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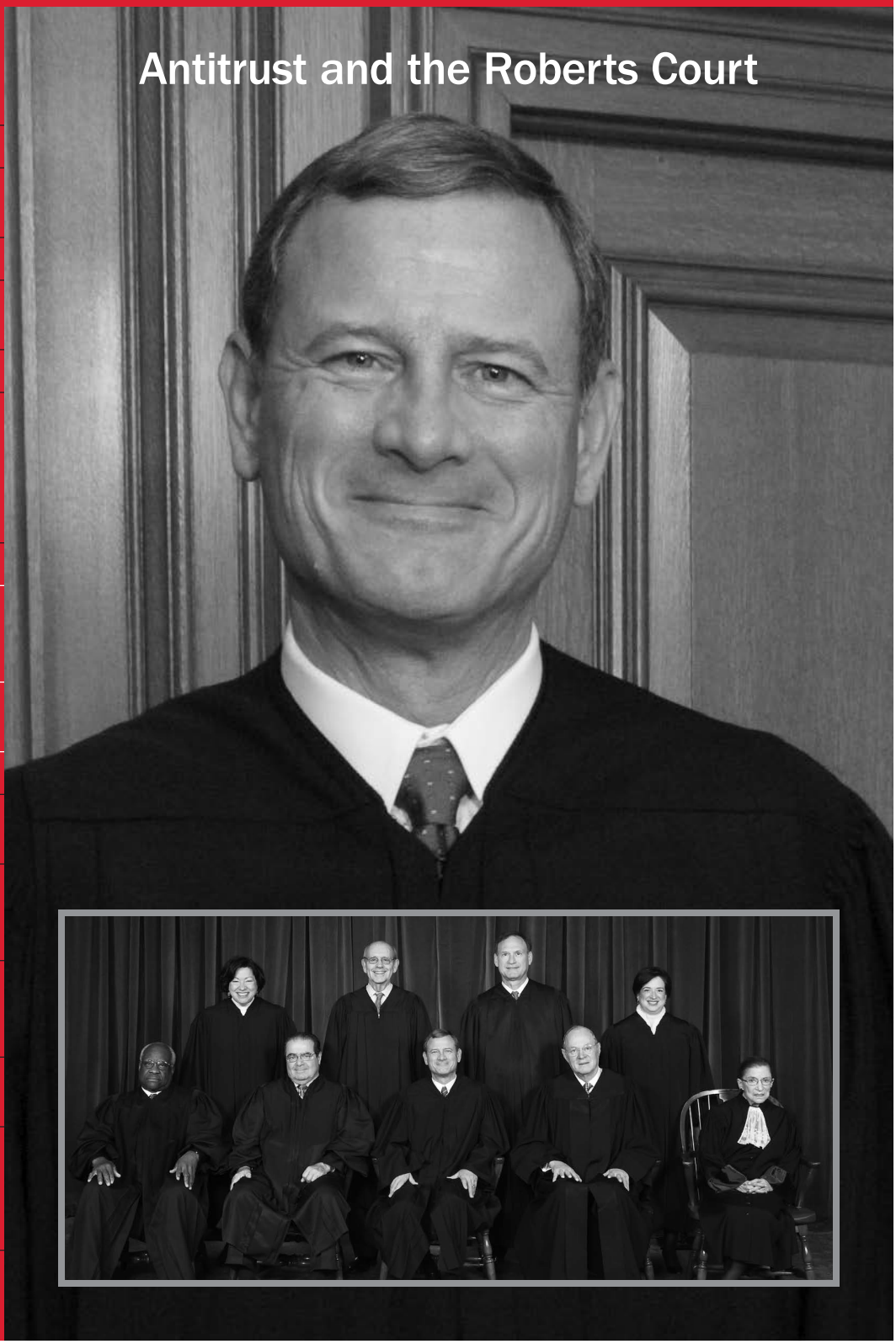

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Challenging the Supreme Court's *American Express* Decision Under the First Amendment Petition Clause

BY ALEXANDER H. SCHMIDT

THE SUPREME COURT'S BRUSQUE 5-4 opinion in *American Express Co. v. Italian Colors Restaurant* (*Amex*)[1] was a game changer for consumer class actions seeking to enforce the nation's antitrust laws.

