAA leaves courts little latitude to question arbitral awards.<sup>105</sup> The Supreme Court has thus had little need to develop these sections. Even so, it has remained steadfast in preventing other courts from expanding judicial review. In *Wilko v. Swan*,<sup>106</sup> it addressed the compatibility of the FAA's "limited" vacatur grounds with the Securities Act's avoidance of conflicting contract provisions. The Court observed:

While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would constitute grounds for vacating the award pursuant to section 10 of the [FAA], that failure would need to be made clearly to appear. In unrestricted submission . . . the interpretations of law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.<sup>107</sup>

The emergent "manifest disregard" standard would remain viable for more than half a century.<sup>108</sup> But in 2008, the Court said this "was not what *Wilko* decided."<sup>109</sup> It instead described "manifest disregard" as a way to refer collectively to the FAA's limited grounds for judicial review.<sup>110</sup> Because the FAA only provides for vacatur, modification, or correction of "extreme arbitral conduct,"<sup>111</sup> only "egregious departures from the parties' agreed-upon arbitration" can justify resisting a party's

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<sup>105</sup> See *infra* Part II.B.

<sup>106</sup> 346 U.S. 427 (1953).

<sup>107</sup> *Id.* at 436-37.

<sup>108</sup> See, e.g., *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1366 (Fed. Cir. 2001); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 760-61 (5th Cir. 1999); *Remmy v. PaineWebber, Inc.*, 32 F.3d 143, 149-50 (4th Cir. 1994); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532-33 (D.C. Cir. 1989); *O.R. Secs., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 746-48 (11th Cir. 1988); *Jenkins v. Prudential-Bache Secs., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749-50 (8th Cir. 1986); *Anaconda Co. v. District Lodge No. 27 of Int'l Ass'n of Machinists & Aerospace Workers*, 693 F.2d 35, 37-38 (6th Cir. 1982); *Nat'l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 143-44 (7th Cir. 1977); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1127-28 (3d Cir. 1969); *San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960).

<sup>109</sup> *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

<sup>110</sup> See *id.* at 585.

<sup>111</sup> *Id.* at 586.

request to enter an arbitral award as a judgment.<sup>112</sup> And, lest any doubt remained, the Court was careful to note that the FAA's "must grant . . . unless"<sup>113</sup> language "carries no hint of flexibility."<sup>114</sup>

The FAA's narrow text and doctrinal expansion has far exceeded its comparatively modest remedial objectives. In its quest to abolish ouster, the FAA has usurped state contract law and insulated the decisions of private tribunals from public scrutiny. The result is a privatized justice system that closes courthouse doors to litigants while disrupting the common-law development of state and federal law.

### III. DIMINUTION DOCTRINE

Diminution doctrine assesses the FAA's compatibility with the Petition Clause. As a rights-bearing right,<sup>115</sup> the right to petition mandates a minimum threshold of access to public tribunals and fosters public law development. Absent these qualities, the facilitative aims of the First Amendment — educating the public, enhancing informed democratic participation, enabling effective expression and association, and developing legal rights<sup>116</sup> — are easily thwarted in the name of efficiency and economy.

Diminution doctrine determines the extent to which the FAA obstructs these interests by three measures: (1) access to state and federal courts, (2) common-law development of public law, and (3) judicial review. It does not weigh these factors in isolation but relative to one another. For example, reduced court access at the trial level is less problematic if robust judicial review and procedural transparency can ensure that the law's development remains unencumbered.<sup>117</sup> In present form, the FAA impermissibly diminishes these interests.

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<sup>112</sup> *Id.*

<sup>113</sup> 9 U.S.C. § 9 (2018) ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.")

<sup>114</sup> *Mattel*, 552 U.S. at 587.

<sup>115</sup> See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011) ("The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.")

<sup>116</sup> See *id.*

<sup>117</sup> The example of administrative tribunals comes to mind. Although initial adjudication of matters by these tribunals reduce initial access to courts, the development of the law is arguably enhanced by the specialization and expertise that

### A. Closing the Courthouse

Diminution doctrine first weighs the extent to which compulsory arbitration shutters courthouses to litigants. The answer is straightforward. When a dispute is deemed arbitrable, the FAA requires the court to stay the action and compel the parties to arbitration. The court's role becomes more supervisory. For instance, a court may continue to hold occasional case management conferences or require the periodic submission of status reports to ensure that arbitration proceeds apace.<sup>118</sup> And yet, because the FAA provides "no effective means of review" before a court "must" enter judgment on an arbitral award,<sup>119</sup> the court's remaining role is largely ceremonial. The arbitrator is the only tribunal with jurisdiction; thus, the court's ability to intervene is limited at best. It is hardly controversial, then, to characterize the FAA as restricting any meaningful access to courts, at least insofar as it concerns their normal adjudicatory functions.

