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It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion

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It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion

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I. INTRODUCTION

To pretend that arbitration has not evolved into different animals of the same species is to not fully appreciate the nuances that exist within the system. To date, most U.S. cases surrounding arbitration agreements and enforcement are resolved within and under the Federal Arbitration Act (FAA). While this makes sense in many instances, arbitration has grown—with the support of the courts—into areas of law and life never intended by the drafters of the FAA. Pre-

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tending that the FAA provides adequate protections for parties in a significantly weaker bargaining position when faced with a contract of adhesion that contains a mandatory arbitration clause is to demonstrate a lack of understanding of the realities these situations present. Businesses are accused of using arbitration as a private dispute resolution system that shields their transgressions from public scrutiny, uses arbitrators and institutions that are perceived as biased, and prevents any real means of justice to the consumer. Something must be done to ensure that consumers facing mandatory arbitration clauses within contracts of adhesion are protected from businesses that seek to use arbitration as an advantageous means to resolve disputes. The American public, a section of Congress, and the arbitration community are all responding, but out-of-date law and recent decisions are thwarting their efforts. It is time for Congress to act, but in doing so it must recognize that old biases toward the use of arbitration will not move the discussion forward. Congress must seek to address the use of arbitration in consumer contracts without creating new issues by prohibiting the use of arbitration in its entirety and/or by attempting to protect consumers from contract clauses that do not seek to enhance the power imbalance that is inherent within contracts of adhesion. Recognition of these needs will allow Congress to draft a narrowly focused, minimally regulatory law that cuts to the heart of the issue: the protection of a specific group of weaker parties entering into contracts of adhesion that contain significantly one-sided arbitration clauses.

This Article will seek to address these issues by first identifying the issues relating to the FAA, the surrounding case law, and the alternative readings of section 2 of the FAA. The Article will then examine and reject some of the early attempts at addressing those issues while considering current attempts by both academics and industry to address the issue of contracts of adhesion and arbitration clauses. The Article will conclude, in Part III, by considering who should be protected, identifying what they should be protected from and how those protections can be accomplished. Finally, the Article will claim that Congress must seek to protect a narrow class of individuals from significantly disadvantageous arbitration clauses within contracts of adhesion.

II. BACKGROUND

A. Expanding Beyond the Original Scope of the FAA

When the issue first arose in 1980, the commercial arbitration community approved of the U.S. Supreme Court's expansion of the scope of the FAA to cover all commercial law disputes where the parties had agreed to arbitration. But at the time, "commerce" was a

term not yet fully explored and defined within the context of the FAA,¹ and the widespread use of arbitration was decades away.

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.² Today, some authorities argue that the judicial attitude toward arbitration agreements has shifted into a substantially pro-arbitration attitude.³ While this is not necessarily a problem, one must appreciate that this attitude arises from a federal act that is significantly out of date and was never designed to be applicable in a pro-arbitration world. In the most general sense, if a contract dealing with interstate commerce contains an agreement to arbitrate, the FAA requires that the arbitration agreement be enforced,⁴ unless generally applicable contract principles render the agreement unenforceable.⁵ The FAA thus forbids courts called upon to enforce agreements to arbitrate from imposing special burdens on arbitration agreements, but permits courts to hold those agreements to the same standards that all contracts must meet.

But this understanding of the enforceability of arbitration clauses was a hard-fought battle. At the time of adoption, the FAA and the language embodied within the Act was far from clear. In fact, even the simplest of terms had to undergo court definitional developments while the scope of the statute was defined.⁶ In many ways, these definitions represent one of the many methods of expansions of the scope of the FAA.

As Margaret Moses writes:

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1. *See* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (“This case concerns the reach of § 2 of the Federal Arbitration Act. That section makes enforceable a written arbitration provision in ‘a contract *evidencing* a transaction *involving* commerce.’ 9 U.S.C. § 2 (2011) (emphasis added). Should we read this phrase broadly, extending the Act’s reach to the limits of Congress’ Commerce Clause power? Or, do the two italicized words—“involving” and “evidencing”—significantly restrict the Act’s application? We conclude that the broader reading of the Act is the correct one . . .”).
 2. *See* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).
 3. *See, e.g.*, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements . . .”); Margaret L. Moses, *Arbitration Law: Who’s in Charge?*, 40 SETON HALL L. REV. 147 (2010) (arguing that recent judicial activism has widened the scope of the FAA).
 4. JULIAN D. M. LEW, LOUKAS A. MISTELIS, STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, ¶ 7-95, at 163 (Kluwer Law Int’l 2003) (“US Courts have consistently held that given the strong federal policy in favor of arbitration . . . no waiver should be assumed.”). Of course, this is the issue to be discussed in relation to *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *See* notes 40–55 and accompanying text.
 5. *See* 9 U.S.C. § 2 (2011).
 6. For an interesting exploration of the history, specifically in terms of the New York Convention and the FAA, see Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT’L ARB. 45 (2011).

The Federal Arbitration Act (FAA) that Congress adopted in 1925 bears little resemblance to the Act as the Supreme Court of the United States has construed it. The original Act was intended to provide federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases.⁷ The Supreme Court's construction of the statute, especially in the last twenty-five years, amounts to a judicially created legislative program, imposed without congressional input, that has vastly expanded the reach and focus of the original statute.⁸

It is important to note, as Professor Moses highlights, challenges to the scope of application of the FAA have continued into the modern era. By 1985, some sixty years after the adoption of the FAA, many state courts continued to remain hostile toward the use of arbitration⁹ or became hostile toward the FAA itself. This hostility resulted in a hodge-podge of state cases and legislative enactments that seemed to defy or at least push the grey area of the enforcement of arbitration agreements. In response to the growing lack of consistency, the U.S. Supreme Court, in *Southland Corp. v. Keating*,¹⁰ held that the FAA's mandates apply not only to federal courts but also to state courts.¹¹ The *Southland Corp.* decision was not the end of the debate, however, as many state courts and legislatures remained hostile to the use of arbitration and sought to find more creative means to get around the Supreme Court's determination. The resistance to the application of the FAA in state courts came to a head in 1994, when the attorneys general of twenty states¹² filed amicus briefs in the case of *Allied-Bruce Terminix Cos. v. Dobson*,¹³ asking the Supreme Court to over-

7. Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 147 (2010) (citing H.R. REP. NO. 63-96, at 1 (1924)); see also *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomm. on the Judiciary*, 68th Cong. 5-10 (1924) (describing the purpose of the FAA as to provide an inexpensive way to resolve disputes of merchants or of anyone engaged in buying and selling).

8. Moses, *supra* note 7.

9. For example, as recently as 1995, courts remained hostile toward arbitration, see *Allied-Bruce*, 513 U.S. at 265, in which the Supreme Court wrote: "Several state courts and Federal District Courts, like the Supreme Court of Alabama, have interpreted the Act's language as requiring the parties to a contract to have 'contemplated' an interstate commerce connection." *Id.* at 269; see, e.g., *Burke Cnty. Pub. Schs. Bd. of Ed. v. Shaver P'ship*, 303 N.C. 408, 417-20, 279 S.E.2d 816, 822-23 (1981); *R. J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 7 Kan. App. 2d 363, 367, 642 P.2d 127, 130 (1982); *Lacheney v. Profitkey Int'l, Inc.*, 818 F. Supp. 922, 924 (E.D. Va. 1993). Several federal appellate courts, however, have interpreted the same language differently, as reaching to the limits of Congress's Commerce Clause power. See, e.g., *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959); cf. *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984).

10. 465 U.S. 1 (1984).

11. See *Southland Corp.*, 465 U.S. 1 ("Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

12. See *Allied-Bruce*, 513 U.S. at 272.

13. *Id.* at 265.

turn its decision in *Southland Corp.*¹⁴ and to permit the States to enforce state (anti) arbitration statutes.¹⁵ The Supreme Court declined to reverse its ruling in *Southland Corp.*¹⁶ and instead took the opportunity to reaffirm its determination by clearly specifying the obligations of the states with regard to arbitration clauses:

States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of *any* contract.” What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit) but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.¹⁷

In case there remained any doubters, the Supreme Court proclaimed the following year that state rules that “undermine the goals and policies of the FAA” are preempted by the FAA.¹⁸ The die had been cast; arbitration agreements were to be treated on equal footing as other contracts, even by the states, despite judicial or legislative attempts to the contrary. Of course, this is only the beginning of the story. This series of cases,¹⁹ and the more recent case of *AT&T Mobility LLC v. Concepcion*,²⁰ has caught the legal and academic worlds in

14. *See id.* at 272.

15. *See id.*

16. *See id.*

17. *Id.* at 281 (internal citation omitted).

18. *See* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

19. Professor Hayford lays out the cases (prior to *AT&T Mobility v. Concepcion*) that made up the preemption groundwork. These cases are: *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). *See* Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 69–70 (2001).

20. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”). This case has garnered a large amount of attention for a long period of time. For example, the *Wall Street Journal* published a blog article back on Nov. 8, 2010—prior to the Supreme Court ruling in the case. *See* Ashby Jones, *Is D-Day Approaching for Class-Action Lawsuits?*, WALL ST. J. BLOG (Nov. 8, 2010, 3:54 PM), <http://blogs.wsj.com/law/2010/11/08/is-d-day-approaching-for-class-actions-lawsuits/>. These authors, and many others, question if this case signals the end of class-wide arbitrations. The tenor of the *Journal’s* assertions has not changed since the rulings. *See* Jess Bravin, *Court Gives Business New Shield Against Class Actions*, WALL ST. J., April 28, 2011, http://online.wsj.com/article/SB10001424052748704099704576288922575935918.html?mod=WSJ_hp_LEFTWhatsNewsCollection; Adam Liptak, *Supreme Court*

a federal preemption argument based on Congress's intent and expansive definitional arguments under the FAA. The outcome of these debates impacts everyone in ways probably never envisioned by Congress in 1925.

B. The FAA as Creating a Federal Preemption

To understand the federal preemption argument, one must begin by examining the language of the Federal Arbitration Act. The FAA section 2 provides, in part: "A written provision . . . to submit [specified disputes] to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²¹ It is first important to note that while one could argue (as many have)²² that section 2 of the FAA is a matter of procedure and not substantive law, the Supreme Court made clear in *Southland Corp. v. Keating*²³ that section 2 should be considered a substantive provision.²⁴ Consequently, section 2 is to be considered a matter of substantive federal legislation, thus giving it the potential to displace state law. The question then becomes, in what situations should the displacement of state law occur?

In the recent U.S. Supreme Court case of *AT&T Mobility LLC v. Concepcion*²⁵ the court used a frequent and long-established standard in situations where the preemption is not expressed but implicit

Allows Contracts That Prohibit Class-Action Arbitration, N.Y. TIMES, April 27, 2011, <http://www.nytimes.com/2011/04/28/business/28bizcourt.html>.

21. 9 U.S.C. § 2 (2011).

22. In fact, this was one of the seminal issues in *Southland Corp.*, in which Justice O'Connor argued that Congress viewed the Arbitration Act "as a procedural statute, applicable only in federal courts." *Southland Corp.*, 465 U.S. at 25 (O'Connor, J., dissenting). However, the majority of the Court noted, "If it is correct that Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the Arbitration Act to contracts 'involving commerce.'" *Southland Corp.*, 465 U.S. at 14 (citing 9 U.S.C. § 2). However, the dissent also drew attention to the language of the House Report on the FAA:

"Whether an agreement for arbitration shall be enforced or not is a question of procedure . . ." [H.R. REP. No. 68-96, at 1 (1924)]. On the floor of the House, Congressman Graham assured his fellow Members that the FAA "does not involve any new principle of law except to provide a simple method . . . in order to give enforcement It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." [65 CONG. REC.1931 (1924).]