In *Amex*, the Court's conservative majority expanded upon its recent spate of pro-arbitration/anti-class action rulings by holding that the Federal Arbitration Act (FAA) compels enforcement of adhesion arbitration clauses even if arbitration is cost-prohibitive for an individual plaintiff and the arbitration clause, therefore, functions as a de facto exculpatory provision immunizing a defendant from civil antitrust liability. The Court also held that the FAA deprives plaintiffs with "low-value" claims—meaning those who cannot arbitrate in a cost-effective way—of any remedy or genuine access to justice altogether "if that is the consequence of a class-action waiver."[2]

Justice Kagan stated in dissent that the five-member majority had subordinated the Sherman and Clayton Acts to the FAA (or, rather, to its interpretation of the FAA) even though it knew its decision would enable a "monopolist . . . to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[3] In its zeal to "diminish[] the usefulness of Rule 23" and "dismantle[]" the class action device,[4] the majority established a federal policy that encourages large corporations not only to impose compulsory arbitration on consumers and small businesses, but to make arbitration as cost-prohibitive for them as possible.[5]

The predictable effect of the Supreme Court's policy choice, according to the dissent, will be to reduce both antitrust enforcement and arbitration. Many believe it will also foster a concomitant increase in antitrust violations, complex commercial frauds and other corporate wrongdoing that could ultimately extract a multi-trillion dollar toll from American consumers.[6] And the majority's attitude toward those who question its policy choice, Justice Kagan reports, is, "Too darn bad."[7]

The Supreme Court's predominant role in setting national arbitration policy is hardly new. Critics argue that the Court has routinely disregarded the FAA's text and purpose to construe the statute in ways Congress never imagined. Justice O'Connor once observed that "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act."[8] A seminal article by Professor Margaret Moses concluded that the Court has "entirely rewrit[ten] the statute and create[d] an edifice of its own design," arguing that even the central premise of the Court's decisions—the strong "'federal policy favoring arbitration'"—was "created by the judiciary out of whole cloth."[9]

Dissenting Justices have referred to some of the Court's FAA rulings as "statutory mutilation," an "exercise in judicial revisionism," and a "mistake" in need of "correction."[10] Often quoting from the FAA's "unambiguous" legislative history,[11] dissenters have concluded that Congress: (1) meant to enact a procedural statute applicable only in federal court, not one creating a substantive federal right to arbitrate that preempts state law; (2) enacted the FAA solely to authorize federal courts to enforce arbitration contracts between merchants of relatively equal bargaining power; (3) expressly disclaimed any intention to permit employers to compel arbitration against employees; and (4) evidenced no intent to apply the FAA to federal statutory claims and other complex legal or factual matters.[12]

Some critics contend that the Supreme Court has overstepped its constitutional role[13] and legislated from the bench to redesign the FAA to its own liking, transforming it in many respects into the opposite of the statute Congress actually enacted.[14] From this perspective, *Amex* further supplants Congress's intent by enforcing adhesion arbitration clauses that deny plaintiffs access to justice altogether.

The real-world impact and potential implications of *Amex* on the daily lives of American consumers hit home recently

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when the *New York Times* reported that General Mills, the maker of staples like Cheerios and Betty Crocker cake mixes, had added legal terms to its website privacy policy that bound consumers to arbitration clauses every time they bought a General Mills product, downloaded coupons, or otherwise interacted with the company on the Internet. Although General Mills quickly retracted its new terms, other corporations have employed similar policies with little or no fanfare, and without retraction.[15] Undoubtedly emboldened by *Amex*'s far reaching rationale condoning the use of adhesion arbitration provisions against consumers, these companies appear to presume that litigants opposing the Supreme Court's trend towards upholding class-action waivers in arbitration clauses have no arrows left in their quiver post-*Amex*.

But the battle to restore Congress's intent under the FAA through litigation may not be over. As I will argue here, *Amex* may be vulnerable to a constitutional attack. "Where a specific statute . . . conflicts with a general constitutional provision, the latter governs."[16] The Court has made clear in non-FAA cases that a citizen's right to access government courts is a fundamental First Amendment right under the Petition Clause.[17] As shown below, a strong argument can be made that interpreting the FAA to require enforcement of adhesion arbitration clauses violates that fundamental right.[18]

The Right to Petition Government Courts

Since our nation's birth, jurists have "viewed the right of access to court as fundamental" to our democracy.[19] The Supreme Court has firmly held that "the right of access to the courts" is an "aspect of the right of petition" enshrined in the First Amendment.[20] The Court has recognized the "right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights,'"[21] and has observed that the "right to sue and defend in the courts" is "the right conservative of all other rights, and lies at the foundation of orderly government."[22] Consequently, the government cannot enjoin or prevent the filing of lawsuits—and thereby "deprive [plaintiffs] of a remedy"—absent an explicit congressional command and attendant compelling justification.[23]