This curtailment of access to judicial relief privatizes the deliberative role of the judiciary, converting courts into judgment mills that must blithely accept whatever legal reasoning (or not) supports the arbitrator's decision. The quantitative losses are twofold. First, litigants lose their day in court. The more invidious result, however, is the second: the lack of public accountability in the arbitral process. By closing courthouse doors, the FAA deprives democratic governance of the judiciary's deliberative function, thereby terminating — or at least limiting — the Petition Clause's critical role as a gateway to other important rights.<sup>120</sup>

### B. Stare [In]Decisis

The second factor of diminution doctrine is separate from, yet still related to the first. Indeed, the diminished value of legal precedent is a function of reduced access to judicial redress. Thanks to arbitration's

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administrative tribunals offer reviewing courts.

<sup>118</sup> See, e.g., *Congdon v. Uber Techs., Inc.*, 226 F. Supp. 3d 983, 992 (N.D. Cal. 2016) (compelling arbitration and scheduling case management conference); *Meadows v. Dickey's Barbecue Rests., Inc.*, 144 F. Supp. 3d 1069, 1087-88 (N.D. Cal. 2015) (compelling arbitration and requiring status reports every ninety days).

<sup>119</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350-51 (2011) (finding it "hard to believe" defendants would agree to class, as opposed to individual, arbitration because statutorily limited judicial review would require defendants to "bet the company with no effective means of review"); see also *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 220 (3d Cir. 2012) (noting that "even serious errors of law or fact will not subject [an arbitrator's] award to vacatur").

<sup>120</sup> See *supra* notes 44-45 and accompanying text.

oft-clandestine processes, the FAA thrusts laws of public import into legal limbo. The most affected areas march lockstep with those in which arbitration agreements are most ubiquitous, including employment and consumer protection law.<sup>121</sup> Yet the FAA's potential sweep lacks real limits. Civil rights, antitrust, securities — every form of civil litigation in which the parties might have some contractual relationship is vulnerable to a well-crafted arbitration clause.<sup>122</sup>

By depriving important public laws of judicial development, the FAA undermines the Petition Clause's promise of deliberative governance. This is not to say that the government loses all deliberative capacity. Congress and executive agencies are theoretically capable of developing these important areas of law over time. But that is not enough.

First, though Congress remains unfettered, state legislatures are forced to operate within the confines of the FAA. Legal developments that exceed arbitration doctrine's increasingly strict limitations, even if inadvertent, are prime candidates for preemption.<sup>123</sup> Second, this view overlooks the limited voice that certain populations may possess in the legislative process. The Petition Clause recognizes judicial process as a meaningful source of public expression, education, and participation that may not always be accessible through the legislative process.<sup>124</sup> Third, litigation bears a uniquely pragmatic quality relative to the law's development over time. The resolution of legal disputes between real people and institutions enables courts to find particular meaning in the law that the broader, often more abstract concerns of the legislative process cannot feasibly replicate.

The upshot: the FAA's curtailment of common-law development in American law is problematic. Inasmuch as arbitration doctrine stifles the judiciary's essential role in declaring "what the law is,"<sup>125</sup> so too

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<sup>121</sup> See ALEXANDER J.S. COLVIN, *THE GROWING USE OF MANDATORY ARBITRATION* (2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> (finding that over half of non-union employers and nearly two thirds of large companies (1000-plus employees) have mandatory arbitration procedures); Hines & Lardner, *supra* note 8 (discussing a Consumer Financial Protection Bureau study finding that millions of consumers are subject to mandatory arbitration).

<sup>122</sup> See, e.g., *Sandquist v. Lebo Automotive, Inc.*, 376 P.3d 506, 510 (Cal. 2016) (compelling arbitration of employee's discrimination claim when "[on Plaintiff's] first day, his manager gave him approximately 100 pages of preprinted forms with instructions to fill out and sign each document as quickly as possible so that [he] could begin work").

<sup>123</sup> See *supra* notes 92–96 and accompanying text.

<sup>124</sup> See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397-98 (2011).