Southland Corp., 465 U.S. at 26.

23. 465 U.S. 1 (1984).

24. See *Moses H. Cone*, 460 U.S. at 24; *Prima Paint*, 388 U.S. at 405.

25. *AT&T Mobility*, 131 S. Ct. at 1748 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

within legislation. Within this analysis, state law will be preempted when the law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁶ Consequently, when courts are called upon to determine the enforceability of an arbitration clause they must consider the purposes and objectives that Congress had in mind when enacting the FAA.

There have been several objectives and purposes advanced for Congress’s enactment of the FAA. The Supreme Court has frequently described the FAA and specifically section 2 as reflecting both a “liberal federal policy favoring arbitration”²⁷ and the “fundamental principle that arbitration is a matter of contract.”²⁸ The result of these two enumerated objectives has created a strong federal policy in favor of arbitration and a strong policy in favor of enforcing the parties’ arbitration agreement as specified in the contract. These policies have gone so far as to allow courts to enforce arbitration agreements even when some of the important terms have been omitted. In fact, some argue that the mere inclusion of the phrase “parties may refer any dispute under this Agreement to arbitration” within an otherwise pathological clause will most likely still result in the parties arbitrating their claim as the courts are likely to determine the phrase as a clear expression of the parties’ intent to arbitrate.²⁹

The courts have granted much latitude to the parties and the choices they make within their arbitration agreement. In fact, courts have gone so far as to allow parties to limit the issues subject to arbitration,³⁰ to arbitrate according to specific rules,³¹ and to limit with whom a party will arbitrate its disputes.³² As the Supreme Court enumerated in *Doctor’s Associates, Inc. v. Casarotto*: “By enacting § 2 [of the Federal Arbitration Act] . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other

26. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

27. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

28. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

29. This phrase is taken from the case of *Canadian National Railway Co. v. Lovat Tunnel Equipment Inc.*, 174 D.L.R. 4th 385, 122 O.A.C. 171, 37 C.P.C. 4th 13 (Ont. C.A. 1999). Of course, this clause will create numerous problems for the parties as the court will most likely now have to assist them in setting up the arbitration.

30. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

31. *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

32. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1774 (2010). Some argue the *Stolt-Nielsen* case has added to the confusion. *See, e.g.*, Diana M. Link & Richard A. Bales, *Waiving Rights Goodbye: Class Action Waivers in Arbitration Agreements After Stolt-Nielsen v. AnimalFeeds International*, 11 PEPP. DISP. RESOL. L.J. 275 (2011).

contracts.”³³ One should not misunderstand this statement, nor fail to appreciate the controversy that this phrase has created within the legal world. Clearly, the primary intention of this statement is to ensure that arbitration agreements are to be enforced as written and treated in the same manner as all other contracts. The question then becomes a question of definition: what is meant by the phrase “same footing as other contracts”? Moreover, does this phrase allow the various permutations of contract law amongst states to creep into the courts’ consideration?³⁴ And if so, when do state arbitration and/or contract provisions infringe upon federal law, specifically the FAA?

The Supreme Court has been reasonably clear in enumerating several contract doctrines states can use to resolve enforceability determinations in relation to arbitration clauses, such as rules in relation to contract formation.³⁵ The Court has also been clear, until recently, in allowing the application of state-driven contract defenses.³⁶ For ex-

33. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

34. In terms of unconscionability, states and courts have tried various means to reign in the significantly one-sided arbitration clauses within contracts of adhesion. For example, in the case of class action waivers, see *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59–60 (1st Cir. 2007) (holding class waiver unconscionable because it would “result in oppression and unfair surprise to the disadvantaged party”); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (holding class waiver unconscionable because one-sided); *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592, 603–04 (D.N.J. 2009) (finding arbitration provisions unconscionable because likely amounts of individual recovery were small and company was effectively immunized “from claims that would be suitable for class action resolution”); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (holding that class waiver, together with other provisions in arbitration agreement, rendered agreement unconscionable; the class waiver “contribute[d] to the financial inaccessibility of the arbitral forum” and “contribute[d] to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers”); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (recognizing that majority of jurisdictions uphold class action waivers but citing cases from fifteen jurisdictions holding that class action waivers in arbitration agreements were substantively unconscionable); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007) (holding class waiver unconscionable because it was “unilateral in effect and . . . gives defendant a virtual license to commit, with impunity, millions of dollars’ worth of small-scale fraud”). In fact, “It has been estimated that around 40% of unconscionability defenses to arbitration agreements have met with success in recent years.” Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 352 n.174 (2012), [hereinafter Stipanowich, *The Third Arbitration Trilogy*] (citing Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1 (2011)).

35. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

36. Until the *AT&T Mobility* case, “Courts have become increasingly likely in recent years to find class arbitration waivers in consumer product sales unenforceable due to the lack of incentives for consumers and their attorneys to recover for ‘low-value’ claims.” Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the*

ample, in *Doctor's Associates, Inc. v. Casarotto*,³⁷ the Supreme Court specified: “[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”³⁸ Recently, however, the application of the *Doctor's Associates* reasoning has been called into question in the case of *AT&T Mobility LLC v. Concepcion*³⁹ in which the Supreme Court arguably removed the doctrine of unconscionability from the analysis of arbitration agreements.

At the heart of the *AT&T Mobility*⁴⁰ case is an arbitration clause that “required that claims be brought in the parties’ ‘individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.’”⁴¹ This clause, although clear on its face, is subject to a specific California law that prohibits class action waivers in situations that arise from contracts of adhesion, when the dispute involves a small amount of damages, and the party with the superior bargaining power has devised a scheme to deliberately cheat large numbers of consumers individually out of small sums of money.⁴² In this particular instance, the California District Court and the Ninth Circuit Court of Appeals both determined that the arbitration clause fell within the California law which prohibited class ac-

Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape, 18 CORNELL J.L. & PUB. POL’Y 477, 477 (2009).

37. 517 U.S. 681 (1996).

38. *Id.* at 687 (internal citations omitted). See also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 555–56 (1995) (Stevens, J., dissenting) (“[A]n arbitration clause may be invalid without violating the FAA if . . . the provision is unconscionable.”).

39. 131 S. Ct. 1740 (2011). The California courts have long used unconscionability to strike down arbitration clauses within employment contracts. For example, the California Supreme Court in the seminal case of *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000) used unconscionability doctrine as the basis for considering what procedural protections would be essential requisites for the arbitration of statutory discrimination claims under an employment agreement. The approach of the California courts has been criticized. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006). However, some commentators have argued that the approach of the California courts in protecting consumers should be applauded. See, e.g., Amy M. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 127–133 (2010).

40. 131 S. Ct. 1740 (2011).

41. *Id.* at 1744 (citing App. to Pet. for Cert. 61a). See generally Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT’L ARB. 199 (2004).

42. See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009) (relying upon *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005)).

tion waivers, and as such, the clause was deemed unconscionable.⁴³ It is the application of this particular California law that bumps up against a possible issue in relation to the enforceability of arbitration clauses and the issue of federal preemption.⁴⁴ All of the courts that reviewed this case prior to the Supreme Court recognized the potential of preemption by the FAA in instances such as those presented in the case.⁴⁵ The Ninth Circuit Court of Appeals enumerated, in relation to express preemption:

[I]f a state-law ground to revoke an arbitration clause is not also applicable as a defense to revoke a contract in general, that state-law principle is preempted by the FAA. However, “because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.”⁴⁶

And in relation to implicit preemption: “Neither does the FAA impliedly preempt California unconscionability law *Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.”⁴⁷

As the Ninth Circuit Court of Appeals made clear, the state law in question is nothing more than a refinement of the unconscionability doctrine,⁴⁸ which is applicable to all contracts.⁴⁹ As such, the law in

43. See *Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS (AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

44. It is not as though the “California” issue had not been considered before. See Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61 (2005); Jonathan R. Bunch, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259 (2004).

45. See *Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS (AJB), 2008 WL 5216255, at *1 (S.D. Cal. Aug. 11, 2008); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

46. *Laster*, 584 F.3d at 855 (internal citations omitted) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

47. *Laster*, 584 F.3d at 857 (citing *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007)).

48. “Standing alone, ‘unconscionability’ is a very slippery notion indeed.” Charles Rickett, *Unconscionability and Commercial Law*, in *COMMERCIAL LAW: PERSPECTIVES AND PRACTICE*, ¶ 9.4, at 168 (John Lowry & Loukas Mistelis eds., 2006). In general, unconscionability may be either procedural or substantive or, more commonly, both. Substantive unconscionability refers to contract terms that are “unreasonably favorable” to one side. Procedural unconscionability deals with the process of contract formation rather than the specific terms of the contract. It encompasses “not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power.” See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28 (2d ed. 1990). Most states require a finding of both substantive and procedural unconscionability. See John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA.

question would not be preempted by federal law as it is part of the state's generally applicable contract defenses.⁵⁰ The U.S. Supreme Court, however, had a different view in relation to the application of

L. REV. 930, 932 (1969). However, the current position has been explained and clarified in the text of U.C.C. § 2-302(1): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." On the importance of U.C.C. § 2-302, see Paul M. Morley, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143 (1968) (quoting Karl N. Llewellyn's testimony in the 1954 *Report of the N.Y. Law Revision Commission: Hearings on the Uniform Commercial Code 121*), describing this section as "the most valuable section in the entire Code." See also Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing the drafting and legal history of U.C.C. § 2-302 and the importance of the clauses). For consideration specific to an arbitration clause, see Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001 (1996).

49. California is not the only state and/or court to consider the doctrine of unconscionability in relation to arbitration agreements. The cases are numerous. See, e.g., *G.R. Homa v. American Express Co.*, 558 F.3d 225, 229–32 (3d Cir. 2009) (class action waiver in credit card agreement unconscionable); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1096–98 (9th Cir. 2009) (class action waiver made entire arbitration clause unconscionable since waiver provision was "not severable"); *Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 854–57 (9th Cir. 2009) (class action waiver made arbitration clause unconscionable; FAA did not expressly or impliedly preempt California law governing unconscionability); *Kaneff v. Del. Title Loans, Inc.* 587 F.3d 616, 624–25 (3d Cir. 2009) (arbitration clause in car loan agreement requiring debtor to arbitrate all disputes but allowing lender to repossess through court channels or self-help, containing class action waiver, provision for sharing of costs, and filing fee was not unconscionable under state law); *Cicle v. Chase Bank*, 583 F.3d 549, 555–56 (8th Cir. 2009) (arbitration clause in credit card agreement containing waiver of class action not unconscionable under Missouri law). And academics have long weighed in on the debate. See generally, Alexander J. Casey, *Arbitration Nation: Wireless Services Providers and Class Action Waivers*, 6 WASH. J. L. TECH. & ARTS 15 (2010); Yongdam Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Arbitration/Arbitration Waivers*, 31 WHITTIER L. REV. 665 (2010); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010); William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 335 (2009); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 154 (2009) (discussing the recent attack on consumer arbitration by consumer advocates and the widely criticized "additional problem . . . that an arbitration clause may preclude the use of the class actions device"); Heather Bromfield, Comment, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. DAVIS L. REV. 315 (2009); Diana M. Link & Richard A. Bales, *Waiving Rights Goodbye: Class Action Waivers in Arbitration Agreements After Stolt-Nielsen v. AnimalFeeds International*, 11 PEPP. DISP. RESOL. L.J. 275 (2011), available at <http://ssrn.com/abstract=1685297>.