The Petition Clause requires litigants to have access to *government* tribunals. In a 2011 opinion joined by seven Justices, the Supreme Court acknowledged that "the Petition Clause protects the rights of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."[24]

History supports that conclusion. English and American colonial precursors to our right of petition included the right to petition courts. The progression of drafts of the Petition Clause leaves little doubt that the framers of the Bill of Rights intended to perpetuate that right. The clause evolved from petitioning only the "Legislature" to petitioning the entire "Government," including the Article III courts. The Constitution uses the word "Government" to refer to all three branches collectively.[25] The fact that applicants to the Supreme Court are called "Petitioners," therefore, is no historical accident.[26] The Constitution, of course, does not include private arbitrators within the three branches of government.

Petitions serve as a check on government power and enable citizens to "communicate their will" to judges, who, "like the other branches of government, make and apply laws in ways that impact the everyday lives of American citizens."[27] Absent access to the courts, "the right to petition would have little significance in the constitutional scheme of things" because "[a]ccess to the courts is often the only method by which a person or a group of citizens may seek vindication of federal and state rights and ensure accountability in the affairs of government."[28]

The ability to sue in court advances several "first amendment interests involved in private litigation," including the "public airing of disputed facts,"[29] enabling groups of citizens to "use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests" and to otherwise "raise matters of public concern . . . [that] promote the evolution of the law."[30]

Compulsory arbitration before private arbitrators does not serve these First Amendment interests. Arbitrations are usually confidential, providing no public forum for airing disputes or advancing legal causes. Arbitral decisions are not reviewable by courts on the merits and have no precedential effect, so they do not develop the law.[31]

To interpret the FAA as a statute that forces citizens into private arbitration without their consent, as the Supreme Court has done, it can be argued, undermines the purposes of the Petition Clause and abridges the First Amendment. The Supreme Court has never addressed the First Amendment implications of its FAA rulings in its opinions, nor has any other court. But the decision of the majority in *Amex* may lead putative class plaintiffs and the Court to tackle this important issue.

The Constitutional Inquiry

Because the right of petition is a fundamental right, the Supreme Court "will not lightly impute to Congress an intent to invade . . . the right of access to the courts"[32] and will "give the benefit of any doubt to protecting rather than stifling" the right of petition.[33] Thus, the FAA's potential unconstitutionality must be judged under the constitutional avoidance doctrine, which requires that, if a statute that might limit a constitutional right is "reasonably susceptible of two interpretations," it is the Court's "plain duty to adopt that construction which will save the statute from constitutional infirmity."[34] This "cardinal principle" "has so long been applied" by the Court "that it is beyond debate."[35]

Under the Court's constitutional avoidance jurisprudence, if an interpretation of a statute "would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[36] The Court assesses "every reasonable construction" of the statutory text, and adopts a

constitutional construction "unless there is the clearest indication" in the text or legislative history that Congress intended the unconstitutional interpretation.[37]

Several decisions that articulate this analytical framework provide important guidance on how it should apply to interpreting the FAA to avoid infringement of constitutional rights under the Petition Clause.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Corp. addressed whether the NLRB had interpreted the NLRA in a way that infringed a union's freedom of speech. While the NLRB's reading was a permissible one, the Court held that the statute "need not be read" that way because Congress had not revealed a "clear intent" to abridge unions' free speech rights.[38] Because a reading consistent with the First Amendment was "*not foreclosed*" by the statute or legislative history, the Court adopted a construction that avoided "the serious constitutional questions" raised by the NLRB's interpretation.[39]

In *BE & K Construction Co. v. NLRB*, which addressed the Petition Clause itself, the Court refused to read the NLRA in a manner that impinged upon an employer's ability to gain access to the courts. While the statute "might be read" to prevent employers from filing retaliatory lawsuits against striking workers, the Court rejected that interpretation because nothing in the statute indicated it "must be read" that way.[40] In language equally pertinent to the FAA, the Court stated that "any concerns related to the right to petition must be greater when enjoining . . . litigation than when penalizing completed litigation" because "the First Amendment historically provides greater protections from prior restraints than after-the-fact penalties . . . and enjoining a lawsuit could be characterized as a prior restraint."[41]

These cases provide a strong basis for arguing that the FAA cannot be construed as directing federal courts to enforce adhesion arbitration contracts that deprive citizens of their right to petition courts unless the 1925 Congress clearly intended that result. To find the requisite clear intent, every reasonable construction that would preserve the right to petition the courts must be foreclosed by the FAA's text or legislative history.