<sup>125</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

does it diminish the deliberative character of democratic governance that the Petition Clause facilitates. It privatizes the once-public dialogue between court and litigant, and in turn, shuts the public out of an entire branch of government.

### C. A New Constitutional Avoidance

Diminution doctrine's final factor asks whether the level of judicial review provided under the FAA is constitutionally sufficient. It is not. The Supreme Court has acknowledged the FAA provides "no effective means of review" of arbitral awards.<sup>126</sup> Beyond the problem this poses for litigants who believe their arbitrator legally erred (or worse),<sup>127</sup> the FAA's judicial review bar poses a special set of constitutional conundrums. What is there to stop an arbitrator from enforcing an unconstitutional law or from interpreting the law in an unconstitutional way? Similarly, what chance does such a deferential standard of review have if an arbitrator chooses to ignore the Supreme Court's pronouncement of a law's meaning? What if the agreement requires litigants to proceed to a religious tribunal that Congress itself would have been constitutionally prohibited from establishing?<sup>128</sup>

One might argue that legitimate causes for such concern are few. Even assuming as much, the FAA offers little to thwart an uptick. What's left is a judicial system that deprives litigants of another critical facet of deliberative governance. American democracy relies heavily on judicial review as a form of democratic participation, expression, education, and representation — together serving as a check on majoritarian impulses that might threaten its constitutional foundation.<sup>129</sup> Diminution doctrine suggests that the FAA

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<sup>126</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350-51 (2011).

<sup>127</sup> See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 247 (2012) ("There is no economic incentive for arbitration providers to make pre-dispute arbitration attractive to employee-consumers: they never purchase the service because, in effect, they can't purchase the service. But there is naturally an economic incentive for arbitration providers to make pre-dispute arbitration attractive to claim-suppressors.").

<sup>128</sup> See Corkery & Silver-Greenberg, *supra* note 70.

<sup>129</sup> See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 199-200 (1952) ("Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers. In a vast country, of mixed population, with widely different regional problems, such an organization of society is the surest base for the hopes of democracy."); see also THE FEDERALIST No. 78, at 509 (Alexander Hamilton) (Modern Library ed. 1937) ("[I]t would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative

impermissibly diminishes the value of vital First Amendment functions that judicial review has come to protect.

#### IV. RESPONSES TO CRITICISM

Reasonable minds may question diminution doctrine's assessment of the FAA. This Part addresses three concerns readily inferred from existing legal literature: (1) lack of state action, (2) waiver by consent, and (3) Professor Rutledge's modified appellate review theory.

##### A. *The State Action Doctrine*

Perhaps the greatest threat to diminution doctrine is its assumption that the FAA burdens the Petition Clause through state action. The state action doctrine ensures that constitutional rights are being asserted exclusively against governmental action.<sup>130</sup> Given the private nature of contract, one could argue that the obligation to arbitrate a dispute is the result of private, not government, action. But for the resisting party's failure to comply with the original arbitration agreement, enforcement would never require judicial enforcement. But judicial enforcement is the beginning, not the end, of the analysis.

The state action doctrine first appeared in the *Civil Rights Cases*<sup>131</sup> following the ratification of the Reconstruction Amendments. At issue then was the scope of federal power to regulate private activity via Section 5 of the Fourteenth Amendment. The Supreme Court found that such regulation required either "some State law [to be] passed, or some State action through its officers or agents [to be] taken."<sup>132</sup> Since then, the state action doctrine has evolved to keep pace with social, political, and economic realities. In its modern form, the doctrine only permits constitutional scrutiny where (1) the deprivation is attributable to "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state" and (2) the depriving party is "a person who may fairly be said to be a state actor."<sup>133</sup> Indeed, state action in the arbitration context is far from

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invasions of it had been instigated by the major voice of the community.").

<sup>130</sup> See *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments.") (internal citations and quotations omitted).

<sup>131</sup> 109 U.S. 3 (1883).

<sup>132</sup> *Id.* at 13.

<sup>133</sup> *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

uncharted.<sup>134</sup> But it is yet to be fully explored with respect to the Petition Clause.