50. See *AT&T Mobility*, 131 S. Ct. at 1747.

the state law. The Supreme Court clarified that the standard of “equal footing” is not overcome by merely making the law applicable to all contracts.⁵¹ Instead, the standard of determination is whether the law stands as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵² The Court determined that in this instance the use of the unconscionability doctrine “interferes with arbitration.”⁵³ It came to this determination by reasoning:

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.⁵⁴

The Supreme Court highlighted that the mere fact that the law applies to all contracts does not eliminate the need to examine the impact that the law has upon arbitration. This, I would argue, is the turning point in the analysis. The Court was clear: one has to be concerned with the impact the law will have upon the enforcement of arbitration clauses. This particular intention of the Supreme Court has been noted before, for example in the case of *Perry v. Thomas*⁵⁵ in which the court noted that federal preemptions “might extend even to grounds traditionally thought to exist ‘at law or in equity for the revocation of any contract.’”⁵⁶ Consequently, in this regard, the Court seems to have laid out a two-tier test: (1) the law must be applicable to all contracts, and (2) must not have a disproportionate impact on the enforcement of arbitration clauses.

The practical effect of the Supreme Court’s determination in *AT&T Mobility LLC v. Concepcion*⁵⁷ is that the *Concepcions* and all others wishing to join the class will now need to arbitrate the dispute as individuals—not as a class. Many commentators, academics, and consumer groups argue that the *AT&T Mobility* decision has signaled the end of class-action arbitrations in consumer-based contracts.⁵⁸ Ac-

51. *See id.* at 1748.

52. *See id.* at 1753 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

53. *Id.* at 1750. The court continued, “Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.” *Id.*

54. *Id.* at 1747 (internal citations omitted).

55. 482 U.S. 483, 492 (1987).

56. *AT&T Mobility*, 131 S. Ct. at 1747 (citing *Perry v. Thomas*, 482 U.S. 483, 492 (1987)).

57. *Id.* at 1750.

58. For example, see Alessandro Presti, *AT&T Mobility v. Concepcion: End of Class Action Litigation as We Know It? Or Much Ado About Nothing?*, CBLR ONLINE, (May 9th, 2011), <http://cblr.columbia.edu/archives/11739>, and the *SCOTUSblog*, which hosted a symposium on the issue with guest authors, including: Terry Moritz, *AT&T Mobility and the end of consumer class action through Commerce Clause jurisprudence: Not so fast*; Michael Rubin, *Class actions in the wake of Concepcion*; David Schwartz, *Do-it-yourself tort reform: How the Supreme Court quietly killed the class action*; Myriam Gilles, *AT&T Mobility vs. Concepcion*:

ording to Senate Judiciary Chairman Patrick Leahy, D-Vt.: “This is the latest in a series of cases where five conservative justices have hampered the rights of consumers to be protected by state laws.”⁵⁹ And as Deepak Gupta, a Public Citizen attorney who represented the Concepcions, remarked: “Now, whenever you sign a contract to get a cell phone, open a bank account or take a job, you may be giving up your right to hold companies accountable for fraud, discrimination or other illegal practices.”⁶⁰ Of course, the Supreme Court has done nothing of the sort. The business community may seize upon the Court’s determination to turn this ruling to its advantage, but the Court has been consistent in its approach toward arbitration clauses. Moreover, the Concepcions (and others) did agree to the arbitration clause as written, with a specific exclusion of class-wide arbitration. As the Supreme Court previously enumerated in the *Stolt-Nielsen* case,⁶¹ class-wide arbitration cannot be done absent consent of *all* of the parties concerned.⁶² In this instance, *AT&T Mobility* and those

From unconscionability to vindication of rights; Jill Gross, *AT&T Mobility, FAA preemption and class arbitration*; Hiro Aragaki, *Status and contract in AT&T Mobility v. Concepcion*; Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSblog: Symposium on Arbitration, DISPUTING, <http://www.karlbayer.com/blog/?p=15714> (last visited Sept. 30, 2012).

59. Marcia Coyle, *Supreme Court Deals Potentially Fatal Blow to Class Action Arbitrations*, NATIONAL LAW JOURNAL (Apr. 27, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202491943426&slreturn=1&hbxlogin=1>.
60. James R. Hood, *End of Class Actions? Supreme Court Oks AT&T Arbitration Clause*, CONSUMERAFFAIRS.COM, (Apr. 27, 2011), <http://www.consumeraffairs.com/news04/2011/04/end-of-class-actions-supreme-court-upholds-at-t-arbitration-clause.html>. Similar sentiments were expressed by Gupta and others in numerous newspaper articles. See, e.g., David G. Savage, *Companies can block customers’ class-action lawsuits, Supreme Court rules*, L.A. TIMES (Apr. 28, 2011), <http://articles.latimes.com/2011/apr/28/business/la-fi-court-class-action-20110428>; Coyle, *supra* note 59.
61. As enumerated in *AT&T Mobility v. Concepcion*: “In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the ‘changes brought about by the shift from bilateral arbitration to class-action arbitration’ are ‘fundamental.’” *AT&T Mobility*, 131 S. Ct. at 1750 (internal citations omitted).
62. “The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” *AT&T Mobility*, 131 S. Ct. at 1751–50. The *Stolt-Nielsen* case, although presenting an issue of the absence of a class action arbitration clause, is nonetheless enlightening on the Court’s impression of class action arbitration. “[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010).

similarly situated as *AT&T Mobility* did not consent to class-wide arbitration—a fact that is readily apparent in the arbitration clause itself. The case should also be distinguished from cases in which an employee is faced with an arbitration clause inserted into an employee handbook that is given to them years after their original date of employment. Unlike these types of situations, the *Concepcions* did have a genuine choice in determining their cell phone provider and the clause was not inserted or significantly modified post-agreement. The arbitration clause was not disguised, hidden, or otherwise inconspicuous. Moreover, the clause is incredibly consumer-friendly⁶³ despite its prohibition on class-wide arbitration. But one certainly cannot disagree with the reality of the situation: businesses are most likely going to seize upon this ruling to eliminate class-action arbitration.⁶⁴

However, it may just be that the Supreme Court has left a window open by stating: “The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*.”⁶⁵ The Court’s extension of the basic purpose of the FAA into a goal “to facilitate streamlined proceedings” is an interesting one. One has to ask—why does the Court go this far? Why not just leave it at “enforce contracts as written,” for this would have resolved the issue

63. See *AT&T Mobility*, 131 S. Ct. at 1744.

64. See *infra* note 144 and accompanying text. Courts may have already extended the doctrine that arises in *AT&T Mobility v. Concepcion*, sometimes well beyond the courts stated intentions. See, e.g., *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) (“*Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.”). However, several courts have already applied *AT&T Mobility v. Concepcion* in a straightforward manner. See, e.g., *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011) (determining that an arbitration agreement identical to the one in *AT&T Mobility* was enforceable despite arguments in relation to Florida public policy). And some courts have distinguished *AT&T Mobility v. Concepcion* so as to avoid its application, see, e.g., *In re Checking Account Overdraft Litigation*, 813 F. Supp. 2d 1365, 1373 (S.D. Fla. 2011), where the U.S. District Court for the Southern District of Florida found arbitration agreements with class-action waivers to be unenforceable on substantive unconscionability grounds despite *AT&T Mobility v. Concepcion*. In this situation, the court wrote, “*Concepcion* has not relieved courts from their obligation to scrutinize arbitration agreements for enforceability on a case-by-case basis where one party resists arbitration; rather, *Concepcion* provides guidance as to what courts may consider when fulfilling that obligation.” *Id.* at 1373. And *NAACP of Camden County East v. Foulke Management Corp.*, 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011), in which the court declined to enforce an arbitration agreement because the majority opinion in *AT&T Mobility v. Concepcion* did not leave litigants bereft of other contract defenses, including the procedural unconscionability question of contract formation or contract interpretation principles. It is not a stretch to imagine, the debate surrounding the interpretation and application of *AT&T Mobility v. Concepcion* is far from over.

65. *AT&T Mobility*, 131 S. Ct. at 1748 (emphasis added).

in *AT&T Mobility*. There can be little question in light of the FAA that state legislatures and courts should not be allowed to expand contract doctrines and defenses in a manner that appears on its face to apply to all contracts but which in reality has a disproportionate impact on arbitration agreements. Is the Court also suggesting that there are limits on how far the law can go when specifying the structure, procedure, and process of arbitration?

The Court further stated: “The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”⁶⁶ Again, this could be considered an unnecessary utterance as the Court has long-ago established that arbitration is a creature of contract and as such parties should be afforded discretion in the terms of their contract, with some key limitations. Why continue with this line of argumentation? The majority was clearly attempting to make a point relating to the dissent’s reasoning and the use of the *Dean Witter Reynolds*⁶⁷ case. In the dissent, Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, took issue with the Court’s inclusion of the “expeditious resolution of claims”⁶⁸ as one of the FAA’s overriding goals.⁶⁹ In response, the majority made clear that the FAA’s overriding goal is to “ensure judicial enforcement of privately made agreements to arbitrate.”⁷⁰ However, the Court went on to note: “This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it”⁷¹ It is in these series of quotes that the majority opinion was attempting to lay bare an important consideration for state and federal legislatures when designing laws that will impact arbitration agreements. The Court made clear that: “Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expecta-

66. *AT&T Mobility*, 131 S. Ct. at 1749.

67. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

68. *See AT&T Mobility*, 131 S. Ct. at 1749.

69. *See id.* at 1749.

70. *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

71. *Id.* at 1749 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)). This is not the only time the Court has made such a statement. For example, “[Arbitration] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see* Thomas J. Stipanowich, *Revelation and Reaction: The Struggle to Shape American Arbitration*, in *CONTEMP. ISSUES IN INT’L ARB. & MEDIATION: THE FORDHAM PAPERS 2010*, at 97 (Arthur W. Rovine ed. 2011) (under the same title in the *PENN ST. Y.B. ON ARB. & MEDIATION* (2011)); *see generally* Linda R. Hirschman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 *VA. L. REV.* 1305 (1985) (discussing the broad reach of the FAA resulting from decades of pro-arbitration Supreme Court jurisprudence).

tions.”⁷² But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.⁷³

The Court left little room for debate. State law may allow the parties to craft their arbitration agreement as they see fit, but it may not alter the basic rules of contract in such a manner as to have a disproportionate impact on the enforceability of an arbitration agreement, nor may the law require the parties to participate in an arbitration procedure that does not comport with the parties’ expectations of what arbitration is to look like and accomplish. The parties are free to alter these expectations within their agreement; however, the state may not unilaterally make the alteration.⁷⁴

On the face of this conclusion, one can appreciate the position of the Supreme Court and the well-supported conclusion that the Court gave; however, this position ultimately leaves the states in a difficult position as the Supreme Court’s decision makes it incredibly difficult for states to regulate and/or protect consumers when they are faced with contracts of adhesion containing significantly one-sided arbitration clauses.