FAA's Text. The FAA's operative language appears in Section 2, which provides:

> 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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[42]

Three canons of construction are relevant to the textual analysis of this provision. First, terms that are not defined in the statute are typically construed in accordance with the ordinary meaning of those words at the time Congress enacted the statute.[43] Second, statutes are typically construed in light of the enacting Congress's understanding of existing law governing the subject.[44] Third, words cannot be viewed in isolation and must be considered in context with "the provisions of the whole law, and to its object and policy."[45] Just as the context, purpose, and policy of the antitrust laws led the Court to conclude that the words "[e]very contract" to restrain trade in Section 1 of the Sherman Act do not literally mean "every" contract, but rather only those that *unreasonably* restrain trade,[46] the words "any contract" in the FAA can be construed to mean "any non-adhesion contract" if Congress's overall statutory scheme so warrants.

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Under these canons, the FAA, like the NLRA, "need not be read so broadly"[47] as to authorize a nonconsensual prior restraint against the filing of lawsuits. Reading the FAA to exclude adhesion arbitration contracts is reasonable based on the words Congress used. The phrase "any contract" in Section 2 of the FAA must be considered together with the two qualifying phrases in the sentence: "evidencing a transaction involving commerce" and "to settle by arbitration." In 1925, the ordinary meaning of to "evidence" was "to prove," to "make evident" or "plain."[48] A "transaction" meant "the doing or performing of any business."[49] Pertinent definitions of "involve" included "entangle; surround; embroil; result as a logical consequence."[50]

In 1925—the year Calvin Coolidge took office—"commerce" was defined as the "interchange of merchandise on a large scale between nations or individuals,"[51] which coincided with the then state of the law limiting the Commerce Clause's reach to interstate and foreign business transactions.[52] Thus, in 1925, a "contract evidencing a transaction involving commerce" literally meant a "contract plainly doing business surrounding the interchange of merchandise on a large scale"—in other words, a "contract among large-scale merchants."

[I]t is difficult to argue, under *DeBartolo* and *BE & K*, that the plain 1925 meaning of the FAA's operative language evidences a clear intent by Congress to permit powerful firms to deprive smaller firms or consumers of their First Amendment right to petition a government court.

As to a "contract . . . to settle by arbitration," the pertinent 1925 definitions of "to settle" were to "cease agitation" and to "adjust differences or accounts."[53] "Arbitration" meant "the settlement of a dispute by an umpire,"[54] an "umpire" being "a third party to whom a dispute is referred for settlement."[55]

Hence, the ordinary meaning of the FAA's operative language reasonably is that it only requires courts to enforce "a contract among large-scale merchants to have their differences or disputed accounts adjusted by a disinterested third party." Congress's apparent focus on "large-scale merchants" suggests that Congress meant to cover only arbitration agreements between businesspeople of relatively equal bargaining power and to enforce only purely voluntary agreements, not compulsory adhesion agreements. That is certainly a reasonable interpretation, even if it is not the only one. Given the reasonableness of this interpretation, it is difficult to argue, under *DeBartolo* and *BE & K*, that the plain 1925 meaning of the FAA's operative language evidences a clear intent by Congress to permit powerful firms to deprive smaller firms or consumers of their First Amendment right to petition a government court.

Structural evidence within the FAA supports that conclusion. Congress was careful not to impinge on another constitutional right when it expressly preserved, in Section 4, the jury trial right for parties who put "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same" in issue.[56] It would be anomalous to presume that Congress preserved citizens' jury rights in the FAA but intended in the same statute to require federal courts to enforce adhesion contracts that deprived those citizens of both the jury trial right and their constitutional right to sue in court altogether.

Because the interpretation that the FAA does not apply to adhesion contracts is not "foreclosed" by the statutory text,[57] the avoidance doctrine requires that courts review the FAA's legislative history for evidence of Congress's requisite clear intent to include adhesion contracts within its statutory scope.