Professor Neuborne provides a useful starting point. Assessing the FAA's toll on the freedom of association, he addresses state action by deconstructing the so-called "private ordering" argument that places the constitutionality of arbitration agreements beyond First Amendment scrutiny.<sup>135</sup> This view maintains that state action is lacking "because the government is merely enabling consensual private ordering."<sup>136</sup> Professor Neuborne responds by pointing to the often non-consensual nature of arbitration agreements, which, but for the FAA, would render them unenforceable under state law.<sup>137</sup> "In those settings, the decision to throw the weight of the state behind a nonconsensual contract term cannot be seen as anything but classic state action — and no different from enacting a statute."<sup>138</sup> Diminution doctrine pushes the analysis one step further.

The absence of consent in many arbitration agreements allows Professor Neuborne to carve out a neat exception to the precise terms of the "private ordering" argument. But this view comes at a cost. Unlike some other constitutional rights — e.g., the Seventh Amendment right to civil trial by jury<sup>139</sup> — the Petition Clause's tripartite institutional interest in preserving courthouse access, fostering precedential development, and maintaining judicial accountability is not entirely within a litigant's capacity to waive.<sup>140</sup> Its institutional interest in functional democracy transcends one party's interest in seeing to it that a contractual agreement to arbitrate is enforced — even if the resisting party knowingly and freely consented.<sup>141</sup> To draw the line at consent thus provides an inadequate

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<sup>134</sup> See, e.g., Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1 (endorsing the concept of arbitration as state action for procedural due process purposes); Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 205 (2015) ("[W]here . . . an unfairly extracted promise [to arbitrate on an individual basis] is deemed unenforceable under state contract law, I believe that a federal statute (like the FAA) compelling an otherwise unwilling judge to enforce that promise constitutes 'state action' abridging the First Amendment right to associate freely with others . . .").

<sup>135</sup> See Neuborne, *supra* note 134, at 206.

<sup>136</sup> *Id.*

<sup>137</sup> See *id.*

<sup>138</sup> *Id.*

<sup>139</sup> See FED. R. CIV. P. 38-39; see also *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

<sup>140</sup> Cf. *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986).

<sup>141</sup> This is not to say that arbitration is anathema to American dispute resolution.



bulwark against the erosion of these interests. The “private ordering” view makes consent a talisman. By requiring courts to compel arbitration, the FAA forces state courts to ignore contrary law and, in turn, erode the Petition Clause’s functional framework — interests that persist, yet go unresolved, with a consent-centric analysis.<sup>142</sup>

This Essay maintains that state action occurs when the FAA forces state courts to use the equitable remedy of compelling arbitration irrespective of state law. Contract law’s preference for legal remedies bolsters this view.<sup>143</sup> Notably, the inclination against equitable remedies provides another line of logic for the ouster doctrine in the Nineteenth Century.<sup>144</sup> Using consent as the sole litmus test for state action fails to consider the less extreme means by which the FAA might fulfill its policy objective of encouraging arbitration without forcing states to transgress the Petition Clause’s larger democratic aims. For example, Congress might have achieved the same policy goals by using a remedial scheme that requires a breaching party to pay a statutory penalty, the moving party’s attorneys’ fees, or some other compensatory relief reasonably related to the costs of foregoing arbitration. This might well have been enough.

Still, one cannot ignore the Ninth Circuit’s recent holding to the contrary. In *Roberts v. AT&T Mobility LLC*, the court held there is no state action when a party moves to compel arbitration.<sup>145</sup> This case, like so many before it, involved consumer protection claims by a putative class of wireless customers. But unlike their forerunners,

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Nor does diminution doctrine necessarily mandate the evisceration of compelled arbitration where consent is actually given. This Essay’s application of diminution doctrine is tailored to the specific terms of the FAA’s statutory and doctrinal structure. Were Congress to amend — or the Supreme Court to strike down — the limited judicial review currently provided under the statute, the balance of interests under diminution doctrine might shift to favor the enforcement of arbitration agreements at the trial stage. Yet even then, a lack of meaningful consent to arbitrate in a particular case would nevertheless run afoul of the Petition Clause’s functional democratic framework.

<sup>142</sup> Cf. *Schor*, 478 U.S. at 850-51.

<sup>143</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. LAW INST. 1981) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”).

<sup>144</sup> See Perlstadt, *supra* note 2, at 210 (“Courts generally would not specifically enforce arbitration agreements, refusing to stay litigation and compel arbitration of disputes covered by such agreements. At best, courts would award nominal damages against a party refusing to arbitrate for breach of the agreement to arbitrate.”) (footnotes omitted).

<sup>145</sup> *Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2653 (2018).

these plaintiffs opposed AT&T's motion to compel arbitration by arguing that such an order would violate the Petition Clause.<sup>146</sup> Finding no state action, the Ninth Circuit left that question for another day.