C. The Potential Limits Within Section 2 of the FAA Should Be Rejected

Unsurprisingly, *AT&T Mobility LLC v. Concepcion*⁷⁵ was not a unanimous decision, at least partially because the Justices held widely different views on the reading and application of FAA section 2. In fact, Justice Thomas in his concurrence argued that:

It would be absurd to suggest that § 2 requires only that a defense apply to “any contract.” If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to “any contract.” There must be some additional limit on the contract defenses permitted by § 2.⁷⁶

Justice Thomas then used rules of statutory interpretation to assert that a clarification of some of the terminology within section 2 is in order, specifically use of the term “revocation” within section 2

72. *AT&T Mobility*, 131 S. Ct. at 1752 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2774 (2010)).

73. *Id.* at 1752–53.

74. One should note, I do take on board and support the comments made by Justice Breyer in his dissent. At issue in the case is the enforcement of an arbitration clause and not the appropriateness of class-wide arbitration. *Id.* at 1758. In addition, the dissent make a very good point that much of the majority’s bias toward class-wide arbitration seems to be based in half-truths and misinformation. *Id.* One must therefore wonder if the court is really struggling with the enforcement of an arbitration clause or trying to justify the limitation of class-wide arbitration.

75. *Id.* at 1753.

76. *Id.* at 1753 (Thomas, J., concurring).

without the often-corresponding terminology of “invalidations” and “non-enforcement.”⁷⁷ Justice Thomas argued that under rules of statutory interpretation a “broader context”⁷⁸ approach should be taken. With this approach in hand, he went on to clarify the implications of this style of interpretation in relation to the term revocation:

Reading §§ 2 and 4 harmoniously, the “grounds . . . for the revocation” preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.⁷⁹

Justice Thomas argued that the intentional omission of terms such as invalidations and non-enforcement lead to the reasonable conclusion that the FAA, specifically section 2, was an attempt by Congress to limit the enforcement of arbitration agreements that fail as a matter of formation, but to not support challenges based on the other defenses to contract enforcement, such as public policy.

It does seem logical that Congress, in 1925, facing an “arbitration hostile world,” must have considered the real possibility that hostility toward arbitration could continue through the use of state-based laws of public policy. Certainly, Congress would not have allowed states to create arbitration-hostile public policy rules relating to the enforcement of arbitration agreements. It is not a great leap then to imagine that Congress was attempting to ensure that arbitration agreements were enforced as written and that challenges to the *formation* of the agreement should be allowed, but hostile state public policy rules that limited *enforcement* of the agreements as written would be forbidden.

Of course, the points that Justice Thomas raised must be appreciated within the context of the Article. Neither states nor Congress should be supported in crafting laws or policies that return arbitration policy to the old, pre-FAA days, when hostility toward arbitration was the main belief and public policy was often used as the excuse to refuse enforcement of an otherwise valid arbitration clause. However, whether one supports Justice Thomas’s argumentation turns on one’s personal belief in the importance of the original intent theory of reading federal law. Yet one needs to appreciate that in the modern pro-arbitration world one salient point must influence and impact Justice Thomas’s line of argumentation: the absence of the drafters’ ability to

77. *Id.* at 1754 (Thomas, J., concurring).

78. *See id.*

79. *Id.* at 1754–55 (Thomas, J., concurring) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (interpreting § 4 to permit federal courts to adjudicate claims of “fraud in the inducement of the arbitration clause itself” because such claims “g[o] to the ‘making’ of the agreement to arbitrate”).

foresee the eventual evolution and expansion of the use of arbitration. As Justice Breyer pointed out in the dissent:

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.⁸⁰

Contracts of adhesion became a matter of academic debate in the United States in 1919⁸¹ and did not widely enter courts' vocabularies until 1965.⁸² There is little realistic argument that Congress considered either class-wide arbitration or contracts of adhesion when debating adoption of the FAA. Consequently, while Justice Thomas's method of evaluating the language within the text of the FAA is legitimate, the world of contracts has changed substantially and now includes contracts of adhesion and class actions—contracts that were rare or did not exist in 1925. While the argument based on the language of the FAA is sound, it should not be allowed to close the debate on new topics within the legal world. The argument of Justice Thomas highlighted the need for Congress to consider protecting certain classes of individuals that face substantially one-sided arbitration clauses contained within contracts of adhesion. These parties and these types of contracts were not within the contemplation of Congress when it adopted the FAA, and as such these issues must be accounted for in new legislation.

D. The Arbitration Fairness Act of 2011 Is Not the Answer

Now more than ever, Congress needs to respond with legislation to clarify the original intent of the Federal Arbitration Act. In arbitration, there is no transparency, nor is there an independent arbitrator.⁸³

Senate Judiciary Chairman Patrick Leahy, D-Vt.

80. *Id.* at 1759 (Breyer, J., dissenting).

81. See *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 882 n.10 (1962) (explaining that the concept, although considered within French law in 1901, was introduced into Anglo-American jurisprudence by Edwin W. Patterson in *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919)). The concept gradually found its way into judicial opinions. See, e.g., *Siegelman v. Cunard White Star, Ltd.*, (2d Cir. 1955) 221 F.2d 189, 204 (2d Cir. 1955) (Frank, J., dissenting); *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781 (Cal. Ct. App. 1961); *Bekken v. Equitable Life Assur. Soc.*, 293 N.W. 200 (N.D. 1940).

82. *Steven*, 58 Cal. 2d at 882 n.10. Even today, it is argued that “[u]ntil fairly recently, judicial decisions grounded on unconscionability doctrine were few and far between.” Stipanowich, *The Third Arbitration Trilogy*, *supra* note 34, at 352 (citing Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 610 (2009)).

83. Coyle, *supra* note 59.

The Arbitration Fairness Act of 2011 (AFA)⁸⁴ was introduced in the House and Senate in mid-May 2011. Of course, the introduction was perilously close to the various summer recesses⁸⁵ and the impending need for Congress to raise the debt ceiling,⁸⁶ so not much happened in relation to the bill. In fact, not much movement had occurred on several occasions previously; however, this is the fourth time⁸⁷ that a bill of this type has been introduced,⁸⁸ and as such, it certainly deserves more than a little bit of attention. Moreover, examination is necessary because the outcome of the *AT&T Mobility* decision made clear that any protections that are to be granted in favor of consumers facing mandatory arbitration clauses within contracts of adhesion must come from Congress. As such, now more than ever, Congress has to find a way to pass this type of legislation.

At the heart of the Arbitration Fairness Act are three main propositions: (1) no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of employment, consumer, or civil rights,⁸⁹ (2) decisions in relation to the validity and enforceability of the agreement to arbitrate shall be determined by a court,⁹⁰ under federal law,⁹¹ and (3) a clause or portion of a clause that could be read as a waiver to judicial enforcement of an employee's rights arising under the U.S. Constitution, a state constitution, a federal or state statute, or related public policy shall be invalid.⁹²

Congress appears to have singled out these specific areas for protection for three main reasons: (1) the nature of the FAA and the origi-

84. The House Resolution is available here: <http://www.govtrack.us/congress/bill.xpd?bill=H112-1873>.

85. See *2011 Congressional Calendar, 112th Congress*, ROLL CALL, <http://cdn.rollcall.com/media/newspics/calendar120910.pdf> (last visited Aug. 12, 2012).

86. For more about the debt ceiling issue, see Lori Montgomery, *President Obama Signs Debt-Limit Bill into Law*, WASH. POST, Aug. 2, 2011, http://www.washingtonpost.com/politics/senate-passes-debt-limit-bill/2011/08/02/gIQA1p2kpl_story.html.

87. S. 3026, 107th Cong. (2001–02); H.R. 3010, 110th Cong. (2007–08); H.R. 1020, 111th Cong. (2009–10); S. 987, 112th Cong. (2011–12).

88. In the introduction to the 112th Congress, the Senate had seventeen co-sponsors and the House had eighty-one—a decrease in support over the previous introduction. See *Arbitration Fairness Act of 2011 (S. 987)*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=S112-987> (last visited Aug. 13, 2012); *Arbitration Fairness Act of 2011 (H.R. 1873)*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=H112-1873> (last visited Aug. 13, 2012).

89. Arbitration Fairness Act, H.R. 1873, 112th Cong. § 402(a) (2011).

90. *Id.* § 402(b)(1). This of course is one of the main issues in terms of the competence of the arbitrator as the general current rule is the arbitrator decides her own competence (decides if the dispute is one for resolution in arbitration) unless a defect that goes to the heart of the arbitration clause exists. See JULIAN D. M. LEW, LOUKAS A. MISTELIS, STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, ¶¶ 14-13 to 14-16, at 332–33 (Kluwer Law Int'l 2003).

91. Arbitration Fairness Act, H.R. 1873, 112th Cong. § 402(b)(1) (2011).

92. *Id.* § 402(b)(2).

nal intent behind the Act, (2) the disparity of power between parties in these type of situations, and (3) concerns with the arbitration system itself.

In relation to concerns over expansion beyond the original intent of the FAA, Congress directs its criticism specifically to the U.S. Supreme Court, writing that: “A series of decisions by the Supreme Court of the United States have changed the meaning of the Act”⁹³ However, it clarifies that this concern arises in the nature of the parties impacted by the expansion.⁹⁴ Congress limits its criticism by arguing that the FAA “was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.”⁹⁵ Thus, the expansion of the scope of the FAA may not be concerning except that the expansion impacts a class of individuals that suffer from a weaker bargaining position. It is interesting to note that the 2009 version of the Act was more robust in argumentation related to the disparity between the parties. In the 2009 version of the bill, Congress advanced the argument by citing pressures on private arbitration companies to support industry, the repeat player syndrome, and proliferation of clauses that remove basic legal and procedural protection from employees and consumers⁹⁶ as the reason that arbitration needs a higher level of policing when it comes to weaker parties. Although the language has been toned down in the current version, it is clear these concerns remain at the heart of many of the provisions within the Act.

While the expansion of the scope of the FAA has long been a concern of industry, constitutional scholars, and academics within the arbitration community, pointing out this problem without concrete methods of addressing it is ineffective. The AFA has no language, definition, or even hint of any attempt to reign in the scope of the Federal Arbitration Act.⁹⁷ The FAA will still apply to employment, consumer and civil right disputes—nothing within the Act changes this position.

93. *Id.* § 2(2).

94. *See id.* § (2)3.

95. *Id.* § 2(1).

96. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., § 2(7) (2009).

Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed federal policy favoring arbitration over the constitutional rights of individuals.

Id.

97. This is true, except maybe the removal of the term “seamen” from section 1. *See* H.R. 1873, 112th Cong., § 402(b)(1)(a) (2011).

Consequently, this language will do nothing to reign in the coverage of the FAA.