FAA's Legislative History. The bill that became the FAA was initially the subject of a hearing on January 31, 1923, before a subcommittee of the Senate Committee on the Judiciary.[58] The bill's drafters and proponents (who were businessmen, trade association members, and lawyers, not members of Congress) repeatedly emphasized that its purpose was to "enable business men to settle their disputes expeditiously and economically" by enforcing "voluntarily entered" arbitration contracts.[59] Despite that emphasis, Section 2 of the original bill differed from its final text in that it would have enforced "a written provision in *any* contract *or* maritime transaction or transaction involving commerce to settle by arbitration . . . ."[60] That language arguably would have made enforceable any arbitration contract presented in federal court.[61]

Senator Thomas J. Walsh of Montana objected to the bill as initially written because it would include adhesion contracts. Walsh, a former plaintiff's lawyer, was a powerful Democratic senator who had led the Teapot Dome scandal investigation and later chaired both the 1924 and 1932 Democratic National Conventions.[62] Senator Walsh had the following exchange with W.H.H. Piatt, a bill proponent:

> Mr. PIATT: . . . [The bill] is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.
>
> Senator WALSH of Montana: This has occurred to me. I see no reason at all . . . why, when two men voluntarily agree to [s]ubmit their controversy to arbitration, they should not be compelled to have it decided that way.
>
> Mr. PIATT: Yes, sir.
>
> Senator WALSH of Montana: The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. . . . Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.
>
> Mr. PIATT: That would be the case in that kind of a case, I think; but it is not the intention of this bill to cover insurance cases.[63]

Senator Walsh then raised other examples of adhesion contracts, which prompted a further exchange:

> Mr. PIATT: . . . I would say I would not favor any kind of legislation that would permit the forcing of a man to sign that kind of contract . . . .
>
> Senator WALSH of Montana: You can see where they are not really voluntary contracts, in a strict sense.
>
> Mr. PIATT: I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods . . . .[64]

Senator Walsh pointed out that railroads often insisted on

putting "restrictions and conditions" in their contract so that the shipper, as a practical matter, "is really obliged to take the contract as it is put up to him. He has got to sign his name there, with all the chances there are to it."[65] Walsh stated that his concern was akin to why many states barred firms from contractually shortening statutes of limitations: "*because the tendency is to put terms in that will give him no real opportunity to prosecute his action.*"[66]

Senator Thomas Sterling of South Dakota, who chaired the subcommittee, asked Piatt if an amendment could address the problem. Senator Walsh likewise asked Piatt to "think of some way by which that objection could be obviated."[67] Senator Walsh concluded by stating that "I really believe that in the class of cases that [another bill proponent] has in mind" (i.e., voluntary contracts between merchants), the bill "would be a very useful thing, and I would be disposed to favor it; but I can see that difficulty."[68] Piatt said he could "see it, too," and pledged to "take this angle up at once" with other bill proponents.[69]

The bill was reconsidered at a joint hearing on January 9, 1924, before subcommittees of the House and Senate Committees on the Judiciary.[70] The bill's supporters again emphasized that the bill's purpose was to enforce arbitration agreements among merchants and trade association members engaged in interstate commerce[71] that were entered into "solemnly" and "voluntarily."[72]

Senator Walsh was unable to attend the joint hearing,[73] but adhesion contracts came up after Senator Sterling, who again chaired the hearing, asked bill proponent Julius Cohen, a lawyer, why courts had refused to specifically enforce arbitration agreements. Cohen said that "the real fundamental" reason was that arbitration clauses often appeared in *adhesion contracts*, or, in Cohen's words, because "the stronger men would take advantage of the weaker" when contracting.[74]

Senator Sterling then revisited the question concerning take-it-or-leave-it contracts between railroads and shippers. Cohen suggested that "the bills of lading act" protected shippers and that "people are protected to-day as never before."[75]

However anecdotal Cohen's evidence on the point may have been, his exchange with Senator Sterling reveals that, to Congress's understanding, the "judicial hostility" to arbitration to which the Supreme Court often refers[76] arose largely from the courts' disdain for adhesion arbitration clauses. Both Senator Sterling and Senator Walsh shared that disdain. Consequently, it seems, Congress *codified the judicial hostility to adhesion arbitration contracts* by excluding them from the FAA's scope.

This point appears plain from what happened next. At the time of the Joint Hearing, the bill still included the broad "*any* contract *or* maritime transaction" language. Five months later, in May 1924, the Senate amended its version of the bill by striking the words "any contract" and finalizing Section 2 into its present form referring to "a contract evidencing a transaction involving commerce."[77] Identical changes were later made to the House version.[78] These changes "were made at the behest of Senator . . . Walsh."[79]

Walsh's amendment restricted the scope of the FAA, transforming it from a statute applying to "all contracts" brought before federal courts (which could have included adhesion contracts) to one that applied only to contracts involving interstate commerce as then understood (which would involve only large merchants of equal bargaining power and not adhesion contracts). "It is simply not plausible," one scholar has noted, that Senator Walsh's amendment "would have been intended to expand the reach of the FAA" rather than limit it, given his concern about adhesion contracts.[80]