The court first found that the Supreme Court's decision in *Denver Area Education Telecommunications Consortium, Inc. v. FCC*<sup>147</sup> did not allow parties to bypass the state action question by directly challenging the constitutionality of a statute.<sup>148</sup> *Denver Area* involved First Amendment challenges to three provisions of the Cable Television Consumer Protection and Competition Act empowering cable operators to restrict offensive and sexual speech on cable television.<sup>149</sup> Though all nine justices reached the First Amendment question, only six addressed state action.<sup>150</sup> Finding no "common denominator" among the Court's plurality and concurring opinions, the Ninth Circuit read *Denver Area* "very narrowly."<sup>151</sup> Thus, the plaintiffs still had to show AT&T is a state actor.<sup>152</sup>

The court also rejected the argument that the government's "encouragement" of arbitration through the FAA's passage and enforcement amounted to state action.<sup>153</sup> Despite the law's preference for arbitration, the Ninth Circuit characterized this as "subtle encouragement" of minimal significance.<sup>154</sup> Instead, it preferred to view the FAA as "state inaction — the government's decision not to interfere with the private parties' choices to arbitrate."<sup>155</sup> Not necessarily.

For all that it says, *Roberts* is just as notable for what it does not. There is the narrow language of the holding itself — i.e., that AT&T's motion to compel was not state action. Left unresolved is whether the default application of courts' equitable power — a rather unique feature of enforcing arbitration agreements relative to other contracts

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<sup>146</sup> *Id.* at 836.

<sup>147</sup> *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996).

<sup>148</sup> *Roberts*, 877 F.3d at 837 ("Because the First Amendment right to petition is a guarantee only against abridgment by the government, state action is a necessary threshold for a Petition Clause claim.") (internal citations and quotation marks omitted).

<sup>149</sup> *Denver Area*, 518 U.S. at 732-33.

<sup>150</sup> *See Roberts*, 877 F.3d at 839-40.

<sup>151</sup> *Id.* at 840.

<sup>152</sup> *Id.* at 841.

<sup>153</sup> *See id.* at 842-45.

<sup>154</sup> *Id.* at 845 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999)).

<sup>155</sup> *Id.*

— should make a difference on this question.<sup>156</sup> Though *Denver Area* is not binding, the varied acknowledgments of state action in the plurality and concurring opinions signal that it is at least open to the idea that congressional enactment of a statute is state action, even if private acts must first give rise to its unconstitutional effects.<sup>157</sup> The FAA altered the relationship of parties to arbitration agreements by supplanting contract law’s preference for legal remedies and, by way of judicial interpretation, deeming these agreements immune from generally applicable state laws that threaten to limit their enforcement. Private action may be necessary to its invocation.<sup>158</sup> But it is ultimately the coercive power of the state that sets arbitration agreements apart from the enforcement of other contracts.

Nor does *Roberts* resolve whether compelling arbitration merely privatizes what has almost exclusively been the public role of interpreting the law. If so, this, too, would satisfy the state action requirement under the so-called “public function” test (or “sovereign function doctrine”).<sup>159</sup> And there is reason to think it would. In the past, courts have found state action in the privatization of prison inmate care, election management, animal control, post office operations, and fire protection.<sup>160</sup> It would not be outlandish, then, to suggest that the judicial function of resolving disputes by interpreting the law should be added to the list.

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<sup>156</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); see also RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. LAW INST. 1981) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”).

<sup>157</sup> See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 737 (1996) (“Although the [lower] court said that it found no ‘state action,’ it could not have meant that phrase literally, for, of course, petitioners attack (as ‘abridg[ing] . . . speech’) a congressional statute — which, by definition, is an Act of ‘Congress.’”) (citation omitted) (plurality opinion); *id.* at 782 (“State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.”) (Kennedy, J., concurring in part and dissenting in part).

<sup>158</sup> Challenging an arbitration clause in a government contract would avoid the state action question altogether because the state itself would be moving to compel arbitration.

<sup>159</sup> See *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264-65 (2d Cir. 2014) (“Under the public function test, state action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity.”) (internal quotation marks and modification omitted).

<sup>160</sup> See *id.* at 265 (collecting cases).

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In sum, diminution doctrine is not necessarily beset by a lack of state action. But for the FAA, state contract law would continue not only to offer effective defenses against otherwise unconscionable arbitration agreements, but also to prefer legal remedies for the breach of legitimate ones. By forcing state courts to deviate from longstanding contract law principles, the FAA compels state action, even where consent is not at issue.