Moreover, the disparity between the parties within various types of contracts of adhesion is highlighted on several occasions within this relatively brief Act. In fact, one could argue it is one of the driving forces behind Congress's belief in its need to reign in the scope of the FAA. Congress emphasizes the impact of the disparity when it writes: "Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights."⁹⁸ Based on this line of reasoning, Congress suggests that these particular groups should be given additional protections because they are the weaker parties in the contractual relationship who do not fully appreciate the nature of the choice between arbitration and litigation and are given no real choice between the two. This is clearly one of the laudable goals of the AFA as the Act attempts to ensure that weaker parties are provided a "true choice." However, Congress has failed to distinguish arbitration clauses within contracts of adhesion from run of the mill contracts of adhesion that consumers enter into every day.⁹⁹ Moreover, even assuming that distinguishing characteristics can be found between *all* clauses within contracts of adhesion and *arbitration clauses* within contracts of adhesion, Congress's method of reducing this power imbalance must be viewed with intense skepticism. In an effort to remedy this power disparity, Congress requires that consent to arbitration must "occur(s) after the dispute arises." Congress does not explain how, exactly, the voluntary nature of arbitration is better ensured by requiring consent after the dispute

98. H.R. 1873, 112th Cong., § 2(3) (2011).

99. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) states:

Weakness in the bargaining process. A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

arises,¹⁰⁰ when the dispute remains between the same people of unequal bargaining power. Moreover, it is not a stretch to argue that an employee in a dispute with his employer is in a far weaker position to now insist on the use of a court over arbitration. Clearly, this goal—while a noble one—is not accomplished by this provision within the Act.

Finally, one has to wonder if the real intent of the Act is hidden, not so subtly, in direct statements that capture common criticism of the nature of arbitration itself, the confidential nature of arbitration, and the lack of substantive review. While at first blush these may appear to be reasonable complaints, the hidden agenda is actually doing nothing more than reinvigorating the old bias that stood behind the need for the FAA in the first place. It is this argument that is most concerning and may just be a window to bias behind the Arbitration Fairness Act of 2011.

As Senate Judiciary Chairman Patrick Leahy expressed in a statement: “In arbitration, there is no transparency, nor is there an independent arbitrator.”¹⁰¹ Congress has also expressed a similar concern, stating: “Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.”¹⁰² There is little ambiguity in these statements; arbitration lacks transparency and arbitrators lack independence. One could infer from these statements that arbitration is not to be trusted. The “lack of trust” sentiment runs throughout prior versions of the Act. For example, the 2009 version of the Act emphasizes the lack of trust sentiment by stating: “With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.”¹⁰³ And “[w]hile the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.”¹⁰⁴

With no real research or actual concrete evidence and with emotional pleas based in personal horror stories and sensationalism, Congress has not hidden its lack of understanding and its bias against arbitration, despite the absence of proper research and concrete evi-

100. Cf. Lisa Blomgren Bingham & David Henning Good, *A Better Solution to Moral Hazard in Employment Arbitration: It is Time to Ban Pre-dispute Arbitration Clauses*, 93 MINN. L. REV. HEADNOTES 1, 1–14 (2009).

101. Coyle, *supra* note 59.

102. H.R. 1873, 112th Cong., § 4 (2011). This is something that I have myself argued. See Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT’L ARB. 479 (2005).

103. H.R. 1020, 111th Cong., § 2(5) (2009).

104. *Id.* § 2(6) (2009).

dence and an abundance of sensational, emotional pleas permeating this debate. And statements such as: “Arbitration can be an acceptable alternative”¹⁰⁵ cannot mask the political reaction that energizes the ongoing propagation of the bias against arbitration.

Examining one of the main biases, the lack of transparency, reveals a shocking set of statistics—not in terms of arbitration but in terms of the judicial system as a whole. For example, the number of civil trials that actually end up being resolved by a judge or a jury is remarkably low. According to the National Center for State Courts,¹⁰⁶ in 2002 Texas had 164,837¹⁰⁷ civil cases¹⁰⁸ that were disposed of during the calendar year. Of those cases that reached a disposition, 1% were disposed of by a jury trial, 14.5% by a non-jury trial,¹⁰⁹ 14% by default, 43% settled or were dismissed,¹¹⁰ and 27% fell within the catch-all “other.”¹¹¹ The 2003 report also highlights that, looking at a composite of twenty-one unified and general jurisdiction state courts, “about 8 percent of civil cases were disposed of by trial in these 21 States. The greatest proportion of civil cases (42 percent) were settled and/or dismissed by the court.”¹¹² According to the Administrative Office of the U.S. Courts, of the 282,895 civil cases filed in U.S. District Courts for 2010, only slightly above 1% (3,309) proceeded to trial.¹¹³ Removing consideration of the obviously concerning fact that a larger percentage of cases are disposed of through default or dismissal, one cannot help but appreciate the growing use of settlement as a legitimate means of resolving disputes. While this may in fact be a good thing, it is clear that a large percentage of court cases do not become part of the public record as settlements generally go unreported. Hence, arbitration is not the only dispute resolution mechanism that fails to produce full transparency.

Moreover, in relation to a second closely tied criticism, the use of arbitration erodes common law and the need for transparency as arbitration awards generally remain confidential and unpublished. This

105. H.R. 1873, 112th Cong., § 2(5) (2011).

106. Information about the organization available at: <http://www.ncsc.org/>.

107. See *Examining the Work of State Courts, 2003*, NATIONAL CENTER FOR STATE COURTS, 22 (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ewsc03-npcsp.pdf>.

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

113. *U.S. District Courts—Civil Cases Filed, Terminated, and Pending*, UNITED STATES COURTS, Table 4.1, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table401.pdf>; *U.S. District Courts—Civil Cases Terminated, by Action Taken*, UNITED STATES COURTS, Table 4.10, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table410.pdf>. Further general information is available at: <http://www.uscourts.gov/Home.aspx>.

is in fact not so unlike a large percentage of court cases since the late 1970s. In fact, according to Stephen L. Wasby:

“Unpublished” rulings, denominated “memorandum dispositions” . . . are now used in upwards of three-fourths of all cases in the U.S. courts of appeals By 1987, the proportion of all courts of appeals dispositive judgments resulting in published opinions had dropped to thirty-eight percent, and it declined further by 1993 to just over one-fourth, the level at which it remained in 1998. In short, unpublished dispositions, rather than being a rare event, are quite common; so routine is their use that we find them even in some death penalty habeas cases and requests for stays of execution, even when a judge dissents.¹¹⁴

Today, all eleven circuit courts of appeal limit the publication of opinions, usually basing the decision on determinations related to the cases’ precedential value.¹¹⁵ This does not, however, mean cases cannot be found, as some decisions are still published with a notation and of course all courts retain copies of the records of the case. However, these opinions remain a matter of the unpublished court record and are therefore more difficult to discover and review. This is slightly different than arbitration opinions, which may or may not be published without key details of the parties involved and are substantially different from arbitration decisions that remain shrouded under a shield of confidentiality. However, pretending that the judicial system is under constant review and contains published decisions is wishful thinking.

Finally, arbitration is not the only means of dispute resolution that allows parties to protect the existence of the dispute and the proceedings and the outcome of those proceedings behind a veil of party-crafted confidentiality. Oftentimes parties bargain for and include a confidentiality agreement within their settlement.¹¹⁶ And the above judicial statistics reveal that many cases are resolved through a settlement mechanism. It is certainly not a stretch to imagine that a good portion of these contain confidentiality clauses. While in recent times there has been a growing backlash against the use of confidenti-

114. Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 69–70 (2004) (citing *Charm v. Mullin*, 37 F. App’x 475 (10th Cir. 2002) (discussing an affirmance of denial of habeas in a capital case that resulted in an authored opinion of eight printed pages containing not only factual matters but legal analysis); *Byrd v. Bagley*, 37 F. App’x 94 (6th Cir. 2002); *Robinson v. Gibson*, 35 F. App’x 715 (10th Cir. 2002); JUDITH A. MCKENNA ET AL., *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* 18, 21 (Federal Judicial Center 2000)).

115. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253–55 (2001).

116. For an examination of the use of settlements and concerns arising from their growing use, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1983–84) (arguing that settlements are often in the interest of efficiency and not necessarily in the interest of justice).

ality agreements in relation to some types of employment settlements,¹¹⁷ these stand as the exception, not the norm. Asserting that arbitration is the only dispute resolution mechanism that shields itself in party created confidentiality is simply wrong.

Consequently, the argument that transparency of outcomes should be a concern for *all* dispute resolution mechanisms is persuasive. However, the argument that arbitration lacks transparency to a larger extent than the judicial system is clearly false. A very large percentage of judicial cases end up being dismissed or settled with the outcome not being reported either through the use of a confidentiality agreement in the settlement or the production of an “unpublished” opinion. Arbitration is not alone in suffering from these tactics.

In terms of the third main criticism, that arbitration awards lack review and the system lacks judicial oversight, this belief is the product of misunderstanding of the law. Arbitration awards are generally not subject to the right of appeal as are judicial awards; however, arbitration awards are subject to review concerning procedural irregularity. In the United States, the confirmation, recognition, and enforcement of both domestic and foreign arbitral awards is governed by the Federal Arbitration Act as long as the award arises within the broad coverage of the Act. For the most part, this requires that the subject matter of the dispute somehow involves “commerce,” which in the United States means tangentially connected to the Commerce Clause.¹¹⁸ So even areas that one would expect to not be covered by the FAA, such as employment contracts, are in fact covered by the Act.¹¹⁹ In the case that state law applies, the Uniform Arbitration Act

117. For example, in several cases in relation to the Fair Labor Standards Act, see *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260 (M.D. Ala. 2003), *Scott v. Memory Co., LLC*, No. 3:09cv290-SRW, 2010 WL 4683621 (M.D. Ala. Nov. 10, 2010), and *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1242 (M.D. Fla. 2010); and in relation to employment discrimination, see *EEOC v. Astra U.S.A.*, 94 F.3d 738 (1st Cir. 1996); *Kalinauskas v. Wong*, 151 F.R.D. 363 (D. Nev. 1993).

118. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Supreme Court examined the legislative history of the Act and concluded that the statute “is based upon . . . the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’” *Id.* at 405 (quoting H.R. REP. NO. 68-96, at 1 (1924)). This was followed by *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 n.32 (1983), in which the Supreme Court “reaffirmed our view that the Arbitration Act ‘creates a body of federal substantive law’ and expressly stated what was implicit in *Prima Paint*, *i.e.*, the substantive law the Act created was applicable in state and federal courts.” *Southland Corp.*, 465 U.S. at 941 (citing *Moses H. Cone*, 460 U.S. at 26).

119. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (“The FAA’s coverage provision, § 2, compels judicial enforcement of arbitration agreements ‘in any . . . contract evidencing a transaction involving commerce.’”). In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995), the Court interpreted § 2’s “involving commerce” phrase as implementing Congress’s “intent to exercise [its] commerce power to the full.”

(UAA) provides the appropriate guidance as the UAA has been widely adopted among the states.¹²⁰ Despite this potential division in the law, in most instances—such as those at issue in this Article—the distinctions between state law and federal law will be minimal.

Generally, arbitration awards that fall within the FAA or the UAA can be resisted or challenged if the award lacks basic due process protection, such as lack of an arbitration agreement, lack of notice, arbitrators that lack independence or impartiality, arbitrators that exceed their power, or an award that is the product of corruption, fraud, or undue means.¹²¹ In fact, in the United States in some limited instances it is possible to challenge or resist confirmation, recognition, or enforcement of an arbitration award if the arbitrators have “manifestly disregarded the law.”¹²² Moreover, it is arguable that in the United States the courts “still serve as ‘gatekeepers’¹²³ to make determinations relating to the arbitration agreement itself.”¹²⁴ In general, courts are still called upon to determine (1) questions regarding the existence or validity of an arbitration agreement, and (2) questions about whether or not a particular dispute falls within the scope of an arbitration provision.¹²⁵ Clearly, when it comes to enforcing the arbitration agreement and the award, courts have the last word in terms of enforcement, and this by necessity involves some oversight of the arbitration process and the subsequent award to ensure that basic ideas of due process are protected. Again, Congress seeks to seize upon a bias that reflects a basic misunderstanding of arbitration. These biases cannot be allowed to hamper the main goal: the protec-

120. See REVISED UNIF. ARBITRATION ACT (2000). Arguments have been made the Uniform Arbitration Act is one of the most successful Uniform Laws as it was adopted by forty-nine states and widely influenced the one state that did not adopt the Act (New York). New York State Bar Association, *Report on the Revised Uniform Arbitration Act*, 1 (Dec. 9, 2005), <http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=54109>.