Congress's intent to exclude adhesion agreements is reflected in the Senate Report that Senator Sterling submitted on the bill, which emphasized "the great value of *voluntary* arbitrations" and the "practical justice" of enforcing arbitration agreements that "have been *voluntarily* and *solemnly* entered into."[81] A written agreement "voluntarily and solemnly" entered into—in 1925—necessarily involved a serious and formal exercise "of choice or free will."[82]

The chair of the House Judiciary Committee confirmed Congress's intent on the House floor, stating: "This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it."[83]

The legislative history thus shows that Congress very deliberately enacted a statute that required judicial enforcement of only limited types of arbitration contracts: those voluntarily signed by merchants engaged in interstate and foreign commerce. It does not reflect a "clear intent" by Congress to compel judicial enforcement of compulsory arbitration clauses that deprive citizens of their First Amendment right of access to a government tribunal. Accordingly, under the avoidance doctrine, the FAA should not be interpreted to apply to adhesion arbitration agreements.

The Court's FAA Decisions

Although the Supreme Court has applied the FAA to adhesion contracts, its decisions have focused only on statutory construction of the FAA under the federal law of arbitration and not on the constitutional implications of its rulings. Those decisions, moreover, have employed "dynamic" statutory interpretation, in effect construing the FAA's text based on what it means today rather than what it meant in 1925.[84] For example, in *AT&T Mobility LLC v. Concepcion*, the Court applied the statute to adhesion consumer contracts because "the times in which consumer contracts were anything other than adhesive are long past."[85] In *Circuit City Stores, Inc. v. Adams*, the Court applied the contemporary legal understanding of the Commerce Clause rather than its far narrower 1925 meaning.[86] Yet, the Court has little leeway to employ dynamic statutory interpretations under the avoidance doctrine if those interpretations are potentially unconstitutional.

In the context of a First Amendment challenge, the

Court's rulings under the federal law of arbitrability would lack precedential weight if they violate the Petition Clause, and its construction of the FAA can be ignored if a reasonable and constitutional alternative construction exists.[87] Such an alternative does exist, and that construction—that the FAA does not apply to adhesion contracts—has the added benefit of being the construction the 1925 Congress appears to have actually intended.

Conclusion

The Supreme Court's interpretation of the FAA in *Amex* enforcing an adhesion arbitration clause would deprive small merchants and consumers of their fundamental First Amendment right to access justice in government courts. Even if the Court's interpretation is a reasonable one, it raises a serious constitutional question under the Petition Clause. A constitutional challenge against *Amex* would implicate the constitutional avoidance doctrine, requiring courts to revisit the FAA's text and legislative history to determine whether the 1925 Congress clearly intended to infringe the Petition Clause when enacting the FAA.

The Supreme Court has never considered the First Amendment implications of its recent FAA rulings, so federal and state courts are free to test the constitutionality of *Amex* with open minds. If they do, they could construe the FAA to apply only to genuinely voluntary arbitration agreements among merchants and trade association members, as Congress seems to have intended, in order to avoid an unconstitutional infringement of the Petition Clause of the First Amendment. ■

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1 133 S. Ct. 2304 (2013).

2 *Id.* at 2310–12; *see id.* at 2312 n.5 ("[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. . . . Accordingly, the FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its 'principal purpose' is the enforcement of arbitration agreements according to their terms.").

3 *Id.* at 2313 (Kagan, J., dissenting).

4 *Id.* at 2320.

5 *Id.* at 2315.

6 *Id.* at 2315, 2320; *see, e.g.*, Ronald L.M. Goldman, *The Largest Heist in History*, LAW360 (June 25, 2013).

7 133 S. Ct. at 2313 (Kagan, J., dissenting).

8 Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

9 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, 123, 131–32 (2006) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) [hereinafter Moses, *Statutory Misconstruction*].

10 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 416 (1967) (Black, J., dissenting); Southland Corp. v. Keating, 465 U.S. 1, 36 (1984) (O'Connor, J., dissenting); *Allied-Bruce*, 513 U.S. at 284 (Scalia, J., dissenting); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting).

11 *Southland Corp.*, 465 U.S. at 25 (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's.").

12 *See Allied-Bruce*, 513 U.S. at 285–89, 291–93 (Thomas, J., dissenting); *Southland Corp.*, 465 U.S. at 21–31 (O'Connor, J., dissenting); Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting); *Circuit City Stores*, 532 U.S. at 125–29 (Stevens, J., dissenting); *id.* at 133–40 (Souter, J., dissenting); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36, 39–40 (Stevens, J., dissenting); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting); *Prima Paint*, 388 U.S. at 411 (Black, J., dissenting); *see also* Moses, *Statutory Misconstruction*, *supra* note 9, at 103–51; David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5 (2004) [hereinafter Schwartz, *Correcting Federalism*].