### B. *Consent by Waiver*

A second critique of diminution doctrine is its lack of concern with the agency of parties who agree to be bound by arbitral awards and wish to limit the costly ordeal of judicial review. Though fair, this critique is unconvincing. Parties who truly wish to arbitrate and avoid judicial review remain free to do so. They may do so informally — choosing not to appeal the arbitrator’s decision and complying with the terms of the award — or formally — agreeing to arbitrate and resolving a subsequent decision to appeal through ordinary doctrines. The latter approach is nothing new.<sup>161</sup> And the former is entirely within the power of the parties.

But a key concern with waiver critiques runs much deeper. Allowing individual waiver to justify modern arbitration doctrine ignores the FAA’s invasion of the broader public and institutional interests that diminution doctrine addresses. While individual constitutional rights are subject to waiver,<sup>162</sup> that person does not hold the same power to waive the constitutional rights of others, much less institutional rights that are beyond waiver’s reach.<sup>163</sup> Consent theories, even if legitimate at the individual level, fail to answer for these larger institutional and public interests.

### C. *Modified Appellate Review Theory*

Professor Rutledge’s modified appellate review theory provides one final flashpoint. Crafted to preserve the “essential components of

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<sup>161</sup> See Perlstadt, *supra* note 2, at 210 (discussing original preference for legal rather than equitable remedies for breach of arbitration agreements).

<sup>162</sup> See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

<sup>163</sup> See, e.g., *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986) (discussing Article III institutional interest in “the constitutional system of checks and balances,” which protects against “the encroachment or aggrandizement of one branch at the expense of the other”).

arbitration while putting it on a surer constitutional footing vis-à-vis Article III,”<sup>164</sup> Rutledge’s theory concedes the insufficiency of waiver to salvage the FAA’s infringement of Article III’s institutional interests. Instead, he argues that the “voluntariness” of arbitral proceedings and absence of sovereigns from most arbitral disputes saves the FAA from constitutional ruin.<sup>165</sup> Such voluntary proceedings, he explains, do not pose real constitutional concerns with respect to judicial review.<sup>166</sup>

It is easy to fathom a similar attempt to rescue the FAA here. The overlap between the institutional interests that Article III and the Petition Clause protect suggests that arbitration’s purportedly voluntary, private nature renders these proceedings sufficiently fair to avoid constitutional invalidation. Not so.

The most critical hole in a modified appellate review critique is Rutledge’s assumption that the manifest disregard doctrine still provides a separate standard of review.<sup>167</sup> The Court’s subsequent disavowal of this view in *Hall Street*,<sup>168</sup> however, leaves such a critique lacking even by Rutledge’s standard.<sup>169</sup> Like waiver arguments, this critique fails to consider the far-reaching ramifications of an arbitration doctrine that undermines the Petition Clause’s broader institutional and public interests. And it overlooks broader democratic interests in keeping courthouse doors open, furthering the law’s judicial development over time, and ensuring that all decisions binding interpretations of American law pass constitutional muster.

#### CONCLUSION

The right to petition is not ordinarily associated with the right to judicial relief. Nevertheless, as this Essay has shown, the Supreme Court has repeatedly acknowledged the democratic interests that the Petition Clause serves. Its anti-abridgement language likewise suggests that this right is measured quantitatively to ensure respect for the First Amendment’s interest in facilitating accessible, deliberative governance. To assess the FAA’s adherence to these interests, this Essay introduced diminution doctrine, which focused on three unique

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<sup>164</sup> Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1204 (2008).

<sup>165</sup> *See id.* at 1216.

<sup>166</sup> *See id.* at 1226.

<sup>167</sup> *See id.* at 1226-27.

<sup>168</sup> 552 U.S. 576, 584-85 (2008).

<sup>169</sup> *See* Rutledge, *supra* note 164, at 1228 (“The question is extremely close, but the manifest disregard doctrine, in my opinion, saves private commercial arbitration from constitutional defect.”).

interests served by the judicial component of the right to petition: (1) access to judicial relief, (2) common-law development of legislation, and (3) judicial review. Given the severe diminishing effect that the FAA has on each of these areas, diminution doctrine finds modern arbitration doctrine subversive to the Petition Clause's functional democratic aims by stifling expression, education, participation, and legal development in the name of efficiency.