121. Although it is rare for the recognizing or enforcing court to find instances of procedural irregularities, this should be viewed as a testament to the procedurally sound nature of the system of arbitration and not a lack of review.

122. See generally Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117 (1998); Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47 (2010); Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL’Y & L. 519 (2004).

123. Stipanowich, *The Third Arbitration Trilogy*, *supra* note 34, at 10 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION* 955–58 (Kluwer Law Int’l 2009), available at <http://ssrn.com/abstract=1919936>).

124. See Stipanowich, *The Third Arbitration Trilogy*, *supra* note 34, at 27.

125. See *id.*

tion of weaker parties from contracts of adhesion that contain significantly one-sided arbitration clauses.

E. What Is Being Done?

Congress is not the only institution looking at arbitration. The American Law Institute is in the process of drafting the *Restatement (Third) of U.S. Law of International Commercial Arbitration*.¹²⁶ As the title suggests, the purpose of this project is to examine law in relation to international commercial law. This limits the examination of unconscionability, but does not eliminate it from the drafters' contemplation. Instead, it places consideration of the doctrine of unconscionability within the ambit of the New York Convention and international law.¹²⁷ Within international arbitration law, there is a general belief that arbitration awards that are the product of a contractual relationship that has been significantly tainted by "fraud, duress, impossibility and unconscionability" lack validity and will, hence, be unenforceable.¹²⁸ However, to date, few courts have taken up this issue at any length.¹²⁹

States continue to work on state-directed arbitration law, as well. For example, in 2000 the National Conference of Commissioners on Uniform State Laws drafted the most recent version of the Uniform

126. For more information, visit http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20. In 2009, George Bermann wrote about the potential problems behind the *Second Restatement*. See George Bermann, *Restating the U.S. Law of International Commercial Arbitration*, 42 U.S. L. INT'L COM. ARB. 175 (2009).

127. One should note, jurisdictions have various means of handling issues in relation to the use of standard form contracts and the doctrine of unconscionability. For example, England handles this type of regulation within the EC Directive on Unfair Terms in Consumer Contracts and the Unfair Terms in Consumer Contracts Regulation (1994). See 1 CHITTY ON CONTRACTS 995 (A.G. Guest et al., eds., 25th ed. 2008).

128. For example, the *Restatement (Third) of the U.S. Law of International Commercial Arbitration* § 5-8 cmts. a & b, clarify that an arbitration agreement may be invalid because it was executed by a person who lacked capacity, either actual or apparent authority, or because of fraud, duress, impossibility, or unconscionability. As the *Restatement* notes, a court may deny recognition or enforcement of a convention award to the extent that "no arbitration agreement exists or the arbitration agreement is invalid." See *id.* § 5-8(a). But see *id.* § 5-6(c) (noting that even if some ground for denying enforcement exists, the court may, in exceptional circumstances, enforce the award). However, notice this issue has arisen in the recognition and enforcement area which places the question under the New York Convention. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967) (holding that "[s]ince the claim of fraud here relates to inducement of the consulting agreement generally, rather than in the arbitration clause, and there is no evidence that the parties intended to withhold this issue from arbitration, there is no basis for granting a stay under § 3").

129. This may leave an interesting disparity between domestic-based arbitration agreements and awards and the recognition and enforcement of foreign arbitral awards.

Arbitration Act.¹³⁰ This Act has historically been widely successful; the previous version had forty-nine state adoptions and the current version already has fifteen enactments, with three states recently introducing the Act for adoption.¹³¹ While the Act does specifically cover the basics of enforceability in the face of an arbitration clause,¹³² the Drafting Committee decided to leave the issue of adhesion contracts and unconscionability to developing law. The decision was made because:

- (1) the doctrine of unconscionability reflects so much the substantive law of the States and not just arbitration, (2) the case law, statutes, and arbitration standards are rapidly changing, and (3) treating arbitration clauses differently from other contract provisions would raise significant preemption issues under the Federal Arbitration Act.¹³³

In hindsight, this was probably a brilliant decision as the outcome of the *AT&T Mobility* (2011)¹³⁴ case has closed or at least clouded the issue.

The arbitration community has also taken note of ongoing concerns relating to contracts of adhesion, weaker parties, and their right to due process. For example, the two largest U.S. arbitration institutions, the American Arbitration Association and JAMS, have both promulgated due process protocols to regulate the fairness of consumer and employment arbitration agreements.¹³⁵ One common criticism when an industry self-regulates is the lack of enforceability of

130. *Arbitration Act 2000*, UNIFORM LAW COMMISSION (2012), [http://uniformlaws.org/Act.aspx?title=Arbitration Act \(2000\)](http://uniformlaws.org/Act.aspx?title=Arbitration Act (2000)).

131. *Id.*

132. National Conference of Commissioners on Uniform State Laws, *Uniform Arbitration Act*, UNIFORMLAWS.ORG, § 6(a), at 18 (Dec. 13, 2000), http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf. The Act further states: “Validity of Agreement to Arbitrate: An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” *Id.* This language tracks both the previous version of the UAA (1956) and the Federal Arbitration Act.

133. *Id.* § 6 cmt. 7, at 23–26. There is also an excellent review of the various then-existing state court cases in relation to the issue of unconscionability. *See id.*

134. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

135. For example, the JAMS rule on the Minimum Standards of Procedural Fairness states: “If an arbitration is based on a clause or agreement that is required as a condition of employment, JAMS will accept the assignment only if the proceeding complies with the ‘Minimum Standards of Procedural Fairness for Employment Arbitration.’” *JAMS Policy on Employment Arbitration*, JAMS (July 15, 2009), <http://www.jamsadr.com/employment-minimum-standards/>. The JAMS rules intend to include these minimum standards: Standard No. 1: All remedies available, Standard No. 2: Arbitrator Neutrality, Standard No. 3: Representation by Counsel, Standard No. 4: Access to Information/Discovery, Standard No. 5: Presentation of Evidence, Standard No. 6: Costs and Location Must Not Preclude Access to Arbitration, Standard No. 7: Mutuality, Standard No. 8: Written Awards. *Id.* The rules go on to specify:

any self-determined protocols.¹³⁶ This criticism is compounded concerning arbitration because the vast majority of awards remain shielded behind confidentiality agreements. However, this criticism should be rejected in these two particular institutional instances. A recent study by Christopher R. Drahozal and Samantha Zyontz titled *Private Regulation of Consumer Arbitration*¹³⁷ has found that in practice arbitration institutions are in fact supporting the plight of consumers or employees in arbitration who lack basic due process protections.¹³⁸ Their real world research has an incredibly positive outcome:

We find that the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. During the time period studied, the AAA refused to administer a substantial number of cases (almost 10% of its total consumer caseload) that involved a protocol violation. Moreover, in response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol.¹³⁹

The study goes on to reiterate a point made by many scholars: "We do not assert that private regulation alone—with no public regulatory backstop, such as through court oversight—suffices to ensure the fairness of consumer arbitration proceedings."¹⁴⁰

As can be seen from the study, at least some of the criticism of arbitration is misplaced as the industry itself recognizes the need to police due process protections at a better level. However, these attempts by the arbitration industry, while noble, have done little to

If JAMS becomes aware that an arbitration clause or procedure does not comply with the Minimum Standards, it will notify the employer of the Minimum Standards and inform the employer that the arbitration demand will not be accepted unless there is full compliance with those standards. In assessing whether the standards are met and whether to accept the arbitration assignment, JAMS, as the ADR provider, will limit its inquiry to a facial review of the clause or procedure. If a factual inquiry is required, for example, to determine compliance with Minimum Standards, it must be conducted by an arbitrator or court.

Id.

136. Unfortunately, the only option for JAMS and AAA is to make these provisions suggestive. If the provisions took on a mandatory nature (i.e., the parties could not submit their dispute to JAMS if they failed to meet the standard) the parties would be left in a difficult position, with an arbitration clause in their contract that might be pathological as the dispute could not be initiated at the institution within the clause. These type of situations place courts and arbitration institutions in a difficult position as the court will assist the parties in setting up arbitration, but will rarely overlook the parties' intent to arbitrate.

137. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* (Univ. of Kan. Sch. of Law, Working Paper No. 2011-4, Aug. 2011), available at <http://ssrn.com/abstract=1904545>.

138. *Id.* at 1.

139. *See id.*

140. *Id.* at 1-2.

quash public concerns about arbitration clauses within contracts of adhesion. As we have seen, the *AT&T Mobility* case has brought to a head concern about overlapping areas of consumers, contracts of adhesion, and arbitration. Numerous entities, including a section of Congress, the legal community, academics, and arbitration institutions have heard the call and are attempting to define these overlapping areas in various ways. However, one essential set of questions remain: who should be protected, what should they be protected from, and how will those protections be accomplished? The next sections seek to respond to these questions.

III. SOLUTIONS

Contracts of adhesion, especially those involving consumers and the purchase of basic goods, are ubiquitous in modern commercial life. Moreover, they are often heralded as positive for business and consumers as contracts of adhesion can lead to lower transactions costs¹⁴¹ and a predictable business legal environment. Certainly, it is a bit late to put the cat back into the bag, at least in terms of contracts of adhesion. But that really should not be the end of the debate as the real issue is not contracts of adhesion but a particular term or clause contained in a contract of adhesion, especially when terms within the clause are designed to significantly benefit the business drafters. As such, we are left with a series of incredibly timely questions: who should be protected, from what, and how?

Consider the following example. On Sept. 19, 2011, Sony Network Entertainment International¹⁴² decided to “update” its terms of service to include the following clause:

ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A NAMED OR UNNAMED MEMBER IN A CLASS, CONSOLIDATED, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL ACTION, UNLESS

141. See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001 (1996).

142. Tons of websites, blogs and newspapers immediately responded with criticism with this change. See, e.g., Mark Milian, *Sony: Supreme Court ruling spurred changes to PlayStation terms*, CNN (Sept. 21, 2011), <http://www.cnn.com/2011/09/21/tech/gaming-gadgets/sony-psn-terms/index.html> (considering the Sony change of Terms of Service in light of the *AT&T Mobility* decision); Jose Vilches, *Sony changes PSN terms to block class action lawsuits*, TECHSPOT (Sept. 16, 2011), <http://www.techspot.com/news/45505-sony-changes-psn-terms-to-block-class-action-lawsuits-.html>; Hamish Barwick, *Sony PSN Australia customers spared service changes: Gamers in North America asked to agree to new terms of service before signing into network*, COMPUTERWORLD (Sept. 20, 2011), http://www.computerworld.com.au/article/401352/sony_psn_australia_customers_spared_service_changes/#closeme (noting that Australians will not be asked to agree to such a clause).