13 *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring) (the Constitution limits the role of Article III courts based on separation of powers principles, which "relate . . . to an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government").

14 *See Prima Paint*, 388 U.S. at 425 (Black, J., dissenting) (describing the Court's "new version" of the FAA as "judicial legislation"); *see also* Moses, *Statutory Misconstruction*, *supra* note 9, at 101 (stating that the Court has simply "failed to cabin judicial discretion to legislate," resulting "in a complete rewriting of the statute").

15 *See* Stephanie Strom, *When "Liking" a Brand Online Voids the Right to Sue*, N.Y. TIMES, Apr. 16, 2014, *available at* http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?_r=0; Lance Duroni, *General Mills Backs Off Treating a 'Like' As Arbitration OK*, LAW360 (Apr. 21, 2014). Absent agreeing to a new arbitration clause, the author was prevented by Microsoft from continuing to use MSN.com as his browser's homepage and forbidden by JP Morgan Chase from continuing to use its on-line banking services.

16 Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 504 (2012).

17 Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2494 (2011) (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896–97 (1984)); *see also* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524–25 (2002).

18 A Petition Clause challenge is one of several potential tenable constitutional arguments that could be directed against the Supreme Court's interpretation of the FAA. Other as yet untested arguments include (i) whether the FAA would survive strict scrutiny in the event the Court rules Congress intended to abridge the Petition Clause; (ii) whether *Amex*'s holding that class-action waivers in adhesion contracts can work to deprive small-dollar claimants of a remedy altogether violates those claimants' right to equal access to justice under Equal Protection Clause; (iii) whether *Amex*'s ruling that claimants in arbitration have a right to pursue but not to prove their claims violates claimants' rights to "meaningfully" access justice under the Due Process Clause; and (iv) whether the Supreme Court's re-writing of the FAA violates the Separation of Powers Clause. An overriding theme for these arguments is that the Constitution makes the civil justice system available to individuals with small-dollar claims, not just persons or entities with large claims, and that use of adhesion arbitration clauses to limit such access may violate constitutional rights that override the Supreme Court's interpretation of the FAA.

19 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, 563 (1999) [hereinafter Andrews, *Right of Access*]; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

20 Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (internal quotations and citations omitted); *see also* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983); *BE & K Construction Co.*, 536 U.S. at 524.

21 *BE & K Construction Co.*, 536 U.S. at 524–25 (citing United Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217, 222 (1967); United States v. Cruikshank, 92 U.S. 542, 552 (1876)).

22 Chambers v. Baltimore & Ohio R.R Co., 207 U.S. 142, 148 (1907).

[23] *Bill Johnson's Restaurants*, 461 U.S. at 742–43; *see BE & K Construction Co.*, 536 U.S. at 525, 530–36.

[24] *Borough of Duryea*, 131 S. Ct. at 2494.

[25] Andrews, *Right of Access*, *supra* note 19, at 616; James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 954–62 (1997).

[26] Andrews, *Right of Access*, *supra* note 19, at 595–605.

[27] *Id.* at 623–25; *see also* James Madison, House Debates (Aug. 15, 1789), *reprinted in* 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1096 (1971).

[28] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361, 1365 (Colo. 1984).

[29] *Bill Johnson's Restaurants*, 461 U.S. at 743.

[30] *BE & K Construction Co.*, 536 U.S. at 525 (quoting *California Motor Transport Co.*, 404 U.S. at 511) (emphasis added in *BE & K Construction Co.*); *id.* at 532 (citing Andrews, *Right of Access*, *supra* note 19, at 656).

[31] Moses, *Statutory Misconstruction*, *supra* note 9, at 144; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1661–66, 1672 (2005).

[32] *BE & K Construction Co.*, 536 U.S. at 525; *see also* United Trans. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971); Thomas v. Collins, 323 U.S. 516, 530 (1945).

[33] Citizens United v. FEC, 558 U.S. 310, 327 (2010) (discussing speech).

[34] United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909) (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247–51 (2012).

[35] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804)).

[36] *Id.* at 575.

[37] *Id.* at 575, 577.

[38] *Id.* at 582–83, 588.

[39] *Id.* at 588 (emphasis added).

[40] *BE & K Construction Co.*, 536 U.S. at 536.

[41] *Id.* at 530 (citing Alexander v. United States, 509 U.S. 544, 553–54 (1993)).