BOTH YOU AND THE SONY ENTITY WITH WHICH YOU HAVE A DISPUTE SPECIFICALLY AGREE TO DO SO IN WRITING FOLLOWING INITIATION OF THE ARBITRATION. THIS PROVISION DOES NOT PRECLUDE YOUR PARTICIPATION AS A MEMBER IN A CLASS ACTION FILED ON OR BEFORE AUGUST 20, 2011.¹⁴³

As the *AT&T Mobility* case made clear, this clause is perfectly legal.¹⁴⁴ But one has to wonder: is it really ok to update terms of service this way for an expensive product I already own?¹⁴⁵ Sony Network Entertainment Inc. clearly states that you can opt out of the clause simply by mailing a letter within thirty days of receipt of the change in terms of service. Alternatively, you can always cancel your Sony Entertainment account. While it might seem a bit unfair that this

143. *Terms of Service and User Agreement*, SONY ENTERTAINMENT NETWORK (Version 13, Feb. 7, 2012), <http://www.sonyentertainmentnetwork.com/tosua>.

144. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753–54 (2011). One should note Sony’s clause is actually not that bad in terms of the imposition it places on consumers. It does not proscribe a location of hearing, or jurisdiction, nor does it proscribe a difficult and obtuse means of initiating arbitration. Most importantly, it does allow customers to opt out. Of course, no one will but that really is not Sony’s fault, is it? In fact, Sony actually sent an email to all PlayStation Network members, thus, the criticism that it was a “stealth clause insertion” is a bit overblown.

145. Currently, the answer is probably “yes” at least in the manner that Sony facilitated the change. First, according to *Douglas v. Talk America*, 495 F.3d 1062, 1066 (9th Cir. 2007), the California court made clear, when considering an online change to the terms of service:

[A] party can’t unilaterally change the terms of a contract; it must obtain the other party’s consent before doing so. *Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 549 F.2d 114, 118 (9th Cir. 1976). This is because a revised contract is merely an offer and does not bind the parties until it is accepted. *Matanuska Valley Farmers Cooperating Ass’n v. Monaghan*, 188 F.2d 906, 909 (9th Cir. 1951). And generally “an offeree cannot actually assent to an offer unless he knows of its existence.” 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:13, at 365 (4th ed. 1990); see also *Trimble v. N.Y. Life Ins. Co.*, 255 N.Y.S. 292, 297 (App. Div. 1932) (“An offer may not be accepted until it is made and brought to the attention of the one accepting.”). Even if Douglas’s continued use of Talk America’s service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes.

However, the language and attention drawn to the notice is also important. See, e.g., *DIRECTV v. Mattingly*, 829 A.2d 626, 636–37 (Md. 2003) (observing that “proper notice” requires that the customer receive “enough information to make an informed decision”); see also *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 180 (Fla. Dist. Ct. App. 2005) (noting that the consumer must be given “a fair and clear warning of changes”); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 805 (1998) (explaining that notice must be designed to achieve “knowing consent”). Consequently, at least under several state laws, notice must be given in an online relationship when one of the parties intends to change the terms of service and the notice must draw attention to the change and be written in a clear manner. In this case, Sony provided notice, called attention to the changes, used clear language, and allowed the parties to “opt out” of the changes. As such, this change of terms of service is most likely enforceable.

clause can be inserted so long after a customer has purchased her entertainment system, businesses must be allowed to update terms of service.¹⁴⁶ Thus the real questions must involve the determination of who should be protected, from what, and how will the law protect them. The simple answers are that not all contracts of adhesion are bad, not all parties should be protected, and only in a limited set of circumstances should we be worried about arbitration clauses.

A. Are All Parties Facing Arbitration Clauses in Contracts of Adhesion Created Equal?

The simple response is that all parties facing arbitration clauses in contracts of adhesion are not in fact created equal. Some parties in contracts of adhesion have already been segregated out to be awarded special protections. Under the Motor Vehicle Franchise Contract Arbitration Fairness Act,¹⁴⁷ enacted in 2002, arbitration provisions in motor vehicle franchise agreements are enforceable “to resolve a controversy arising out of or relating to such contract . . . only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.”¹⁴⁸ Some of the rationale behind the protections afforded motor vehicle franchisees:

Dealers of new motor vehicles are virtual economic captives of automobile manufacturers. Unlike some other franchisees, who may have a broad choice of franchisers with which to contract, new motor vehicle dealers may only obtain the right to merchandise and sell their product from an extremely limited group of manufacturers. As a result of the imbalance in bargaining power inherent in this relationship, manufacturers possess unparalleled leverage over dealers and potential franchisees. Motor vehicle manufacturers have historically, and do currently, require dealers to execute standard contracts of adhesion defining the manufacturer-dealer contract on a “take it or leave it” basis.¹⁴⁹

This language in many ways mirrors the language and overall approach of the language used in the recent Arbitration Fairness Act

146. In fact, Sony made the argument that the insertion of an anti-class-action arbitration clause is not bad. Sony argued in response to a CNN request for a response: “The updated language in the TOS is designed to benefit both the consumer and the company by ensuring that there is adequate time and procedures to resolve disputes.” Mark Milian, *Sony: Supreme Court ruling spurred changes to PlayStation terms*, CNN (Sept. 21, 2011), <http://www.cnn.com/2011/09/21/tech/gaming-gadgets/sony-psn-terms/index.html>.

147. 15 U.S.C.S. § 1226 (2002). Interestingly, the U.S. Supreme Court has held that state legislatures are constitutionally empowered to regulate the motor vehicle contractual relationship as a valid exercise of their police powers. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

148. 15 U.S.C. § 1226(a)(2).

149. *The Motor Vehicle Franchise Contract Arbitration Fairness Act*, S. REP. NO. 107-266, 107th Cong., § IV (Sept. 2002) [hereinafter *Motor Vehicle*, Senate Report (2002)], available at <http://www.gpo.gov/fdsys/pkg/CRPT-107srpt266/html/CRPT-107srpt266.htm>.

(AFA). Clearly, Congress has already recognized the need to protect some categories of parties that stand in significantly weaker bargaining positions. But one has to ask: why should automobile franchisees benefit from protections unavailable to the average consumer placed in a similar position?

The distinguishing facts paint an interesting picture of the fundamental distinctions between certain types of franchisees and the average consumer. It is important to note that the Federal Arbitration Act, prior to the enactment of the Motor Vehicle Franchise Contract Arbitration Fairness Act, applied to these types of contracts in the same manner as all commercial/commerce-based arbitration contracts.¹⁵⁰ As such, had Congress not acted to protect these specific parties, the *AT&T Mobility*¹⁵¹ case would have solidified the position of federal preemption in relation to arbitration clauses within franchise agreements.¹⁵² Instead, Congress acted for some very specific and enlightened reasons. First, to create an agency designed specifically to enforce motor vehicle franchise laws and charged with enforcing public policy protections:

These State forums, boards, and commissions serve as efficient and cost-effective alternative dispute resolution systems for motor vehicle franchise disputes because State agencies have both expertise and experience in these matters. State motor vehicle administrative forums were specifically established for the public policy purpose of providing alternative dispute resolution mechanisms, but with the added features of important legal safeguards, particularly that of a right to appeal.¹⁵³

Congress, yet again, let its bias toward certain aspects of arbitration show, but in this context it seems to be accepted. Why? Probably

150. There was widespread use of mandatory binding arbitration in dealer franchise contracts. According to the Motor Vehicle, Senate Report (2002), dealers such as: Bering Truck, DaimlerChrysler (which provided limited opt-out of arbitration by addendum), Freightliner Truck/DaimlerChrysler, Sterling Truck/DaimlerChrysler, Ferrari, Ford Dealer Development—principally with dealer development programs, General Motors Dealer Development—principally with dealer development programs, Saturn/GM, Hino Diesel—Toyota majority stock holder, Kenworth Truck, Nissan Diesel, Peterbilt Trucks, Suzuki, and Western Star, all used this type of arbitration agreement. *See id.* at 3.

151. *See supra* notes 56–59 and accompanying text.

152. Of course, Congress was most likely reacting to a series of cases that seemed to cause great issue in terms of statutory rights available under the Sherman Act. *See Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), followed by *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990) (relying upon *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987)).

153. Motor Vehicle, Senate Report (2002), *supra* note 149, at section V (listing the states of: “Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin”).

for several reasons: (1) the industry itself has several well-recognized and efficient alternative dispute resolution organizations,¹⁵⁴ (2) mandatory arbitration clauses are often designed to get around otherwise applicable state laws and state-created forums, (3) “motor vehicle dealer(s), after making a tremendous investment, depend completely upon the manufacturer to survive and prosper,”¹⁵⁵ and (4) “[m]otor vehicle franchise contracts and resulting disputes greatly affect the competitive distribution of vehicles which directly affects consumers as well as individual States’ economies generally.”¹⁵⁶

Congress has advanced these types of justifications before for other similarly situated parties. For example, the Petroleum Marketing Practices Act,¹⁵⁷ which regulates franchise relationship between oil refineries and gasoline retailers, was enacted to “prevent oil companies from improperly exploiting their unequal bargaining power and to deter unfair conduct by prohibiting refineries from forcing gasoline retailers to accept mandatory binding arbitration and surrendering important statutory rights.”¹⁵⁸ Clearly, Congress stands ready and willing to assist in the protection of significantly weaker parties when faced with contracts of adhesion containing arbitration clauses. But it seems those protections will only be afforded in an incredibly narrow set of circumstances under which the lack of available protections may impact the economic well-being of a large section of the population. Should consumers be treated the same and afforded the same protections as those parties already protected? And if so, how broad should those protections be from arbitration clauses?

B. What Protections Are Really Necessary and for Whom?

Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful

154. The Supreme Court has previously upheld a mandatory arbitration clause in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–33 (1991), at least partially because the Court found that enough safeguards exist because the private New York Stock Exchange arbitration rules protected against bias, allowed for adequate discovery, required arbitrators to provide awards in writing, and did not limit the available relief.

155. Motor Vehicle, Senate Report (2002), *supra* note 149, at section IV.

156. *Id.* “In fact, the U.S. Supreme Court has held that State legislatures are constitutionally empowered to regulate the motor vehicle contractual relationship as a valid exercise of their police powers.” *Id.* (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)).

157. 15 U.S.C. §§ 2801–2806 (2012).

158. Motor Vehicle, Senate Report (2002), *supra* note 149, at section V (citing Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801–2806 (2012)).

industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.¹⁵⁹

Friedrich Kessler made this alarming prediction based on several key observations in terms of contracts of adhesion and freedoms of contract. Kessler argued that “[t]he stereotyped [standardized] contract of today reflects the impersonality of the market.”¹⁶⁰ One should not forget, however, that “society as a whole ultimately benefits from the use of standard contracts.”¹⁶¹ Of course, as argued by many scholars including Kessler, business benefits when it can create uniform terms to cover similar situations, allowing them to anticipate and conglomerate risk in a predictable fashion. When business is allowed to engage in this activity, the entire market community realizes cost benefits.

Unfortunately, some businesses began to recognize benefits of another kind and began to use this recognition to their advantage. Today the majority of scholars appreciate that:

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all compet-

159. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943), available at http://digitalcommons.law.yale.edu/fss_papers/2731. The issue of standard form contracts has intrigued scholars for many years. See, e.g., Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065 (1986); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

160. Kessler, *supra* note 159, at 631.

161. *Id.* at 632. However, as Thomas J. Stipanowich argued:

Broad judicial enforcement of arbitration provisions in standardized adhesion contracts governing employees and consumers has fueled impassioned debate over the need for regulation of arbitration agreements. The real concerns of reform advocates, lawmakers, legal commentators, and educators have produced strong responses that “spill over” into the realm of arm’s-length business-to-business agreements—often imposing new transaction costs without commensurate benefits.

Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 1 (2010).

itors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all Not infrequently the weaker party to a prospective contract even agrees in advance not to retract his offer while the offeree reserves for himself the power to accept or refuse; or he submits to terms or change of terms which will be communicated to him later.¹⁶²

Kessler is intimating that contracts of adhesion have become so ubiquitous and have shifted the balance of power so significantly in favor of business that in some instances courts and legislative bodies need to be concerned about what clauses and terms are contained within a contract. Kessler is asking us to consider two key points: the ubiquitous nature of contracts of adhesion and the disadvantage created by the power imbalance. In our current case, the issue that must be given prominence is the power imbalance between the parties as the ubiquitous nature of contracts of adhesion in consumer and employee contracts is a matter for another day. In this instance, and in line with Kessler's argument, we should cast an eye on arbitration clauses within contracts of adhesion that take advantage of the power imbalance.¹⁶³ Thus, when considering the scope and protections afforded to weaker parties, we should focus on arbitration clauses within contracts of adhesion in which the party in the stronger bargaining position seeks to take *significant* advantage of its position.

C. How Should Those Protections Be Accomplished?

In light of case law coming out of the Supreme Court, the preemptive status of the FAA and the public's growing concern over the insertion of arbitration clauses within contracts of adhesion, Congress needs to act. So why is there not widespread support for the Arbitration Fairness Act? I would suggest a main reason is that the AFA, as

162. Kessler, *supra* note 159, at 632.

163. Of course, this is a return to the essence of the issue that underlies concerns surrounding contracts of adhesions, the "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party." RESTATEMENT (SECOND) OF CONTRACTS: UNCONSCIONABLE CONTRACT OR TERM § 208 cmt. d (1981). And handling unconscionable clauses is a power left to the courts wide discretion. For example, under the *Restatement (Second) Of Contracts*: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." *Id.* § 208. A similar approach is taken under the Uniform Commercial Code:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (2003).

currently written, seems to focus too much on old biases against arbitration instead of focusing on the specific and narrow area of concern. The lack of support might be overcome if the Act focused on protecting a narrow class of individuals needing protection from a contract of adhesion that contains an arbitration clause designed in a manner to significantly disadvantage them, the weaker party. This narrow and specific approach will allow many others to support the legislative initiative.

I would suggest the following as potential draft language:

The Congress finds the following:

- (a) The fair and just resolution of disputes is a fundamental right for all persons.
- (b) While arbitration can be a fair and just means of resolving disputes, it must arise within an agreement that is completed within a voluntary and informed agreement process.
- (c) Contracts of adhesion may place individuals at a disadvantage when selecting a dispute resolution mechanism; especially concerning are situations in which the party in the stronger bargaining position seeks to take advantage of that position.
- (d) Additional protections must be afforded to all persons entering into contracts of adhesion when the party in the stronger bargaining position seeks to take advantage of that position.

Chapter 4: Arbitration of Consumer Disputes¹⁶⁴

Sec. 401. Scope and Definitions:

In this chapter—

- (1) A consumer shall be protected under this Act if he/she
 - (a) is faced with a contract of adhesion containing an arbitration clause, and
 - (b) is given no opportunity to negotiate the terms of, or reject the insertion of, the dispute resolution clause, and
 - (c) has a significantly limited choice of alternative suppliers within the region, or
 - (d) he/she is faced with an arbitration clause that significantly disadvantages him/her.

Definitions:

- (1) Contract of adhesion is one in which:
 - (a) The contract is a standard printed contract, that is
 - (b) drafted or imposed by the party with the superior bargaining power, and
 - (c) relegates to the subscribing party only the opportunity to adhere to the contract or reject it, and
 - (d) contains an arbitration clause that is objectively unfairly one-sided in favor of the drafting party, or
 - (e) contains a specific arbitration term or provision that would be a surprise to a reasonable person in light of the circumstances.
- (2) "Consumer Dispute" means a dispute between an individual who seeks or acquires real or personal property, services (including ser-

164. One should appreciate that the AFA, as it stands today, also covers employment and civil rights disputes. These are clearly areas of legal disputes that share some characteristics with consumers; however, these issues are substantially different in key areas and as such, these areas have been specifically excluded from the language considered.

vices relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.¹⁶⁵

Sec. 402. Validity and Enforceability:

- (a) In general, notwithstanding any other provision of this title, no arbitration agreement shall be valid or enforceable if it requires arbitration of a consumer dispute which arises in a contract of adhesion, unless
 - (1) there has been specific notice of the arbitration clause, and
 - (2) a plain language explanation of the clause, with an
 - (3) option of opting out of the arbitration clause, unless
 - a. the arbitration clause is designed in such a manner as to protect the individual's interests. This would include, at minimum:
 - i. a simple and clear means of initiating the arbitration claim, and
 - ii. resolving the dispute within 90 days, and
 - iii. requiring arbitration to take place either online or within the domestic region of the initiating party, and
 - iv. requiring the business to pay the cost of arbitration should the consumer prevail on the issue, and
 - v. preventing the drafting party from receiving attorney's fees, even if successful in the arbitration.
- (b) In the interest of clarity, the above provision applies in full to arbitration agreements, clauses, and significant modification thereof, which are:
 - (1) presented after the original date of contracting, or
 - (2) contained in subsequent mailing or similar methods of notification, or
 - (3) contained in a change in terms or other similar legal instrument.

The language in this draft act would protect a narrow class of individuals from significantly disadvantageous arbitration clauses within contracts of adhesion. The adjustment seeks to protect the class of individuals who need protecting without over capturing those parties that should not be protected within the class. Moreover, the act seeks to provide information concerning the nature of arbitration and the agreement while allowing the weaker party to opt out of the use of arbitration should a dispute arise. However, the draft act also seeks to allow businesses to use contracts of adhesion that contain arbitration clauses, provided that such clauses are explained, apparent, and balance power between the parties.¹⁶⁶ Moreover, arbitration clauses that fail to meet reasonable expectations of what arbitration should look like are prohibited, as are significantly modifying “after the fact” clause insertions.

165. H.R. 1873, 112th Cong., § 401(2) (2011).

166. Jeremy Senderowicz of Columbia University has advocated an amendment to the FAA “aimed at ensuring true consent by consumers to arbitration clauses.” Jeremy Senderowicz, *Consumer Arbitration and Freedom to Contract: A Proposal to Facilitate Consumers’ Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 279 (1999). His proposal is to require that any arbitration clause present in a consumer contract be accompanied by a detailed explanation of the procedural differences between arbitration and court-based conflict resolution, along with an explanation to the consumer of the rights she is signing away. See *id.* at 278–79.

Applying this draft act to the facts in *AT&T Mobility LLC v. Concepcion*¹⁶⁷ would likely result in the arbitration clause being enforceable: an outcome that seems just under the circumstances. First, although the Concepcions might successfully argue that they were not provided with a specific notice about the existence of the arbitration clause, the clause was designed in such a manner as to shift the arbitration clause in favor of the consumer. The clause in *AT&T Mobility*¹⁶⁸ was incredibly consumer-friendly (provided the claim was not a frivolous one) and this shift of power makes the main purpose behind protections afforded consumers suspect under the circumstances. In addition, the Concepcions did not lack choice, as various mobile phone providers had alternative provisions available to them within the region. Plus, they were not faced with an “after the fact” or significantly modified arbitration clause. The Concepcions had choices and their position was not one that the draft act seeks to protect as those choices also create a situation in which a contract of adhesion is not unreasonable.

In relation to the updated Sony Terms of Service,¹⁶⁹ the draft act would also not prohibit Sony from inserting an arbitration clause—or an anti-class-action arbitration clause—within its revised Terms of Service. In fact, Sony’s actions would be allowed under the draft act. In the Sony example, although customers face an insertion of an arbitration clause and an anti-class-action arbitration clause, the customer can easily opt out of both clauses. This is the precarious balance that the draft act attempts to address—businesses’ need to protect their interest through the use of contracts of adhesion that contain arbitration clauses, and customers need to be protected from

167. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

168. *Id.* As the Supreme Court describes:

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T’s Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T’s Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney’s fees, and, in the event that a customer receives an arbitration award greater than AT&T’s last written settlement offer, requires AT&T to pay a \$7,500 minimum recovery and twice the amount of the claimant’s attorney’s fees.

Id. at 1744 (citing the Brief for the Petitioner at 7).

169. *Sony Network Entertainment*, *supra* note 143.

significantly disadvantageous arbitration clauses. By allowing an opt-out, the Sony clause does not seek to take advantage of its more powerful position. Nothing in the clause suggests that Sony seeks to use its more powerful bargaining position to take advantage of the customer. Sony sent emails notifying its customers of the change, allowed customers to opt out, and set up a JAMS or AAA process of arbitration.¹⁷⁰ Customers should not expect protection from clauses that do not arise from the more powerful party taking advantage of its position, even if it is inserting an arbitration clause.

IV. CONCLUSION

The Federal Arbitration Act has been expanded through numerous court decisions with the support of business and consumers. The Supreme Court has continued to be firm in its holding that state law may allow the parties to craft their arbitration agreement as they see fit. However, states may not alter the basic rules of contract in such a manner as to have a disproportionate impact on the enforceability of an arbitration agreement, nor may the law require the parties to participate in an arbitration procedure that does not comport with the parties' expectations of what arbitration is to look like and accomplish. The parties are free to alter these expectations within their agreement; however, the state may not unilaterally make the alteration. This leaves little room for debate. If consumers, Congress, and the arbitration community are concerned about the insertion of arbitration clauses that seek to take advantage of business's stronger bargaining position, Congress must legislate a change to the protections afforded weaker parties facing arbitration clauses in contracts of adhesion. However, Congress must ensure its legislation is focused on protecting a narrow class of individuals needing protection when faced with a contract of adhesion that contains an arbitration clause designed in a manner to significantly disadvantage the weaker party. This narrow and specific approach will allow many others to support the legislative initiative. We cannot allow biases against arbitration to overtake the creation of legislation that protects weaker parties from the insertion of arbitration clauses into contracts of adhesion, when the arbitration clause significantly benefits the drafting party.

170. The Knowledge Center at Sony helped explain the process and the content of the email to Sony customers. *See You have not accepted the latest version of the PlayStation®Network Terms of Service*, PLAYSTATION®NETWORK, http://us.playstation.com/support/answer/?a_id=4235 (last visited Sept. 30, 2012); accord Devin Coldewey, *Sony's New PSN Terms Of Service Prevent You From Joining Class Action Suits Against Sony*, TECHCRUNCH (Sept. 16, 2011), <http://techcrunch.com/2011/09/16/sonys-new-psn-terms-of-service-prevent-you-from-joining-class-action-suits-against-sony/>; Brendan Sinclair, *Sony sued over terms of service update*, GAMESPOT (Dec. 19, 2011), <http://www.gamespot.com/news/sony-sued-over-terms-of-service-update-6347852>.