[42] 9 U.S.C. § 2.

[43] Kouichi Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2002–03 (2012); *see* Scalia & Garner, *supra* note 34, at 85 (construing texts as of the time they were written "prevents . . . [a] nine-person (or indeed five-person) . . . revision" by the Supreme Court).

[44] Holland v. Fla., 560 U.S. 631, 130 S. Ct. 2549, 2560–61 (2010); Thompson v. Thompson, 484 U.S. 174, 180 (1988); Brown v. GSA, 425 U.S. 820, 828 (1976); *see also Allied-Bruce*, 513 U.S. at 286, 292 (Thomas, J., dissenting) (the FAA must be interpreted at "the time of [its] passage in 1925"—a "later development" in the law "does not mean [it was] so understood in 1925" and "could not change the original meaning of the statute that Congress enacted in 1925").

[45] Maracich v. Spears, 133 S. Ct. 2191, 2203 (2013).

[46] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

[47] *BE & K Construction Co.*, 536 U.S. at 536.

[48] Webster's New Modern English Dictionary (Illustrated) 305 (1925).

[49] *Id.* at 850.

[50] *Id.* at 469.

[51] *Id.* at 188.

[52] *See* Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918); Paul v. Va., 75 U.S. (8 Wall.) 168, 183–84 (1868); *see also Allied-Bruce*, 513 U.S. at 275 ("The pre-New Deal Congress that passed the [FAA] in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case.").

[53] Webster's New Modern English Dictionary (Illustrated) 744 (1925).

[54] *Id.* at 48.

[55] *Id.* at 867.

[56] 9 U.S.C. § 4.

[57] *DeBartolo*, 485 U.S. at 588.

[58] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. (1923) [hereinafter 1923 Senate Hearing].

[59] *Id.* at 2–9.

[60] Schwartz, *Correcting Federalism*, *supra* note 12, at 21 (quoting H.R. 646, 65 Cong. Rec. 11,081 (daily ed. June 6, 1924)) (emphasis added).

[61] *Id.* at 21–22.

[62] *Id.* at 21; *see* http://en.wikipedia.org/wiki/Thomas_J._Walsh.

[63] 1923 *Senate Hearing*, *supra* note 58, at 9.

[64] *Id.* at 10.

[65] *Id.*

[66] *Id.* (emphasis added).

[67] *Id.* at 10–11.

[68] *Id.* at 11.

[69] *Id.*

[70] *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 16 (1924).

[71] *See id.* at 7, 12–14, 27, 30–31, 41.

[72] *Id.* at 26, 35.

[73] *Id.* at 1.

[74] *Id.* at 14–15.

[75] *Id.* at 15.

[76] *See, e.g.*, *Amex*, 133 S. Ct. at 2308–09.

[77] *To Make Valid and Enforceable Certain Agreements for Arbitration*, S. Rep. 68-536, at 1–2 (1924) [hereinafter Senate Report].

[78] 66 Cong. Rec. 2759 (1925).

[79] *Id.* at 2761 (statement of Senator Sterling); *see also* Schwartz, *Correcting Federalism*, *supra* note 21, at 21 & n.103 (citing 66 Cong. Rec. S2761 (daily ed. Jan. 31, 1925)).

[80] Schwartz, *Correcting Federalism*, *supra* note 12, at 22 & n.109 (citations omitted).

[81] Senate Report, *supra* note 77, at 3 (emphasis added).

[82] "Voluntary" meant "acting from choice or free will; spontaneous; designed; gratuitous." Webster's New Modern English Dictionary (Illustrated) 894 (1925). "Solemn" meant "characterized by religious rites or ceremonies; inspiring awe; serious; devout; formal; attended with a serious appeal to God." *Id.* at 768.

[83] 65 Cong. Rec. 1931 (1924); *see also* Moses, *Statutory Misconstruction*, *supra* note 9, at 108.

[84] Schwartz, *Correcting Federalism*, *supra* note 12, at 27 ("dynamic" statutory interpretation enables a court to "attribut[e] a policy or purpose to a statute to address issues not contemplated when the statute was enacted . . . and effectuate related but unanticipated policy judgments that arose in later times, so long as the interpretation is not contradicted by the statute's language or intent").

[85] 131 S. Ct. at 1750.

[86] 532 U.S. at 116–18.

[87] *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), interpretation of 1789 Judiciary Act as unconstitutional); *see also* Schwartz, *Correcting Federalism*, *supra* note 12, at 47 (a precedent interpreting a statute may be overruled if "a constitutional question is raised by the Court's prior interpretation").